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1 [The R.M.C. 803 session was called to order at 0916,  
2 9 September 2019.]

3 MJ [Col COHEN]: Commission is called to order. Good  
4 morning, ladies and gentlemen. It's good to see everyone  
5 again.

6 General Martins, I'll start with you. Would you  
7 please identify who is here on behalf of the United States and  
8 if any counsel are making their first appearance.

9 CP [BG MARTINS]: Good morning, Your Honor.

10 MJ [Col COHEN]: Good morning.

11 CP [BG MARTINS]: Representing the United States,  
12 Brigadier General Mark Martins, Mr. Edward Ryan, Mr. Clay  
13 Trivett, and Major Christopher Dykstra. Also at counsel  
14 table, Mr. Rudolph Gibbs and Master Sergeant April Horn. And  
15 also present in the courtroom is Kimberly Waltz of the  
16 Federal Bureau of Investigation.

17 These proceedings are being transmitted by  
18 closed-circuit television, Your Honor, to the locations in the  
19 continental United States pursuant to the commission's orders.

20 MJ [Col COHEN]: Okay. General Martins, I issued the  
21 order last night that would also have opened up the Pentagon.  
22 Has that also begun today?

23 CP [BG MARTINS]: I can confirm the Pentagon station is up

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1 and running.

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

4 Good morning, Mr. Nevin. Will you -- we'll take care  
5 of some other business later, but for now, will you please  
6 announce who is here representing Mr. Mohammad.

7 LDC [MR. NEVIN]: Yes, sir. David Nevin on behalf of  
8 Mr. Mohammad, and also Ms. LeBoeuf, Ms. Radostitz, and  
9 Mr. Sowards. Lieutenant Colonel Poteet is absent pursuant to  
10 your order.

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

13 Ms. Bormann, good morning.

14 LDC [MS. BORMANN]: Good morning, Judge. I'm here on  
15 behalf of Mr. Bin'Attash, who is present, as well as  
16 Captain Caine, Mr. Montross, and Mr. Perry.

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

18 Mr. Harrington, good morning.

19 LDC [MR. HARRINGTON]: Good morning, Judge. On behalf of  
20 Mr. Binalshibh, James Harrington and Major Virginia Bare. Our  
21 other counsel have been excused but will be joining us in the  
22 later weeks.

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

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1 Mr. Connell, good morning.

2 LDC [MR. CONNELL]: Good morning, sir. James Connell and  
3 Captain Mark Andreu, United States Air Force, on behalf of  
4 Mr. al Baluchi.

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

6 Mr. Ruiz, good morning.

7 LDC [MR. RUIZ]: Good morning, Judge. Ms. Suzanne  
8 Lachelier, Mr. Sean Gleason, Lieutenant Commander Dave Furry,  
9 Major Joseph Wilkinson, and myself are here on behalf of  
10 Mr. al Hawsawi.

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

12 I also note that representatives of the MCD0 appear  
13 to be present in the courtroom as well.

14 CP [BG MARTINS]: Your Honor, on the representative from  
15 the Military Commissions Defense Organization, the government  
16 has no objection to Commander Wall being here. We will be  
17 concerned about his presence at a 505(h) hearing later ----

18 MJ [Col COHEN]: Okay.

19 CP [BG MARTINS]: ---- in light of the commission's  
20 existing orders against that.

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

23 LDC [MS. BORMANN]: Judge, if I may.

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1 MJ [Col COHEN]: Ms. Bormann, yes, ma'am.

2 LDC [MS. BORMANN]: Mr. Perry was present for this portion  
3 of it, but I've asked that he be excused. I know you -- I  
4 think you said you don't really mind if they -- if people have  
5 other work they have to attend to, but he has other work that  
6 he has to ----

7 MJ [Col COHEN]: That's correct, ma'am. I -- normally, we  
8 would all sit here for the entire time, but there are so many  
9 moving pieces that, to the extent that as long as it's not  
10 disruptive, and it hasn't been to this point, I'm okay with  
11 either the prosecution -- a prosecutor or a defense counsel  
12 getting up and leaving.

13 LDC [MS. BORMANN]: Then I will not interrupt you ever  
14 again. Thank you.

15 MJ [Col COHEN]: Thank you, ma'am. Thank you for asking,  
16 though.

17 I have a tendency to speak quickly, and the  
18 interpreters have asked me again this morning to be very slow.  
19 So this will be very deliberate as I do this, and hopefully  
20 we'll avoid any yellow signs coming up. But I do need to  
21 advise each of the gentlemen of their rights to be present and  
22 waive such presence.

23 I will now advise the accused of their right to be

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1 present and their right to waive said presence. You each have  
2 the right to be present during all sessions of the commission.  
3 If you request to absent yourself from any session, such  
4 absence must be voluntary and of your own free will.

5           Your voluntary absence from any session of the  
6 commission is an unequivocal waiver of the right to be present  
7 during that session. Your absence from any session may  
8 negatively affect the presentation of the defense in your  
9 case. Your failure to meet with and cooperate with your  
10 defense counsel may also negatively affect the presentation of  
11 your case.

12           Under certain circumstances, your attendance at a  
13 session can be compelled regardless of your personal desire  
14 not to be present. Regardless of your voluntary waiver to  
15 attend a particular session of the commission, you have the  
16 right at any time to decide not to attend any subsequent  
17 session -- rephrase that. If you choose to voluntarily be  
18 absent during any portion of a session, you may still ask to  
19 be present at a later portion of that session or any  
20 subsequent session.

21           If you decide not to attend the morning session, for  
22 example, but wish to attend the afternoon session, you must  
23 notify the guard force of your desires, hopefully with enough

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1 time for those accommodations to be made. Assuming there's  
2 enough time to arrange the transportation, you will then be  
3 allowed to attend the afternoon session.

4 You will be informed of the time and date of each  
5 commission session prior to the session to afford you the  
6 opportunity to decide whether you wish to attend that session.

7 Mr. Mohammad, I'll start with you. Do you understand  
8 what I just explained to you as your rights?

9 ACC [MR. MOHAMMAD]: Yes.

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

11 Mr. Bin'Attash, do you understand what I just  
12 explained to you?

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

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

15 Mr. Binalshibh, do you understand what I just  
16 explained to you?

17 ACC [MR. BINALSHIBH]: **[Speaking in English]** Yes.

18 MJ [Col COHEN]: Thank you.

19 Mr. Ali, do you understand what I just explained to  
20 you?

21 ACC [MR. AZIZ ALI]: Yes.

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

23 Mr. al Hawsawi, do you understand what I just

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1 explained to you?

2 ACC [MR. AL HAWSAWI]: Yes.

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

4 I need to go into a summary of the R.C.M. [sic] 802  
5 conference that I held with counsel on Saturday evening.

6 On 7 September 2019, I conducted a conference with  
7 trial and defense counsel in accordance with Rule for Military  
8 Commission 802. Learned counsel for all accused were present.  
9 The accused were absent. At this conference we discussed the  
10 following:

11 Ms. Denise LeBoeuf entered a written appearance  
12 before the commission to represent Mr. Mohammad. I advised  
13 the parties that we would enter her detail and qualifications  
14 on the record today and provide any oaths that must be  
15 administered at that time.

16 Mr. Mohammad's team also proposed in AE 004KK and  
17 AE 006V for the commission to approve the detail of  
18 Mr. Sowards as learned counsel for Mr. Mohammad and to detail  
19 Mr. Nevin to represent Mr. Mohammad pro bono.

20 AE 006V was filed ex parte, but counsel for  
21 Mr. Mohammad advised the commission they had no issue telling  
22 the parties that this filing and AE 004KK were linked and  
23 involved the detail of Mr. Sowards as learned counsel in place

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1 of Mr. Nevins -- excuse me, Mr. Nevin. Sorry for putting that  
2 "S" on there, sir.

3 The commission advised the parties that he would  
4 address this issue with Mr. Mohammad and obtain his consent on  
5 the record prior to ruling on this matter, and I will take  
6 that up momentarily. I will not go into the further content  
7 of the ex parte filing.

8 The parties also had no objection to proceeding in  
9 the order of march proposed by counsel for Mr. Ali in AE 652M  
10 (AAA). I advised the parties that we would do that.

11 Counsel for Mr. Ali requested to add AE 502HHHH to  
12 the docket and to address whether the bases for the  
13 commission's rulings in AE 502BBBB, hostilities for personal  
14 jurisdiction, and AE 617K, hostilities as an element at trial,  
15 could coexist. I advised counsel for Mr. Ali I would look at  
16 these rulings and AE 502HHHH and would allow the parties a  
17 brief opportunity to be heard regarding the coexistence of the  
18 rulings. We'll take that up at the same time I get a status  
19 update on AE 642.

20 We also discussed the timing of the deposition of the  
21 interpreter in the NCR or CONUS location to be determined. I  
22 advised the parties that I prefer to schedule the deposition  
23 in the NCR or at least in CONUS for a four-day period at some

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1 point after completion of this hearing session and before the  
2 end of the year.

3 I directed the parties to confer, discuss how many  
4 people from the defense teams would be required at the  
5 deposition, and determine -- as well as the prosecution, and  
6 determine a location and agreed-upon dates for the deposition.  
7 I further advised the parties that I would adjust my schedule  
8 entirely to accommodate the agreed-upon dates regardless of  
9 what those were.

10 With respect to the trial scheduling order issued by  
11 the commission in AE 563 and the litigation schedule in  
12 AE 539M, I advised the parties that, despite the fact that a  
13 trial date has been set, I feel no pressure and can adjust  
14 dates if changing circumstances necessitate that; however, I  
15 will add that my full attention is on this case, and we will  
16 proceed accordingly.

17 I advised -- also advised the parties that now that  
18 the commission sessions are longer and more frequent, I need  
19 time to -- decompress is maybe a good way to -- to assimilate  
20 information, to rethink some issues through and may schedule  
21 things like a 90-minute lunch recess on occasion to  
22 accommodate that, and to the same extent, I'm willing to do  
23 that for the parties. If you need some additional time

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1 because something has come up during testimony or something  
2 like that, just ask.

3           It's -- I understand how litigation works. Things  
4 pop up at the last minute. You may need to go find a couple  
5 of files that you weren't anticipating, those kinds of things.  
6 Just let me know and keep me apprised, and we will work  
7 through the process.

8           I also understand that counsel and other trial  
9 participants may also have wellness issues. I hope the teams  
10 are all doing well. I asked to be advised if anyone on the  
11 teams or their families have been impacted by Hurricane Dorian  
12 or if there are any illnesses that I should be aware of that  
13 they wanted to disclose. That can also be in another 802  
14 session if the parties wish to do so.

15           I thank the parties for timely filing their motions  
16 in accordance with the deadlines set by the commission. I  
17 also appreciate the government filing detailed classification  
18 guidance with the commission and the parties regarding the  
19 testimony of the witnesses who will testify during this  
20 session. I reviewed that document, I found it to be very  
21 helpful. I hope the parties did as well. And I hope that  
22 that practice will continue in the future.

23           This is in line with the commission's position that

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1 the government owns the classified information privilege and  
2 is primarily responsible for the protection of classified  
3 information. The court information security officer and the  
4 judge, however, are a secondary protection, and we will be  
5 following that guidance to also do our due diligence as anyone  
6 with a classification or a security clearance is obligated to  
7 do to protect the inadvertent or intentional spill of  
8 classified information.

9           However, I do recognize that the primary duty of me  
10 as the judge is to hear and evaluate the argument and the  
11 evidence, and so I appreciate the government's willingness to  
12 take the primary responsibility for the protection of that  
13 classified information and to assist the commission in doing  
14 so.

15           Counsel for Mr. Ali asked about my procedures for  
16 documentary exhibits that will be presented to the witnesses.  
17 I advised the parties that I would accept procedures that  
18 would expeditiously allow me to simultaneously see what the  
19 witness sees, or words to that effect.

20           Counsel, that's my recollection of the general  
21 substantive matters that we had discussed at the 802, which  
22 lasted approximately 35, 40 minutes at the most. But if there  
23 are any additions, the government may now be heard.

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1 CP [BG MARTINS]: Your Honor, I believe that is a very  
2 clear summary. I thought it might be a matter of put it on  
3 the record that we had intended to notify Your Honor of the  
4 Pentagon being available, and within a couple of hours of the  
5 802 conference in here ending, we put that out by an e-mail to  
6 the parties and to Your Honor, and you've already addressed  
7 that you've made a ruling with regard to the Pentagon. Just  
8 wanted to put that in there.

9 MJ [Col COHEN]: Thank you, General Martins. I think that  
10 is appropriate. I considered that an 802 notification to the  
11 court that included both sides. I saw the comments from  
12 everyone.

13 In addition to that order, I -- I'm sure the parties  
14 noticed that I also asked the government to provide some  
15 additional background moving forward as to how -- show cause  
16 on some particular issues. That notification is -- that order  
17 is unclass. It should be available to all of the parties and  
18 the public in short order. So essentially what I did is I  
19 deferred any further ruling on the defense request until I  
20 could get some more information on what is the real  
21 feasibility of what I could order in this particular case.

22 But I will -- I have no problem summarizing now,  
23 since the matter is here, that in the order I did ask the

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1 government to look at it with an eye towards maximizing, to  
2 the maximum extent practicable, the opportunity for public  
3 access.

4 I do believe that for the same reasons we allowed it  
5 on the east coast, that there was an -- and I didn't  
6 necessarily hear argument to the contrary by the government  
7 during the oral argument on this, was that there are  
8 interested parties throughout the United States. And so to  
9 the extent that we can find some way of facilitating that  
10 access as opposed to having to fly all the way to the eastern  
11 -- east coast, perhaps that is something that we could manage  
12 to do, but I'll wait for further guidance from the government.

13 Defense Counsel, are there any -- do any of the teams  
14 wish to add anything else to my summary of the 802?

15 Mr. Connell.

16 LDC [MR. CONNELL]: Sir, I see my microphone is working.  
17 Thank you to all.

18 I don't have anything to add to the summary, but I do  
19 have some updates on a few matters for the record when it's  
20 appropriate.

21 MJ [Col COHEN]: Okay. Thank you. Let me get through  
22 just a few issues with respect to Mr. Mohammad's team, and  
23 then I'll be ready to take those.

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1 Mr. Ruiz.

2 LDC [MR. RUIZ]: Judge, before we dive into that, I  
3 neglected to ask before for Mr. Hawsawi to be excused at the  
4 first break. It's his intention to go back.

5 MJ [Col COHEN]: That will be fine. Let me -- he will  
6 definitely be allowed to do it at some point this morning.  
7 Let's see how long this first session takes, and then that --  
8 but definitely at some point this morning I will allow him to  
9 leave.

10 LDC [MR. RUIZ]: Right. And his request is at the first  
11 break, whenever the commission takes that break.

12 MJ [Col COHEN]: Okay, all right. Thank you.

13 LDC [MR. RUIZ]: Thank you.

14 MJ [Col COHEN]: All right. Ms. LeBoeuf, I have received  
15 your notification that you wish to make an appearance here as  
16 defense counsel on behalf of Mr. Mohammad. If you would  
17 please announce by whom you were detailed and your  
18 qualifications, I would appreciate it.

19 CDC [MS. LeBOEUF]: Thank you, Your Honor. I'm Denise  
20 LeBoeuf. I'm requesting permission of the military judge to  
21 enter an appearance as civilian defense counsel on behalf of  
22 Khalid Shaikh Mohammad pursuant to Rule 502(d)(3) of the  
23 Manual for Military Commission. I am a United States citizen.

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1 I'm admitted to the practice of law in the state of Louisiana,  
2 as well as admitted to practice before the Supreme Court of  
3 the United States, the Fifth Circuit, and the federal courts  
4 of Louisiana.

5 I have not been the subject of any sanction or  
6 disciplinary action by any court, bar, or other competent  
7 governmental authority for relevant misconduct. I have been  
8 determined to be eligible for access to classified information  
9 at the appropriate level. And I executed a sworn agreement on  
10 July 17, 2008, to comply with all applicable regulations or  
11 instructions for counsel. A copy of that agreement is filed  
12 with the commission as Attachment B to AE 004LL.

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

14 Mr. Mohammad, any objection to Ms. LeBoeuf  
15 representing you?

16 ACC [MR. MOHAMMAD]: [Indicated negative response.]

17 MJ [Col COHEN]: Okay. That's a negative response from  
18 Mr. Mohammad. Ma'am, would you like to swear or affirm?

19 CDC [MS. LeBOEUF]: Swear is fine.

20 [Counsel was sworn.]

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

22 CDC [MS. LeBOEUF]: Thank you.

23 MJ [Col COHEN]: Mr. Nevin, I'd like now to address 004KK

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1 and AE 006V. I have attempted to summarize them while  
2 protecting any issue with respect to the ex parte filing. Is  
3 there anything you would like to add to the substance of  
4 either of those at this time?

5 LDC [MR. NEVIN]: No, Your Honor. Thank you.

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

7 Mr. Nevin, it's my understanding of looking at the  
8 filings that you, Mr. Sowards, and the Chief Defense Counsel  
9 believe Mr. Sowards meets the statutory and regulatory  
10 requirements to qualify as learned counsel to represent  
11 Mr. Mohammad; is that correct?

12 LDC [MR. NEVIN]: Yes, it is.

13 MJ [Col COHEN]: Okay. Mr. Mohammad, Mr. Nevin has  
14 asserted to the commission, as has Mr. Sowards and the Chief  
15 Defense Counsel, that Mr. Sowards is qualified to represent  
16 you as learned counsel in this case.

17 Have you had the opportunity -- are you aware of this  
18 request?

19 ACC [MR. MOHAMMAD]: **[Speaking in English]** Yes.

20 MJ [Col COHEN]: Okay. Would you like the opportunity to  
21 further consult with your defense team about this request?

22 ACC [MR. MOHAMMAD]: **[Speaking in English]** No, I'm okay.

23 MJ [Col COHEN]: Okay. Do you consent to having

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1 Mr. Sowards represent you as learned counsel and Mr. Nevin  
2 represent you as pro bono counsel?

3 ACC [MR. MOHAMMAD]: [Speaking in English] Yes.

4 MJ [Col COHEN]: Okay. I find that Mr. Sowards qualifies  
5 as learned counsel to represent Mr. Mohammad, and Mr. Mohammad  
6 consents to the change from Mr. Nevin to Mr. Sowards as his  
7 learned counsel.

8 The commission accepts the detail of Mr. Sowards as  
9 learned counsel and grants Mr. Nevin's excusal from  
10 representation as learned counsel as set forth in AE 006V, and  
11 there will not be a written ruling to follow. This will be an  
12 oral ruling on the record.

13 CDC [MR. NEVIN]: And, Your Honor, I think it's important,  
14 based on conversations I've had, that the military commission  
15 also direct the convening authority to discontinue funding me  
16 as learned counsel and to commence funding Mr. Sowards as  
17 learned counsel, based on communications we had with the  
18 convening authority previously.

19 MJ [Col COHEN]: Okay. Excellent. Then I tell you what,  
20 then I will modify what I just said. I will go ahead and  
21 issue a written ruling directing as such.

22 CDC [MR. NEVIN]: But, Your Honor, I take it your order  
23 would be effective at the present time?

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1 MJ [Col COHEN]: That is correct.

2 General Martins?

3 CDC [MR. NEVIN]: Thank you.

4 CP [BG MARTINS]: Your Honor, it was a while ago, but I  
5 recall that when learned counsel originally announced their  
6 qualifications, that there was an announcement that stated  
7 they were in accordance with the Regulation for Trial by  
8 Military Commission, and I'm not aware that Mr. Sowards'  
9 qualifications to be appointed learned counsel are on the  
10 record.

11 MJ [Col COHEN]: Thank you, sir. I have no problem  
12 asking.

13 Mr. Sowards, would you mind putting your  
14 qualifications on the record now? If not, sir, that would be  
15 great. I think it will make the record clean.

16 LDC [MR. SOWARDS]: How long do you have?

17 MJ [Col COHEN]: Just -- just briefly will be sufficient,  
18 sir. And I apologize for making you walk up here.

19 LDC [MR. SOWARDS]: No, no, that's fine. That's fine.

20 Without disclosing any further -- or making a  
21 disclosure of confidential attorney-client information ----

22 MJ [Col COHEN]: Right.

23 LDC [MR. SOWARDS]: ---- just generally, and I believe

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**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 this has also been in public, that I've been practicing  
2 criminal defense work at the trial, appellate, and  
3 post-conviction level for, I'm sorry to say, 40 years, and  
4 during that time have represented death sentence prisoners or  
5 death-charged prisoners in over 45 cases, including  
6 evidentiary hearings in federal court, as well as trials at  
7 the state and appellate level -- I mean the state and federal  
8 level, to include the defense of the defendant in  
9 United States v. Theodore Kaczynski which was -- and I allude  
10 to that only because it is similar in this instance that it  
11 involves a multi-jurisdictional case with a number of very  
12 complex facts and events. And that was successfully concluded  
13 to a sentence less than death.

14 MJ [Col COHEN]: All right.

15 LDC [MR. SOWARDS]: I'm not sure what else Your Honor  
16 would like to know or whether General Martins ----

17 MJ [Col COHEN]: No, sir. I did get the filing with  
18 additional matters with respect to your qualifications. The  
19 court is satisfied.

20 General Martins, do you have any additional concerns?

21 CP [BG MARTINS]: No, Your Honor.

22 MJ [Col COHEN]: All right. Thank you, Mr. Sowards. I  
23 appreciate it.

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*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 LDC [MR. SOWARDS]: All right. I'll assist myself to my  
2 seat.

3 MJ [Col COHEN]: Thank you.

4 Now that we have concluded appearance of counsel  
5 issues, we will begin today's session with a few of the  
6 matters that I don't anticipate will take a significant amount  
7 of time.

8 Mr. Connell, before I do so, you said there were some  
9 additional matters that you wanted to put on the record. I  
10 have no objection to doing so now.

11 LDC [MR. CONNELL]: Thank you, Your Honor.

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

13 LDC [MR. CONNELL]: Your Honor, two of them are in the  
14 matter of updates from the 802. At the 802, I said that I  
15 would meet and confer with the government regarding my  
16 questions around 658. I wanted to let the military commission  
17 know that we have done so. There were a couple of  
18 clarifications that came out of that, which I will put on the  
19 record at the 505(h) hearing if that's appropriate.

20 MJ [Col COHEN]: That will be wonderful. Thank you.

21 LDC [MR. CONNELL]: The second thing is that I also met  
22 and conferred with the government regarding the 505 notices in  
23 the 628 series for next week's testimony. We have agreed to

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**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 ask the military commission to add to the 505(h) docket 628P,  
2 R, T, V, and W.

3 MJ [Col COHEN]: Okay.

4 LDC [MR. CONNELL]: Mr. al Baluchi will be withdrawing  
5 628U because the government had some issues with it. I'm  
6 going to rework it, resubmit it, and see if we can have a  
7 meeting of the minds on that question.

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

9 LDC [MR. CONNELL]: The -- I will add to the government's  
10 mention regarding AE 007I that I also -- after the government  
11 made its 802 communication, I also responded to that e-mail,  
12 just stating that the position -- our position had not changed  
13 since our filing in the 007 series.

14 MJ [Col COHEN]: Did you -- was it your understanding that  
15 the -- that the ruling adequately deferred your concerns?

16 LDC [MR. CONNELL]: Absolutely it did, sir.

17 MJ [Col COHEN]: Okay.

18 LDC [MR. CONNELL]: Thank you. Both rulings I thought  
19 were completely appropriate ----

20 MJ [Col COHEN]: Okay.

21 LDC [MR. CONNELL]: ---- and reflected ----

22 MJ [Col COHEN]: The intent would have been to say, hey, I  
23 hear you, but I haven't ruled yet.

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1 LDC [MR. CONNELL]: That's the way I took it, sir, was  
2 that you needed more information. And that made sense to me.

3 MJ [Col COHEN]: Okay.

4 LDC [MR. CONNELL]: Okay. The next items that I have are  
5 in the nature of things that should be on the record. I'm  
6 sometime hesitant to put these kinds of things on the record  
7 because I sort of personally do not like to be -- to sound  
8 like I'm whining. But on the other hand, other things get  
9 lost to history, and if they're not known to the record, then  
10 later when they become important there's no way -- there's no  
11 record of them.

12 When we discussed the trial scheduling order, I  
13 advised the military commission that the on-island media  
14 facilities are essentially closed. I have a picture, which I  
15 have had cleared with the court information security officer,  
16 and it is found in the record at AE 628S Attachment BB.

17 If I may have access to the document camera and  
18 display to the gallery.

19 MJ [Col COHEN]: Yes. It's impressive that you found the  
20 cat to sit there at the exact same time.

21 LDC [MR. CONNELL]: Do you know how hard it was to get  
22 that cat to sit there, sir?

23 This is just a picture of the interior of what used

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1 to be known as the media hangar, and the building to -- in the  
2 upper left of the picture at Attachment BB is what used to be  
3 the media hut. It contains a curtain, a Department of  
4 Defense seal, you know, an ordinary professional media space,  
5 which allowed both parties or any party, as they chose, to  
6 address the media and hold conferences.

7           The -- for quite a substantial amount of time now,  
8 the -- this space has been closed and various much less  
9 satisfactory workarounds have been used. But the military  
10 commission has made clear that it likes to know not just the  
11 primary but also sort of the secondary effects.

12           This media room was also used for other purposes  
13 because it's one of the few rooms which is controlled in  
14 Camp Justice which can be at the disposal of its owners who  
15 would make it available, and both the prosecution and the  
16 defense make themselves available to meet with victim family  
17 members, if the victim family members choose, if they have  
18 something to say or they have something that they want to ask  
19 or just want to see if we're actually human beings. And that  
20 was -- it was a very good space for that that we used, and we  
21 no longer have any access to that, and the workarounds to that  
22 have been much less satisfactory.

23           And I'm done with the document camera.

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1           In addition to the physical logistical issues  
2 surrounding public access, at the very end of August,  
3 Naval Station Guantanamo Bay, not JTF and not military  
4 commissions, but the naval station, issued a new highly  
5 restrictive media policy, which after discussion with the  
6 interested parties, they withdrew. We don't know if something  
7 will be forthcoming in the future, but I think it underlines  
8 the importance of coordination of these sorts of things to see  
9 if in advance it's possible to reach a consensus as opposed to  
10 ex post.

11           I know that formal briefings from the government on  
12 those issues don't begin until 1 November under your trial  
13 scheduling order, but I just wanted to give you the current  
14 update on that.

15           MJ [Col COHEN]: Thank you.

16           LDC [MR. CONNELL]: Two other sort of matters that fall  
17 within the trial scheduling order umbrella. The first one is  
18 that since the last hearing, the government has worked  
19 diligently to provide discovery in anticipation of meeting its  
20 1 October deadline, and as of last Wednesday, which is when we  
21 stopped counting, the government had produced since the last  
22 hearing 27,199 pages of discovery or an average of about 680  
23 pages per day.

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1           This, of course, is a mixed blessing because everyone  
2 wants the discovery transfer to take place. At the same time  
3 everyone wants to prepare for hearings, make proper use,  
4 triage the discovery, figure out what's important, what's not,  
5 what's very important, et cetera.

6           At one point, I considered asking for some sort of  
7 accommodation around this, and then I thought better of it,  
8 because I want to encourage the government to provide the  
9 discovery.

10           If some sort of accommodation becomes necessary, I'll  
11 bring it to the military commission's attention at that time.

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

13           LDC [MR. CONNELL]: The last thing that I want to say is  
14 about -- put on the record is about physical capacity here at  
15 Guantanamo.

16           The -- Mr. al Baluchi's team is assigned three office  
17 spaces, Room 202 in AV-34, which consists of six workstations  
18 is rated up to the secret level. The -- at the ELC Room 105,  
19 which consists of five workstations, and then there's a new  
20 trailer which we're not permitted to use yet. At some point,  
21 hopefully, we will be.

22           On 8 September yesterday, as of 0800 there was no  
23 power in AV-34, as the military commission may know, which

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1 eliminated over half of our space and our capacity for  
2 workstations. We reported that through channels, and at  
3 10:48, I conferenced the question of a possible 24-hour delay  
4 with the understanding that if power were restored by 1200,  
5 then I thought we would be okay. We were okay. At 11:43, the  
6 power was restored.

7           The -- one of the reasons I bring this up is that  
8 this was not an isolated occurrence. When I was here on 15  
9 August for -- to visit Mr. al Baluchi during the intervening  
10 space between the hearings, there was a similar power outage  
11 that I reported through channels, and with the request for the  
12 installation of emergency lighting.

13           The -- the reason why I say these things is that in  
14 many ways, practicing here on Guantanamo often feels like  
15 trying to run through water in that there are various things  
16 each of which takes away about five percent of our capacity.  
17 And on their own they don't sound like much, but when we're  
18 trying to as a whole make progress towards resolution of the  
19 case, these things often become significant.

20           And so I'm not asking for any relief, I just didn't  
21 want us to get through two months from now and not even  
22 remember what happened in August. So those are my comments,  
23 sir. Thank you.

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

2 I suspect that towards the end of the week, that I  
3 will want an 802 with all of the learned counsel, and at least  
4 one or two prosecutors. I want to go over some procedures for  
5 making objections, et cetera, during the two weeks of  
6 testimony, make sure we're kind of all on what we believe will  
7 be the best process for addressing those kinds of things, and  
8 I think an 802 would probably make the most sense for us to  
9 sit down. If I get the five learned counsel and then no more  
10 than two prosecutors, whoever is going to be -- whoever the  
11 government wants to send, we can sit maybe even just here in  
12 this room if we have to or we can sit back in my chambers and  
13 just kind of walk through those things.

14 In addition, this might be a good time to just  
15 informally talk about some of these issues and make sure that  
16 we're all kind of on the same page with those as well.

17 LDC [MR. CONNELL]: Sir, thank you. I'd be happy to avail  
18 myself of that. The one thing that I'll add is, the one  
19 discussion that I think we should have on the record is with  
20 respect to objections around classified information privilege.

21 When we get to 649 in the docket, I will have some  
22 comments on how I think that process might work, some  
23 accommodations that could be created. But I just wanted to

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1 say that I will be addressing that particular type of  
2 objection on the record.

3 MJ [Col COHEN]: That makes sense. Yeah, so let's do  
4 that. I think also in addition to that -- yeah, I think -- I  
5 think all of that is something I want to sit down and talk  
6 with you all as to what we all kind of think is -- are the --  
7 the pros and cons of some various things. And then if we need  
8 to put that on the record, I never have a problem with putting  
9 something on the record. But also -- just to kind of have an  
10 informal discussion as well just using all of our various  
11 experiences and expertise to come to what we think is the best  
12 course of action. All right.

13 Mr. Trivett. Good morning.

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

15 I just wanted to raise to the commission's attention,  
16 the docket and Mr. Connell's proposed order of march.

17 MJ [Col COHEN]: Okay.

18 MTC [MR. TRIVETT]: When we looked at it, we thought that  
19 it was appropriate and reasonable and it made sense how it was  
20 ordered. What we did not realize, though, in the 802 was that  
21 for some reason, 644, the defense motion to compel a Kastigar  
22 hearing was not on his order of march.

23 So if the commission could at some point give us some

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1 fidelity as to when that would be so the parties could  
2 prepare. It is on your docket at 644. It's just not on  
3 his -- the initial part of ----

4 MJ [Col COHEN]: I'm actually glad you mentioned that,  
5 because I was -- I was having the same discussion last night  
6 with -- well, they agreed on this, but 644 was on the docket  
7 that we issued, did that mean that they didn't want to address  
8 644? And so it was actually something that I wanted to  
9 discuss with you all as well.

10 I will say this with respect to 644 in general: In  
11 reading AE 644, while I understand the idea for a Kastigar  
12 hearing, what I didn't see anywhere in there was any reference  
13 to M.C.R.E. 304(a)(5), which would be -- in military practice  
14 it's not unusual that where they take Supreme Court precedent  
15 and then adopt it into a Military Rule of Evidence.

16 And so when I read M.C.R.E. 304(a)(5), I essentially  
17 -- that's where I see, when they're talking about derivative  
18 evidence from coerced statements or involuntary statements,  
19 that essentially they've taken the concept of Kastigar and  
20 they put it into M.C.R.E. 304, in the same way that we do that  
21 with M.R.E. 304 with respect to statements by the accused as  
22 well in those cases.

23 What I would like to do is -- is to see how

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1 references to that -- because I think I would need to address  
2 M.C.R.E. 304 in any ruling that I would make along those  
3 matters, as I do believe that those rules are directly  
4 applicable to this issue of either coerced statements and  
5 derivative evidence or involuntary statements and derivative  
6 evidence.

7           And the fact that the motion did not address that  
8 particular -- those particular rules, I'll let the parties  
9 talk about that and say are we ready -- is it ripe now or do  
10 we need to file a supplement to AE 644 to address particularly  
11 M.C.R.E. 304?

12           Mr. Connell. If you guys need to chat for a second,  
13 that's fine.

14           LDC [MR. CONNELL]: Sir, my position on 304 -- excuse me,  
15 on 644, which we articulated in the reply, is that to some  
16 extent it's been overcome -- overtaken by events. Because we  
17 were asking for a particular form of hearing and, in fact,  
18 we're having a hearing at which both sides can ask whatever  
19 questions that they want.

20           Many of the government's observations in June and  
21 their independent source claim that they make in 628 -- in  
22 their reply and response in 628, the government has an  
23 argument that essentially the investigative decisions of the

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1 investigators were unaffected by -- by evidence obtained by  
2 torture or by coercion, and thus, they have a sort of  
3 independent source.

4           They articulated that first in June, and we addressed  
5 that in the reply as to how, in our view, that fits into the  
6 Fifth Amendment sort of universe of independent source,  
7 inevitable discovery, and Kastigar. So to me, the -- the  
8 initial relief we asked for of asking for a hearing is  
9 essentially moot because we're already having a hearing.

10           Now, the military commission described to us and the  
11 government has taken the position in its -- in some  
12 conferences that, at the end of the taking of evidence --  
13 well, actually, it's now in the trial scheduling order, now  
14 that I think about it -- end of the taking of evidence, there  
15 will be a brief where I'm sure both parties will try to  
16 summarize this vast amount of evidence and will try to explain  
17 what its legal consequence is.

18           So to me it seems to me that's when we take up the  
19 Kastigar question, what effect, if any, it has. That's when  
20 we take up the 304 question as to what evidence is derivative  
21 of us -- of what. And so that's my view on it.

22           And that's why I didn't put 644 on the order of  
23 march, because it seemed like, if you wanted to give us

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1 something, you couldn't, right? I mean, you have already  
2 given us what we asked for in the matter of having a hearing,  
3 and then what the evidence will show at that hearing is yet to  
4 be determined, of course. And then at the end, both parties  
5 are going to brief what the effect of it is.

6 So it seems to me that it's valuable briefing. And  
7 I'd be happy to add additional briefing on Rule 304 to our  
8 post-hearing brief on that topic, but it seems to me like we  
9 don't need to do anything else on 644 right now. But that's  
10 just my view.

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

12 In light of what you just heard, Mr. Trivett, what is  
13 the government's position?

14 MTC [MR. TRIVETT]: Sir, I think we're happy to defer the  
15 argument on the applicability of Kastigar at this point;  
16 however, I think it's Mr. Mohammad's motion. So ----

17 MJ [Col COHEN]: I think it was a joint motion by AAA and  
18 KSM, so I'll listen for Mr. Sowards as well. But you would  
19 have no objection to deferring it at this point?

20 MTC [MR. TRIVETT]: I think that's consistent with our  
21 position, is that there is a hearing and we're going to  
22 establish where we have the evidence anyway. But a Kastigar  
23 hearing, in our mind, is much different than the hearing we're

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1 envisioning. It will have a similar result, but Kastigar is a  
2 far more burdensome and upfront hearing that we don't believe  
3 they're entitled to, and we believe that the commission will  
4 be convinced at the end of the taking of the proceedings of  
5 the independent source of the documents.

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

7 MTC [MR. TRIVETT]: The second issue, while I'm up here,  
8 sir ----

9 MJ [Col COHEN]: Sorry. I'll hear from you momentarily.  
10 I don't want to make you stand there on that foot longer than  
11 you need to.

12 MTC [MR. TRIVETT]: We recently filed AE 655, which is a  
13 motion to compel mental health exam of Mr. Ali. We have  
14 waived our reply in hopes that the commission can address it  
15 at some point during the next three weeks.

16 MJ [Col COHEN]: Okay.

17 MTC [MR. TRIVETT]: So we just wanted to bring that to  
18 your attention. That request is based on the timing of when  
19 we would envision this exam happening if, in fact, it is  
20 compelled, and the sequencing of where the trial conduct order  
21 has us doing things.

22 MJ [Col COHEN]: Okay.

23 MTC [MR. TRIVETT]: Thank you.

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1 MJ [Col COHEN]: No, that's a reasonable request. Thank  
2 you.

3 Mr. Connell.

4 LDC [MR. CONNELL]: I just wanted to let you know our  
5 position on 655. If you want to take it up in a more formal  
6 way, that's perfectly fine; we're prepared to do so. Our  
7 position at that time will be that there's substantial  
8 evidence to be taken on 655. Three of those witnesses are  
9 already scheduled.

10 655 is a request for mental health evaluation, and  
11 three of the -- one of our positions is the government has had  
12 many mental health evaluations. Three of those mental health  
13 evaluators are scheduled to testify already. And so when we  
14 come to it, I'm perfectly happy to discuss 655, but our  
15 position is that it is not ripe for final resolution because  
16 the witnesses are going to -- haven't testified yet.

17 MJ [Col COHEN]: Okay. Thank you. I'll go back and take  
18 a look at those motions.

19 One question for the government. With respect to  
20 AE 658, Mr. Trivett -- once again, I appreciate you providing  
21 that classification guidance -- will there be any objection to  
22 me asking my own clarifications on a couple of things that are  
23 in there during a 505?

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1 MTC [MR. TRIVETT]: Not at all. Happy to answer.

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

3 LDC [MR. SOWARDS]: Excuse me, Your Honor.

4 MJ [Col COHEN]: Yes, Mr. Sowards, please. Because it is  
5 a joint motion.

6 LDC [MR. SOWARDS]: Yes. Thank you very much, Your Honor.

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

8 LDC [MR. SOWARDS]: I was going to say, I find myself in  
9 the familiar territory of having Mr. Connell's brain work much  
10 faster than mere mortals, so I wasn't prepared for everything  
11 that he said this morning.

12 And I'm also on the unfamiliar territory of agreeing  
13 with Mr. Trivett, that the Kastigar considerations extend far  
14 beyond the question of the suppression motion. And I thank  
15 you for your guidance on the potential applicability and the  
16 omission of the M.C.R.E.

17 MJ [Col COHEN]: Right. Yeah, the way I read the motion  
18 initially -- and this is not a ruling -- but the way I read it  
19 is, you know, primarily Kastigar deals with that situation  
20 where someone is immunized generally and therefore then  
21 compelled to provide something.

22 And I caught the -- I caught the gist of what you  
23 were saying in there in respect that, well, if the government

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1 is saying that these were coerced statements, you know,  
2 there's possibly derivative evidence in the same way that  
3 you'd have this Kastigar hearing and those types of things.  
4 But I didn't -- I couldn't ignore the fact that M.C.R.E. 304  
5 also talks specifically about these in kind of what the legal  
6 standards are, when that is the issue of coerced statements  
7 and/or involuntary statements.

8           So I just wanted to at least give you all the  
9 opportunity to possibly either withdraw and resubmit later or  
10 to ask for a leave to amend that to address the 304 interplay,  
11 if any, that that might have with what you're requesting.

12           LDC [MR. SOWARDS]: And it may be much more efficient just  
13 to do a supplemental brief in response to the military  
14 judge's ----

15           MJ [Col COHEN]: Okay.

16           LDC [MR. SOWARDS]: ---- inquiry. And what I would ask  
17 for is an opportunity to informally consult with Mr. Connell  
18 and Mr. Trivett and maybe sometime this week tell you, never  
19 mind, exactly what you want to do is fine, as Mr. Connell  
20 suggests that when the dust settles on this.

21           MJ [Col COHEN]: Right.

22           LDC [MR. SOWARDS]: But I think it is important from  
23 Mr. Mohammad's perspective as a coparticipant in the motion

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1 that we agree with what I understand you to be saying, that  
2 this is not limited to just a question of the statements.  
3 Because then I think that would be -- Mr. Trivett's correct,  
4 that all of this would be subsumed in what you're going to be  
5 looking for.

6 MJ [Col COHEN]: Okay. I think that's appropriate.

7 I have my own issues. I think the briefing is not --  
8 that I would want more briefing on the 304 if I was even to  
9 address that issue. And so I will let you all chat amongst  
10 yourselves and then let me know.

11 The issue won't be waived. I mean, to be honest with  
12 you, motions to suppress based on anything other than  
13 voluntariness at this time have a date later on in the trial  
14 scheduling order. So if you ultimately decide we want to  
15 withdraw and then just submit a new motion as new evidence  
16 comes in, that would be fine as well. You know, the initial  
17 motion to suppress that was ordered was just on the issue of  
18 voluntariness and we hadn't even -- and I understand that  
19 derivative evidence may be a consequence of any finding along  
20 those lines. But to the same extent, a ruling on that may  
21 also impact, you know, what legal arguments you may have with  
22 respect to derivative evidence.

23 LDC [MR. SOWARDS]: Very good. Thank you, Your Honor.

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

2 CDC [MR. NEVIN]: Excuse me, Your Honor.

3 MJ [Col COHEN]: Yes, Mr. Nevin.

4 CDC [MR. NEVIN]: May I be heard on the 658 question ----

5 MJ [Col COHEN]: You may.

6 CDC [MR. NEVIN]: ---- that counsel just spoke to?

7 Thank you. And I heard in the 802 that the military  
8 judge summarized that you had expressed the appreciation --  
9 appreciation to the government for the classification guidance  
10 in 658 and indicated that it was the duty of the commission  
11 and the parties as well to protect classified information.

12 I simply wanted to say that while the military  
13 commission is not in a position to classify or declassify  
14 information -- that is apparently the government's  
15 prerogative -- it is within the military commission's, or the  
16 military judge's prerogative to say if you have walled that  
17 information off, this is no longer a fair proceeding, and it's  
18 one -- and as a result, I'm going to impose a sanction.

19 MJ [Col COHEN]: I agree with you.

20 CDC [MR. NEVIN]: I know you know that. I simply wanted  
21 to articulate that for the record as a -- to complete the --  
22 to some extent the question of how we respond to the  
23 government's classification decisions.

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1 MJ [Col COHEN]: No, sir, you're absolutely right. That  
2 is -- that is my lane that I can steer in and simply say is it  
3 discoverable, and so either provide me one of the enumerated,  
4 you know, ways that you provide discoverable information, or  
5 if they refuse to comply with any of those, then I grant some  
6 other type of relief as appropriate. But you are correct that  
7 I need to ensure that there's a fair trial.

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

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

10 Any other general matters? Okay.

11 Which side -- it was kind of a joint submission with  
12 respect to AE 118. Mr. Connell, are you going to initially  
13 speak on behalf of the joint submission?

14 LDC [MR. CONNELL]: Sir, I'm kind of the reporter for the  
15 group.

16 MJ [Col COHEN]: Okay. That will be fine.

17 LDC [MR. CONNELL]: So, Your Honor, AE 118 has, like a lot  
18 of things, has long procedural history which I will not go  
19 through here. If the military commission wants any of it, I  
20 can direct the court to AE 652M footnote 3 which summarizes  
21 it.

22 The most recent chapter, however, begins with 118M,  
23 which deferred the question of access to security clearance --

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1 classification guides but was an order of the military  
2 commission to modify the information security infrastructure  
3 of the military commission. It had three basic elements to  
4 the order:

5           The first of those was to move the defense  
6 classification review function from the primary responsibility  
7 of the Office of Special Security to the primary  
8 responsibility of the Department of Defense Security  
9 Classification/Declassification Review Team or SC/DRT.

10           Second, it established a 60-day clock for defense  
11 classification reviews.

12           And third, required the government to provide a point  
13 of contact for informal consultation.

14           In AE 118N, the government moved to reconsider. It  
15 proposed establishing a sort of tenet-style relationship  
16 between the SC/DRT and OSS. It proposed keeping the 60-day  
17 clock and accomplishing the third goal through an  
18 institutional e-mail box.

19           In 118S, the military commission ordered the parties  
20 to meet and confer along with the stakeholders, and that  
21 meeting took place on 9 August 2019. In 118T, we notified the  
22 military commission that the meeting had taken place per your  
23 order.

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1           The first result of that meeting, which was quite  
2 productive, was the joint proposal which is found at 118U. It  
3 has three -- it deals with those three questions in three  
4 ways:

5           First, it was essentially unwind the order change  
6 with respect to OSS and SC/DRT and to restore OSS to its  
7 former role. That is more acceptable to the defense because  
8 we know the personnel and trust the personnel at OSS. We've  
9 worked with them for many years now. At the same time, it was  
10 more acceptable to SC/DRT because they feel they're not  
11 appropriately resourced to handle those additional  
12 responsibilities.

13           Second, we would keep the 60-day clock. I can report  
14 to the military commission that on the occasions that we have  
15 submitted material for classification review through the  
16 e-mail box, it appears to be working. All of our material has  
17 been returned in less than 60 days, sometimes substantially  
18 less.

19           With respect to the more informal aspect, the -- in  
20 my view with respect to the e-mail box, the -- 118U continues  
21 that practice for an additional 60 days for evaluation. That,  
22 in my view, is the place where the jury is still out. The --  
23 it is not working, I think, exactly as it was envisioned, but

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1 hopefully it can.

2 I'll give you just one example. On 29 July, I  
3 submitted a request for clarification of some matters to the  
4 e-mail box. I never heard anything back from the e-mail box,  
5 but the government addressed all those issues in 658. So as  
6 we stand here today, it's overtaken by events in that the  
7 government covered all of the questions that I had.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. CONNELL]: But it wasn't exactly working as  
10 intended, which was for information professionals, information  
11 security professionals to be able to consult with one another  
12 and sort of, at the lowest level possible, to stop friction  
13 from taking place in the first place and avoiding spills.

14 MJ [Col COHEN]: Let me ask you this question as far as  
15 just what's happening: When you send it to the org box, are  
16 you at least getting a -- within some reasonable amount of  
17 time an indication that we've received your request or are you  
18 just hearing crickets?

19 LDC [MR. CONNELL]: May I have a moment?

20 MJ [Col COHEN]: You may.

21 LDC [MR. CONNELL]: Sorry about that.

22 MJ [Col COHEN]: There's some water to your right there.

23 LDC [MR. CONNELL]: I think I'm choking on water.

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1 MJ [Col COHEN]: There you go. I've done that before.

2 LDC [MR. CONNELL]: As it's set up now, sir, no, there's  
3 no, like, read receipt or indication that we've obtained it.

4 Did that answer the question, sir?

5 MJ [Col COHEN]: Yes.

6 So -- so you never know when they actually get that,  
7 then. You just know when you send it?

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

9 MJ [Col COHEN]: Okay.

10 LDC [MR. CONNELL]: And the reason why I bring that up is  
11 not to -- I still have hopes for the e-mail box, right? We're  
12 trying to make it work. Having met with the relevant attorney  
13 for the stakeholders, I know that they're trying to make it  
14 work. I know the government has very little to do with that  
15 e-mail box, but it has their moral support, at least.

16 But that's the reason why this 118U does not finally  
17 close the issue but maintains an additional 60 days for us to  
18 continue to evaluate to see if that's a viable solution.

19 MJ [Col COHEN]: Okay. Yeah, it would be great if you  
20 all ----

21 LDC [MR. CONNELL]: If this has the military commission's  
22 blessing, we can turn this into a proposed order and send it  
23 to you as a Word version.

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1 MJ [Col COHEN]: Yeah. I'll hear from -- just to see if  
2 there's any objections to that. I don't think since it came  
3 in as joint, I'm going to assume not. But then I need to  
4 verify that on the record.

5 LDC [MR. CONNELL]: Yes, sir. I have one other thing to  
6 say about 118, which is the 118V very recent filing. I can go  
7 ahead and address that now if you would like?

8 MJ [Col COHEN]: Okay.

9 LDC [MR. CONNELL]: There was a second result of the  
10 meeting, and that second result is 118V.

11 What -- just to give you a little context to that, at  
12 the meeting, after we addressed sort of the primary agenda  
13 items, we looked for other ways that we could make things  
14 better. And, in fact, that's how the complete unwinding of  
15 OSS came about, was that it seemed, you know, we talked about  
16 it, and everybody -- it wasn't really on the agenda, but  
17 everybody -- that's something that everybody wanted.

18 It turned out there was another thing that fell into  
19 that same category. I asked during the meeting if it would be  
20 possible for us to submit courtroom display items to the SIPR  
21 mailbox. Because it seemed like they were going to SC/DRT for  
22 review anyway. I know it's a big heavy lift for the CISOs.  
23 It's a heavy lift for us to physically take discs over; it

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1 seemed like a solution.

2           But what emerged was that SC/DRT feels that the  
3 courtroom display review is sometimes not just duplicative but  
4 triplicative, if that's a word, in that they would review  
5 government discovery before it's produced to the defense and  
6 mark it appropriately, do redactions of whatever they  
7 considered they were going to do. And then when we attached  
8 it to a motion, they reviewed that again for posting on the  
9 website, and then sometimes it comes to them a third time, if  
10 we want to show it in the courtroom.

11           So they felt it was not a good use of their resources  
12 to be reviewing the same item over and over, especially so I  
13 do not -- not especially, but that's what it was. So that led  
14 to further discussions among the parties and led to the joint  
15 proposal in 118V.

16           It would create a carveout to Change #2 Rule Of  
17 Court 7.2.f.1., and essentially it would say that if documents  
18 were provided by the government in discovery and were marked  
19 either unclassified or unclassified FOUO without further  
20 caveats, or, second category, documents released by the United  
21 States Government under the Freedom of Information Act with  
22 unambiguous markings, then either party -- or any party would  
23 be able to use them in court without additional review under

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1 the Rules of Court.

2 That does not avoid OCA review. In fact, it actually  
3 implements OCA review because in both of those situations, OCA  
4 have already reviewed the material. And it really honors  
5 that, that it's already gone through OCA review. But there  
6 are also several fail-safes in the order for the government if  
7 something slips through the net and they tell us -- and those  
8 three fail-safes are, first, if the markings are ambiguous,  
9 right, having -- dealing with a lot of FOIA material,  
10 sometimes they forget to strike through the word "Secret" or  
11 they -- it has ambiguous markings. And it would not apply in  
12 that situation. If the government has further caveats beyond  
13 FOUO, such as Law Enforcement Sensitive or Not Releasable to  
14 the Public, then it would not apply in that situation. If  
15 there was a document that the government informs us is  
16 mismarked, it would not apply in that situation. And if  
17 something is put forward for review, and, you know, sometime  
18 down the road the government comes to understand that there's  
19 a problem, then they have a mechanism to come to the military  
20 commission and ask for a clawback on that.

21 So if the -- I know that you want to hear from all of  
22 the parties, but if the military commission were in a position  
23 to sign that order, I think it would make the presentation of

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1 evidence next week and the week after much easier and  
2 smoother. It's a much easier way to allow the military  
3 commission to see the document and everyone to see the  
4 document that we're talking about without necessarily having  
5 to have a whole bunch of copies of it.

6           And we have -- you probably noticed with all of these  
7 filings, we've tried to get a bunch of exhibits to the  
8 military commission, but there are probably hundreds left that  
9 we were not able to get into that process and that are still  
10 being worked and copied and analyzed.

11           MJ [Col COHEN]: No, you're right. I think I recognize  
12 that between two filings, there was like almost 6,000 pages of  
13 information that came to the commission last -- just in the  
14 last few days there.

15           LDC [MR. CONNELL]: Yeah. Yes, sir.

16           MJ [Col COHEN]: And thank you to the parties. I mean it  
17 with sincerity. Thank you for doing your due diligence. It's  
18 now my due diligence to get through all of that information as  
19 we work through this. But I knew that's what was driving  
20 this.

21           LDC [MR. CONNELL]: Right.

22           MJ [Col COHEN]: And so I appreciate everyone's due  
23 diligence in doing so.

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1 LDC [MR. CONNELL]: Right. And I'll just close with one  
2 example which, in the current process -- I'm going to very  
3 tentatively and safely drink this water so that I don't choke  
4 myself again.

5 MJ [Col COHEN]: All right.

6 LDC [MR. CONNELL]: There were some discovery documents  
7 that we submitted to the CISO through the process that  
8 included foreign language material. And there was some  
9 pushback on that, but I understand why. I mean, the OCAs have  
10 already devoted their linguistic capacity to reviewing that  
11 material once and marked it the way that they considered  
12 appropriate. And the fact that they might push back against  
13 reviewing it a second time, you know, because it's not just an  
14 English language, they have to deploy specialized assets for  
15 that, I can understand that.

16 And so I think this is a solution, and Mr. Trivett  
17 will address it, I'm sure, but my understanding that it has  
18 stakeholder support.

19 MJ [Col COHEN]: Okay. Great. So let me do it this way.  
20 Mr. Connell, thank you.

21 Are there any additional comments on this -- on 118U  
22 or V that the parties want to be heard on, like either -- for  
23 example, is anyone on the defense side against me granting

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1 118U or V? If so, please speak now.

2 ADC [MS. RADOSTITZ]: Not on behalf of Mr. Mohammad, Your  
3 Honor.

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

5 LDC [MS. BORMANN]: Judge, I just want to reiterate what  
6 Mr. Connell said about avoiding additional work on behalf of  
7 the OCAs. It has been a burdensome process. I sat in a  
8 meeting with Mr. Trivett and Mr. Connell and a variety of  
9 others, that this process has become incredibly burdensome.  
10 And as we move into areas where we're taking testimony, it's  
11 especially important to get things done in an expeditious  
12 manner, so ----

13 MJ [Col COHEN]: I completely agree.

14 LDC [MS. BORMANN]: ---- we fully support that.

15 MJ [Col COHEN]: I agree with the prosecution and the  
16 defense. I laud both sides for putting together a joint  
17 proposal to me. I really appreciate that. It shows me that  
18 the parties, when you can agree on things, that you are  
19 willing to do so. And I think that's important for efficiency  
20 for everyone.

21 I'll take it that there are no other comments from  
22 any other defense counsel?

23 Mr. Trivett, is there anything you would like to say

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1 on this matter?

2 MTC [MR. TRIVETT]: Just briefly, sir. Thank you.

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

4 MTC [MR. TRIVETT]: If any lawyer tells you that he knows  
5 exactly what documents he's going to show a witness, you know,  
6 three or four weeks before that witness is scheduled to  
7 testify, he's -- he or she is probably lying. It's just ----

8 MJ [Col COHEN]: I agree that things change. You are  
9 absolutely right.

10 MTC [MR. TRIVETT]: It could not ----

11 MJ [Col COHEN]: I mean, just refreshing recollection  
12 alone may require you to show something that you weren't  
13 anticipating.

14 MTC [MR. TRIVETT]: Yes, sir. And what it wound up  
15 incentivizing, quite frankly, of getting everything to the  
16 court security officer in the amount of time that  
17 appropriately he would need to go through the process and get  
18 reviewed, it incentivized, if you didn't know exactly what  
19 documents you wanted to show, that you erred on the side of  
20 caution and put everything in.

21 And so this became a sort of self-fulfilling problem,  
22 because the OCAs, who are great patriots and are doing very  
23 difficult work, very detailed work, sometimes would have to do

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1 things three times, and the last time under somewhat of a --  
2 of a -- time crunch. So this is completely supported by the  
3 original classification authorities who have equities. I  
4 would not have filed this in a joint manner with Mr. Connell  
5 and the other defense counsel had it not been.

6 So I want to make sure that the commission is clear  
7 that we join this and the reasons why we join this.

8 MJ [Col COHEN]: Okay.

9 MTC [MR. TRIVETT]: Obviously, it's a Chief Judge rule, so  
10 that may require the commission to engage with the Chief Judge  
11 at some point for it, perhaps not. But in any event, we fully  
12 support it and it has the full support of the original  
13 classification authorities.

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

15 MTC [MR. TRIVETT]: I did want to address very briefly the  
16 one issue that Mr. Connell raised regarding the 60-day time  
17 frame being met through the provision of our classification  
18 guidance. This was a unique issue. I don't want the  
19 commission to leave with the belief that the 60-day process  
20 won't work. By all accounts in the normal process, it has  
21 been working according to Mr. Connell.

22 This was a unique issue where Mr. Connell actually  
23 showed me what he had sent through the walled-off

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1 classification review process during that meeting, and I asked  
2 him specifically whether or not I should just address this  
3 separately, because I did tell him that we were going to  
4 provide classification guidelines. It was agreed we could do  
5 that. We did address that specifically. And the original  
6 classification authorities and the people who run the -- the  
7 e-mail box was aware that we were doing it, they obviously  
8 worked with us on the classification guidance.

9           So I think this was a unique issue that's not going  
10 to be replicated, and that's the reason why the answer in this  
11 instance came back specifically in the classification  
12 guidelines we provided and not through the regular walled-off  
13 process.

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

16           I will grant 118U and 118V. To the extent that I  
17 need to put together an order, I will do so. But everything  
18 the parties have said makes sense.

19           Looking at Rule 1, it says, "In the interests of  
20 justice, a Military Judge may modify or change any Rule of  
21 Court or portion thereof, or determine a certain Rule of Court  
22 or portion thereof is not applicable to a given trial by  
23 Military Commission. When taking such action, a Military

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1 Judge will so advise counsel in the case, other interested  
2 parties, the Chief Trial Judge, and the Trial Judiciary  
3 staff."

4 My order will do so, but I do believe that the Chief  
5 Trial Judge has given me authority to grant the relief  
6 requested. Thank you.

7 All right. We've been going for almost 90 minutes.  
8 I think it's probably a good time for a comfort break. I'll  
9 allow Mr. Hawsawi to excuse himself.

10 LDC [MR. RUIZ]: Thank you, Your Honor.

11 MJ [Col COHEN]: We're in recess.

12 [The R.M.C. 803 session recessed at 1022, 9 September 2019.]

13 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1041,  
2 9 September 2019.]

3 MJ [Col COHEN]: Commission is called to order. The  
4 parties are present with the exception of Mr. Hawsawi, who has  
5 voluntarily absented himself.

6 Mr. Ruiz, are you just thinking, or did you have  
7 something you wanted to ----

8 LDC [MR. RUIZ]: Oh, I was just standing, Judge. Sorry.

9 MJ [Col COHEN]: Not a problem. Like I said, I just want  
10 to make sure I didn't fail to recognize you if you had  
11 something to say.

12 LDC [MR. RUIZ]: Thank you.

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

14 Counsel, I do have one further question on 118V. I  
15 wanted to make sure that the parties were in agreement on  
16 something.

17 When we're talking about types of markings, so for  
18 example, the UNCLASSIFIED, or UNCLASSIFIED//FOR OFFICIAL USE  
19 ONLY, is there a particular way that has to to be done? Like  
20 for example, I know from experience that sometimes in a FOIA  
21 request there's a handwritten marking on there that may say  
22 UNCLASSIFIED, is that sufficient for the purposes of the  
23 meeting of the minds here or is that considered ambiguous?

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1           I just wanted to make sure that we're all clear,  
2 because what I'm not inclined to do is, based on what I'm  
3 hearing, is these are also things where if you all are in  
4 agreement based on this modification that the UNCLASSIFIED or  
5 the UNCLASSIFIED//FOUO would not need to actually come to the  
6 CISO for review, you could just -- but I would like, if we're  
7 going to have significant documentary evidence that you do  
8 know about, if you will at least give me advance notice of how  
9 many documents to expect, you know, and those kinds of things,  
10 that would be helpful to me as far as especially for timing  
11 purposes.

12           That was one issue that kind of came up because I was  
13 back there thinking, like let's make sure there is a meeting  
14 of the minds what constitutes a classification marking for  
15 purposes of this order.

16           LDC [MR. CONNELL]: Yes, sir. And, of course, the  
17 government can speak for itself, but what I understand to be  
18 the central concern is that these be exact replicas of  
19 whatever the United States Government released.

20           MJ [Col COHEN]: Correct. Because you had discovery from  
21 them ----

22           LDC [MR. CONNELL]: Right.

23           MJ [Col COHEN]: ---- versus if you went through the FOIA

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1 process, you may get something else. So I want to make sure  
2 that everyone was in agreement as to what the marking needed  
3 to look like.

4 LDC [MR. CONNELL]: Yes, sir. And so what I understand  
5 what the government really wants to be able to do, and in  
6 almost every circumstances could, with something like the word  
7 "Unclassified" handwritten. In almost all circumstances there  
8 is a -- you know, the CIA reading room or something like that  
9 where they could go and look and say, "Okay. Yes. It's not  
10 Mr. Connell's handwriting. He didn't write 'UNCLASSIFIED' on  
11 there. You know, some OCA wrote 'UNCLASSIFIED' in there."

12 MJ [Col COHEN]: Okay.

13 LDC [MR. CONNELL]: So in my view, as long as it were  
14 possible to verify, that would be an unambiguous marking.

15 What I think we mean by ambiguous markings is  
16 incomplete strikethroughs, they forget to mark through  
17 "SECRET."

18 MJ [Col COHEN]: Okay.

19 LDC [MR. CONNELL]: You know, sometimes you do get these  
20 very ambiguous markings and the government did not  
21 understandably want to sign on to public display of those  
22 without some fidelity as to what the OCA was actually  
23 thinking.

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1 MJ [Co1 COHEN]: Okay. This allows you all to take a  
2 significant portion of responsibility, which I'm not opposed  
3 to letting you do, okay?

4 What I do want to avoid is, although what we say may  
5 be on a 40-second delay, what we see isn't. So if there's --  
6 I am really trusting you all that you can make this process  
7 work. And I'm willing to do so. I have no problems doing  
8 that. I think that's in the interest of justice, to let you  
9 guys do this.

10 But that if there is any question about -- about a  
11 marking or something like that, please just talk with one  
12 another beforehand, before you throw it on a screen. Because  
13 I'm just going to trust you that if you say this has been --  
14 you know, this exhibit has been cleared, unless I hear an  
15 objection, it's going to go up on a screen, and I'm going to  
16 say, "Sure, show it."

17 LDC [MR. CONNELL]: Sir, we're very familiar with acting  
18 in an abundance of caution.

19 MJ [Co1 COHEN]: Okay.

20 LDC [MR. CONNELL]: It has been, you know, our watch  
21 phrase for the past eight years, so I will take that  
22 responsibility.

23 MJ [Co1 COHEN]: Absolutely. I expect that you will. I

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1 just wanted to make sure that I -- if there was any potential  
2 chance of ambiguity among what the order means, that this was  
3 the chance to talk about it.

4 LDC [MR. CONNELL]: Yes. We don't intend to exploit this.

5 MJ [Col COHEN]: No, I don't think you would.

6 LDC [MR. CONNELL]: All of the parties intend to, you  
7 know, make things easier.

8 MJ [Col COHEN]: I agree. I think this will -- I think it  
9 is going to make it easier on everyone, just in talking with  
10 my CISO. You know, the idea was, the way I understood it --  
11 and it sounds like with the nod that I'm getting from  
12 Mr. Trivett as well -- is that that is what you anticipated  
13 too, is that the stuff that -- if it meets the criteria of the  
14 order, it's useable.

15 LDC [MR. CONNELL]: Right.

16 MJ [Col COHEN]: And you guys can present it like you  
17 would in any other case.

18 LDC [MR. CONNELL]: All right.

19 MJ [Col COHEN]: All right. Thank you. I'm in complete  
20 understanding of what you're looking for. I will issue the  
21 order as part of the order that will be the notification  
22 requirement under Rule 1 to the Chief Trial Judge and the  
23 trial judiciary staff, and an indication that that rule change

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1 only applies to this case.

2           It's 1047. I'd like to get through at least a couple  
3 more matters before we break for lunch today. I am aware of  
4 the prayer schedule. I think it's closer to 1300. It's 1246  
5 or 9, depending on the day, so I'll account for that during  
6 the lunch break.

7           523N, it's technically not exactly in order, but I  
8 anticipate that might be more of a status update than an  
9 argument at this point. Am I correctly understanding that?

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

11          MJ [Col COHEN]: Okay, Mr. Connell. Let's take that up,  
12 then, as a status update.

13          LDC [MR. CONNELL]: Sir, just to frame what the issue --  
14 just as a reminder of what the issue is in 523N, is that  
15 originally we had sought the identity of a variety of  
16 witnesses.

17                 There were two major groups. The CIA witnesses were  
18 accounted for in Protective Order #4. The medical witnesses  
19 were accounted for in the rest of the 523 series, but they  
20 left these sort of bits and pieces. And the best summary of  
21 argument of this is found on 2 May 2019 at pages 23006 to  
22 23009 for the defense, and 23022 to 23023 for the government.  
23 That kind of encapsulates that.

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1           But the -- the -- of the four categories of witnesses  
2 in the bits and pieces, the first category of that is Camp VII  
3 witnesses with knowledge of policies in 2006 and 2007. The  
4 Camp VII commander from that time will be testifying in two  
5 weeks, and he fills the bill for that. There is one remaining  
6 witness in that category, and I will tell the military  
7 commission, and don't mind telling the government, that I  
8 wrote to him under option number 2 of Protective Order #4.  
9 The military commission had added an option where we could  
10 write a letter, give it to OSS and they would try to deliver  
11 it. I did that. What's going to come out of that, I have no  
12 idea.

13           MJ [Col COHEN]: Okay.

14           LDC [MR. CONNELL]: It's the only time the process has  
15 ever been used, so we'll see what I get back out of that.

16           Furthermore, last week the government produced the  
17 SOPs which were governing at that time, which is also  
18 responsive to the underlying concern of what were the policies  
19 at Camp VII.

20           With respect to the -- so I think that one is --  
21 there's -- the status there is either the government has  
22 complied or I'm working the process the military commission  
23 has provided.

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1 MJ [Col COHEN]: Okay. Thank you, sir.

2 LDC [MR. CONNELL]: With respect to the second category,  
3 which is the author of one specific memorandum found at  
4 AE 502Y Attachment E, MEA-MEM-699 through 707, the government  
5 has not yet produced that. With respect to the third  
6 category, which is the XYM witnesses, in -- that has changed,  
7 actually.

8 AE 658 Attachment B, the new classification guidance,  
9 paragraph 10, asserts national security privilege over 12  
10 aspects of the XYM evidence, but interestingly, I read this as  
11 not one of those 12; that they did not assert classified  
12 information privilege over this aspect. But this witness --  
13 in my view, these witnesses have become even more important  
14 than they were before because of additional government  
15 discovery.

16 On 9 August 2019, the government produced a document  
17 which is MEA-PRG -- that's P-R-G -- 777. It's found in the  
18 record at AE 628T Attachment B, and that document was a  
19 game-changer, most important piece of evidence I've ever  
20 received in discovery, and it makes these XYM witnesses even  
21 more important.

22 I can go into that -- I know I'm being obscure in  
23 open session. I can be more clear in a closed session.

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1 MJ [Col COHEN]: Okay.

2 LDC [MR. CONNELL]: And then the fourth -- so we're still  
3 waiting on that.

4 The fourth of the bits and pieces is the identity  
5 of -- we believe it's two, but it's not clear -- of the Bureau  
6 of Prisons witnesses who visited the black sites. As far as  
7 we can tell, other than the men who were involuntarily kept  
8 there or members of the attachment -- excuse me, contractors  
9 or employees of the CIA, they're the sort of only independent  
10 people who ever went to the black sites, which makes them  
11 important witnesses.

12 The government has produced some discovery around  
13 those, some statements from them, their interviews during the  
14 John Durham investigation, et cetera, but this is about --  
15 with their identities so that we could go and interview them.  
16 They don't fall under Protective Order #4 because they're not  
17 CIA witnesses.

18 On 21 July 2019 at the 802 conference -- and the  
19 military commission was kind enough to order production of the  
20 transcripts, so it's at page 6 of that transcript -- the  
21 government stated its intent to comply with producing these  
22 witness identities; and it has done so with respect to the  
23 Camp VII commander, but not yet with respect to the others.

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1 MJ [Col COHEN]: Okay. All right. Are you expecting the  
2 government to follow through on providing those identities, or  
3 where is your understanding of where you're at and what you're  
4 waiting for?

5 LDC [MR. CONNELL]: I do expect them to. I know they're  
6 working -- we've had -- we haven't really discussed this  
7 particular thing very much ----

8 MJ [Col COHEN]: Okay.

9 LDC [MR. CONNELL]: ---- but on other aspects they're  
10 working on, I understand the government has a big process that  
11 they have to go through. And Bureau of Prisons, for example,  
12 is probably not within their ordinary, you know, e-mail list  
13 of people that they talk to.

14 MJ [Col COHEN]: Right.

15 LDC [MR. CONNELL]: So it's my -- I assume that they're --  
16 I believe that they are working the approvals that they need  
17 to comply with their intention on 21 June.

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

19 LDC [MR. CONNELL]: But the one thing -- the one carve-out  
20 from that is in -- under option number 2 in Protective  
21 Order #4, the government itself doesn't have any role. So  
22 they're not -- if I choose to try to make that work and write  
23 my letter, which I did, and send it off through OSS, the

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1 government doesn't have any view of that whatsoever. They  
2 don't know who I wrote to or what I said to them.

3 MJ [Col COHEN]: Right.

4 LDC [MR. CONNELL]: And so that's also a mixed blessing,  
5 right? I get the opportunity to make my case directly, but  
6 the government's not -- it relieves them of the responsibility  
7 for going out and finding the person.

8 So if they chose to give me the identity, I certainly  
9 wouldn't object; but under option number 2, they're not  
10 responsible for that.

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

12 Are there any other defense comments on 523N status?  
13 Negative response.

14 Mr. Trivett, will you be speaking to this or will  
15 someone else?

16 MTC [MR. TRIVETT]: Can I have a second to confer?

17 MJ [Col COHEN]: You may.

18 [Pause.]

19 MTC [MR. TRIVETT]: Major Dykstra is going to represent  
20 the United States on this issue, sir.

21 MJ [Col COHEN]: Major Dykstra, if you would please come  
22 forward. Good morning.

23 ATC [Maj DYKSTRA]: Good morning, Your Honor.

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1           As Mr. Connell stated back -- we argued this thing  
2 back on 5 May. Our argument's at 23021 and through 23029.  
3 Back then, we rested on our pleadings based on our ex parte  
4 brief as well as our response to that one.

5           A couple of things: As far as the Camp VII witness,  
6 like Mr. Connell said, we're going to be producing the  
7 Camp VII OIC as well as we produced the guiding SOPs at the  
8 time. And they also have the statement admitting relevant  
9 facts that this commission approved in 516B.

10           As far as the MEM witnesses, that one we specifically  
11 sought substitutions for the requested information in 112LL,  
12 which this commission granted in 112PP. So we view that  
13 request for -- as a request for reconsideration and should be  
14 denied under 949p-4(c).

15           As far as the XYM witnesses, we note that they have  
16 the statement admitting relevant facts in 516B, and I point  
17 the commission to pages 5 through 8 of that document  
18 specifically.

19           As far as the BOP witnesses, as we stated back in  
20 May, we do not believe that those witnesses are relevant or  
21 necessary to this -- to any issue before the commission. And  
22 I would further point the commission's attention to AE 3080000  
23 and AE 497B where the commission approved the substitutions

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1 for the relevant BOP witnesses.

2 Subject to your questions, Your Honor, that's all I  
3 have.

4 MJ [Col COHEN]: What was the last citation you gave me  
5 for the BOP witnesses?

6 ATC [Maj DYKSTRA]: It's 3080000 ----

7 MJ [Col COHEN]: Okay.

8 ATC [Maj DYKSTRA]: ---- and AE 497B. And those citations  
9 are also contained in our brief under footnote 5 of 523P.

10 MJ [Col COHEN]: All right. So back in July -- I just  
11 want to make sure I'm conceptualizing the same issue that we  
12 discussed back in July.

13 In July, Mr. Trivett stood up and addressed providing  
14 specific names for some witnesses that were addressed in 523N.  
15 Has the government changed its position on that or are we  
16 talking about something completely different?

17 ATC [Maj DYKSTRA]: If I may have a second just to consult  
18 with Mr. Trivett just to make sure that I'm not contradicting  
19 anything?

20 MJ [Col COHEN]: Okay. Yeah, because that's one of the  
21 reasons why we tabled this, was because the government said  
22 we're providing these names.

23 ATC [Maj DYKSTRA]: Yes, Your Honor.

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1 MJ [Col COHEN]: All right.

2 [Pause.]

3 ATC [Maj DYKSTRA]: Thank you, Your Honor.

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

5 ATC [Maj DYKSTRA]: The names that Mr. Trivett was  
6 referencing were contained within the unredacted  
7 medical records which we have turned over.

8 MJ [Col COHEN]: Okay.

9 ATC [Maj DYKSTRA]: All of the unredacted medical records  
10 dating from when they first got here have been turned over to  
11 the defense. And then, as well as they've -- they also  
12 possess the true name of the Camp VII OIC from that time  
13 period as well.

14 MJ [Col COHEN]: So we're talking about the same witnesses  
15 who initially had UIFs, but then they were going to say, well,  
16 never mind, we're actually going to give them the actual names  
17 of the UIFs. We're talking about the same thing?

18 ATC [Maj DYKSTRA]: Pardon me, sir. I can't ----

19 MJ [Col COHEN]: So we had UIFs for folks -- the way this  
20 played out in my recollection over the last few months, was  
21 there were medical personnel who provided assistance during a  
22 time period where these guys were in confinement. They  
23 initially had UIFs. The government then said, well, actually,

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1 we rethought that, and so now we're going to actually provide  
2 names as opposed to the UIFs, but we're having a little bit of  
3 trouble locating all of these individuals because, as you can  
4 imagine -- I think the comments in the record were, you know,  
5 sometimes we have multiple people going by the same, you know,  
6 Doc 1, you know, or whatever it might have been. I'm just  
7 throwing that out there.

8 ATC [Maj DYKSTRA]: Uh-huh.

9 MJ [Col COHEN]: No intention it was actually any name you  
10 actually used.

11 ATC [Maj DYKSTRA]: Uh-huh.

12 MJ [Col COHEN]: But there might have been people using  
13 various pseudonyms and so, therefore, you had to track down  
14 who actually was there at a particular time and what the UIF  
15 actually would have related as far as the contact information.  
16 What I remember the government saying on the record was, we're  
17 going to provide the actual names, we're just having a little  
18 bit of trouble tracking down some of these people.

19 ATC [Maj DYKSTRA]: Yes, sir. We have provided all of the  
20 names that we have located.

21 MJ [Col COHEN]: Okay.

22 ATC [Maj DYKSTRA]: That's where we are at right now.

23 As far as -- in the early days, from what I

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1 understand, there were some true names in those  
2 medical records that were redacted. We have now provided  
3 those unredacted to the defense ----

4 MJ [Col COHEN]: Okay.

5 ATC [Maj DYKSTRA]: ---- as well.

6 MJ [Col COHEN]: In addition to the actual names for the  
7 UIFs?

8 ATC [Maj DYKSTRA]: Correct.

9 MJ [Col COHEN]: Okay. So then what we're talking about  
10 now is not something that Mr. Trivett talked about back in  
11 July?

12 ATC [Maj DYKSTRA]: Correct.

13 MJ [Col COHEN]: Okay. Good. I want to make sure that  
14 I'm there. Because I just want to make sure that there wasn't  
15 a change in position of the government that I was not made  
16 aware of. And doesn't sound like there is.

17 ATC [Maj DYKSTRA]: No, Your Honor.

18 MJ [Col COHEN]: So what we're talking about now, then, at  
19 least from the government's perspective, is the identities of  
20 witnesses that are not the medical personnel that went by  
21 those UIFs?

22 ATC [Maj DYKSTRA]: Yeah, the nonmedical, non-UIFI  
23 witnesses.

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1 MJ [Col COHEN]: I say UIFs, you say UFI. I apologize.  
2 UFIs.

3 MTC [MR. TRIVETT]: Sir, can I just make a clarification  
4 for the record? Because we're conflating a couple of distinct  
5 acronyms we use.

6 MJ [Col COHEN]: That would help me. Like I say, I'm just  
7 trying to make sure I understand, in September that it -- how  
8 that relates to what we talked about in July.

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

10 So the medical personnel got what we called Unique  
11 Medical Identifiers, which were UMIs.

12 MJ [Col COHEN]: That's correct. Thank you.

13 MTC [MR. TRIVETT]: There are -- for the covert CIA  
14 personnel, they got an acronym called Unique Functional  
15 Identifier, which is UFI.

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

17 MTC [MR. TRIVETT]: So there are no UIFs, but what we were  
18 speaking about in regard to 523 was the Unique Medical  
19 Identifiers, the UMIs.

20 MJ [Col COHEN]: Thank you. That's correct. I apologize.  
21 Lots of acronyms.

22 ATC [Maj DYKSTRA]: Thank you, Your Honor.

23 MJ [Col COHEN]: Thank you for clarifying.

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1           So that's what I'm talking about, though, is those  
2 UMIs, and that's what Mr. Trivett was talking about back in  
3 July, like, hey, let's just put this on hold because we're  
4 actually going to give them all the names of these folks to  
5 the extent that we can figure out who's who.

6           ATC [Maj DYKSTRA]: And part of looking back at the  
7 transcript as well as -- from the 802 as well as the  
8 transcript from back in May, it was always our intent to  
9 provide the unredacted medical records, since we were  
10 providing them the UMIs and so forth to -- so they can locate  
11 these people and talk with them, if they so wish. So once we  
12 provided them the UMIs, there was no reason to redact that  
13 identifying information in the medical records that were  
14 provided to defense counsel.

15          MJ [Col COHEN]: So are they still stuck with just the  
16 UMIs or did you actually give them the name that correlates to  
17 a UMI?

18          ATC [Maj DYKSTRA]: No, they have a chart that  
19 correlates ----

20          MJ [Col COHEN]: Okay.

21          ATC [Maj DYKSTRA]: ---- the UMI with the true name of  
22 that individual.

23          MJ [Col COHEN]: Okay. Now I'm tracking. Thank you. All

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1 right. Thank you.

2 ATC [Maj DYKSTRA]: Thank you, Your Honor.

3 LDC [MR. CONNELL]: Sir?

4 MJ [Col COHEN]: Sir.

5 LDC [MR. CONNELL]: The government just conflated two  
6 different issues.

7 The first issue is the UMI issue, and the -- back in  
8 May, the government decided -- well, the -- when the military  
9 commission issued Protective Order #5, the government said  
10 that it would provide a chart explaining what pseudonym went  
11 with what actual person, right? They did that.

12 The -- then there was a discussion about the fidelity  
13 of that chart, and the government agreed to turn over  
14 unredacted medical records, to the extent they had them,  
15 because some -- there's some bracketing -- there was some  
16 information that was destroyed. But bracketing that, the  
17 government would turn over unredacted records to us and so we  
18 would have the same thing that they had. Okay.

19 That's the UMI medical witness piece, but that's not  
20 from -- from -- essentially after May, that has no longer been  
21 at issue in the -- in this 523N litigation. What's at  
22 issue in the -- what 523 is about and the transcript cites  
23 that I gave you, what 523N is about is the bits and pieces,

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1 the non-UF1, nonmedical witnesses.

2           And so over the lunch break I will pull the  
3 transcript because it's TS, and I didn't bring it in here, but  
4 the -- when this 523 -- the only thing that was at issue in  
5 July in 523N was these non-UF1, nonmedical witnesses. And the  
6 reason we didn't argue was -- and to my recollection it wasn't  
7 Mr. Trivett; it was actually Mr. Swann who stood up and  
8 said we're giving them -- or maybe Mr. Swann said to  
9 Mr. Trivett, "But we're giving the witnesses, don't worry."

10           You turned to me and said, "Well, what do you think,  
11 Mr. Connell?"

12           And I said, "I'm not going to look a gift horse in  
13 the mouth. If they're going to comply, why would we argue  
14 it?"

15           So what it sounds to me like is through -- and I  
16 don't know whether it's a confusion or a re-thinking of  
17 position or whatever, but it sounds to me like we need to  
18 actually argue this.

19           So there's already been approval for a closed  
20 session. The three remaining segments are all classified. I  
21 basically said everything unclassified about them that I can  
22 say. If you will add them to the closed session under the  
23 existing 505 closure order, then we can just argue it out and

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1 this time what I thought we were going to do in July, so I'm  
2 ready to go.

3 MJ [Col COHEN]: Okay. Yeah, and if I attributed the  
4 government's comments to the wrong person, I apologize.

5 LDC [MR. CONNELL]: I'm probably wrong, sir.

6 MJ [Col COHEN]: Okay. But -- okay.

7 LDC [MR. CONNELL]: Now, just to address the one specific  
8 thing that the government just argued, the government has  
9 produced the unredacted medical records to us. So to the  
10 extent that there is a -- I think the government has done all  
11 that they can do, right? Like I said, there was some  
12 information that was either destroyed or spoliated or  
13 whatever, but I think that the prosecution has produced to us  
14 on the medical side everything that they can.

15 MJ [Col COHEN]: Okay.

16 LDC [MR. CONNELL]: The remaining issue in 523N are these  
17 bits and pieces, these four other categories.

18 MJ [Col COHEN]: Okay. And all of that would be  
19 classified?

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

21 MJ [Col COHEN]: Okay. All right. Let me -- I also need  
22 to spend a little time this evening going back and reviewing  
23 the various things that everyone has cited to me, so I

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1 can ----

2 LDC [MR. CONNELL]: Okay.

3 MJ [Col COHEN]: But I agree, I think we're beyond a  
4 status update and some things -- some decisions need to be  
5 made.

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

7 MJ [Col COHEN]: All right. I agree that we'll -- and if  
8 I determine that I -- that I can be ready to hear this matter,  
9 is the government prepared to have a classified argument on  
10 this matter?

11 ATC [Maj DYKSTRA]: Your Honor, as far as our argument  
12 goes, I have provided everything ----

13 MJ [Col COHEN]: Okay.

14 ATC [Maj DYKSTRA]: ---- as far as that goes, subject to  
15 responding to any particular argument that Mr. Connell may  
16 have on the issue.

17 MJ [Col COHEN]: Okay. But no objection to him making  
18 that argument?

19 ATC [Maj DYKSTRA]: No, Your Honor.

20 MJ [Col COHEN]: Okay.

21 LDC [MR. CONNELL]: Thank you.

22 MJ [Col COHEN]: All right, then. I will -- at some point  
23 while we're here this time period we'll work that in.

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

2 MJ [Col COHEN]: I just need to figure out how much time I  
3 need to -- I was expecting a status update and not the  
4 argument ----

5 LDC [MR. CONNELL]: So was I, sir.

6 MJ [Col COHEN]: ---- so as you know, I like to be fully  
7 prepared to ask questions when we argue.

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

9 MJ [Col COHEN]: Thank you.

10 Mr. Nevin.

11 CDC [MR. NEVIN]: Thanks, Your Honor. Just in the way of  
12 status from where we sit, we do not have fully unredacted  
13 medical records.

14 MJ [Col COHEN]: Okay.

15 CDC [MR. NEVIN]: The most recent round of records that we  
16 have received still have redactions in them, number one. And  
17 number two, just so we're clear, the last time we were here, I  
18 believe it was Mr. Ryan who said that there were something on  
19 the order of 700 pseudonyms that had been identified in the  
20 various medical records, and that the government had  
21 identifying information for -- rather than say the actual  
22 numbers, which I'll probably get wrong, there was a  
23 substantial number of these pseudonyms which -- as to which no

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1 one now apparently has identifying information. No one knows  
2 who those people are. The number 300 or so sticks in my mind,  
3 but that could easily be wrong. I understand that problem has  
4 not been remedied.

5 I believe that problem requires a remedy. We have  
6 now filed a motion. I don't think anyone else has filed a  
7 motion seeking a remedy for that, but I believe that comes  
8 within the umbrella of a status update. So I say that as  
9 well. Thank you.

10 MJ [Col COHEN]: I appreciate that. That is definitely a  
11 status update, thank you.

12 Mr. Connell.

13 LDC [MR. CONNELL]: Sir, I just want to give you two  
14 things to look at. The first one is when you're orienting  
15 yourself with respect to 523N, the relief sought that is still  
16 at issue in my mind is paragraph 2.d., and the ----

17 MJ [Col COHEN]: Okay.

18 LDC [MR. CONNELL]: When I just a moment ago referred to  
19 the fact that there was already an order, a 505(h) order on  
20 this matter, that order is 523Q.

21 MJ [Col COHEN]: Thank you. Like I said, we'll definitely  
22 have argument on that during -- sometime during the next three  
23 weeks. Just -- and most likely this week. I just wanted to

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1 make sure that I -- I have -- go back and read everything that  
2 you guys have cited before I have that argument.

3 Mr. Ruiz.

4 LDC [MR. RUIZ]: Judge, I just want to make sure. With  
5 respect to Mr. Connell's comment that they believe the  
6 government has provided everything they can with respect to  
7 medical records, we part company with that.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. RUIZ]: I just wanted to make that clear on  
10 behalf of Mr. al Hawsawi.

11 MJ [Col COHEN]: Thank you.

12 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,  
13 we're in the same position, also.

14 MJ [Col COHEN]: I understand. Thank you. Yeah, I'll  
15 take that up. I think with the deadlines that I have set, the  
16 big difference is that under their obligations under 701, that  
17 gave them until 1 October, and then I gave them until 1  
18 November to include any orders by the court. So I need to get  
19 you an order one way or the other on this matter so the  
20 government can meet that deadline. We'll definitely take that  
21 up.

22 I anticipate that I'll probably break for lunch  
23 around 1230 today, which would provide enough time for prayer

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1 and then provide about a 75-minute lunch. And then we'll come  
2 back and then take up 643 this afternoon.

3 Prior to that, I anticipate that probably within the  
4 next hour and 20 minutes we could probably have a discussion  
5 on the record with respect to just generally classification  
6 procedures.

7 Mr. Connell, you indicated that you had some thoughts. I  
8 don't have a problem with you initially putting those on the  
9 record. Then I can take some additional thoughts. I don't  
10 think I'll issue a ruling today. I think I do want to, for  
11 sure, then have an 802 with you all to kind of maybe ferret  
12 out these notions that we're putting on the record now and  
13 then come back on the record and maybe close the loop on that.

14 I am going to have -- what I anticipate that I'm  
15 going to do for testimony moving forward is establish some  
16 Rules of Court with respect to objections, those types of  
17 things. I think that's beneficial to all of us. And nothing  
18 drastic or Draconian, just things that make the process work  
19 better for everyone so that we're all on the same page. And  
20 then obviously, to the extent that we need to take up some of  
21 that in a classified session, we can do that as well.

22 All right. But initially, let's start with just a  
23 discussion of 649. Although I did have an ex parte session

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1 with the government in the interest of the protection of  
2 classified information, I did specifically indicate to the  
3 parties that I was interested in thoughts from everyone on  
4 what the procedures and processes should be.

5 TC [MR. RYAN]: Your Honor, may I be excused for a moment,  
6 sir?

7 MJ [Col COHEN]: You may.

8 Mr. Connell.

9 LDC [MR. CONNELL]: Sir, and that's -- that's my starting  
10 point, actually, is 649, which you had included on the docket.

11 Obviously, in AE 649, the military commission entered  
12 an order for a pretrial conference, and it included a request  
13 to the government to state their position on whether that  
14 conference would need to be ex parte or could be adversarial.

15 And in 649A, the government made the argument  
16 tracking the statutory language that the order would have to  
17 be ex parte in order to protect classified information. At  
18 the time, I had a hard time understanding the government's  
19 position. And I pride myself on intellectual honesty, I try  
20 to see my opponent's -- you know, it's to my advantage to  
21 understand my opponent's argument as best as possible.  
22 Because if we were going to -- if the conference was going to  
23 cover, you know, how we were going to best protect classified

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1 information security procedures, then, you know, we're at  
2 least, by category, aware of most of the classified  
3 information -- I'm not saying the specific classified  
4 information, but at least by category -- including the  
5 categories that we don't -- that have access to.

6           So I filed our brief on that, and the military  
7 commission disagreed. And I still was kind of confused ----

8           MJ [Col COHEN]: Let me ----

9           LDC [MR. CONNELL]: ---- but I'm not fishing here,  
10 actually ----

11          MJ [Col COHEN]: Yeah, to the extent -- I have no problem.  
12 I think it's important for the -- for public perception and  
13 everything.

14           It was a very limited scope of what I discussed with  
15 them. What I discussed with them, I could not -- I had to do  
16 ex parte.

17          LDC [MR. CONNELL]: I understand.

18          MJ [Col COHEN]: But you are correct that the process in  
19 general is something that affects all of us, and that's why I  
20 specifically put it on the docket to say, hey, this is not  
21 just a completely ex parte discussion in the way -- in the  
22 same way that sometimes the ex parte substitutions and  
23 summaries, but there can still be other matters which we'll

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1 take up in 650 as to whether or not there are other interests  
2 involved.

3 I think in 649, you are correct. And that's why I  
4 definitely wanted to put it on the docket. It was very  
5 limited in scope. Obviously, I can't talk about it because it  
6 was ex parte, but very limited in scope.

7 LDC [MR. CONNELL]: Yes, sir. And all of that makes sense  
8 to me because, once I read 658, I at least have the illusion  
9 of understanding, if not actually understanding.

10 Because 658 in many ways is a remarkable document.  
11 You know, the military commission led this morning with its  
12 appreciation, and I will add mine, for obviously a lot of work  
13 went into that document, because it does three different  
14 things.

15 The first and sort of middle category, in my mind, is  
16 the most obvious. It sharpens some classification guidance,  
17 especially in the particular context in which we're in, and --  
18 which is very helpful.

19 The second thing that it does is that it declassifies  
20 a lot of facts that were not out there. In our conference  
21 last night, you know, one of the points that the government  
22 made was that there had been substantial effort around some  
23 declassification is certainly true.

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1 I mean, the fact that Echo II, where we meet our  
2 clients, was a black site where Mr. al Hawsawi,  
3 Mr. Binalshibh, and Mr. Nashiri were held, that was a big  
4 deal. The fact that there were -- FBI agents were detailed to  
5 the RDI program, those are big declassifications. And that  
6 will make next week flow a lot smoother.

7 But the third thing that 658 did and that I came to  
8 understand why the hearing might have been -- had to be  
9 ex parte, is that the government invoked national security  
10 privilege in the sense -- in the -- of taking it out of the  
11 judicial process, meaning this will not be allowed to be heard  
12 in a court, over an enormous variety facts, many of which we  
13 have already argued here in this court.

14 And, you know, one of my tasks on my to-do list when  
15 I go back is to go and look at -- through the transcripts and  
16 the pleadings, at all the things that we have already argued  
17 that have now been withdrawn from the judicial process. And  
18 there are many more than we intended for use.

19 So that, in my mind at least, clarified why it would  
20 be ex parte. Because there were aspects to these -- these  
21 things that we didn't, in fact, know. Like I was -- I just  
22 previously had the illusion of I knew the categories, and  
23 there were more categories that were forthcoming.

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1           And what that really means like from a going-forward  
2 perspective is that -- and the military commission knows my  
3 position that I agree with the military commission that the  
4 government is the custodian of the classification information  
5 privilege, and it is a strong weapon, but one with two blades,  
6 in that, one that -- that they have to act advisedly in doing  
7 so, and on this occasion have essentially created a sort of  
8 Protective Order #4 on steroids.

9           But what that does is -- and I'm not asking for  
10 confirmation, but I at least think that what the military  
11 commission might have been doing, and -- but certainly its  
12 effect was to bring transparency to these invocation of  
13 classification information privilege, because, assuming that  
14 these are reflected in ex parte pleadings, I didn't know about  
15 these invocations of classified information privilege. And so  
16 whether that was the intention or not, it's certainly the  
17 effect that we now have a much better sense of what the  
18 government considers to be off limits to the judicial process  
19 than we did before.

20           And in some ways, it looks as if the government went  
21 through our pleading in 628 and picked out details that it  
22 didn't like and invoked national security privilege over them.  
23 That's not exclusively true, but certainly appears to be, in a

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1 way that will hobble our motion to suppress. I mean, it's --  
2 it will be, you know, 85 percent of what it used to be.

3 And there's some couple of unclassified examples.  
4 And I looked through 658, relying exclusively on unclassified  
5 paragraphs. Paragraph 7.ii says that now we cannot elicit in  
6 open or closed session any individual CIA officer's  
7 involvement with the RDI program unless they're on the list of  
8 25 people.

9 Now, that's certainly something that, you know, last  
10 week was reflected on my notes for my -- on specific  
11 occasions, right? I'm not asking for every CIA officer in the  
12 world -- but things that I was planning to ask the witnesses  
13 who will be testifying this -- these next two weeks, and  
14 others.

15 Paragraphs 8 and 35 say that we cannot produce  
16 evidence or elicit evidence of the location of the black  
17 sites, except for Echo II where Hawsawi and Binalshibh and  
18 Nashiri were detained in the time frame of late 2003 to early  
19 2004, which we have done in closed session already in this  
20 military commission many, many times.

21 For example, in the discussion of 524 about the --  
22 and 525. So 525, just as a reminder, because you've never had  
23 to specifically deal with it, 524 had a companion. 524 was

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1 about domestic investigation of people associated with the  
2 CIA. 525 was a short-lived prohibition against foreign  
3 investigation of black sites that the government ultimately  
4 withdrew, only to revive it now in 658. Because even if we go  
5 and get the evidence now, we can't produce it.

6           And in the course of that litigation, as well as in  
7 the course of the litigation in 425 over the destruction of  
8 the black site while the public order for preservation was  
9 pending, we specifically produced to the military commission  
10 and to the government evidence about specific countries that  
11 we thought were involved and why the specific country was  
12 important. Because we were able to obtain additional  
13 information about that specific country, that if it's a  
14 generic location number X, there would be no matching up of  
15 that country with a location because -- and we produced  
16 argument.

17           There are declarations in the record. The  
18 government, in fact, tried to sort of halfheartedly call two  
19 of the witnesses that we had declarations from as witnesses,  
20 but they weren't available and they never subpoenaed them. We  
21 will be producing those -- those witnesses -- we'll be  
22 producing those witnesses in the course of the suppression  
23 motion. But, you know, it's a huge area of things that we

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1 explored in 628 as well as many other motions.

2           We cannot now under paragraphs 8 and 35 produce  
3 evidence of specific dates, which is going to become extremely  
4 important when we start matching up FBI information where we  
5 have very specific dates for -- for example, when the FBI sent  
6 requirements to the CIA asking for information about certain  
7 topics for the defendants to be interrogated on their behalf,  
8 basically, and then when information comes back.

9           Like, about two-thirds of my cross-examination of  
10 Special Agent Fitzgerald relies on matching up of loops of  
11 information about how the CIA would obtain information which  
12 would flow to the FBI and then the FBI would ask questions,  
13 and then the CIA would go back to the defendants, extract it  
14 from them and then feed it back to the FBI. And that's  
15 extremely date-important.

16           So how these FBI agents, some of whom are detailed to  
17 the RDI program interact with the RDI program, the dates were  
18 very important. And I'm not saying that -- I'm not making a  
19 claim that I'm going to try to break through classified  
20 information privilege. I'm saying these were things which  
21 were -- have been and are anticipated to be a focus of our  
22 evidence that are now off the table.

23           So the ----

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1 MJ [Col COHEN]: Have you had the opportunity based on  
2 628 -- one of the reasons why I was pleased to get 628 is at  
3 least we're all on the same page initially ----

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

5 MJ [Col COHEN]: ---- so we can kind of talk through  
6 these -- excuse me, 658.

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

8 MJ [Col COHEN]: I apologize.

9 Because I think this is kind of important and I  
10 suspect we'll probably have further discussion in a different  
11 setting later this week ----

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

13 MJ [Col COHEN]: ---- because we'll all probably want some  
14 clarification.

15 But with respect to some of these, are you  
16 endeavoring to go back to the government and say, is this just  
17 for open or can we actually talk about this in closed session,  
18 or are you getting the Heisman? I mean, what are you ----

19 LDC [MR. CONNELL]: No, to be honest, we haven't had that  
20 conversation yet.

21 MJ [Col COHEN]: Okay.

22 LDC [MR. CONNELL]: The government, we met and conferred  
23 last night, as I mentioned, about like the actual meaning of

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1 658. There were some things that I found ambiguous, whether  
2 they were actually ambiguous or not? What does this mean?  
3 Hey, this is how I read that. Is that what it actually means?

4 MJ [Col COHEN]: Okay.

5 LDC [MR. CONNELL]: And the government was very  
6 forthcoming, and I appreciate their efforts on that. But I  
7 have taken them at their word that there are really three  
8 different things happening here, which is when I went through  
9 my copy of 658, I had a green, a yellow, and a red  
10 highlighter. And green were things that were previously  
11 classified that are now declassified. Yellow was just  
12 straight-up classification guidance, meaning it has to be in a  
13 closed session rather than an open session. And red was now  
14 off the table. And the language that the government used for  
15 that was cannot inquire in an open or closed session ----

16 MJ [Col COHEN]: Okay. And there was ----

17 LDC [MR. CONNELL]: ---- and it invokes national security  
18 privilege.

19 So that is -- it is a different question -- so I find  
20 it -- the document unambiguous as to what the military -- the  
21 government is removing from the judicial process. But that is  
22 a different question from, "Hey, could you go back to the OCA  
23 and ask if we could have this one in closed session?" Those

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1 are different questions. You know, that's entirely an  
2 internal government function that I really have any -- I'm  
3 just -- you know, sort of a petitioner when it comes to that.  
4 I can ask, but that's the best I can do.

5 But I found the division among those three things,  
6 here's what you can do in open, here's what you can do in  
7 closed, and here's what you can't do at all, to be pretty much  
8 unambiguous in the pleading. And the parts that I'm talking  
9 about now are limited to the "You can't do that at all."

10 MJ [Col COHEN]: Copy.

11 LDC [MR. CONNELL]: And so that's paragraph 8, that's  
12 paragraph 35, it's parts of paragraph 7, and then it's parts  
13 of paragraph 10.

14 Paragraph 10, I mentioned earlier, takes aspects of  
15 Camp VII operations, which are actually at issue in the 645  
16 series, and places those off limits.

17 Paragraph 18 takes -- classifies information that I  
18 have actually argued in the AE 538 series, not in closed  
19 session, but in open session, right? Like where I was  
20 guessing at something, and I guess I'm no longer allowed to  
21 speculate about those things. So there's an enormous amount  
22 of information that's just being taken off the table.

23 And then there are -- and then in paragraphs 19, 20,

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1 22, 25, 26, 30, 31, and 32, the government asserts  
2 national security privilege, meaning the third category,  
3 cannot do an open or closed session, over information that I  
4 intend -- or intended to elicit this week in support of the  
5 argument that our defense argument that the -- that the  
6 torture program was a single policy implemented by multiple  
7 entities, which brings us to sort of the cleansing statement  
8 question as opposed to the attenuation question that we've  
9 talked about before.

10           So one -- I mean, to be completely honest and  
11 personal, one initial reaction was, wow, some OCA has had it  
12 with this process and, you know, they just want to trigger the  
13 sanctions. But whether that's true or not, it's clear that  
14 these invocations are aimed at our suppression motion, for  
15 whatever reason.

16           I still believe that, and I think that -- and I will  
17 brief this question, right? There will be a version of 524  
18 that is forthcoming, an alternative 524. I mean, 524 was  
19 about the front end of the process about investigation.

20           And in many ways, there was at least a debate between  
21 the parties over how much do you really have a right to  
22 investigate anyway, right? We thought we had a very strong  
23 right to investigate. The government thought it was much more

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1 qualified.

2           That concern is not really in play when we're talking  
3 about asking the witness, you know, information that the  
4 military commission determines to be relevant in the course of  
5 an examination; that the equity of the defense in that, for  
6 example, is much stronger than it is, you know, sitting here  
7 under the supervision of a military judge with both parties  
8 represented than it is with investigators out in the field  
9 which is a little bit, I recognize, a little bit harder to  
10 tell what they're doing and why they're doing it and that kind  
11 of thing.

12           But -- and this is why I'm specifically bringing this  
13 up, is about the -- this sort of handling of this. It creates  
14 the same problem that we have in the AE 574 series but on a  
15 much larger scale. And as a refresher, in the 574 series, the  
16 military commission issued Protective Order #3 prohibiting the  
17 defense from inquiring into the providence of certain pre-9/11  
18 conversations that the government intends to use in its case  
19 in chief.

20           And the actual unclassified language that the  
21 military commission uses is the language of prior restraint.  
22 It, quote, restricted any party from making any reference or  
23 asking any question during any session of the commission that

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1 could tend to reveal or could conceivably elicit information  
2 regarding the classified source or method by which the United  
3 States acquired certain telephone calls.

4           The effect, and I suggest the intent, was to take  
5 away the defense ability to challenge or to expand on --  
6 right? Because Mr. Bin'Attash in particular wanted to expand  
7 on those telephone calls because under Mr. Bin'Attash's theory  
8 of defense [REDACTED]

9 [REDACTED]  
10 [REDACTED] which the military commission  
11 recognized in its ruling.

12           But -- so we filed 574G, and our -- and that's --  
13 which is connected to 600 and 601. And our argument was,  
14 well, look, you should do one of two things. You should  
15 either rescind that protective order, which shouldn't have  
16 been issued ex parte anyway, in my humble opinion, or you  
17 should impose a sanction.

18           And the government's argument in response was very  
19 important for what's going to happen over the next two weeks.  
20 Because their argument in response was not that we didn't have  
21 any right to ask the questions. It was that there were plenty  
22 of other questions that I could ask; that although I can't  
23 inquire about sources or methods, where did this come from?

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1 What were the capabilities? [REDACTED]

2 [REDACTED]

3 [REDACTED] how do we know that these are  
4 legitimate in the first place? I can't ask those questions,  
5 but they said there were plenty of other questions that I  
6 could ask say of the linguist, as to whether the translation  
7 was proper or things like that.

8 And the military commission accepted that argument.  
9 In AE 574L, the military commission denied AE 574G, and did  
10 two things:

11 First, the military commission recognized that some  
12 examples that I gave in closed argument, which it referenced  
13 the closed argument, would be prohibited by Protective Order  
14 #3.

15 Interestingly -- and this is the problem I'm actually  
16 trying to avoid here -- I didn't really actually give the  
17 examples in closed argument because I was afraid of running  
18 afoul of Protective Order #3. I self-edited. I, in fact, had  
19 things that I -- suggestions that I could have made, and have  
20 made privately with the government in these discussions, but  
21 didn't argue them because Protective Order #3 sounds in prior  
22 restraint: Thou shalt not make this argument or ask this  
23 question.

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1           But the military commission further found that other  
2 than those limited examples that the defense, quote, would be  
3 fully able to present a complete defense under the reasonable  
4 constraints of Protective Order #3. Specifically, the  
5 military commission found that we were, quote, free to ask  
6 questions that would elicit information on other types of  
7 information and on other telephone call activities so long as  
8 Mr. al Baluchi refrains from asking questions that could  
9 elicit information pertaining to the telephone call  
10 information at issue.

11           Meaning that -- I mean, one way to read that is,  
12 well, you can ask questions about things that are not -- that  
13 the government's not offering against you, but you  
14 can't against the things that you are. That's not the only  
15 possible way to read it.

16           But what it meant is that this becomes a  
17 question-by-question inquiry as to whether an answer to a  
18 question falls within the government's invocation of  
19 classified information privilege, because the plain text of  
20 the Protective Order #3 in this case is not coextensive with  
21 what either the government or the military commission  
22 understood to be the questions that we could ask.

23           And so the reason why that's important is that --

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1 just taking this 574 as an example, I plan to ask -- if  
2 allowed, I plan to ask Special Agent Fitzgerald questions  
3 about those telephone calls. He's already testified about  
4 them in an unclassified setting before a grand jury in  
5 New York. The -- I intended to ask questions about it before  
6 Protective Order #3 came along. I've always intended to ask  
7 questions about it.

8           And so that really raises the question -- and that's  
9 the reason why I rise to speak here -- of how does the  
10 military commission balance the interest in avoiding a witness  
11 providing an answer that is classified, that falls within the  
12 scope of government invocation of national security privilege,  
13 at the same time as both allowing the defendants to ask the  
14 questions that they are allowed to ask and also to make a  
15 record as to where the denied information falls into it, into  
16 their overall defense.

17           Because one of the issues the military commission has  
18 expressed with respect to 524 is a sort of paucity of  
19 empirical information about what effect Protective Order #4  
20 has on the defense. And one can look at this exactly the same  
21 way, of the government could introduce -- could invoke  
22 classified information privilege over satellite locations and  
23 it would have no effect on us whatsoever. And so are they

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1 actually cutting us off from defenses that we would otherwise  
2 present?

3           So my first idea for that, for how do you actually  
4 figure that out, was to give warning to the military  
5 commission and then to intentionally violate Protective  
6 Order #3, go ahead and ask my question, ask for a one-dollar  
7 fine for contempt, and then seek review. Because that's what  
8 you would do in a civil case. I mean, it's not a crazy idea.  
9 That's what you would do in a civil case.

10           And to be honest, that's what the government did in  
11 Moussaoui. When they were dealing with the question of do we  
12 have to produce Mr. Mohammad and Mr. Hawsawi and Mr. Qahtani  
13 as witnesses in the Moussaoui case, they said, "We are going  
14 to refuse to comply. We're going to absorb your sanction, and  
15 we're going to appeal to the Fourth Circuit." That's what  
16 they did.

17           There's no defense appeals normally, but if I  
18 personally were held in contempt, then that would provide us a  
19 mechanism to get this to the CMCR. My wife vetoed this idea.  
20 But it turned out that the military commission did not have  
21 summary contempt power anyway, so that idea went out the  
22 window.

23           So that leaves us with the same question -- issues

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1 that I was originally wrestling with in 574, but on a much  
2 broader scope from 658. And we have to determine the actual  
3 scope, detailed scope of the government's -- we have to  
4 determine -- I'm repeating -- have to determine the actual  
5 scope of the government's invocation of privilege; otherwise,  
6 they'll argue, oh, they could have asked that question if they  
7 wanted, but they just chose not to. At the same time as  
8 allowing us to assess and provide the military commission, you  
9 know, factual data on how much actual impact does this have on  
10 the defense.

11           So here's my proposal -- and I know this is just the  
12 opening bid in this question -- which is that, number one, any  
13 question that itself contains classified information has to be  
14 asked in a closed session. That seems clear to me. If I were  
15 to use the name of one of the relevant countries in the  
16 question itself, the question has to be asked in closed  
17 session.

18           Second element -- so the rest of this assumes that  
19 the question is -- the question itself is unclassified, right?  
20 For -- an example of that kind of question would be: Who were  
21 you speaking to in that conversation? You know, who was on  
22 the other end of the telephone?

23           I propose that in that situation that we come up with

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1 some kind of way for me to flag, I think this might be --  
2 because the real concern is the witness is going to blurt out  
3 the answer, right? That's the concern. With all of these  
4 layers, with, you know, six government lawyers and a CISO and  
5 a judge and defense counsel and the 40-second delay, there's  
6 still the concern -- which I understand, I'm not discounting  
7 the concern -- the witness is going to blurt out the  
8 classified information.

9           So I propose flagging in advance, when I get to a  
10 question that I think falls within the government's scope of  
11 classified information privilege invocation, whether that's  
12 raising my hand or we come up with a phrase or I -- or we  
13 instruct the witness, please wait five seconds before you  
14 answer this question or something like that, some way to flag  
15 a question of, you know, I really do think it's important --  
16 this question would be important to my defense, I think that  
17 it falls under the government's classified information  
18 invocation, but that's their decision to make, not mine. But  
19 some way that I could give advance notice of, in my  
20 professional judgment, here's what I think is happening, and  
21 then that would -- the witness would know not to just blurt  
22 out an answer to give the government time to make its  
23 objection or whatever.

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1           So when you are considering the sort of rules of  
2 engagement around making objections, I don't know if that's  
3 one of the things you had in mind or not. But it seems to me  
4 that that would be a -- some variation of that would be a  
5 reasonable way to balance the equities so that the government  
6 can protect its invocation of national security privilege, and  
7 that the defense can make its record as to the impact that  
8 this is having on the case.

9           MJ [Col COHEN]: Whether or -- I'm not saying I'd  
10 necessarily approve that particular issue, but one of the  
11 things that came to my mind is, because I told everyone -- and  
12 I will be true to my word -- if I ever change my mind, you  
13 will definitely know it well in advance. I'm not going to do  
14 it after the fact -- that the scope of these hearings would be  
15 broader because this testimony goes to multiple issues, and  
16 all of the parties were like, hey, we got that.

17           And one of the issues that I specifically told the  
18 judge that I wanted to address was the issue of what is the  
19 true impact of these protective orders on your ability to  
20 present a case, and are you in substantially the same position  
21 that you otherwise would have been, and is that also  
22 consistent with the right to a fair trial?

23           LDC [MR. CONNELL]: Right.

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1 MJ [Col COHEN]: I mean, there's no doubt -- I mean,  
2 statutorily -- we don't even have to get to the Constitution.  
3 I mean, by statute these accused are entitled to a fair trial.

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

5 MJ [Col COHEN]: There's no doubt about that. And whether  
6 I then just look to constitutional interpretation to determine  
7 what a fair trial is, you know, it's that whole constitutional  
8 avoidance issue, right? Do I have to determine whether the  
9 Fifth Amendment applies or do I, in the same way the CMC just  
10 did with respect to the interpreter, you know, finally say,  
11 well, I don't have to reach the constitutional issue because  
12 it says right here it's a public trial.

13 LDC [MR. CONNELL]: Right.

14 MJ [Col COHEN]: In the same way, there's statutory  
15 language that says they get a fair trial. There's no doubt  
16 about that. So -- and what determines a fair trial?

17 Well, now I've got to look to judicial -- to  
18 jurisprudence to figure out what does that mean. And clearly,  
19 one of the places that I most likely look to that is what does  
20 that mean under the United States Constitution if the  
21 Constitution applied.

22 LDC [MR. CONNELL]: Right.

23 MJ [Col COHEN]: So I agree that the record needs to be

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1 created. Now, the question I've got for you is, is what  
2 you're proposing that, you know, I flag the questions, the  
3 most efficient way of doing that, or is an alternative  
4 solution to that to say, look, here's just a list I'm going to  
5 file with the court of the questions I would have asked, you  
6 know, of this particular witness but for the fact that I was  
7 precluded to do that, and then they're all in one location so  
8 I can make my findings of fact instead of going back in the  
9 record and trying to find that.

10 I am not saying that one is better than the other,  
11 but it's even just something that comes to my mind is now as  
12 an alternative solution, like, well, these are the questions  
13 that I would have asked ----

14 LDC [MR. CONNELL]: Right.

15 MJ [Col COHEN]: ---- and I believe they are relevant and  
16 necessary.

17 Or, you know, is it -- you know, I still stick by  
18 what I told you guys earlier, we get through this initial  
19 round of testimony and then there's motions to compel. You  
20 know, we want this evidence. And so then I sit there and say,  
21 well -- you know, then I rule on it and say government, you  
22 got your options. Either we call the witness back to testify  
23 on this because I have now found this is relevant,

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1 discoverable information, or you do a summary, or you do a  
2 stipulation of fact, or you -- you know, whatever the -- the  
3 law allows me to compel, right?

4 LDC [MR. CONNELL]: Right.

5 MJ [Col COHEN]: And at the end of the day, depending on  
6 where we end up, I still have a better record than I believe  
7 existed in 524 to determine a couple of issues: One, should  
8 these statements be suppressed because they were involuntary?  
9 Or two, even if they were voluntary, is this a remedy that  
10 should be imposed because the ability of the defense to have a  
11 fair trial has been so prohibited by the invocation of  
12 national security privilege and the orders that the commission  
13 was compelled to do in compliance with that invocation of  
14 privilege on your right to a fair trial.

15 Those are all matters to be determined. I'm not  
16 leaning one way or the other. The rulings have hopefully  
17 indicated to all the parties that facts determine my outcomes,  
18 and I'm very interested in getting facts.

19 The issues that you raise, I get it. One of the  
20 reasons I was pleased with at least getting 658 out is not  
21 because I said, "This is great. This is the way the law  
22 should be." But at least now, when you and I are even having  
23 this discussion, I can look to one document that you are also

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1 looking at and that the government produced and say, okay, now  
2 we're a little bit closer to understanding what the impacts  
3 are and what questions are on limits and what questions are  
4 off limits and whether I agree or disagree, you know, and  
5 those kinds of things when those issues are raised before me.

6 But so, please don't take -- I mean, and the parties  
7 shouldn't take this either as an indication of me being  
8 pleased with the fact that it exists that I agree or disagree  
9 with the contents. And to be honest with you, it's really not  
10 up to me until the motion is raised with me to indicate  
11 whether I agree or disagree. But at least it's a step in the  
12 right direction that we're at least talking about the same  
13 thing now.

14 And to the extent that we can consolidate any  
15 guidance that's out there or the positions by the government  
16 in one singular document so that when we have these  
17 discussions we're all talking about the same thing, I think  
18 that will facilitate ultimately findings for me in this case  
19 with respect to the impacts of these protective orders and the  
20 national security privilege on rights to a fair trial.

21 LDC [MR. CONNELL]: Yes, sir. And sort of beginning where  
22 you ended, you know, my earlier comments about the increased  
23 transparency around 658, I was hoping to reflect that same

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1 sentiment.

2 MJ [Col COHEN]: And I took it that way.

3 LDC [MR. CONNELL]: You know, that it is very good to  
4 have -- to all be talking about the same thing, right? I  
5 mean, so we can debate what it means. We might disagree about  
6 what it means, but, you know, at least we're having a  
7 conversation that is on a level playing field.

8 MJ [Col COHEN]: And you and I are in agreement that  
9 ultimately they get to determine what it means ----

10 LDC [MR. CONNELL]: Right.

11 MJ [Col COHEN]: ---- and then we are bound by their  
12 interpretation under the law.

13 LDC [MR. CONNELL]: Right.

14 MJ [Col COHEN]: My role then is to decide whether relief  
15 is warranted based on their interpretation of what they're  
16 asserting.

17 LDC [MR. CONNELL]: Right.

18 So let's go back to the initial question of the  
19 relative merits of what I'll call the flagging approach, the  
20 flagging question approach, versus, say, consolidated sort of  
21 here are a bunch of questions that I would have asked type  
22 approach versus some other approach. I'll start with some  
23 other.

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1           If we were in a different context in which we were  
2 not talking about classified information privilege, the  
3 easiest way -- and we were in front of the members, right, the  
4 easiest way to do that is you just do a witness proffer, which  
5 is -- you know, when I've had a witness excluded, for example,  
6 a judge has said, "All right, stick around after the jury  
7 goes, and we're going to call your witness. You ask him your  
8 questions, and you've made your record," and you go from  
9 there, right?

10           MJ [Col COHEN]: Right.

11           LDC [MR. CONNELL]: That's a perfectly good way to do it.  
12 We can't do that here, right? Because that would defeat the  
13 purpose of the classified information privilege invocation of  
14 that we never get to know the information in the first place.  
15 I understand.

16           MJ [Col COHEN]: I agree.

17           LDC [MR. CONNELL]: So that -- which is a good way, a  
18 common way to deal with that problem that's not available to  
19 us.

20                   And so that leaves us to basically a practical  
21 question of what is the most accurate and the most easily  
22 accessible way to figure out what these things are.

23                   Now, I will tell you that there's certain attraction

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1 in my mind to going away with what the French call as esprit  
2 de l'escalier, the wit of the staircase, that the thing you  
3 should have said that you don't think of until you are on the  
4 stairs leaving the encounter -- you know, there's a certain  
5 attraction to going away afterward and thinking of all the  
6 questions that I wished that I had asked and putting them in a  
7 brief and claiming they fall under national security  
8 privilege.

9           But there's a certain artificiality to that as well  
10 in that, you know, the military commission would not be wrong  
11 to view, you know, those sort of with a certain skepticism of,  
12 well, I didn't really understand -- you know, even today we've  
13 had multiple understandings of an exchange just in July,  
14 right?

15           MJ [Col COHEN]: Right.

16           LDC [MR. CONNELL]: What were we talking about and what  
17 does the transcript actually say and who was the speaker.  
18 Right? We all have slightly different recollections of it.  
19 I'm perfectly willing to be wrong, but, you know, but there's  
20 a retrospective aspect to that.

21           Whereas the reason why -- and I haven't discussed  
22 this with my colleagues. They may have completely different  
23 views. I speak for no one else. The reason why I like the

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1 flagging idea is that it's natural, right, and it provides  
2 context to the question.

3           So let's say -- super easy question: What country  
4 did that occur in? Right? That would be an example.

5           And so the answer could be location number 3. And  
6 then if I asked the follow-up question: Well, what is  
7 location number 3 -- in a closed session and, you know, for  
8 example, where they could answer -- and the government stands  
9 up, it honors their -- the government's ownership of the  
10 classified information privilege because they are the one who  
11 assert it. They make the decision on the individual question  
12 as to, yes, that falls into the scope of our understanding of  
13 the invocation or no, it doesn't, right? I could be wrong.

14           And at the same time it allows a discussion in a  
15 natural context of -- because the next question after that  
16 matters, right? So they invoke that and that's fine. Okay.

17           Well, did you know that in that country in their  
18 prisons it is common to do X? You know. The -- so the next  
19 question that comes after the invocation of the information of  
20 national security privilege matters, and -- because then you  
21 get to see how it flows into what the parties would do.

22           We talked about when I first brought this up. I  
23 talked about the difficult -- in the 524 context, the

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1 difficulty of having fact set A of -- which is what we're  
2 allowed to present, and fact set B, which is what we would  
3 present if we were allowed, and -- because one of the things  
4 you have to assess is the delta between those two and what its  
5 implications are.

6           And the most natural way to see -- to create a fact  
7 set B, which I talked about how difficult it is, is to  
8 actually create the fact set B and then have what are  
9 essentially verbal redactions out of it, where the government  
10 comes back and says, "No, that question will not be allowed to  
11 be presented in either open or closed court," and then we ask  
12 the next question.

13           Now, is that going to be the most beautiful  
14 cross-examination that I've ever conducted or the most  
15 interesting one that the military commission has ever presided  
16 over? I doubt it.

17           You know, the military commission raised the sort of  
18 breadth of this question coming up, including the question of  
19 whether we need initial motions to compel. That particular  
20 part, for example, means that in the -- when we're  
21 questioning, say, Special Agent Fitzgerald, I'll be asking him  
22 questions that I don't think he knows the answer to, because I  
23 need to demonstrate that he doesn't know the answer so that I

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1 can demonstrate that some other witness does, right?

2           Because that's -- you know, 928B is out there of 100  
3 other witnesses who I think are important, but, you know, if  
4 Special Agent Fitzgerald knows the answer, then maybe he can  
5 answer and they aren't important. But if he can't answer the  
6 question, I have to demonstrate that he doesn't, so that's  
7 going to create a weird cross-examination already.

8           Layer on top of that, you know, asking questions that  
9 I think the government is -- whether he knows the answer or  
10 not, the government is not going to allow him to answer, is  
11 going to be weird. I mean, I'm just owning that at the  
12 outset.

13           And -- but I still think it is the most natural way  
14 to -- for you to create a fact set B, to assess, you know,  
15 what would have actually happened in the world where there  
16 were no invocation of classified information privilege so that  
17 you can compare the two and make a decision as to what impact  
18 that should have.

19           MJ [Col COHEN]: I understand. I understand. And like I  
20 said, I -- I won't foreclose that as a possibility. I think  
21 this is -- yeah, I appreciate you coming up with some ideas as  
22 to maybe how this might work out best.

23           LDC [MR. CONNELL]: And I'm not married to that idea. If

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1 there are other ideas that we -- anybody, any party has, I'm  
2 happy to discuss them.

3 MJ [Col COHEN]: Yeah, I've got -- I -- to be a fair trial  
4 and to be consistent with my intent, I have to allow a means  
5 of creating the record that you're talking about.

6 So -- and I am open to -- I have my own ideas, but that  
7 doesn't mean it's the best idea or the -- or this. But I --  
8 you are correct that this is -- this examination is going to  
9 be a little bit different. It's going to be different just  
10 from the sense of the breadth of the examination. But I think  
11 everyone was in agreement that, to the extent that some of  
12 these witnesses can testify once, that is the ideal ----

13 LDC [MR. CONNELL]: Right.

14 MJ [Col COHEN]: ---- situation. But then I'm still true  
15 to my word, but that's to be determined.

16 LDC [MR. CONNELL]: Right.

17 MJ [Col COHEN]: So I appreciate it. I will definitely  
18 take that under advisement. I will hear whatever other  
19 comments or whatever other ideas are out there, because I'm  
20 brainstorming some ideas. Maybe that's something we can talk  
21 about a little bit later in an 802, and then come back on the  
22 record and I can summarize what we've discussed, and then --  
23 because I won't reach a conclusion, and then we can have any

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1 final thoughts, and then I can actually reach a decision on  
2 that, because an 802 is not the proper place to make a ruling.

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

4 MJ [Col COHEN]: Thank you, Mr. Connell.

5 Mr. Sowards.

6 LDC [MR. SOWARDS]: Thank you, Your Honor.

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

8 LDC [MR. SOWARDS]: Gary Sowards appearing on behalf of  
9 Mr. Mohammad again.

10 And I wanted to just express my appreciation, Your  
11 Honor. I understand that you're not proposing to decide  
12 anything here today, you're giving us an idea of what the  
13 scope of potential ground rules discussions will be. And I  
14 also want to extend my appreciation for the conscientious way  
15 in which Your Honor has approached both this issue with  
16 respect to 649 and explaining that, you know, from your  
17 perspective, the only way to do whatever you needed to do was  
18 ex parte, however concerning that may be to us; and also your  
19 reaching out to ask the questions that actually are very good  
20 questions in the context of 650, which we'll be discussing in  
21 open session, I gather, tomorrow.

22 MJ [Col COHEN]: Yeah. I'm trying to find that balance  
23 between doing what I'm required to do under the law in

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1 protecting classified information and allowing for the  
2 statutory rights of ex parte, but then at the same time to the  
3 extent that I can -- but limiting that to only what has to be  
4 done in those lanes and then for other things having an open  
5 and public hearing.

6 LDC [MR. SOWARDS]: Right. And I think also in the same  
7 spirit, both the prosecution and certainly Mr. Connell have  
8 indicated a willingness to work together and see this through  
9 and reach a good resolution, and I hesitate to upset the  
10 situation which Judge -- a former military judge in this case,  
11 Judge Pohl, would refer to as instances in which peace breaks  
12 out.

13 MJ [Col COHEN]: Right.

14 LDC [MR. SOWARDS]: That if we're going in a good  
15 direction, that's good.

16 But I think one important overarching consideration  
17 for anytime we start grappling with potential ground rules as  
18 we come up with, the main overarching consideration is that  
19 this is an instance which very much demonstrates to us the  
20 point that torture is only always in the room. It gets sent  
21 into the background. People don't actually talk about it  
22 explicitly, but it really is the organizing principle which  
23 has given rise to a number of the procedures under which we

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1 operate and under which we continue to grapple and which,  
2 unfortunately, continue to change.

3           And aside from the substantive acts, the evidence of  
4 the torture coming out of the black sites, what was done to  
5 these men before they were brought to this hearing room and  
6 given a trial, the equally great concern we have is the sort  
7 of manufacture and, indeed, perhaps the distortion of the  
8 procedures that we are supposed to operate under in the course  
9 of defending their lives and bringing to the fore the issues  
10 that are involved in that torture.

11           And I -- and again, I was encouraged to hear Your  
12 Honor say that perhaps we don't need to even refer to the  
13 Constitution; we have a statutory right to a fair trial in  
14 this case.

15           But the United States Supreme Court has made it  
16 clear, in both cases such as Wheat v. United States and  
17 Indiana v. Edwards, that trials in criminal proceedings must  
18 not only be fair, they must appear fair to all who observe  
19 them. And so I understand that's part of what you were  
20 serving and explaining your actions and also inviting our  
21 participation in the formulation or the following of rules  
22 under 650.

23           But a -- sort of a legacy nagging problem in these

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1 proceedings stems from the fact that we may remember the last  
2 time an iteration of the military commissions effectively  
3 collapsed in the state of extraordinary appellate review was  
4 after I began -- I believe the rank was Colonel Henley, the  
5 military judge at the time, apologized to the defense and  
6 said, "I understand that it must be very difficult for the  
7 defense to operate under a situation in which the rules are  
8 constantly shifting under your feet and you have nothing to  
9 rely on." And I, you know, very much also have always  
10 appreciated Mr. Connell's willingness to roll up his sleeves  
11 and look for what he calls workarounds.

12           But I can't help but take notice of the fact that  
13 this -- which I believe I can discuss in open session, but  
14 this most recent guidance, which was even amended after it was  
15 initially provided to us, which runs approximately 25 pages;  
16 and even if it improves some things, certainly changes rules  
17 in a host of fashions, and to a very substantial degree. That  
18 was first made available on 6 September 2019, which was some  
19 three days ago.

20           And I don't know if the government has a particular  
21 talent or affection for irony, but, of course, 6 September of  
22 2006 was the date identified by George W. Bush as the time  
23 that the defendants were brought to Guantanamo, or certainly

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1 the time that he announced their presence on Guantanamo, and  
2 revealed that up to that point they had been held  
3 incommunicado, disappeared in the CIA, the government black  
4 sites.

5           And the irony is -- among the ironies is that since  
6 that date we have all openly discussed 6 September 2006 as the  
7 operative date. And we're now told by the new classification  
8 guidance that henceforth, the date on which the defendants  
9 were brought to Guantanamo is itself classified, and we now  
10 must speak in terms of the first week of September.

11           Just putting aside the curious nature of that  
12 particular change, which has a certain -- you know, I don't  
13 want to be harsh and suggest kind of Orwellian or Catch-22 or  
14 Kafkaesque sort of notion of distorting reality, but the fact  
15 that it would be presented to us at the beginning of the week  
16 in which we're going to have motions and then roll into  
17 examination of witnesses using this information, using  
18 these -- or restricted by these guidelines.

19           And Mr. Connell and you just had a very erudite,  
20 complex -- I was impressed by the sophistication of the  
21 intricacies you were discussing and trying to resolve, but it  
22 was all going about how to now shift and change and  
23 accommodate the requirements that the government, which always

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1 has the power to do this under classification, has dictated we  
2 will do.

3           And the understanding is the purpose of this, the  
4 virtually exclusive purpose of this, is to continue a  
5 government cover-up of what happened in the black sites, the  
6 torture that was inflicted upon these men.

7           And the further ramifications -- the more important  
8 things for our client, or certainly equally important, is that  
9 part and parcel of that classification superstructure that  
10 they've imposed on these proceedings and their ability by fiat  
11 to control what can be discussed and how it can be discussed,  
12 is that the defendants, whose lives are on the line, are  
13 really relegated to no more than spectator status.

14           We constantly, and something that will come up with  
15 you and certainly will be brought directly to bear in the 650  
16 discussion, is the, to our minds -- and I mentioned how  
17 unfortunately long it has been that I have been doing capital  
18 litigation work, but the idea that the most critical evidence  
19 in the case is evidence you can't show to the defendant, that  
20 the defendant can't be aware of some of the most important  
21 discovery and information in the case.

22           And so every time -- and this is -- I hasten to  
23 emphasize it -- in no way a criticism of Your Honor, no way to

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1 distract from my appreciation of your conscientious approach  
2 and candor in talking to us about this.

3 MJ [Col COHEN]: No, I understand.

4 LDC [MR. SOWARDS]: But every time there is an ex parte  
5 communication with the government, we know that that is for  
6 some purpose of significantly affecting the course of the  
7 trial. And irrespective of whether everything is absolutely  
8 on the up and up and the judge has exercised his or her  
9 discretion in the most conscientious and even-handed fashion,  
10 the person whose life is on the line is sitting out in the  
11 hallway unaware of anything that is going on.

12 And so I would just -- I would just commend to Your  
13 Honor to keep in mind the much broader themes, and concerns we  
14 have here. It's not just a matter of, which ordinarily I  
15 would maybe complain about saying, wait a minute, you're  
16 asking me to go into a significant potentially case  
17 dispositive evidentiary hearing and you're now giving me 25  
18 pages of rules that tells me how I'm supposed to do it, and  
19 the 25 pages of rules apply to something that happened, you  
20 know, over 13 years ago? Why haven't we heard this sooner?

21 It isn't just that. It is the nature of how these  
22 rules are promulgated and how we hear from them after they  
23 have been these, unfortunately, secret sort of black site

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1 communications about how the trial is going to be conducted,  
2 and then at the last minute people have to adjust accordingly.

3           So I'd just ask you to keep in mind the kind of  
4 overall dynamics and considerations as we move forward, not  
5 only talking about 650, but in talking about the rules of the  
6 game.

7           MJ [Col COHEN]: No, I understand, and that's one of the  
8 reasons why I even talked about the ex parte hearing with 649.  
9 I couldn't go into the contents; the law would kind of allow  
10 me to do that. But I am very conscientious of that.

11           It is the -- it is a unique aspect of this particular  
12 case, unlike any other case that I've done. I mean, just the  
13 general number of ex parte that I can get from either side in  
14 this case is significantly greater than anything I will see in  
15 most criminal trials.

16           I'm aware of that. I think that it is important that  
17 not only the trial be fair, but that it has the appearance of  
18 fairness. And I understand what -- what happens when ex parte  
19 filings are done, regardless of whether they are authorized by  
20 the law or not, but the appearances and the concerns that that  
21 raises on either side, whether -- depending on who is filing  
22 it or in the public in general. How is the judge making these  
23 decisions? Why is the judge making these decisions?

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1           But I do believe that 658 is an effort to provide a  
2 little bit more transparency to the guidance that's out there.  
3 And whether we agree or disagree -- like I said, we can take  
4 that up later. I said I'm not making a statement that I agree  
5 with what's in 658. Ultimately, even if I didn't -- even if I  
6 didn't agree, I can't change classification guidance. That is  
7 what the statute tells me. That is beyond my authority.

8           But I do think that it's important for us finally to  
9 at least to some modicum be on the same page as to, you know,  
10 what -- what the government is asserting and what they aren't  
11 with respect to what privileges. And so hopefully while the  
12 public may not know all of that information, at least the  
13 defense now finally has some of that guidance.

14          LDC [MR. SOWARDS]: Yes, and the only -- my only one  
15 concern as I understand as someone who is relatively new to  
16 the case, although you have shown lightning-quick speed in  
17 coming up to speed on the case, is the comment that this was  
18 very helpful. And I'm sure it's very helpful in the sense of  
19 knowing -- for you to know from the government's perspective  
20 what is and is not off base in terms of classified  
21 information.

22           To us -- and I don't attribute this to everybody, and  
23 again, I'm speaking for myself as Mr. Mohammad's lawyer. For

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1 us it is another instance in which the rules change either  
2 just on the eve of something important happening or sometimes  
3 after the fact. And I won't go into all of the other times  
4 that, you know, things have been put up on the screen here  
5 with the blessings of everybody, including the prosecution,  
6 only to find that apparently when somebody at some secret  
7 location saw it in print, you know, that size, decided that  
8 maybe it shouldn't be shared and it should be a spill. Those  
9 are minor things, those are just kind of interesting  
10 curiosities.

11 But -- and Mr. Connell brushed over it very quickly  
12 because, you know, didn't want to spend a lot of time with it,  
13 but I mean, we are people who are sitting -- or running a  
14 defense in which we find while we were sitting secure in the  
15 knowledge that a judge has said nothing is going to happen to  
16 very critical material evidence without further order of this  
17 commission, the government was busy destroying it under the  
18 authority of an order obtained ex parte.

19 So these are -- you know, it's not just the  
20 ex parte -- and again, I've said this, and I know you've  
21 acknowledged it, but I see your -- perhaps your expression,  
22 you're questioning whether I did, and I absolutely appreciate  
23 what you have said about the process of this case.

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1 MJ [Col COHEN]: If there's any expression, it's just more  
2 of I understand what you're saying.

3 LDC [MR. SOWARDS]: Okay.

4 MJ [Col COHEN]: And ----

5 LDC [MR. SOWARDS]: And it was just a look ----

6 MJ [Col COHEN]: ---- what I can really say is if I was in  
7 the position of either party, what I would want to know first  
8 and foremost, if I was trying cases, what are the ground rules  
9 for how we are going to try this case.

10 I would need to know what because that impacts  
11 strategy, it impacts all kinds of other things. As a seasoned  
12 litigator, I get it. And to the extent then that you can at  
13 least see that my attempt here for the parties is to provide  
14 fidelity to the process, that is where I'm coming from on all  
15 of this. And there's going to be some bumps along the way, as  
16 I kind of say, well, that's not kind of the process. There's  
17 not enough fidelity. We have to have more fidelity on this  
18 process.

19 We may not ultimately get to where everyone is happy  
20 with the process -- but we're going to get to a point where  
21 the process itself is clear. And then you aren't going to  
22 have situations -- at least if you come to me now, you are  
23 going to say, hey, this is a motion to compel because we

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1 believe we are still entitled to this regardless of what they  
2 say and so we need you to make a ruling. That's still part of  
3 the process.

4           And I agree with you, sir, and I agree with the  
5 government and everyone else and the public that the process  
6 itself cannot -- cannot change constantly. It has to be  
7 solidified, and then we're going to follow the process. And  
8 so bear with me. Hopefully you take my comments as sincere,  
9 is that's what I'm trying to do here is to get a process.

10           And even the process of challenging 658, right? I  
11 mean, there's statutory guidance here. Just because they  
12 classify something doesn't mean that you can't sit there and  
13 make a motion with me even ex parte under the law of why we  
14 think we're entitled to this type of classified information.

15           And I expect you all to use the exact same statutes  
16 that allow you to do those kinds of things to the extent that  
17 you believe they're beneficial. You have the absolute right  
18 to exercise all of your statutory and any other rights that  
19 exist.

20           LDC [MR. SOWARDS]: Thank you, Your Honor.

21           And it was only -- my last comment was to say that I  
22 just -- to alert you after we've had a chance to more  
23 thoroughly look at this, we may do exactly that.

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1 MJ [Col COHEN]: Absolutely, sir.

2 LDC [MR. SOWARDS]: Thank you very much, sir. I  
3 appreciate it.

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

5 Ms. Bormann.

6 LDC [MS. BORMANN]: I would adopt the comments of  
7 Mr. Connell and also Mr. Sowards, but -- and so I just want to  
8 focus on a couple of issues.

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

10 LDC [MS. BORMANN]: You asked in your colloquy with  
11 Mr. Connell, well, how about this idea that we just write the  
12 questions? And that's -- and I think Mr. Connell pointed out  
13 why that might be a problem, but I want to bring to your  
14 discussion, your brainstorm, another problem.

15 So as I read through this on Friday and then again  
16 over the weekend, I had some questions because, of course, as  
17 we know in this case classification guidance is often subject  
18 to interpretation. My interpretation of the various  
19 paragraphs involved here could be very different from  
20 Mr. Trivett's interpretation, which could be very different  
21 from your interpretation, which might ultimately be different  
22 from your CISO's interpretation. So as we're formulating  
23 questions to put to witnesses and then deciding not to ask

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1 them, my interpretation might be very different from what the  
2 government intended.

3           So writing out questions and subject matter after the  
4 fact based upon my understanding of something that could be  
5 incorrect is the not the most efficient way to do it.

6           MJ [Col COHEN]: That's a good point.

7           LDC [MS. BORMANN]: The most efficient way to do it is to  
8 put the question -- if it's unclassified, the question itself,  
9 to a witness -- put it to the witness, let the government  
10 object. You can rule upon it, and then we preserve it for the  
11 record. I don't want to be put in a position where I forgo  
12 asking a question because my reading of a 26-page memo handed  
13 out a week before testimony is not subject to my correct  
14 comprehension.

15           The only way I see going forward to preserve those  
16 issues is to actually see it in action.

17           MJ [Col COHEN]: Okay.

18           LDC [MS. BORMANN]: Moving on to a different point, which  
19 is this: So 524 has a long and sordid history, and you came  
20 into 524 when we were in 524LLL territory, but I want to tell  
21 you how it started.

22           It started with classification guidance. We received  
23 an e-mail from Mr. Groharing in September or August of 2017 --

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1 it's in the record in 524, I don't know the exact exhibit  
2 number. We brought that to the attention of Judge Pohl  
3 because it restricted our ability to do investigation.

4 Judge Pohl said, "Prosecution, are you really,  
5 really, really sure that you want to invoke national security  
6 privilege over the investigation function of the parties on  
7 the other side?" And they said, "Yes, Judge, we're really,  
8 really, really sure we do." And Judge Pohl said, "Then, fine,  
9 give me a proposed protective order." Because the guidance  
10 itself alone didn't have any effect; it was simply guidance.

11 So I note here that the government has not asked you  
12 for a protective order, although numerous of these paragraphs  
13 are new and seem to impose national security privilege over  
14 areas that previously had not been subject to such issues, and  
15 they restrict question asking in both open and closed session.  
16 So we're not talking about, you know, issues involving  
17 something we don't want the public to hear. We're talking  
18 about issues involving something the government doesn't want a  
19 cleared judge, cleared defense counsel to hear.

20 So with all of that in mind, and because we're  
21 operating on a tight schedule, since we just got this, I would  
22 suggest to you that the better way to do this, the most  
23 efficient and, frankly, the best way to make a record, which

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1 is what you say you want to do ----

2 MJ [Col COHEN]: That's absolutely what I want to do.

3 LDC [MS. BORMANN]: ---- on where we are cut off is to do  
4 it as close to the method that Mr. Connell suggests as we  
5 possibly can.

6 MJ [Col COHEN]: Okay.

7 LDC [MS. BORMANN]: Subject to your questions.

8 MJ [Col COHEN]: No, ma'am. I understand the points you  
9 made.

10 Mr. Harrington.

11 LDC [MR. HARRINGTON]: Judge, I have to confess that the  
12 other day when I got the government's 658 classification  
13 guidance, I felt a little bit like the Aflac duck after he  
14 talked to Yogi Berra, and I just kind of shook my head and  
15 said I can't understand this or believe it.

16 And I think, Judge, in our previous conversations, I  
17 think you think that I'm picking on you, and I'm going to do  
18 it again, if I can.

19 MJ [Col COHEN]: You may.

20 LDC [MR. HARRINGTON]: You made the comment a few minutes  
21 ago about, you know, you appreciate the transparenence in the  
22 classification guidance, and I just found it striking that the  
23 word "transparenence" could be used in connection with this

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1 classification guidance. It might be clarification, but it  
2 certainly is doing nothing to make anything transparent.

3           When we go back and look at part of the reason that  
4 we're here on these issues is Judge Pohl, in 524LL, made a  
5 decision that the government summaries were sufficient for  
6 mitigation, but they weren't sufficient for preparation for  
7 suppression motions. And then that was reconsidered by  
8 Judge Parrella, who didn't reverse Judge Pohl's decision, but  
9 said the record isn't sufficient for me to make findings of  
10 fact.

11           And I think some of what we have here now goes toward  
12 making the finding of fact on that sanction, and you have  
13 acknowledged that this morning, that that's one of the  
14 remedies that you have. Because we have in this new  
15 classification guidance not only that certain things are being  
16 declared classified, whether they were before or not, but also  
17 that we can't inquire about a number of things, which  
18 certainly goes toward that issue of the sanction if that  
19 inquiry is being limited.

20           And as has been stated by Mr. Connell and others in  
21 the recent months, we have gotten 27,000 pages, a lot of which  
22 is information that is critical to the litigating of  
23 suppression motions. And we're standing here now in this

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1 world that we don't even know what it is -- and I'm not  
2 blaming you for it, you came into it with Judge Parrella not  
3 only saying I need more information about the factual basis  
4 for granting sanctions, but also I want you to move with  
5 respect to voluntariness, but not the other issues of  
6 suppression. And you came into that, and that's still -- that  
7 cloud is still out there for us. And you've offered us the  
8 opportunity to ask questions of witnesses who are here on  
9 issues that we haven't even filed suppression motions yet,  
10 which is a chaotic situation not only for us but also for you.

11           But then we get this new guidance for us, which -- in  
12 which we say: How do we approach these witnesses? What areas  
13 do we go into, if any? Does it make any sense whatsoever for  
14 any of us who have not filed a specific motion on a specific  
15 issue to ask these witnesses questions now? And can we do  
16 that, and are we effective counsel if we do, or are we plainly  
17 ineffective counsel if we do? I think all of us are leaning  
18 to the point that we would be ineffective.

19           So I just make these comments, Judge, because one of  
20 the suggestions that you made was, like, you could propose a  
21 list of questions that you can't ask and that will satisfy  
22 things. But I heard Mr. Trivett say this morning on a  
23 different issue any lawyer who tells you 60 days or 30 days

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1 ahead of time what exhibits they're going to use or what  
2 questions are going -- a liar. I don't know if you're a liar.  
3 I think you might believe that you know what you're doing and  
4 you're preparing and all of that, but you know and I know,  
5 every lawyer knows, and Mr. Trivett was just making the point,  
6 that you get into it, you get the day before, you get into the  
7 middle of the questioning, and all sorts of things are  
8 changing and you have to be ready to adapt to it.

9           So, Judge, we are in a horribly frustrating and  
10 almost an impossible place for us to be in terms of these  
11 hearings going forward next week and litigating those issues  
12 with any kind of questions that we are limited from asking.

13           Thank you.

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

15           Mr. Ruiz, anything else?

16           LDC [MR. RUIZ]: I don't have anything to add. Thank you.

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

18           Anything from the government? In particular, less  
19 about 658, we can talk about any clarifications itself later  
20 in a classified session. But just the proposal for how we  
21 allow a record to be created and the proposals of a question  
22 being asked, you essentially perhaps saying it calls for  
23 classified information, asserting your privilege, and then me

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1 saying I agree; based on the guidance, move on.

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

3 So I think it was the first session that you presided  
4 over where I explained that we had done an excellent job with  
5 Judge Pohl explaining the needs to protect classified  
6 information that was on a document, and that we struggled a  
7 bit convincing him that the information in someone's mind was  
8 equally important and needed equal protections.

9 The government stands before you today completely  
10 unapologetic about what is in 658. And quite frankly, 658 is  
11 completely consistent with what we have done over the last  
12 seven years of the litigation. We needed to make that clear  
13 because now we're dealing with witnesses for the first time  
14 where specific classified information is going to be at issue  
15 and the defense is going to have an opportunity to either  
16 direct or cross-examine witnesses who have the same  
17 information in their mind.

18 So the defense stands here and pretends like the  
19 rules changed. The rules didn't change. Those aren't rules  
20 at all. That is completely consistent with everything we have  
21 provided them up to this date.

22 It should be no surprise that, when they were  
23 reviewing the thousands of pages of documents that we gave

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1 them, that there are no names of CIA covert officers. They  
2 could not have been thinking, well, that's okay, I'll just ask  
3 the witness about it, and the government won't have a problem  
4 if the witness just tells me what their names are. I'll just  
5 ask the witness. Of course they can't do that. We sought and  
6 got substitutes for covert officers to be referred to as  
7 Unique Functional Identifiers.

8           So when Dr. Mitchell or Dr. Jessen testify, they  
9 obviously know the names of a lot of covert officers. We have  
10 asserted national security privilege over that. We've got a  
11 substitute for that, and they're going to be referred to by  
12 UFI. The classification guidelines make clear that if  
13 Dr. Mitchell is asked about who was with them at that time, he  
14 is not to answer by their true name, but providing he has a  
15 code with him, and he knows how he can refer to the UFI to the  
16 real name, he will refer to the code.

17           Of course, the defense knew that we were asserting  
18 national security privilege over the specific locations of the  
19 countries. We litigated that like dogs with the issue of the  
20 site being decommissioned. There's not a single document that  
21 the United States provided that has the country or that  
22 confirms the country. They could not have possibly believed  
23 that now when they have a witness on, they're going to say,

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1 "Well, what country was that in," and they're going to answer.

2           So none of these classification guides -- none of the  
3 guidelines that we just provided are any different than any of  
4 the protective orders that we've already sought and had the  
5 judge agree were adequate substitutes for the defense to make  
6 their case, right?

7           Third issue, sources and methods. We are  
8 unapologetic about the fact that the Military Commissions Act  
9 lets us substitute a source and method when the source and  
10 method by which we acquired evidence is classified; that the  
11 military judge can ultimately approve a substitute for that.

12           It could not have -- the defense could not have  
13 possibly believed that when they had a witness who was aware  
14 of the source and method, that they were simply going to ask  
15 them about those questions that we have in the protective  
16 order. That's how CIPA, that's how 505 is envisioned. If we  
17 are going to protect the information and if the commission is  
18 going to allow for substitutes, then those witnesses must be  
19 allowed to give those substituted answers as well.

20           And I don't want to get into the argument over the  
21 case law of limitations on cross, but cross-examination is not  
22 any question they want to ask on any topic. CIPA has  
23 recognized that it can be tailored in certain ways, especially

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1 in order to protect classified information.

2 So we come here completely unapologetic. This is not  
3 different. These aren't new rules. This is consistent with  
4 everything we have provided.

5 That the defense does not like it, I get it. I  
6 understand that. But their problem is with the rules, with  
7 the Military Commissions Act itself, and with the manual. And  
8 to the extent that they've objected to this, they're creating  
9 their record. The government has no problem with them  
10 creating a record. Our concern is that they're creating a  
11 record on the fly and specifically asking questions that  
12 elicit the information over which we did provide -- or invoke  
13 national security privilege.

14 So I will agree with Mr. Connell that the guidelines  
15 attempted to do three things. They attempted to say what was  
16 classified, what was not classified. It declassified a  
17 tremendous amount of information because we do want this to be  
18 as transparent as possible.

19 But at the end of the day, we've invoked  
20 national security privilege over covert officer identities,  
21 specific sources and methods that involve evidence that we  
22 intend to use, really in three different instances. We've  
23 invoked it over special -- specific techniques, tactics, and

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1 procedures used in the camp. And those are the primary times  
2 that we've invoked them. They are limited in nature. There  
3 are substitutes that are permitted or limitations on cross to  
4 protect just the aspects that we need to protect.

5 But I want to address specific issues first raised --  
6 I'll go counsel by counsel. I think that's how I have my  
7 notes organized.

8 Last session we did indicate to the commission that  
9 we believed we needed a protective order in 641 and 586 prior  
10 to starting the testimony. But we are on the eve of having  
11 witness testimony, and because of the -- the need, I think,  
12 for classification guidance before that, the commission outran  
13 the supply lines a little bit, right? We're seeking  
14 protective orders for certain information in those two  
15 categories of motions that we had to notify the defense that  
16 we invoked the national security privilege over or would  
17 invoke the national security privilege over in the event that  
18 it was raised with the witness prior to the issuance of any  
19 order in 586 or 641.

20 So but for those two exceptions, all of the other  
21 information for which we've invoked the national security  
22 privilege over we did years ago. And although we may not have  
23 explicitly stated it to the defense, they're smart people.

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1 They know. They know that we invoked it over the covert  
2 officers' names. They know that we invoked it over the  
3 countries. They know we invoked it over certain aspects of  
4 who was involved within the CIA RDI program.

5           So this is not news to them. They would not read it  
6 for the first time and say, oh, wow. They know. And they've  
7 made their record, quite frankly. They have objected to it,  
8 and ultimately it will go up to an appellate court, and the  
9 appellate court will make their decision as to whether or not  
10 that was appropriate under the statute.

11           So other than those two instances, all of this had  
12 been invoked years before. We were just now making it more  
13 explicit so they understood that they shouldn't be asking  
14 questions about that which we invoked national security  
15 privilege over.

16           One other issue that Mr. Connell brought up, this --  
17 the United States isn't going to confirm or deny the  
18 information over which we've invoked national security  
19 privilege, and we're not going to allow a witness with  
20 knowledge of it to say it.

21           He seemed to indicate that he couldn't argue or make  
22 any claim or make any record about independent investigation  
23 they may have done with other -- you know, with their own team

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1 and those things before a protective order was in place.

2 That's not envisioned by the classification guidelines. The  
3 classification guidelines ----

4 MJ [Col COHEN]: Let's talk about that real quick to make  
5 sure I'm on the same page as you.

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

7 MJ [Col COHEN]: So if we have to have a discussion  
8 classified, that's fine, like I said.

9 But -- so when you say that, what does that mean to  
10 you? Like -- like certain things would still be -- just  
11 because you find out something doesn't mean it's not  
12 classified, technically.

13 MTC [MR. TRIVETT]: Right.

14 MJ [Col COHEN]: So how would that -- how would you  
15 envision that working when you -- when you make that kind of  
16 assertion?

17 MTC [MR. TRIVETT]: So there's a lot of information for  
18 which we will neither confirm nor deny that the defense have  
19 made statements about, including certain countries, certain  
20 names. That's classified. They can't elicit that from our  
21 U.S. Government witnesses.

22 If they put on someone who is their own investigator  
23 on that, and they -- and we properly close it, and it's given

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1 notice of, and you believe that it's relevant and necessary,  
2 these classification guides don't prevent them from doing  
3 that.

4 MJ [Col COHEN]: Okay. So the way I interpret what you're  
5 telling me, then, is the government will not -- and  
6 essentially it's a Glomar response, I won't confirm or deny  
7 that that is correct. But the defense, if they knew that  
8 was -- that information and they wanted to present that still  
9 to the commission, they would just have to present that  
10 through an independent source?

11 MTC [MR. TRIVETT]: Correct, under the correct  
12 classification.

13 MJ [Col COHEN]: Under the correct classification. Okay.

14 MTC [MR. TRIVETT]: That's correct.

15 MJ [Col COHEN]: All right.

16 MTC [MR. TRIVETT]: We never intended to ----

17 MJ [Col COHEN]: I think that's an important clarification  
18 there, because I think that -- I didn't glean that myself from  
19 658.

20 MTC [MR. TRIVETT]: No, that's fine.

21 MJ [Col COHEN]: So I appreciate that clarification. All  
22 right.

23 MTC [MR. TRIVETT]: And obviously a lot of these

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1 conversations are easier in classified, and I know we'll be  
2 doing that in the 505(h) hearing.

3           Now, we have prohibited them under certain protective  
4 orders of doing certain investigation, but there was  
5 information that was provided to them or information that they  
6 gathered prior to those protective orders. And these  
7 classification guidelines do not attempt to prohibit them from  
8 using that information, but they can't elicit that information  
9 from U.S. Government witnesses.

10          MJ [Col COHEN]: Copy. I understand the distinction that  
11 you're making.

12          MTC [MR. TRIVETT]: And also maybe we'll get into a little  
13 bit more detail with Mr. Connell in the classified, but he had  
14 made a comment about not being able to elicit specific dates  
15 of requirements that were sent. I don't believe that the  
16 classification guidelines prohibit that, if that's what it is.  
17 I want to hear exactly what the context is and what the  
18 question is.

19               The specific dates over which we've invoked  
20 national security privilege are the specific dates where they  
21 moved from sites and a period of time before and after that.

22          MJ [Col COHEN]: All right.

23          MTC [MR. TRIVETT]: But generally, that someone was in a

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1 site during a certain period of time, that there was a  
2 specific request sent by the FBI during that period of time,  
3 the guidelines don't in any way prohibit that.

4           So I'd like to hear more exactly, if we can get  
5 examples, and I think that's part of what the 505(h) hearing  
6 is for so we know exactly how it was intended to be used. But  
7 that struck me as not something that we intended to invoke  
8 over, but I could certainly talk to Mr. Connell.

9           MJ [Col COHEN]: And I recognize -- I mean, that's -- it  
10 goes to whether it's transparent or not. I mean, is it  
11 completely transparent as a piece of glass? No. But is it  
12 more transparent as to what the government intends to invoke  
13 privilege on than may have previously existed? There's no  
14 doubt about that. But are there still some concerns from all  
15 of the sides as Ms. Bormann said as to, well, maybe my  
16 interpretation is a little bit different. I agree. I mean,  
17 that's the whole reason why I am at least pleased that we're  
18 at least having this conversation now so we have some guidance  
19 so that really our 505, in and of itself, can be more  
20 productive ----

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

22           MJ [Col COHEN]: ---- so we can kind of talk about these  
23 issues.

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1           I mean, because what you just said was pretty  
2 significant as to, well, if they've got an independent source  
3 they want to put on the stand and testify, then, that's great,  
4 it's just not the government confirming it.

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

6           MJ [Col COHEN]: Okay. I mean, that's -- those are the  
7 kinds of things that I'm hoping during this week that the  
8 parties will take you up on and say, okay, I want to sit down  
9 and talk about this document because here's the kind of stuff  
10 that I really want to talk about, and are you saying this is  
11 or is not? Or is there an alternative source that I can  
12 provide this that you're not going to object to?

13          MTC [MR. TRIVETT]: And we're -- unlike actual protective  
14 orders we seek, because we already have received many of the  
15 protective orders that are now at least articulated in the  
16 guidance, I'm willing to work with the defense; and if they  
17 need clarifications, I'm happy to do another draft.

18           What I can tell you is this is not an OCA just being  
19 tired of this issue. This was me writing it. I wrote it  
20 based on my understanding of everything that we have invoked  
21 so far and then we worked it back through the classification  
22 authorities, and then we worked on getting specific things  
23 declassified because we wanted to be as transparent as

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1 possible. And pretty much following the ex parte hearing, I  
2 did nothing but work on this.

3           So this was not some nefarious concept by original  
4 classification authority saying I'm going to thwart  
5 Mr. Connell in his suppression motion. This was me  
6 understanding what we had invoked on, what the witnesses were,  
7 and the commission's need and the parties' need to understand  
8 what the left and right limits are. So that's all this was.

9           So we're certainly -- if things need to be clarified,  
10 I'm happy to do it. This could be an iterative process that  
11 we work through. At some point we want to get locked down on  
12 it, hopefully before testimony. But if we want to do that as  
13 part of the 505(h) hearing, or if the defense counsel want to  
14 meet with me and confer with me and I can try to clarify  
15 things, if that makes it easier for them, I'm more than happy  
16 to do that. Because I want everyone to be on the same page,  
17 even if they don't like what page they're reading.

18           MJ [Col COHEN]: That was my intent. You know, so I  
19 said -- I'll say the same thing to you that I said to the  
20 defense. I'm not making any comment on whether I agree or  
21 disagree with the contents, but as far as at least that we're  
22 moving this forward to kind of have these discussions and to  
23 get this clarification before we start in the middle of

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1 testimony, to the extent that we can then minimize the  
2 significant breaks during testimony while we have to rehash  
3 whether or not someone can ask questions or not, then that was  
4 the -- that was -- that would be my intent.

5 MTC [MR. TRIVETT]: Okay. Mr. Connell referenced  
6 specifically our AE 574 protective order, and not making  
7 certain arguments to create the record that he wanted. It was  
8 certainly not our intention that the protective order would  
9 prohibit him from arguing or making a record to the commission  
10 about the types of questions he wants to ask and why they're  
11 important. That's not our interpretation of it. Ultimately,  
12 the commission -- it would be up to the commission, but I want  
13 you to understand that that wasn't our interpretation.

14 They can make the record. We want them to be able to  
15 make their record. We are confident when it goes up under the  
16 auspices of CIPA and M.C.R.E. 505 that's it's going to be  
17 approved. But we've never tried to prevent them from being  
18 able to make a record in any way.

19 The method by which they make the record, we need --  
20 our equity is principally involved in making sure that we're  
21 not spilling classified information while that's being done.  
22 But that said, we are happy for them to make a record and we  
23 will be flexible with how the commission wants that to be

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1 done.

2 MJ [Col COHEN]: All right. I want to say that, probably  
3 have an 802 towards the end of the week, probably around  
4 Friday. Friday -- Friday, maybe Friday morning even, just in  
5 case there's some more clarification after the 802 for some  
6 additional discussion.

7 I would like to -- I would -- I strongly encourage  
8 the parties to get together, even if it's individual teams  
9 with the government, to have some of these discussions so that  
10 when we have that 802 we can come back to, okay, what are the  
11 issues and kind of what is the proposal from the parties as to  
12 how we're going to make this work.

13 I understand that not everyone is going to be  
14 satisfied. That's the nature of litigation to a certain  
15 extent. And to the extent that motions get filed before me, I  
16 will rule on them as the motions get filed. But to the extent  
17 that we can narrow the issues that I need to specifically  
18 address, I think that's in the interest of everyone.

19 MTC [MR. TRIVETT]: And lastly, you mentioned that you  
20 thought it would be helpful to have consolidated guidance of  
21 all of the previous classification guidance that we have  
22 filed. We are intending to do that. We were waiting for --  
23 we're getting some additional information regarding specific

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1 dates that certain accused were here at Echo II in the black  
2 sites. We're getting that declassified as well to make that  
3 as transparent as possible. Once that gets done, we will  
4 attach 568 to it as well, do a cross-check and make sure we  
5 have remembered all of the other ones that we have provided  
6 over the years. We're going to provide that for the ease of  
7 the parties' use so it's all in one place. It's one appellate  
8 exhibit number that gives all of the previous classification  
9 guides, at least the ones that are still in effect.

10 MJ [Col COHEN]: Thank you.

11 MTC [MR. TRIVETT]: If you just give me one moment, sir, I  
12 just want to make sure I'm not missing anything.

13 MJ [Col COHEN]: Absolutely.

14 MTC [MR. TRIVETT]: Subject to your questions, sir.

15 MJ [Col COHEN]: No, Mr. Trivett, I understand. Like I  
16 said, I think there's more discussion to be had. There's more  
17 discussion for us to have in a classified setting,  
18 undoubtedly, and then we'll have the 802. And then if we need  
19 to have a -- then we'll decide when we need to have a more  
20 formal hearing to kind of solidify what those final Rules of  
21 Court will be, so thank you.

22 MTC [MR. TRIVETT]: All right, Judge.

23 MJ [Col COHEN]: Mr. Connell.

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1 LDC [MR. CONNELL]: Sir, can I make just one point just  
2 to -- that the government just made?

3 MJ [Col COHEN]: You may.

4 LDC [MR. CONNELL]: I am perfectly willing to engage in  
5 discussion, have already in the last 24 hours, expect to  
6 continue to.

7 The one -- but the government just made a number of  
8 arguments what I could have -- about what I could have  
9 possibly believed. And, in fact, what I could have possibly  
10 believed is that the military commission meant what it said  
11 when it issued orders.

12 This military commission has issued three different  
13 types of protective orders in this area. One of those, 570 --  
14 in the 574 series prohibited us from doing certain things,  
15 asking certain questions, making certain arguments. I  
16 understood that. That's why, when we argued it, I didn't make  
17 those arguments or ask those questions.

18 There was a second type in Protective Order #4 where  
19 the military commissions that prohibited us from undertaking  
20 certain types of investigation. I have said on multiple  
21 occasions that we parsed that thing like -- I live and die by  
22 the text of that order. Every time an investigator comes to  
23 me with a request, like a witness package, we pull out the

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1 order, re-read it again, and say does this person fall into  
2 that category?

3           The vast majority of the protective orders that this  
4 military commission has issued, which have all been  
5 unclassified, have been about discovery, about what the  
6 government can withhold, substitute, redact, or provide a  
7 summary for.

8           And it is entire -- so whether it is surprising or  
9 not, I thought when the -- it is 100 percent true that I  
10 thought when the government -- when the military commission  
11 issued a protective order directing a certain form of relief  
12 requested by the government, for example, that a document not  
13 include something or that they substitute something for  
14 something else, I never understood that to sort of  
15 automatically become a 574-style, prior restraint-style  
16 protective order. And, in fact, I honestly feel like if five  
17 years ago, if I had argued that those 505-type, discovery-type  
18 orders were restricting my ability to ask questions of  
19 witnesses, like everybody would have looked at me like I had  
20 three heads.

21           The government absolutely has the right to invoke  
22 classified information privilege, and they have done that in  
23 658. But that does not retroactively change the character of

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1 other protective orders that the military commission has  
2 entered -- and we will abide by that classification guidance,  
3 or at least on Mr. al Baluchi's team going forward -- but that  
4 doesn't change the last eight years, where the military  
5 commission would grant the relief that the government asked  
6 for, whether that was in 574, you can't ask these questions,  
7 or in most of the cases, you may turn over this document  
8 instead of that document.

9 MJ [Col COHEN]: I understand. And I think that's part of  
10 the nuance of the 650 series that I want to address, is  
11 perhaps unintended consequences.

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

13 MJ [Col COHEN]: So I will -- I'm sure we'll have much  
14 more lengthy discussion on that during the 650 argument.

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

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

17 Given the hour, I think it's appropriate for to us  
18 take a lunch recess. Let's return at 1400 hours.

19 [The R.M.C. 803 session recessed at 1241, 9 September 2019.]

20 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1400,  
2 9 September 2019.]

3 MJ [Col COHEN]: Commission is called to order. All  
4 parties present when the commission recessed are again  
5 present. Mr. Ryan had previously stepped out, so he is not  
6 here at this point.

7 CP [BG MARTINS]: Your Honor, I also just wanted to  
8 mention there was a problem with the feed at the Pentagon this  
9 morning.

10 MJ [Col COHEN]: Okay.

11 CP [BG MARTINS]: There were initial glitches. The audio  
12 was pretty good, but there was some interruptions in the  
13 video.

14 MJ [Col COHEN]: Okay.

15 CP [BG MARTINS]: Apparently after 1030 break, it  
16 significantly improved. I just wanted to let you know that.

17 MJ [Col COHEN]: Thank you for letting me know that.

18 Mr. Sowards.

19 LDC [MR. SOWARDS]: Thank you.

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

21 LDC [MR. SOWARDS]: Your Honor, I meant before the break,  
22 if it's okay, convenient with the military commission now, I  
23 just wanted to quickly respond to a couple of points

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1 that ----

2 MJ [Col COHEN]: Sure.

3 LDC [MR. SOWARDS]: ---- Mr. Trivett made.

4 That is, first of all, I invoked -- I think I talked  
5 about Kafka and Orwell this morning; but after listening to  
6 Mr. Trivett, I think probably our text for today should be  
7 Lewis Carroll, because I was trying to follow him down the  
8 path he was describing about how we got here.

9 And I think it's important again -- and I know you're  
10 going to review this in substance when we get to the right  
11 point, but I can't help thinking that when we start off with a  
12 certain frame it sometimes, you know, gets us in a certain  
13 direction, hard to move everybody back to maybe where I think  
14 we should be.

15 But the first thing is we're not asking him for an  
16 apology or the government to be apologetic about anything.  
17 What we are asking for is a clear and timely notice about  
18 what's going on.

19 And I know the former learned counsel in our case,  
20 Mr. Nevin, hails from the great state of Idaho, and that's a  
21 state that gave us the Lankford v. Idaho overarching  
22 considerations in capital cases, and that is that you have to  
23 know what is at stake and what the rules are for any

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1 particular proceeding.

2           And Mr. Trivett picked up on the idea, our complaint,  
3 that we are at what he concedes is the eve of witness  
4 testimony, and we get this fairly substantial document. And  
5 what he says to you, and said as far as I could tell very  
6 soberly and with a straight face, is that this is nothing new.  
7 I mean, this has been known to everybody for every -- for all  
8 time. We, the government, are just making it clear, even  
9 though it's been invoked years ago. And so, of course, the  
10 first question is: Well, if it's been known to everybody, why  
11 are we making it clear now?

12           But the other points were that -- the suggestion of  
13 some kind of consistency which is being maintained. Let me  
14 share with the military judge the fact, just as one example,  
15 and I think Mr. Trivett will recall this situation, although  
16 as with some of my colleagues today, I'm trying to recall  
17 which of the particular government attorneys was at the  
18 podium, but in front of Judge Pohl in a closed session, Judge  
19 Pohl -- they got into an exchange, and Judge Pohl finally  
20 said, "Wait a minute. Are you saying that even in a closed  
21 session where everybody has clearance, you're saying the  
22 defense can't mention names of specific countries?"

23           And the government said, "That's right."

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1           And Judge Pohl said, "Well, I'm not going to do that.  
2 Forget it. That's not on the table."

3           And there was no follow-up motion by the government,  
4 nothing to reconsider. That was the understanding. And now  
5 it is my understanding, although I haven't read it line by  
6 line, that in the new guidance that's exactly what they're  
7 telling us. Okay. So that's just one little factoid that  
8 tells you this is not a consistent document that everybody's  
9 known about and everybody's worked under.

10           What is consistent is the characterization that the  
11 government arrogates unto itself of saying such things as we  
12 are always ready to go to trial because we have given you all  
13 the discovery, even though 25,000 pages will be coming next  
14 week; that we have always been consistent with these rules,  
15 even though we generate any number of -- not only protective  
16 orders -- and we'll talk about that later, about whether we  
17 should be in on the formation, the formulation of those, but  
18 protective orders that are subject to modification on the fly  
19 by -- from folks, you know, whose role we're not really sure  
20 of.

21           And Mr. Trivett was good enough to share with us his  
22 understanding of how this particular latest classification  
23 guidance came into being. And I think after listening to him,

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1 we probably might even need to formally move for discovery  
2 about who was involved in causing that to happen.

3           But I can tell you that the sort of qualifications  
4 that he has made here today in and of themselves are  
5 internally inconsistent. When he says that this is a  
6 consistent guidance that has been in effect for years, and  
7 then he says there are two -- there are only two exceptions,  
8 which he discusses. And then he says, as to others, we may  
9 not have done it explicitly, but the defense are smart people.  
10 They can figure it out.

11           So, I mean, that again is the -- I mean, that is the  
12 core problem that was noted in Lankford, that the  
13 prosecution -- or at least the judge in that case, not even  
14 the prosecution, but the judge in that case, was sort of  
15 saying, well, the defense are smart people. They can kind of  
16 figure out where I might be going with this, even though  
17 they've been given notice that the type of hearing we're doing  
18 is something different.

19           So, you know, I just -- and I don't want to belabor  
20 it, but it's just the point that the government assuring  
21 you -- and it sounded very reassuring and very comforting --  
22 that they are prepared to fix any little glitches. But just  
23 to let you know, we have been disadvantaged in no way because

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1 from the outset we have known all about this, and all they're  
2 doing is clarifying something they think is necessary on the  
3 eve of witness testimony.

4 But the other issue with that is that, to my  
5 recollection, at least two of the featured FBI agents,  
6 Special Agents Perkins and Fitzgerald have already testified  
7 here, and their testimony was not preceded by 25 pages of new  
8 and improved apparently redundant but also clarifying  
9 classification guidance, so that's not the case.

10 So I just want you to know that with all due respect  
11 to Mr. Trivett, this is not a situation in which we have been  
12 either sleeping on our rights or looking at something that  
13 we've seen time and time again and are suddenly raising some  
14 sort of belated concern with you.

15 The last thing was that in -- if I -- and again, I  
16 understand that you're talking about this in sort of broad  
17 strokes, and so nobody's holding anybody to the particulars.  
18 But you did mention in an exchange with Mr. Trivett that in  
19 terms of a procedure for handling questions that may raise  
20 classified information, that would be a matter of the  
21 government saying, "Objection, classified information." You  
22 saying, perhaps, if you recognize that from the guidance, that  
23 it's a valid -- valid objection -- you say, sustained, move

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1 on. Then we go to the next question.

2 As I understand it, in fact, there's an intervening  
3 inquiry in which if they raise the privilege, then the  
4 military judge has to determine whether the question seeks  
5 information that is relevant and necessary and helpful to the  
6 defense. And if you rule that it is, then you say, "I  
7 understand, Government, but I have to let them answer the  
8 question, unless you want to reassert the privilege or propose  
9 some substitution or endure some sanction."

10 And so as we look ahead to the possible ground rules  
11 that, you know, again, we have to fashion in fairly short  
12 order between now and Friday, possibly, that we have to build  
13 in an allowance for that procedure to happen.

14 MJ [Col COHEN]: I would agree. And the intent was not to  
15 misstate anything more just -- it was a short -- I guess it  
16 was a short comment as generally how the process would work,  
17 but yeah, not any ruling on my part as to what the actual  
18 process would be.

19 LDC [MR. SOWARDS]: Okay. And may I just have one moment,  
20 Your Honor, to make sure I haven't missed some part?

21 MJ [Col COHEN]: You may, sir.

22 LDC [MR. SOWARDS]: Thank you very much, sir, for your  
23 attention.

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

2 Any other final comments on that matter? It will not  
3 be the last time. I know we're going to talk about that this  
4 week, so.

5 All right. Negative response.

6 Any objection to me spending the remainder of this  
7 afternoon most likely, at least initially, talking about 643  
8 and then moving the 502 and 617 discussion to perhaps  
9 Wednesday in the next open session, from either side?

10 Good afternoon, sir. How are you doing?

11 DC [MR. MONTROSS]: I'm doing well, thank you. Not an  
12 objection, but an issue of procedure.

13 You may recall from the 802 hearing that we advised  
14 Your Honor that 643, Hawaii, H was something that was a 505  
15 notice that we had provided to the court.

16 MJ [Col COHEN]: Okay.

17 DC [MR. MONTROSS]: It wasn't on the list of 505 things.  
18 We asked for it to be added.

19 MJ [Col COHEN]: That's right.

20 DC [MR. MONTROSS]: Your Honor did agree to add it.

21 MJ [Col COHEN]: That is correct.

22 DC [MR. MONTROSS]: The issue about that is the 643  
23 hearing I was intending to start with 643F, which is

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1 discovery, talk about 643E, which is the compulsion of  
2 witnesses to testify. Both of those issues involved the very  
3 subject or the very documents that are at stake in 643H. So  
4 in order to understand kind of where I can go in 643F and  
5 643E, I was going to ask Your Honor if we can actually have a  
6 505 first on the H before we actually dig in deep on to 643.

7 MJ [Col COHEN]: Okay.

8 DC [MR. MONTROSS]: Just so I can understand what are my  
9 left and my right boundaries moving forward. I believe that's  
10 the process that this judge or this court has undertaken thus  
11 far.

12 MJ [Col COHEN]: It is. Thank you for reminding me of  
13 that.

14 DC [MR. MONTROSS]: Thank you.

15 MJ [Col COHEN]: I did look at the notice and that is --  
16 you're right. You asked for that in the 802, and I forgot to  
17 note that when I was going through the list of stuff that had  
18 been typed in, so ----

19 DC [MR. MONTROSS]: I didn't supplement it, so it's my  
20 error.

21 MJ [Col COHEN]: No, no. Like I said, we are working --  
22 the process works together, so let me just pull up something  
23 real quick.

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1 DC [MR. MONTROSS]: I would just note, Your Honor, that  
2 one of the 643F, the discovery requests, directly involve the  
3 documents at issue in 643H.

4 And the basis for Mr. Reismeier's testimony, one of  
5 the three -- probably the primary argument I have about why we  
6 need him and what hasn't been discussed before is the  
7 underlying documents present at 643H.

8 MJ [Col COHEN]: All right. I'm just reading -- I'm just  
9 pulling it up, 643F and 643H. Okay. Okay. I'll defer that  
10 matter. We'll take that up in the 505(h). I don't -- I think  
11 that makes sense. It has been the policy that, to the extent  
12 that we need to decide something in a closed session or in  
13 order to be able to know what we can argue in the open  
14 session -- so we'll defer that.

15 DC [MR. MONTROSS]: Okay. And I appreciate that.

16 MJ [Col COHEN]: No problem. Thank you -- thank you for  
17 reminding me.

18 DC [MR. MONTROSS]: Thank you.

19 MJ [Col COHEN]: All right. Then it appears we have some  
20 time now. Can we go ahead and address 502 and 617 and the  
21 interplay there? Thank you for your flexibility.

22 LDC [MR. CONNELL]: I'm here all week, sir.

23 MJ [Col COHEN]: All right. Mr. Connell, let me -- you're

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1 always free to argue everything you want, but I just want to  
2 throw out something that's kind of been on my mind. It's not  
3 directly on point, but it was just a Supreme Court case that I  
4 was recently reading that didn't deal with this issue at all  
5 but it got me thinking about the issue that we're talking  
6 about here, and that's I pronounce it Rehaif v. United States  
7 139 Supreme Court 2191.

8           And the reason I even mention this case, it's all off  
9 possession of a firearm by someone who was illegally in the  
10 United States and knowledge elements and stuff, but then it  
11 talked within there about the issue of the interstate commerce  
12 being a jurisdictional element as opposed to, you know, a  
13 situs or some kind of factual element, you know, that needed  
14 to be proved -- proven, excuse me.

15           Which got me thinking about this whole issue of  
16 hostilities and the interplay of 502 and 617. And so then I  
17 started thinking, okay, well, if this goes to a jury, you  
18 know, how does the interstate commerce issue go to a jury, you  
19 know, and then how does that deal with personal jurisdiction,  
20 subject matter jurisdiction, those kinds of things.

21           And so I just didn't want to keep that within, I  
22 wanted to let the parties kind of -- to the extent that you're  
23 prepared; if you're not, that's fine. But I at least wanted

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1 to tell you that, as I've gone back and looked at your motion  
2 for reconsideration and then this issue of the interplay  
3 between the two, it was just something that was on my mind,  
4 too, is what do I do with something that is to a certain  
5 extent a jurisdictional element -- well, really, and a subject  
6 matter -- just jurisdictional on both sides, personal and  
7 subject matter.

8 LDC [MR. CONNELL]: Yes, sir. And before I address that,  
9 was the underlying statute in that case, 18 U.S.C. 922(g)?

10 MJ [Col COHEN]: That is correct.

11 LDC [MR. CONNELL]: All right. Very good.

12 MJ [Col COHEN]: Yeah. It's an August -- excuse me,  
13 decided June 21, 2019. So just a recent opinion.

14 LDC [MR. CONNELL]: Yes, sir. I will tell you that I have  
15 not read that opinion, but I am familiar with the  
16 jurisprudence of the interstate commerce elements under  
17 922(g). So I'll address it. And if like the Supreme Court  
18 has totally changed their minds since the last time that I  
19 looked at the issue ----

20 MJ [Col COHEN]: No. I mean, generally, the Supreme  
21 Court -- it wasn't even -- so I said it's not directly on  
22 point. It didn't really say anything other than the issue of  
23 that it made a distinction between jurisdictional elements

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1 versus other types of elements ----

2 LDC [MR. CONNELL]: Yes.

3 MJ [Col COHEN]: ---- which then got me thinking about,  
4 well, isn't that kind of what we have here potentially as  
5 well?

6 LDC [MR. CONNELL]: It is, sir. And so I'm going to  
7 address that. I'm going to do it in -- I'm going to start  
8 there in the context of some history as well.

9 MJ [Col COHEN]: Absolutely.

10 LDC [MR. CONNELL]: Because there's a difference among the  
11 parties, among the parties on the left-hand side of the room  
12 on this question, and so please -- as you always do, I'm  
13 speaking only for myself ----

14 MJ [Col COHEN]: Understand.

15 LDC [MR. CONNELL]: ---- other people have an almost  
16 diametrically opposed position.

17 The way this issue began was in 488, and the --  
18 Mr. Hawsawi filed a motion to dismiss on subject matter  
19 jurisdiction grounds. And the CMCRC had recently addressed the  
20 operation of the hostilities concept within the Military  
21 Commissions Act because Judge Spath had dismissed a charge  
22 relating to the MV Limburg on the basis that it did not occur  
23 associated with and in connection with hostilities.

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1 MJ [Col COHEN]: Right, which is really a nexus ruling  
2 that he made.

3 LDC [MR. CONNELL]: Yes. That's right.

4 And so -- and that's what the CMC said, was that,  
5 look, there are really two different things here that are  
6 happening, and that was the position that we took, that  
7 Mr. al Baluchi took, which was that the idea of the motion was  
8 sound but that the challenge really sounded in personal  
9 jurisdiction rather than subject matter jurisdiction. And  
10 that led to an exploration of all the way that federal  
11 statutes deal with elements which are sometimes described as  
12 jurisdictional, right?

13 Interstate commerce is a perfect example. It is a  
14 jurisdictional element in the sense that the authority of the  
15 United States to legislate in that area comes from the  
16 Interstate Commerce Clause. It is not jurisdictional in the  
17 sense that, if interstate commerce is not present, the court  
18 does not have jurisdiction over either the offense or the  
19 person.

20 So it turns out -- and some of the Supreme Court  
21 cases have been quite eloquent on this question -- that the  
22 vast majority of federal cases -- federal statutes which have  
23 elements commonly called jurisdictional elements are not

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1 jurisdictional at all. The "jurisdictional" is a short tag  
2 that the lawyers use, but it's not really a jurisdictional  
3 element. And that has to do with obscenity; that has to do  
4 with guns; that has to do with, except in one particular  
5 situation, domestic violence. It has, you know, all of those  
6 things.

7           But there are situations, fairly rare, in which a  
8 statute sets forth a true personal jurisdiction challenge --  
9 element. Element is not even the right word. A new personal  
10 jurisdiction finding that must be made.

11           The Maritime Drug Law Enforcement Act is an example  
12 of that because a person has been picked up on the high seas,  
13 and there really does have to be a determination, you know,  
14 does this person belong in a United States court, right? Or  
15 do they belong in a Thai court? Or a Somali court or whatever  
16 it is.

17           MJ [Col COHEN]: Right.

18           LDC [MR. CONNELL]: The Military Commissions Act is one of  
19 those rare statutes which includes a true jurisdictional  
20 finding in 948a(7). The -- it also -- and this was the source  
21 of the confusion, I think, to the defendant in Nashiri and  
22 where they went wrong, in my view, was that it also includes a  
23 hostilities element of an offense under 950p(c), that could be

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1 called a jurisdictional element because the authority of the  
2 United States Government to legislate in this area comes from,  
3 at least the Define and Punish Clause, which everyone agrees  
4 on, but according to some judges on the D.C. Circuit also the  
5 War Powers, and the government has other elements of the  
6 Constitution that it points to.

7           But it's not truly, in my view, jurisdictional in  
8 that if there -- if Congress exceeded its power, it doesn't  
9 affect the jurisdiction of the military commission, it affects  
10 the Article III structure that gave Congress the power to pass  
11 the Military Commissions Act in the first place. And in the  
12 second al Bahlul en banc decision, that's the question that  
13 they grapple with, is the Article III question, which is not  
14 truly -- it could be called, legitimately called jurisdiction  
15 but in my humble opinion is not truly jurisdictional.

16           So one thing, which is either good news for the  
17 military commission or is just going to throw more -- one  
18 more, you know, ingredient into this stew, is that that's  
19 the -- Judge Pohl addressed this exact question in his initial  
20 ruling, 502I.

21           MJ [Col COHEN]: Right.

22           LDC [MR. CONNELL]: And there were really -- there were  
23 really sort of three positions at play in 502I -- or in the

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1 lead up to 502I. One of them was that -- which, and they can  
2 speak for themselves, but what I understand Mr. al Hawsawi's  
3 position to be, that the hostilities question sounded in both  
4 personal and subject matter jurisdiction; Mr. al Baluchi's  
5 position which was that hostility sounded in personal  
6 jurisdiction and as an element of the offense; and the  
7 government's position, which was that hostilities existed as a  
8 matter of law for personal jurisdiction purposes, and that  
9 hostilities was an element of the offense. So there are  
10 really sort of a three-way split around.

11           And in this situation -- and this is actually  
12 important to what we're talking about with 617 -- Judge Pohl  
13 chose, in a rare flash of brilliance -- well, not rare, he was  
14 frequently brilliant; but a rare -- but he rarely agreed with  
15 me, so I'll just say that. Rare -- unusually, he chose our  
16 position on that, which was that hostilities does not exist as  
17 a matter of law, it is a factual inquiry, well supported by  
18 the military case law saying that jurisdictional --  
19 jurisdiction, especially when it used to frequently arise  
20 under Article II, is a factual question to be decided, and --  
21 and that it was an element of the offense to be considered by  
22 the members, not by him; but that he, as the military  
23 commission, had a role to play in making an initial

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1 determination as to whether personal jurisdiction existed over  
2 any defendant who chose to fight it.

3           And so that sort of leads me into the next sort of  
4 phase of decision-making that took place in the case. But  
5 before I go there, I want to make sure that I fully considered  
6 the question that you laid out there for me.

7           MJ [Col COHEN]: Yeah. No, I think that's it. It's just,  
8 I really haven't come to any conclusions. It was just  
9 something that was -- that's been on my mind as I have  
10 re-looked at these issues of the interplay between  
11 jurisdictional elements, and to the extent that it's -- and I  
12 don't disagree generally with the way you described it, which  
13 is, you know, for Congress to pass the 18 U.S.C. statute, they  
14 rely on, you know, a lot of times the Interstate Commerce  
15 Clause as their authority for doing so.

16           You know, the legislative history in this case would  
17 tend to suggest, and then the Supreme Court decisions on this  
18 would tend to suggest that this commission exists to address  
19 specific types of cases that arise as a result of hostilities  
20 or international conflict or however you want to phrase it.  
21 Like I said, I'm -- please don't hold me to what I'm saying  
22 here, it's not a ruling. But generally that notion, right?  
23 It's a special court ----

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1 LDC [MR. CONNELL]: Right.

2 MJ [Col COHEN]: ---- to try special types of cases. And  
3 their authority therefore resides on this. And so the fact  
4 that there's a hostilities element to the offense doesn't  
5 surprise me in the same way that 18 U.S.C. 922(g) has an  
6 interstate commerce element to the offense because that's what  
7 ties it to that particular type of court.

8 LDC [MR. CONNELL]: Right.

9 MJ [Col COHEN]: And so I was just looking to see if you  
10 had any thoughts on how that -- how I should consider that,  
11 analogizing the Interstate Commerce Clause to this idea of a  
12 hostilities clause.

13 LDC [MR. CONNELL]: Right. So the interstate commerce  
14 element in 922(g) is a direct analog to the hostilities  
15 element in 950p(c). The -- I completely agree with the -- and  
16 I'm not saying you said that, but the suggestion that those  
17 are equivalent in my view -- and again, I speak for no one  
18 else, but in my view, that is exactly right; that the -- and  
19 the CMCR, obviously under a previous version of the MCA -- but  
20 under the previous version of the MCA, the statutory language  
21 was not exactly the same, but the Manual for Military  
22 Commissions language was basically the same. When they  
23 adopted that language in 950p(c), it essentially came from the

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1 prior M.M.C. under the Military Commissions Act of 2006.

2           And so in doing that, the -- and we explored this at  
3 some depth in our pleading in 617, if you want to -- if it's  
4 something you -- an idea you want to pursue further, the --  
5 both the Hamdan and the Bahlul court in their quite expansive  
6 discussion of why do military commissions exist and how and  
7 under what constitutional authority do they exist, really  
8 talked about the -- that those -- that element which was  
9 listed as an element in the M.M.C., that element existed to  
10 sort of cabin the free-ranging exercise of power by a military  
11 commission which might otherwise exceed its boundaries,  
12 especially a law of war military commission, right?

13           Of course, we know there are three different kinds of  
14 military commission and an occupation military commission, for  
15 example, might have expansive powers. Some of the Civil War  
16 occupation military commissions, like the Civil Court of  
17 Louisiana, essentially ran the whole government. They handled  
18 the civil cases, they handled the criminal cases, you know,  
19 everything. Whereas as the law of war developed, and law of  
20 war military commissions became more of a specialized  
21 tribunal, you know, their powers is very cabined.

22           And that's even more true in the Military Commissions  
23 Act than it is under sort of the received wisdom of military

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1 commissions because we know from Quirin that a military  
2 commission convened under Article 21 could try U.S. citizens  
3 whereas the Military Commissions Act military commission could  
4 not try U.S. citizens. So Congress specifically acted.

5           And what Hamdan -- the Hamdan and Bahlul decisions  
6 say is they support the idea that you are putting -- that you  
7 have suggested that the element of hostilities is one of  
8 several checks which holds the military commissions within its  
9 fairly narrow jurisdictional limits.

10           Now, that is a separate question from the one which  
11 is at issue next week in the evidentiary hearing. All right.  
12 We make no challenge. We make no claims, or Mr. al Baluchi  
13 makes no claims about whether the -- what Judge Parrella was  
14 fond of calling the nexus portion, everything that leads up to  
15 the word "hostilities" in 950p(c), or the existence of  
16 hostilities -- or really scope is more important than  
17 existence, right, because obviously there have been  
18 hostilities. The question is: When did they begin and what  
19 was their scope? Those -- we make no claims about that.  
20 That's not what we're doing next week.

21           But to the extent that we are having our 502 hearing  
22 because the government would like everybody to just testify  
23 once, the question that is at issue there is not a -- the

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1 hostilities element under 950p(c), which is analogous to the  
2 interstate commerce element under 922(g). It is rather purely  
3 confined to the statutory inquiry that Congress set up as to  
4 what defendants go in these tribunals. And that is confined  
5 to 948a(7) for our purposes. If the person were a U.S.  
6 citizen, it would be a -- it would be different, but for our  
7 purposes, 948a(7) is the controlling authority.

8           And so in one way, they are separate inquiries from  
9 each other. And that's what Judge Pohl decided in 502I, which  
10 is that, yeah, there's two inquiries that are going to happen  
11 here. One is going to be by the members and one is going to  
12 be by the military commission sitting as a judge.

13           Now, the -- what happened from there, just as a  
14 little bit of history here, is that Judge Pohl split the  
15 personal jurisdiction hearing into two parts, one for  
16 Mr. al Hawsawi and one for Mr. al Baluchi. Because as I've  
17 described it before, Mr. al Hawsawi took essentially a law of  
18 war perspective on this, and Mr. al Baluchi took a U.S. policy  
19 perspective on this. There was some overlap in their views,  
20 but not that much.

21           And if at some point this procedural history becomes  
22 important, there's an excellent summary of it in 502EEEE,  
23 pages 7 through 16, which sort of tried to take this vast

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1 meandering procedural history and cabin it into a relatively  
2 small number of pages.

3           And, of course, the military commission ruled against  
4 Mr. al Hawsawi in AE 502BBBB, and then Judge Parrella  
5 retroactively extended that ruling to Mr. al Baluchi in  
6 502FFFF. There's a challenge pending to that in 502QQQQ on  
7 the basis that -- of the -- of the unfairness, both as a due  
8 process matter, but also as just a sort of adversarial system  
9 matter of holding people to decisions in which they were not  
10 allowed to participate. But that's not what we're talking  
11 about today.

12           What we're talking about today is 502BBBB, and it's  
13 important to understand what its reasoning was. Because the  
14 shorthand reasoning that sometimes parties use for what Judge  
15 Pohl was -- argued is generally -- does not capture the full  
16 nuance of it. For example, the government has sometimes  
17 called it a ruling that hostilities existed as a matter of  
18 law, which is not what he ruled. It has also been referred to  
19 as -- that he ruled that it was a political question, and  
20 that's not what he ruled, either. Both of those questions  
21 have been explored and ruled on in other matters. Judge Pohl  
22 ruled on the matter of law question in 502I and Judge Parrella  
23 ruled on the political question issue in 617K.

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1           What he did do is contained in 502BBBB essentially at  
2 pages 4 through 7.

3           MJ [Col COHEN]: Just one second. Do you want to grab  
4 that?

5           I have it. Thank you.

6           LDC [MR. CONNELL]: Thank you. And so at page 4 -- and  
7 I'm looking at the bottom paragraph on page 4 of 502BBBB --  
8 Judge Pohl framed the debate, and in those last two sentences,  
9 or the last sentence and then going on to the next page, he  
10 essentially -- to put it in the terms Judge Parrella used  
11 later in 617K says that Mr. Hawsawi is in the Tadic group, and  
12 that the government is in the Hamdan instruction group, all  
13 right? That's the language that Judge Parrella -- and he's --  
14 that's correct. That was Mr. Hawsawi's argument, was that the  
15 appropriate standard was given by Tadic. The government  
16 countered with the Hamdan.

17           And so you will note that absent from that discussion  
18 whatsoever is Mr. al Baluchi because we were not allowed to  
19 participate in that part of the argument. We were -- we did  
20 ask for permission and received permission to participate in  
21 the part of the argument over what does the part of al Qaeda  
22 standard mean in 948a(7)(C), but Judge Pohl pushed off our  
23 hostilities challenge and deferring it much later in 502QQQ

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1 until we filed a motion to suppress.

2 So what 502BBBB held, and this is at page 6 -- or  
3 reasoned, rather, is that at the top of page 6, that the law  
4 of war, as incorporated by the Military Commissions Act, is  
5 ambiguous. All right. That's the starting point of his  
6 argument, "law of war" is an ambiguous term.

7 And we challenged that idea in our -- in the original  
8 502HHHH, which is the other -- the sort of parent motion to  
9 reconsider. I'm not arguing that today. I'm just addressing  
10 the one question the military commission asked me, but -- I  
11 don't think that's correct, but there it is, and so we're  
12 living with it.

13 And then he said at page 7 that -- and it's the top  
14 paragraph, that the congressional intent to allow jurisdiction  
15 foreclosed a Tadic approach. Because in Judge Pohl's  
16 reasoning, if you applied the Tadic approach, Hawsawi would  
17 automatically win, and Congress didn't mean for Hawsawi to  
18 automatically win.

19 Instead, what he wrote is, "Whatever Congress may  
20 have had in mind when they employed the term 'laws of war' in  
21 the MCA 2009 jurisdictional provisions, they manifestly did  
22 not intend a formulation which would foreclose military  
23 commission jurisdiction for offenses occurring on or at least

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1 sometime before September 11, 2001."

2           So really two pieces to his reasoning: Law of war is  
3 ambiguous; Congress -- well, really three pieces -- Tadic  
4 would foreclose military commission jurisdiction; and Congress  
5 did not intend for that to happen. That reasoning cannot  
6 coexist with the reasoning in 617K.

7           And the -- in 617K -- or excuse me. In the 617  
8 series, in 617D to be specific, the military commission  
9 ordered briefing on a series of issues, all of which boiled  
10 down to the question of whether the military commission could  
11 find hostilities as a matter of law. And he ruled in K, of  
12 course.

13           And there's an interesting parallelism in the  
14 structure of K and BBBB, in that in BBBB, after Judge Pohl  
15 reached that conclusion that I just described, he spent a long  
16 time saying it was constitutional for Congress to make that  
17 decision, which was -- they didn't have to address in 617K.

18           But 617K draws the same divisions, what  
19 Judge Parrella called the Tadic group and the instruction  
20 group. Mr. al Baluchi, who was a participant in the 617  
21 briefing, was part of the instruction group. And the  
22 reasoning of 617K is diametrically opposed to the reasoning of  
23 582BBBB.

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1           As we just discussed, 502BBBB at page 7 essentially  
2 said Congress could not have intended for the law of war to  
3 mean the Tadic standard. And 617K at page 9 holds that the  
4 law of war is the Tadic standard.

5           But it's not just that top-level conflict, there is a  
6 second-order conflict as well. And that is that -- the second  
7 half of their reasoning, which is that at 502BBBB at page 7,  
8 Judge Pohl reached his conclusion because application of the  
9 Tadic standard would foreclose personal jurisdiction over  
10 Mr. al Hawsawi. Whereas the opposite conclusion came about in  
11 617K at pages 9 and 10, that Tadic provides a framework for  
12 the parties to debate the question.

13           So it's not just that Judge Parrella said Tadic and  
14 Judge Pohl said not Tadic, it's also the underlying assumption  
15 that is in conflict; that Judge Pohl believed that application  
16 of the Tadic standard would -- could only reach one result,  
17 whereas Judge Parrella believed that application of the Tadic  
18 standard was, in fact, the framework, created a place for the  
19 parties to debate it out in front of the members, and then  
20 went on to talk about, well, what factors would go into that,  
21 and today I would put forward these factors, but the -- all of  
22 which is fine. But the key part is that Judge Parrella saw it  
23 as, you know, I've set -- here's the boxing ring, right? I

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1 have set up the battlefield for the parties to debate upon, to  
2 totally mix my metaphors. Whereas Judge Pohl saw Tadic as a  
3 one-sided defense win, and that would be automatic, and that  
4 can't be what Congress intended.

5           So that really -- so given that those reasonings are  
6 opposite, what about the idea that leaves one other way that  
7 they could coexist? And that one other way is: What if the  
8 standard for personal jurisdiction is completely different  
9 from the standard for element to be decided by the members,  
10 right? That's possible.

11           If you look at an MDLEA case, what the members are  
12 actually deciding is whether the person intended to smuggle  
13 drugs into the United States, and whether -- what the judge is  
14 deciding is whether there is a sort of due process -- a  
15 connection to the United States that is sufficient to satisfy  
16 due process. Those are really two separate inquiries from  
17 each other because intent does not necessarily establish that  
18 kind of connection.

19           But it's different in the Military Commissions Act  
20 because we're talking about the same word that applies in both  
21 situations. The word "hostilities" appears both in 948a(7)(A)  
22 and (B), and also in 950p(c). It's not two different  
23 formulations of a standard, it's the exact same. But it's not

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1 merely -- so that, of course, brings in the ordinary principle  
2 of statutory construction that, within a single statute when  
3 Congress uses a single word, it means the same thing.

4 Ratzlaf -- R-A-T-Z-L-A-F -- v. United States at  
5 510 U.S. 135, 1994 case, is just an example of that principle  
6 of statutory construction. It almost doesn't need a case  
7 because it's so -- you know, it's so strong in our law, but  
8 just as one place to look for it among others.

9 But Congress went further than that. It was not here  
10 that they simply used the same word, they actually pulled that  
11 word "hostilities" out of the statute and gave it a  
12 definition, meaning that we know that Congress was -- whether  
13 you look at that as a plain-language inquiry or as an intent  
14 inquiry, that Congress meant what it said when it uses  
15 "hostilities" because it defines it as an armed conflict  
16 subject to the laws of war.

17 And once one had looked at that from a statutory  
18 construction point of view, both its plain language and its  
19 sort of manifest intent, then that leaves that question to be  
20 resolved by 617K. Because 617K's actual holding was, when a  
21 military commission is required to determine whether a, quote,  
22 conflict subject to the laws of war, end quote, existed, the  
23 overarching relevant standard is the intensity and

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1 organization standard articulated in Tadic.

2           And if 617K -- if -- defines the word -- tells us how  
3 the military commission approaches the question of  
4 hostilities, then that applies equally in the personal  
5 jurisdiction portion in 948a(7) as it does to the members in  
6 948p(c).

7           MJ [Col COHEN]: I see what you're saying.

8           LDC [MR. CONNELL]: I just have one last observation,  
9 which is, why does all that matter, all right?

10           Interestingly, at least in -- the government takes a  
11 different position in the Nashiri case, but in this  
12 position -- in this case, both Mr. al Baluchi and the  
13 government think that U.S. policies matter, and U.S. political  
14 decisions matter. The question that is being resolved is:  
15 Okay, so they matter; what do they mean?

16           And the government has arguments that it has put  
17 forward that various political decisions made by various  
18 political actors mean that hostilities have existed since 1996  
19 to the present, right? That's fine. That's the argument --  
20 government gets to make that argument; they put forward facts,  
21 they draw inferences from them.

22           Mr. al Baluchi puts forward many of the same facts,  
23 some different, but draws different inferences from them, and

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1 we think that the evidence supports those differences. I'll  
2 give you a perfect example, like an easy one. The AUMF.

3           So approximately a week after the attacks of  
4 September 11, Congress passes the AUMF. That's just a  
5 historical fact, everyone agrees, and it's a political act of  
6 a political branch. But what does that mean? Like what is  
7 the inference to be drawn from that?

8           The government draws the inference from that that  
9 that is a retroactive determination by Congress that  
10 hostilities existed prior to the attacks of 9/11.

11           Mr. al Baluchi takes the -- draws the conclusion from  
12 that that Congress, by choosing to use an AUMF as opposed to a  
13 declaration of war, has delegated the decision as to whether  
14 to enter a state of armed conflict or not to the President.

15           And then on 7 October 2001, the President decides we  
16 are going to -- I'm going to exercise the authority which has  
17 been granted to me by Congress under the AUMF and begin --  
18 initiate a period of armed conflict.

19           And so both of us are looking at the same political  
20 act, but we're just drawing two different conclusions from it.  
21 And we think that there's substantial evidence that we can  
22 bring forward to support that conclusion.

23           Just as that one -- just give you a little bit more

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1 of this example, this is not the first AUMF that Congress has  
2 ever passed. There is an existing AUMF called the Taiwan AUMF  
3 which authorizes the President to use armed force against  
4 China to defend Taiwan. That was a delegation of authority by  
5 Congress to the President where the President can choose to --  
6 how to deal with this foreign policy question of what are we  
7 going to do about the Taiwan Strait and the tensions in the  
8 Taiwan Strait.

9 All presidents since the passing of the Taiwan AUMF  
10 have elected not to use armed force against China except very  
11 minor, you know, border skirmishes -- or air skirmishes, I  
12 suppose I should say; but in general not to use armed force,  
13 not to enter a state of armed conflict.

14 That would be different if Congress had chosen to  
15 declare war against China. If they had chosen to declare war,  
16 declaration of war is a speech act; Congress says we're at  
17 war; therefore, we are at war. But an AUMF is different. An  
18 AUMF gives -- transfers authority from one branch to a  
19 coordinate branch, the President, and says, "President, you  
20 use your discretion in this situation."

21 Some of the evidence around this AUMF that we would  
22 bring forward, for example, is that President Bush seriously  
23 considered and, in fact, proposed alternatives to violence

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1 against al Qaeda in Afghanistan through diplomatic channels,  
2 through intelligence channels, through obviously economic and  
3 criminal channels.

4           The place where the government and we part company on  
5 this is that we never make the claim that, of the five manners  
6 of force projection of the United States, that they're  
7 necessarily mutually exclusive with each other. It is not  
8 that the exercise of military force precludes diplomatic,  
9 intelligence, economic, and criminal activity, but those are  
10 on a menu of options which are available to the President or  
11 whoever the decision-maker is, in this case, the President.

12           And the President can choose among them and can  
13 choose, look, I'm going to give diplomacy a chance to work.  
14 I'm going to make an ultimatum to the Taliban to expel Usama  
15 bin Laden and return -- subject him to the criminal processes  
16 of the United States. That is the place where President Bush  
17 actually and historically elected to try diplomatic and  
18 economic and criminal solutions before resorting to military  
19 force.

20           One can imagine lots of reasons why that might be a  
21 good idea, including the loss of life and expense of a war,  
22 but also politically, that the United States wanted to --  
23 might want to position itself with the United Nations or its

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1 European allies or others to say, look, we gave diplomacy a  
2 chance before we entered armed conflict.

3 I'm not arguing the hostilities question now. I'm  
4 just trying to give you an example of why it matters that the  
5 policy and politics can be brought before a military  
6 commission on this personal jurisdiction question to be  
7 debated as opposed to simply being cut off under the reasoning  
8 that Judge Pohl used.

9 So it's my view that the reasoning in 502BBBB did not  
10 survive 617K. It's completely obvious that Judge Parrella did  
11 not explicitly say that he was overruling 502BBBB, but on  
12 multiple levels their -- both their holdings and their  
13 reasoning are completely in conflict.

14 And so even though we were not completely -- you  
15 know, Judge Parrella did not adopt our position in 617K, but  
16 it is the case -- you know, it's the last opinion on this, and  
17 it's the most sort of comprehensive one in which all parties  
18 were able to participate. And I think that 617K states the  
19 standard that we're bound by at this point, and I think that  
20 it supplants or replaces the reasoning in 502BBBB.

21 MJ [Co1 COHEN]: Okay. I did have one question.

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

23 MJ [Co1 COHEN]: Well, at least one.

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1           You said something about page 7. Do you have 502BBBB  
2 with you?

3           LDC [MR. CONNELL]: I do, sir.

4           MJ [Col COHEN]: Okay. And you guys are welcome to -- so  
5 this is not like me challenging so much as to make sure I  
6 understand how you're reading this.

7           LDC [MR. CONNELL]: Challenge away, sir.

8           MJ [Col COHEN]: So the very -- in paragraph 6 or  
9 subparagraph 6, it says -- the language that I read is, "To  
10 the extent this indicates a congressional conception of  
11 hostilities to some degree inconsistent with Tadic or other  
12 customary international law or standards prevailing before  
13 that time, the MCA 2009, a federal statute occurring later in  
14 time controls."

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

16          MJ [Col COHEN]: So my question is really ----

17          LDC [MR. CONNELL]: Did it really reject Tadic?

18          MJ [Col COHEN]: Right. So your assertion was pretty  
19 strong like when he says, well, if it is Tadic, you know, they  
20 win, and just -- I didn't see it as that strong.

21          LDC [MR. CONNELL]: Yeah. Let me show you where I draw  
22 that conclusion from. You can assess it for yourself.

23          MJ [Col COHEN]: Okay.

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1 LDC [MR. CONNELL]: If you will flip back to page 4.

2 MJ [Col COHEN]: Okay.

3 LDC [MR. CONNELL]: Which is the beginning of -- you know,  
4 this is paragraphs 1 and 2 of this, which we just read is  
5 paragraph 6 of.

6 And so paragraph 1 on page 4 says "Mr. al Hawsawi  
7 argues that he did not fall into any of the three categories  
8 because hostilities did not exist" -- and then gives the  
9 statutory definition.

10 Then at the beginning of paragraph number 2, this is  
11 why I began with sort of setting the framework.

12 MJ [Col COHEN]: Okay.

13 LDC [MR. CONNELL]: "Whether Mr. al Hawsawi's argument is  
14 correct largely depends on the terms 'law of war' as used by  
15 Congress in the cited MCA 2009 provision." Then he lets --  
16 states out the positions of the parties. Mr. al Hawsawi says  
17 Tadic. The government says Hamdan.

18 MJ [Col COHEN]: I understand.

19 LDC [MR. CONNELL]: So that's where my -- the strength of  
20 my argument comes from in that I agree that that sentence that  
21 we just looked at together, read in isolation, is really kind  
22 of a soft-peddling of the sentence.

23 But when you read it in the context of how this

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1 argument was set up, Judge Pohl in at least in what he  
2 expresses here believed that the -- that the determination of  
3 the standard was largely outcome determinative.

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

5 As you guys have noticed, that's another unique  
6 aspect of this case, is that I am not only reading just  
7 Supreme Court or, you know, CAAF opinions; I'm actually going  
8 back and reading other judges' opinions and trying to discern  
9 what they said. And I appreciate that.

10 LDC [MR. CONNELL]: Right. And as you've said here  
11 before, sir, this is not a situation of your making, and I  
12 understand that the -- what I am suggesting of the court is  
13 not easy, right? Nobody wants to say that one judge sub  
14 silentio overruled another judge. I get that, right?

15 From this very podium, I have argued the idea of  
16 horizontal deference, that a new judge coming in, unless  
17 there's a very good reason, should leave the decisions of the  
18 previous judge undisturbed. But what you inherit, sir, is two  
19 decisions which conflict with each other. And I would suggest  
20 that either more simply looking at last in time but more  
21 complexly looking at the reasoning and the second and third  
22 order consequences of the reasoning would lead you to adopt  
23 617K as the appropriate standard and not its predecessor.

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1 MJ [Col COHEN]: Okay. One other question.

2 So because this is in 502BBBB, at least in reference,  
3 and not so much in 617K, and that is the issue of -- in the --  
4 in the law -- let me pull it up. In 948d, where we talk about  
5 jurisdiction, I realize we are talking more about subject  
6 matter jurisdiction there as opposed to in personam  
7 jurisdiction but nonetheless Congress -- talking about the  
8 intent of Congress, and when you are trying to -- and that's  
9 what I understand generally what Judge Pohl was trying to get  
10 at.

11 LDC [MR. CONNELL]: I do.

12 MJ [Col COHEN]: I mean, they specifically talk about the  
13 events of September 11, 2001 ----

14 LDC [MR. CONNELL]: 2001.

15 MJ [Col COHEN]: ---- as these offenses -- at a minimum  
16 these offenses can be tried, you know, by a military  
17 commission.

18 How does -- so then when weighing potentially which  
19 judge do I think got it right ----

20 LDC [MR. CONNELL]: Right.

21 MJ [Col COHEN]: ---- or neither.

22 LDC [MR. CONNELL]: Right. How does it play ----

23 MJ [Col COHEN]: How does that -- how does that play into

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1 there when I have -- like you said, I agree, statutory  
2 construction.

3 Words have meaning.

4 LDC [MR. CONNELL]: Right.

5 MJ [Col COHEN]: So clearly there's some inference -- not  
6 even inference, some direct indication from Congress that they  
7 intended for the September 11th, 2001 events to be tried in a  
8 military tribunal or military commission.

9 LDC [MR. CONNELL]: I understand, sir. So here's what I  
10 think is happening there. And if one reads 948d in isolation,  
11 I can see how -- and some judges have come to that conclusion,  
12 right? I mean, this is an issue which has shattered jurists,  
13 right? They have gone in every conceivable direction. When  
14 you read both of those al Bahlul decisions, and they're just  
15 going in every different direction.

16 But the -- what I think should be done is to read  
17 that provision in conjunction with 948a(7), and what I think  
18 that Congress was trying to do is to leave open the  
19 possibility that a military commission could conclude that  
20 hostilities existed prior to September 11th. The -- I think  
21 that what they were trying to do by those two pieces together  
22 was to not foreclose it in either direction, not to say no,  
23 there were no -- there was no military commission jurisdiction

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1 during that time, or to say that the -- any case charged from  
2 pre -- from before 9/11 would necessarily establish all of the  
3 elements which would be necessary to be tried in a military  
4 commission.

5           And so when -- I think that they were trying to  
6 address -- principally in d, they were trying to oppress the  
7 ex post facto problem, right? There were testimony before  
8 Congress. Everybody knew that conspiracy was a very hotly  
9 contested application of the law of war, and that there were  
10 definite schools of thought on whether conspiracy was a  
11 violation of the international law of war or not.

12           And if conspiracy was not a violation of the  
13 international law of war, then Congress was defining it as a  
14 violation of U.S. law in the Military Commissions Act. That  
15 would bring the Ex Post Facto Clause into play. In fact, one  
16 of the -- one of the motions which is still pending before  
17 you, 490, presents that exact issue. And there's extensive  
18 briefing -- in fact, General Martins and I both cited our  
19 last -- at the last hearing our briefing on that to you.

20           But Congress knew that, too, right? We didn't think  
21 that up, right? Congress knew what a serious issue this was.  
22 In fact, when we talk about Rear Admiral Reismeier later, you  
23 know, one of the questions we're going to talk about is, you

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1 know, what his views about whether conspiracy was a violation  
2 of the law of war are, and whether those influence him in some  
3 way here.

4           The -- in doing so, Congress, I think, was trying to  
5 legislatively address the ex post facto problem. And, in  
6 fact, if you go back to the first Hamdan decision in the  
7 D.C. Circuit, the one that never went en banc, there's a great  
8 deal of discussion of the legislative interplay of the ex post  
9 facto clause and, in that situation, material support, not  
10 conspiracy, but how those two things -- what Congress must  
11 have been thinking about ex post facto.

12           It never really went anywhere, right? That's the  
13 case that was not appealed by the United States Government  
14 past the panel, but there is a good deal of discussion about  
15 that -- about Congress' thinking about ex post facto,  
16 specifically with respect to 949d. And to the extent that  
17 that reasoning survives al Bahlul, it's still binding on this  
18 military commission.

19           So that's what I -- so that's what I think was going  
20 on in 949d. But I think that by doing -- by putting both  
21 948a(7) and 948d in the same statute, Congress was saying that  
22 they trusted you, that they trusted a military commission to  
23 take the standard that they had articulated in 948a(7) and to

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1 apply it. And they were leaving open the possibility that  
2 that military judge would conclude that there either was or  
3 was not military commission jurisdiction in any particular  
4 case. And so that's what I think is going on there.

5 I don't think that we can pick out 948d from the rest  
6 of the statute and elevate it to a -- the highest possible  
7 place. I think that it has to be read in conjunction with the  
8 rest of the statute in the same way that the word  
9 "hostilities" has to be read in conjunction in the two places.

10 MJ [Col COHEN]: Last question. This is an iterative  
11 process, like I said.

12 LDC [MR. CONNELL]: Of course.

13 MJ [Col COHEN]: To what extent, if any, because --  
14 there's various options I have here. I could say, you know  
15 what? 502BBBB sounds right and I'm going back and  
16 reconsidering 617K.

17 LDC [MR. CONNELL]: Right. That's one of your options.

18 MJ [Col COHEN]: Because perhaps Tadic might -- should  
19 inform the decision but shouldn't be the decision.

20 LDC [MR. CONNELL]: Sure.

21 MJ [Col COHEN]: To perhaps -- especially if 502BBBB is  
22 correct and that international law morphs over time because  
23 there's not a legislative body for it.

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1 LDC [MR. CONNELL]: Sure.

2 MJ [Col COHEN]: And perhaps the instances of  
3 September 11th, 2001, were so different from anything that was  
4 expressed in Tadic or Haradinaj or any of those kind of  
5 circumstances that this should be the new standard.

6 What do I do, though -- to what extent should the  
7 habeas decisions by a Supreme Court play into this with  
8 respect to the idea that they found that there's still  
9 authority to hold many of these gentlemen as a result of these  
10 hostilities and the fact that the laws of war apply?

11 LDC [MR. CONNELL]: Right. I love that question.

12 The -- so there are really two places that it  
13 matters. The first one is, to some extent, those cases -- and  
14 I'm thinking of Hamdan v. Rumsfeld in particular, right ----

15 MJ [Col COHEN]: That would be a good one.

16 LDC [MR. CONNELL]: ---- which is an extraordinary writ  
17 case, informed what Congress was thinking when they passed the  
18 Military Commissions Act of 2006. Because I don't agree with  
19 some arguments that are sometimes made that Hamdan necessarily  
20 supplies us controlling law, because in some ways Congress  
21 overruled Hamdan; to the extent that it was making  
22 nonconstitutional decisions, it overruled Hamdan.

23 Hamdan informs us in important ways, for example,

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1 Hamdan tells us that a political decision as to the nature of  
2 hostilities is not necessarily controlling because President  
3 Bush famously in February of 2002 had issued an executive  
4 order characterizing the nature of the conflict with al Qaeda  
5 and Taliban as noninternational, non -- noninternational,  
6 right? It was neither a noninternational armed -- armed  
7 conflict not of an international character. It wasn't that  
8 because he said, you know, United States and Afghanistan. And  
9 neither was it an international armed conflict because a  
10 non-state actor like al Qaeda was involved.

11           And that came to the Supreme Court. And they said,  
12 nope, it doesn't matter that the President decided that --  
13 this nature, we say Common Article III applies.

14           The -- Hamdan also, however, does a -- is very useful  
15 in laying out on this jurisdiction question what is the  
16 background. And the Stevens plurality talks about the  
17 traditional dimensions of jurisdiction in a military  
18 commission. One of those dimensions is scope of the conflict,  
19 right? That the crime for a law of war military commission  
20 had to take place during the scope of the conflict.

21           One of those dimensions is personal, that it had to  
22 be a person who was subject to military commissions  
23 jurisdiction, usually laid out by the President in executive

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1 order, right? The -- Roosevelt or Lincoln laid out who was  
2 going to be subject to them, and those persons could be  
3 subject to them.

4 There are others that did not -- and so when Congress  
5 was -- and there was also subject matter, right? They had to  
6 be violations of the law of war, and let's bracket the  
7 decision, how are we going to figure out what the law of war  
8 is, but it had to be violations of the law of war.

9 Those three dimensions all made it into the Military  
10 Commissions Act of 2006. The -- and later, even more  
11 powerfully, in 2009, in that the scope of the conflict became  
12 the personal -- part of the personal jurisdiction inquiry.  
13 Whereas, the nature of the offense became a question for the  
14 members, what we started off talking about today, like  
15 Interstate Commerce Clause.

16 And the geographical element that was traditionally  
17 present, that a military commission had to be convened in the  
18 theater of war, did not make it into the Military Commissions  
19 Act at all. So in that way, Hamdan very significantly informs  
20 the exercise of jurisdiction, and, you know, Congress was  
21 drawing on Hamdan for that. Now, that's part one.

22 Part two is, what is the relationship between the  
23 Hamdi -- not Hamdan, but Hamdi standard for holding prisoners

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1 and the exercise of jurisdiction of a military commission?

2 Those two things are related, but they're not contiguous. Let  
3 me explain.

4 In Hamdi, which was in 2004, right, so early in the  
5 war on terror -- so-called war on terror, the -- the  
6 government is still making representations. And in Hamdi, the  
7 Supreme Court says the government tells us that it will only  
8 hold prisoners if two different things are satisfied: First,  
9 that they were part of al Qaeda or the Taliban; and second --  
10 and, conjunctive, that they participated in hostilities  
11 against the United States or its coalition partners.

12 That's the standard that D.C. Circuit and everybody  
13 else applies born of Hamdi. But you will note that that  
14 standard does not survive in its conjunctive form into the  
15 Military Commissions Act, because the Military Commissions Act  
16 of 2006 had a different jurisdictional basis than the Military  
17 Commissions Act of 2009.

18 The Military Commissions Act of 2006 subjected a  
19 person to military commission jurisdiction if the President  
20 had designated them or if they had been found to be an enemy  
21 combatant. And that's where the Khadr case comes up, was an  
22 unlawful enemy combatant the same thing as an enemy combatant,  
23 et cetera.

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1           So that was what Congress was trying to scrap, right?  
2 It knew that that standard, which had drawn on Hamdi and to  
3 the President's military order of November 13, 2001, and  
4 Congress said that that standard is not working for us, right?  
5 It's been a significant problem in the military commissions.  
6 It's made its way up one way or another to the D.C. Circuit,  
7 so we're going to give a new standard. And that's the -- the  
8 standard we are addressing now is the first time we've done  
9 it, so -- that we've had this standard.

10           And so the connection of our personal jurisdiction  
11 standard is in some way drawing upon the habeas cases in  
12 Hamdi, but it is in other ways expanding upon what Hamdi did,  
13 right? Because Hamdi had a conjunctive standard, that you had  
14 to -- a person had to meet both prongs, whereas 948a(7) has a  
15 disjunctive standard, that any of the three prongs can be  
16 satisfied and general -- generate jurisdiction.

17           So that might be a more complicated answer than you  
18 wanted, but there is a real but complex relationship between  
19 the habeas cases as decided by the Supreme Court and the  
20 D.C. Circuit and the Military Commissions Act of 2007 [**sic**].  
21 Those standards are related but they're not coextensive.

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

23           LDC [MR. CONNELL]: Thank you.

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1 MJ [Col COHEN]: Before we have any additional argument,  
2 we'll take a 15-minute comfort break. We're in recess.

3 [The R.M.C. 803 session recessed at 1505, 9 September 2019.]

4 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1532,  
2 9 September 2019.]

3 MJ [Col COHEN]: The commission is called to order. All  
4 parties present when we recessed are again present. I will  
5 note that Mr. Ryan has also joined us.

6 Good morning -- or excuse me, good afternoon. How  
7 are you doing?

8 DC [MAJ WILKINSON]: Good afternoon, sir.

9 MJ [Col COHEN]: Excellent.

10 DC [MAJ WILKINSON]: All right. I was not planning  
11 actually to say much, but what I have in mind now is mainly  
12 responsive to the things you and Mr. Connell were talking  
13 about.

14 MJ [Col COHEN]: Okay.

15 DC [MAJ WILKINSON]: And I'll slow myself down.

16 Firstly, on the basic question of how 502BBBB  
17 interacts with 617K, we agree with what Mr. al Baluchi's team  
18 had to say. We think he put that and reasoned that extremely  
19 well.

20 Of course, you know already a trial court is not  
21 bound by its own decision; it's not precedent for itself. And  
22 that if you see, as with these motions to reconsider, that  
23 your predecessors got the law wrong, you have both the right,

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1 a power and a duty to get it right, and we know you're  
2 committed to doing just that.

3           The one thing I'll say about 617K, if I remember from  
4 the last time I read it, I believe it modifies Tadic insofar  
5 as it will allow statements of a private armed group to be  
6 relevant to armed conflict; and insofar as it says that, we  
7 disagree completely. I think we proved that with witnesses  
8 and judicial notice facts before, that statements of private  
9 groups simply did not in the law of war have anything to do  
10 with whether there was actually an armed conflict. You had to  
11 look at facts on the ground.

12           On the meaning of this language about before, on, or  
13 after 9/11 in 948d, I also agree with Mr. al Baluchi's team  
14 that you have two choices in front of you. One choice is the  
15 one that Judge Pohl took in 502BBBB, which is to say,  
16 regardless of what facts you put on and regardless of how you  
17 argued it, Congress wanted for this specific case to be in a  
18 military commission. If that means we have to reinterpret  
19 laws of war, we do it. That means you go here.

20           Of course, if you do it that way, then what you've  
21 got is a bill of attainder, as we argued in 625 already.  
22 That's not our entire bill of attainder argument, there are  
23 other ways that Congress put a thumb on the scales in the

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1 government's favor that we -- that should be addressed  
2 regardless of how you come out on this one, but it leads to a  
3 dismissal on those grounds.

4           The other is the interpretation that we argued in  
5 December of 2017, which is very similar to what Mr. Connell  
6 just said: That that language, when you read it in connection  
7 with other parts of the act, just says, do not take it as read  
8 that there is armed conflict that only starts on 9/11. You  
9 should be able to make your individual determination based on  
10 the facts in front of you, was there armed conflict or not.

11           I will note there is other language that we point to  
12 in the briefs that says a military commission is a competent  
13 tribunal to determine its own jurisdiction. So that does  
14 favor the latter interpretation. But if you take the latter  
15 interpretation and you take laws of war as meaning the law of  
16 war as it stood at the time of the alleged crime, then it  
17 leads to dismissal anyway, because that's something else that  
18 Judge Pohl understood.

19           If you use the Tadic standard, which we showed with  
20 an expert witness was customary at the time, and you used the  
21 facts we've got here, with the standard that sporadic attacks  
22 are not armed conflict, and that you cannot have an armed  
23 conflict just from terrorism, then that also leads to

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1 dismissal; there's no way you can get this out of those facts.

2           On the question you raised about hostilities as a  
3 jurisdictional element, I should tell you you have an  
4 excellent forum if you want to explore that a little further,  
5 which would be by granting oral argument on 488J, which is our  
6 motion to reconsider 488. Because in 488, Judge Pohl  
7 ultimately relied on the CMCR's case in U.S. v. Nashiri. And  
8 in the Nashiri case, after they made their actual holding,  
9 which is, the statute doesn't require hostilities for subject  
10 matter jurisdiction and, therefore, it shouldn't have been  
11 dismissed on that basis, they said, assuming arguendo that  
12 under the statute it has anything to do with jurisdiction, you  
13 could do an interstate commerce-type jurisdictional element.  
14 And I think Mr. Connell talked very well about how those work  
15 in law. So although that particular language we didn't talk  
16 much about in 488J, that could be a good forum to explore all  
17 of that together.

18           I will note that, although -- I'm not going to argue  
19 488 today, but in 488 and 502, we believe there is a -- well,  
20 we know there is a constitutional element to the requirement  
21 of hostilities that is entirely independent and goes beyond  
22 what Congress wanted to do in this particular statute. That's  
23 why we believe that the Nashiri case doesn't control in 488,

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1 as Judge Pohl held it did, because it doesn't address the  
2 constitutional requirement.

3 I will note that in Ex parte Quirin, that case was  
4 tried under the old Article 15 laws of war statute, which is  
5 like Article 22 of the UCMJ, and just says basically, you can  
6 have military commissions, and says -- you know, puts no other  
7 limits.

8 And the Quirin court then said that when Congress  
9 passed Article 15 of the Articles of War, they had provided,  
10 so far as they may constitutionally do so, that military  
11 tribunals have jurisdiction to try offenses against the law of  
12 war.

13 So that gave them the outer limits of what they could  
14 empower commissions to do. And you'll notice in  
15 Ex parte Quirin, when they looked at the jurisdiction, they  
16 didn't just defer to the Executive or to anyone else; they  
17 said we're going to look de novo, do you have something that  
18 legitimately may be tried as a war crime? They said yes, they  
19 did.

20 And, in fact, in their last brief in the 502 series,  
21 the government cited a case, Johnson v. Eisentrager, I  
22 believe. And in that case something very similar happens;  
23 that is, they have a German committing a war crime in China,

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1 and a lot of the case and what they cite it for is that  
2 Congress is not giving them very much in the way of rights.

3           But when it comes to -- they said, we are going to  
4 examine one thing, and that's the power of this military  
5 commission to try them for the war crime of fighting after  
6 their government capitulates. And just as in Quirin, what  
7 they did is they looked at international treaties. I think  
8 there was a German one by Oppenheim, and they looked at  
9 Emmerich de Vattel from the 18th century and so forth. But  
10 the same basic thing, that when it came to the basic issue of  
11 law of war commission jurisdiction, they looked at what the  
12 law of war said and they -- and they analyzed it accordingly.

13           And if that's the outer limits of what Congress can  
14 do, that means with the statute, Congress could not extend the  
15 jurisdiction of military commissions a bit beyond what the  
16 international law of war allowed.

17           So -- and we argue -- you know, again, this is more  
18 in 488, though I think we have some in 502, too, that it's  
19 important to have that as a judicial determination that can be  
20 reviewed de novo and not simply to have a group of military  
21 officers go off in secret and vote on that for themselves,  
22 which might too easily become a vote, do they want to be able  
23 to convict these accused or not.

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1           On the subject of how hostilities shall be proved, we  
2 have always said, and we reaffirm, that we absolutely support  
3 the right of any defendant here to bring the evidence that he  
4 sees fit, to prove it as he sees fit. But as a tactical  
5 matter, we didn't see the need for evidence about U.S.  
6 policies and behavior because we believe the objective facts  
7 on the ground, particularly the objective facts about the  
8 violence, are the main things you need to look at. And when  
9 you do, you have only sporadic short-lived violence with lots  
10 of time in between.

11           But I have to express some extra gratitude there to  
12 Mr. al Baluchi's team, even as I'm diverging a bit from their  
13 position, because one of the authorities that we used to  
14 establish that is an affidavit from Professor Marco Sassòli,  
15 one of the top law of war experts in the world, and it was  
16 Mr. al Baluchi's team who had introduced that affidavit in the  
17 litigation over 490, which is also subject matter jurisdiction  
18 for the same reason. If you don't have a proper war crime  
19 under the law as it stood, then there's no jurisdiction to try  
20 that.

21           You talked a little bit about the possibility maybe  
22 the law of war changed on 9/11. Supposing that it did, two  
23 things we'll ask you to keep in mind. The law of war

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1 certainly can change -- that was something Judge Pohl got  
2 right in 502BBBB -- but it can't change retroactively.

3           The principle of legality -- you know, an analog to  
4 the ex post facto clause is you use the law as it was at the  
5 time of the alleged crime. If people see a need to change it,  
6 let governments either get together and sign some new treaties  
7 or let them start behaving in such a way uniformly that you've  
8 really got a new custom. But a new custom or a new reality or  
9 even a new -- if they wanted to do a new Geneva Convention,  
10 can't go back before 9/11 and apply then.

11           And I should also say -- it's a point we've made a  
12 few times -- if you look at the proof the government brought  
13 in December of 2017, and also at the specific acts mentioned  
14 on the charge sheet, everything that Mr. Hawsawi is accused of  
15 doing, he is accused of doing before the first plane is  
16 hijacked. According to the government's evidence, by the time  
17 the hijacking started, he was already on a plane out of the  
18 Emirates off to Pakistan.

19           And it is also a principle -- we've cited both the  
20 ICTY and even the Nuremberg Major War Criminals Tribunal, that  
21 you do not have war crimes before the beginning of armed  
22 conflict. So while we don't accept that 9/11 was either a  
23 change in the law of war or even itself armed conflict -- we

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1 think that at the earliest that happened weeks later when  
2 there were U.S. forces going into Afghanistan, that to -- in  
3 order to charge him with a war crime in this tribunal, you  
4 would have to have armed conflict before 9/11 began which, if  
5 anything, is even a harder case, though in both cases, in  
6 reality, it's impossible.

7           You also asked a question that we've talked about, of  
8 course, it's very important to our argument on  
9 reconsideration, about the relevance of detention habeas  
10 cases. And we take the view that that's a completely  
11 different area of law, and that the Supreme Court said exactly  
12 that in the case of Lee v. Madigan.

13           The detention habeas mostly rests on  
14 Ludecke v. Watkins the case that says there's a lot of  
15 deference and a lot of flexibility for the government in the  
16 area of detaining people in connection with armed conflict.  
17 But when it comes to criminal justice and possibly executing  
18 somebody for a violation, all that deference goes away. It's  
19 just -- it's a different standard.

20           In that case, they used the avoidance canon and they  
21 interpreted the statute in such a way they didn't have to hit  
22 the constitutional issue directly. But the principle is still  
23 the same, which is that they're not the same area of law.

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1 That also fits Baker v. Carr, which says when you talk about  
2 deference to the political branches, even in the realm of  
3 hostilities, it rests on reason, not habit, and it depends on  
4 the situations.

5           There's an analogy you might make that I just thought  
6 of. If someone's accused of an act of domestic violence, you  
7 might have two different legal proceedings. You might have a  
8 hearing on a temporary restraining order with very low  
9 standards, a lot of deference to the accuser. Its purpose is  
10 just to keep her safe, and there's not a lot of due process  
11 for the accused. You might have a criminal case to punish him  
12 for the domestic violence, in which case he gets the full set  
13 of trial rights, it's proof beyond a reasonable doubt and  
14 there's not such deference.

15           It would be a mistake to try to take the standards  
16 from one and put them into the other. And likewise, it's a  
17 mistake to take standards from security detention or other  
18 areas of law and put them into military criminal jurisdiction  
19 where they don't belong.

20           Might I have a moment to confer with my team?

21           MJ [Col COHEN]: You may.

22           DC [MAJ WILKINSON]: That's it, sir. If you have --  
23 unless you have questions of me, that's all I have.

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1 MJ [Col COHEN]: Just one question.

2 DC [MAJ WILKINSON]: Yes, sir.

3 MJ [Col COHEN]: In looking at -- this is just me really  
4 kind of asking for the record to see what -- try to keep up.  
5 There's still a lot for me to get through.

6 To the extent that -- has anyone addressed whether  
7 949a(7)(B) equates at all to a principal theory of liability?

8 DC [MAJ WILKINSON]: And what does it say in 948a(7)(B)?

9 MJ [Col COHEN]: "As purposefully and materially supported  
10 hostilities against the United States or its coalition  
11 partners." Typically under the UCMJ under Article 77, you  
12 could have had someone charged as a principal -- I think it's  
13 77, the principal theory. Essentially, you don't have to  
14 actually commit the act but if you aided, abetted or  
15 encouraged someone to commit the act, you are held as if you  
16 committed the act yourself.

17 So my question is: I didn't see the word "principal  
18 theory" in there, but it's the same general notion there  
19 under (7)(B) that that might be a principal theory of  
20 liability.

21 DC [MAJ WILKINSON]: I don't remember us litigating in  
22 those particular terms.

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

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1 DC [MAJ WILKINSON]: Yes, sir.

2 MJ [Col COHEN]: Yeah. It is Article 77. All right.

3 Is there any additional argument from the defense?

4 LDC [MR. CONNELL]: I know the answer to that question,  
5 sir, if you want.

6 MJ [Col COHEN]: Sure. I will let you address that, then  
7 I'll let the government go. Or would you want to save it for  
8 rebuttal? I'll tell you what, I'll save it for rebuttal.

9 Mr. Trivett, do you wish to address this? You may.

10 So one other option I have, Mr. Trivett, is to do  
11 nothing and let the two rulings continue to exist in the  
12 record, which I have not -- also not foreclosed, so feel free  
13 to address that as well.

14 MTC [MR. TRIVETT]: Yes, sir. And quite frankly, sir,  
15 that's our position.

16 MJ [Col COHEN]: Okay.

17 MTC [MR. TRIVETT]: Is that they live completely in  
18 harmony with one another, that there is nothing inconsistent  
19 in 617K from 502BBBB.

20 In a lot of ways with this hostilities issue, I feel  
21 like I'm stuck in a bad horror movie where there's this  
22 supernatural monster who I think I've killed, chopped up in  
23 little pieces, spread out all over the country, continues to

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1 come back together and haunt us again.

2 We thought we killed this monster in 488. We thought  
3 we killed it in 502. And we thought for sure it was dead  
4 after 617K.

5 I've come to terms at this point with the fact that I  
6 can't kill this monster. I don't have the power or the  
7 authority to do it. There's only one person in this room that  
8 does, and respectfully, sir, that's you.

9 The Tadic standard as discussed by Judge Pohl, it  
10 seemed as if Mr. Connell were arguing -- and I think the  
11 military judge picked up on this -- that somehow Judge Pohl  
12 said, I agree that if Tadic applies that jurisdiction is  
13 foreclosed. That was never the case, and that was not the  
14 context in which the issue was even addressed.

15 The parties argued over the correct instruction to be  
16 provided to the members at trial for proving the common  
17 element of -- in the context of and associated with  
18 hostilities.

19 The prosecution's first position was, Judge, you can  
20 decide this as a matter of law. But if you don't, we'll prove  
21 it factually in the jurisdictional hearing against  
22 Mr. Hawsawi, which we did in December of 2017.

23 We believed that the Hamdan standard as approved by

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1 the CMCr and then later also addressed favorably in the  
2 al Bahlul case of the CMCr was the binding standard on the  
3 commission. We explained to Judge Parrella that in Hamdan --  
4 because I was one of the prosecutors in Hamdan; I was  
5 responsible for this piece of the litigation -- that we  
6 actually proposed the Tadic standard and ultimately  
7 Judge Allred took several related concepts from Tadic, from  
8 other things that were requested from the defense counsel in  
9 Hamdan and put together an instruction that was very much like  
10 Tadic, but not quite verbatim with it.

11 We could have lived with either one. We proposed  
12 one. We won in Hamdan on the other. Didn't matter to us. It  
13 wasn't an issue that mattered as far as how it would impact  
14 our litigation because it wasn't going to.

15 It started impacting our litigation in this case in a  
16 major way primarily because of the last element that was in  
17 there, and the last element that was in the Hamdan instruction  
18 was and whatever the other -- whatever information the other  
19 parties feel is relevant to armed conflict.

20 Judge Parrella recognized that that was a  
21 never-ending hole in which the standard, an actual legal  
22 standard could get completely swallowed up by whatever the  
23 parties felt like was the appropriate standard or the

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1 appropriate information for the members to consider.

2           So when ruling in 617K that -- Judge Pohl's ruling in  
3 502BBBB applied to everyone, it was the only reasonable  
4 answer. They're all alleged to be part of the same armed  
5 conflict between the United States and al Qaeda. They're all  
6 alleged to be principals in the attacks of September 11th.

7           If you were going to decide as a matter of law for  
8 purposes of jurisdiction that you had jurisdiction over the  
9 offenses because hostilities existed, of course that would  
10 apply to everyone; it would have to, just by logic and reason.

11           The legislative history of the act makes clear that  
12 it intended to provide jurisdiction for the embassy attacks,  
13 the USS COLE attack, and the September 11th attacks. The  
14 September 11th attacks, as you know, are specifically  
15 referenced in the Military Commissions Act under the  
16 jurisdictional provisions.

17           It said, any offense on, on -- before, on or after  
18 September 11th, 2001, the commission has jurisdiction,  
19 providing you can establish that the individual is an alien  
20 unlawful enemy belligerent, which requires that he was either  
21 a member of al Qaeda or some affiliated group, and that he  
22 engaged in hostilities against the United States.

23           So this commission, not unlike any other court, has

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1 to be sure that it has jurisdiction over the offenses, whether  
2 it's raised or not. I think the judge would probably agree  
3 that you have a sua sponte responsibility to ensure that you  
4 have jurisdiction.

5           Judge Pohl did that. After we proved the attacks  
6 of -- al Qaeda's responsibility for the attacks on the  
7 embassies in Kenya and Tanzania in 1998, which killed  
8 230-some-odd people; al Qaeda's responsibility for the attack  
9 on the USS COLE, which killed 17 United States sailors,  
10 injured 39 others; and al Qaeda's responsibility for the  
11 September 11th attacks that killed 2,976 people, the judge  
12 didn't rely on any of those facts. He simply said that  
13 Congress clearly intended to grant jurisdiction over these  
14 offenses and, therefore, found that he had jurisdiction over  
15 the charges.

16           Judge Parrella was dealing with a very different  
17 question, and that was: What are the members going to be  
18 instructed on this element? And I think Judge Parrella had  
19 the same instinct that you had, Your Honor, that if this is  
20 really jurisdictional, is it truly an element? Is it  
21 something that needs to go to the members?

22           And part of the directed briefing in 617 asks that  
23 question, and could he take either judicial notice of a

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1 legislative fact or judicial notice of law that Congress has  
2 found and the President has found that we were engaged in  
3 armed conflict before September 11th.

4           Instinctually, I think both of you are correct. We  
5 were concerned, and the way we responded was, I believe that  
6 that's correct; however, it's not going to impact our case at  
7 all because the conspiracy is going to be proven the same way  
8 the hostilities are going to be proven; that in 1996, Usama  
9 bin Laden, as the head of al Qaeda, declared war on the United  
10 States; that in 1998, he declared that civilians were  
11 legitimate targets in that war because of our democratic  
12 institutions, the fact that they voted and the fact that they  
13 paid taxes. He then systematically started attacking the  
14 embassies, the COLE, and 9/11.

15           We decided that it would be best to go to the members  
16 just to -- just to insulate the issue from appeal. While we  
17 think the judge is correct and we may still ask for judicial  
18 notice of law, we don't want that notice to be binding on the  
19 members. And I think the language we used specifically -- let  
20 me see if I have it.

21           MJ [Col COHEN]: It was something to the effect of you may  
22 consider this finding by the Court but you are not bound by  
23 it.

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1 MTC [MR. TRIVETT]: Exactly.

2 MJ [Col COHEN]: Something along those lines.

3 MTC [MR. TRIVETT]: May but are not required to accept as  
4 conclusive this finding of law that Congress made that  
5 determination. That's ultimately where we came down on the  
6 question of the directed brief by Judge Parrella, and that's  
7 simply to insulate the issue from appeal.

8 But it's a very different question. And for purposes  
9 of jurisdiction, you can consider anything. You're not bound  
10 by Tadic, you're simply bound by what's in the statute and the  
11 wordings of the statute.

12 And there seems to be some conflation that somehow  
13 the standard in Tadic is the law of war. It's a subpart of  
14 the law of war. It's been recognized as the correct way to  
15 instruct a law of war tribunal on whether or not hostilities  
16 existed for purposes of their jurisdiction; but there's also  
17 the Geneva Conventions on the protections of prisoners of war,  
18 there's The Hague Convention.

19 It's a component of the law of war, but to simply say  
20 that Judge Pohl, in finding that Congress may have had a  
21 different application of the law of war, was somehow directly  
22 in contradistinction with Tadic is just not accurate. It's  
23 just -- it's not part of the analysis.

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1           It was simply an element of the offense at the  
2 International Criminal Tribunals of Yugoslavia in 1998. They  
3 were the first to consider the issue. That was the first law  
4 of war tribunal that had happened in quite a long time,  
5 certainly from the civilized nations of the United States as  
6 sanctioned by the United Nations. And that's how this sort of  
7 sprang out into a standard. But it's not accurate to call it  
8 the law of war, and that Congress is somehow limited by it.

9           So Judge Pohl was correct when he said, even if you  
10 are right, Mr. Hawsawi, even if Tadic applies, and even if  
11 you -- the government couldn't prove through the sporadic  
12 attacks that they continue to talk about -- even if all of  
13 that is true, Congress isn't bound by it, and Congress has its  
14 own law of war authorities. The D.C. Circuit has now  
15 recognized the domestic law of war as being a legitimate part  
16 of the war and the law of war for the United States.

17           That's what the opinion was saying. There's no  
18 grounds to reconsider it. There is no inconsistencies between  
19 what Judge Pohl was saying and what Judge Parrella was saying.  
20 They were deciding two different issues for two different  
21 purposes, one on the basis of law -- and I will part company  
22 with Mr. Connell. He did, in fact, rule as a matter of law  
23 Congress gave him the jurisdiction to try the offenses. I

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1 don't know that there's any other way to parse that. I  
2 believe Judge Parrella found the same, and he also found that  
3 it had to, by logic and reason, apply to all five defendants.

4           So to raise a specific issue to -- regarding what  
5 Major Wilkinson said, overt acts themselves aren't the  
6 offenses, they need not even be criminal. It is true that  
7 many of the overt acts that Mr. Hawsawi is charged with in the  
8 conspiracy predate 9/11; however, we are advancing against all  
9 five of these individuals in an identical principal theory,  
10 that they aided, abetted, counseled, or commanded, or  
11 conspired with the 19 hijackers to commit the 9/11 attacks,  
12 period, end.

13           The object offense is the 9/11 attacks. They are  
14 also charged substantively with the actual attacks. So it  
15 need not matter that the overt acts took place before the  
16 attacks on 9/11, even if somehow the commission believed that  
17 the hostilities didn't exist until 9/11.

18           We've always taken the position that hostilities  
19 existed before, as early as 1996 with the declaration of war,  
20 certainly no later than August of 1998 with the attacks on the  
21 embassy; but even if you don't agree with that -- and we're  
22 going to ask for an instruction to this degree, we are  
23 advancing solely on the fact that the 9/11 attacks, in a

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1 vacuum, on their own, were sufficient to establish hostilities  
2 and to trigger the law of war and that they violated the law  
3 of war in the most fundamental ways, by intentionally  
4 attacking civilians.

5           So there is a concept called a bridge conspiracy.  
6 That allows for overt acts to be considered by the commission  
7 and by the members of the commission even before jurisdiction  
8 may have attached. If there was overt acts taken prior to a  
9 law actually being passed, providing the government can show  
10 one overt act after the time in which the law was passed, all  
11 of those other overt acts are considered for lack of mistake  
12 and motive and intent and all of those things.

13           I think the case is United States v. Hirsch. I  
14 believe it's briefed elsewhere. I'm just responding on the  
15 fly to Mr. Wilkinson, I don't have a citation for you. But to  
16 make clear, the overt acts aren't what's charged, the  
17 conspiracy and the object offenses are, and they both  
18 culminate in the September 11 attacks that killed 2,967  
19 people.

20           Hawsawi -- Mr. Hawsawi took a position not  
21 necessarily challenging the government's evidence, only simply  
22 saying that it was insufficient and presented only one  
23 witness. They presented an expert witness in the law of war,

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1 Army professor, I think his name is Sean Watts, definitely  
2 Professor Watts. And that's how they made their argument that  
3 no jurisdiction exist -- no personal jurisdiction existed.  
4 The judge did not accept that argument. Ultimately he  
5 determined as a matter of law that Congress gave them the  
6 authority. They have presented this over and over again.

7 I believe the great Yogi Berra was quoted before, and  
8 I think it's appropriate now that he be quoted again, "This is  
9 like déjà vu all over again." We have argued this to death.  
10 The judge just needs to make a final determination as to what  
11 instruction's appropriate, that there is no inconsistency  
12 between 502 and 617, and let us move on towards trial.

13 Subject to your questions, sir.

14 MJ [Col COHEN]: Let me just look at my notes. There was  
15 something that popped into my head, but then I was paying  
16 attention to the rest of your arguments. So just give me one  
17 second to refresh my recollection.

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

19 MJ [Col COHEN]: Okay. Yes.

20 You said something interesting in that -- I want to  
21 make sure I'm not misunderstanding or conflating your argument  
22 as well.

23 So, as you -- you indicated Tadic is a component of

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1 the law of war. It is an explanation or a standard that has  
2 been adopted to address conflicts in the former Yugoslavia and  
3 other places based on the specific facts that were presented  
4 in those particular cases.

5           Then you said, but nonetheless, because it's just a  
6 component, we believe that the events of 9/11 in and of itself  
7 was sufficient to be a violation of the law of war.

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

9           MJ [Col COHEN]: I don't necessarily expect you to fully  
10 brief that at this particular point, but can you expound on  
11 that just a little bit as to how I can contextualize how in  
12 your mind Tadic plays in that analysis of -- like, for  
13 example, is it because of the intensity of the acts and the  
14 number of acts of that intensity on 9/11 that you say, look,  
15 we meet the -- we meet the intensity based on these particular  
16 facts, and we can clearly show that there was an organization  
17 that enacted these? Is that where you are going with that, or  
18 is it something a little bit different?

19           MTC [MR. TRIVETT]: No. Yes, sir. In the end, we didn't  
20 care if it were Tadic and Hamdan in front of the members. It  
21 didn't matter to us because we believe we're going to win  
22 either/or. We did in Hamdan. We did in Bahlul. And these  
23 facts are far better than those as far as their direct

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1 participation in the actual attacks themselves. So we believe  
2 that we establish all of the prongs.

3 Part of the cross-examination of Professor Watts was  
4 we were giving examples -- to the extent the judge let me do  
5 this a little bit, and then he sort of shut me down because I  
6 think he had made his determination that it was going to be a  
7 legal question anyway.

8 But we sort of walked through: You would agree that  
9 almost 3,000 people being killed has a certain intensity. It  
10 seemed sort of counterintuitive, if you have two guys shooting  
11 a gun at each other from two different countries, that that  
12 would be sufficient. Yet after you had a terrorist  
13 organization declare war on the United States and turn  
14 civilian airliners into guided missiles full of people and  
15 flew them into buildings, that that would somehow not be  
16 sufficient enough or not intense enough.

17 So certainly the number of dead, the statements of  
18 the leaders of al Qaeda, the statements certainly of the  
19 Secretary of Defense following our retaliation in 1998, when  
20 we launched 90 -- close to 90 Tomahawk missiles at al Qaeda  
21 targets in Africa and Afghanistan, and any of the other  
22 subcomponents. We believed that 9/11 in and of itself will  
23 satisfy that. We'll take that to the members every day, twice

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1 on Sunday, and win.

2 I would be shocked -- and we keep talking about this,  
3 you know, amongst ourselves. I would be shocked if they  
4 actually make this defense in front of the members. It's a  
5 very -- it's a very tricky one for them to do. It's up to  
6 them. It's a defense strategy issue. But at the end of the  
7 day, I would be shocked if they take that position. It's very  
8 hard to do that in front of military members and ask for  
9 acquittal of your guy on the basis of the fact that it doesn't  
10 constitute an armed conflict.

11 I think this is solely an appellate issue that they  
12 continue to try to convince the military commission is  
13 actually as a matter of law, that you can dispose of the case  
14 immediately and preserve the issue on appeal. We'll see.  
15 We'll see what happens when we get there in January 2021, but  
16 I would be surprised.

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

19 Mr. Connell.

20 LDC [MR. CONNELL]: Sir, I just want to answer the three  
21 questions that you have asked.

22 The first, I've now had the opportunity to read  
23 Rehaif v. United States, and at slip opinion page 4, there is

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1 a discussion of jurisdictional elements which in 922(g), of  
2 course, is being in or affecting commerce.

3 And the court says that, "Jurisdictional elements do  
4 not describe the evil Congress seeks to prevent, but instead  
5 simply ensured that the Federal Government has the  
6 constitutional authority to regulate the defendant's conduct  
7 normally as here through its commerce clause powers."

8 That is precisely the formulation that I advanced  
9 on -- in the original argument with the relationship of  
10 950p(c) to at least the define and punish clause and whatever  
11 else, wherever else you want to find authority in the  
12 Constitution.

13 The goal there of hostilities -- of that hostilities  
14 is Congress trying to stay within its own lane in the  
15 enactment of military commissions. So I think that the --  
16 this characterization of -- of jurisdictional elements is  
17 entirely consistent with our position.

18 The second thing is that you asked Major Wilkinson  
19 about material support as a theory of liability. Three  
20 comments on that.

21 The first one is the equivalent of Article 77 in the  
22 Military Commissions Act is 950q. 950q subparts 1 and 2 are  
23 exactly identical to Article 77, and 950q adds a third theory

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1 of liability which is command responsibility. I'll give you a  
2 moment to get there.

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

4 LDC [MR. CONNELL]: Thank you. With respect to the  
5 parties' positions on theory of liability ----

6 MJ [Col COHEN]: Exactly what I was talking about.

7 LDC [MR. CONNELL]: Yes.

8 With respect to the parties' positions, they -- both  
9 parties -- all parties extensively briefed their positions on  
10 theory of liability in AE 120. Ultimately nothing happened  
11 with it. There was kind of sound and fury, signifying nothing  
12 on the whole 120 issue, which you'll see. Because at the end  
13 of the day, the government appealed the Bahlul decision.

14 The government filed 120 here after the first Hamdan  
15 decision came down, and it was afraid that conspiracy was not  
16 going to survive further appellate review, and so it was -- it  
17 asked to modify the charge sheet to sort of change the nature  
18 of the way that it -- that it charged conspiracy, but then  
19 Judge Pohl denied that. And then they decided they didn't  
20 want to do it anyway, and it all came to nothing. But there  
21 was an enormous amount of briefing on domestic and  
22 international standards as theories of liability. And if you  
23 want to learn more about that, the parties have already staked

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1 out their positions.

2 MJ [Col COHEN]: Thank you.

3 LDC [MR. CONNELL]: The third observation that I'd like to  
4 make is that the one thing that we know about material support  
5 is that it did not predate the enactment of the 1996 Military  
6 Commissions Act because that is the actual holding of the  
7 first en banc decision in al Bahlul.

8 So if -- if someone were -- if the government, for  
9 example, were to offer a material support as a theory of  
10 liability instruction, I think that instruction would be  
11 foreclosed by the first al Bahlul en banc decision which  
12 reversed Mr. al Bahlul's conviction for material support on  
13 the basis that it violated the ex post facto clause or at  
14 least what it assumed was the ex post facto clause, although  
15 some judges, including now Justice Kavanaugh, you know,  
16 clearly articulated why ex post facto clause did apply.

17 The third observation that I'd like to make is the  
18 one piece of this -- of the government's presentation that we  
19 have not heard a number of times is the speculation that we're  
20 not actually putting on a hostilities defense. I'll take that  
21 bet.

22 For Mr. al Baluchi, we have a hostilities defense.  
23 It is our trial defense. And could that change if vast swaths

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1 of evidence were suppressed? Possibly. But a great deal of  
2 our resources, a great deal of our witness interviews and  
3 everything else go to this -- which is why this -- both this  
4 instruction and a correct articulation of the personal  
5 jurisdiction standard is so important to us.

6 MJ [Col COHEN]: At the end of the day, it really wouldn't  
7 matter to my decision. I mean, this is an in personam  
8 question.

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

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

11 Thank you, Mr. Trivett, for your comments.

12 Major Wilkinson.

13 DC [MAJ WILKINSON]: Yes, sir.

14 Well, you certainly do have an opportunity with  
15 reconsideration on 502 and 488 to do something that has not  
16 yet been done in this case, namely to consider the merits of  
17 the hostilities issue.

18 And I will note that if Mr. Trivett is right, if it  
19 is very difficult for a defense counsel to go in front of a  
20 bunch of members who have just been shown all of the movies of  
21 the planes hitting the towers -- that was a big part of their  
22 case back in December 2017 -- and everything that might get  
23 them into a proper fury and remember these Global War on

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1 Terror service medals that they're wearing that date back to  
2 9/11 -- if indeed that is a hard thing for defense counsel to  
3 do, and to try to sell, that's a better case for making this a  
4 judicial determination because it's still a very important  
5 constitutional issue whether the jurisdiction of the military  
6 is going beyond its proper constitutional bounds, and that  
7 should not be limited by any biases or practical concerns that  
8 you have trying to sell it to a group of line officers.

9           I will note -- I beg your pardon -- that this Hamdan  
10 standard is not really even close to Tadic. Leaving aside  
11 that terminal element, which was an absurdity, saying think  
12 about anything you want, the whole thing is written in very  
13 permissive terms. You should consider the intensity of the  
14 conflict. You should consider whether -- you know, how  
15 organized the parties are.

16           Imagine, as I said to Judge Parrella on the same  
17 thing, you're trying a murder case and you say, "Members, you  
18 should think about whether the victim is dead. You should  
19 think about whether he had the intent to kill." The unspoken  
20 end of that is, but, in fact, you can do whatever you want.  
21 That's not law.

22           We argued this at length in 617G/620F, which was our  
23 brief on specified issues including that, you may have looked

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1 at it before. But I won't belabor it because it's there.  
2 I'll just say it's nowhere close to Tadic as long as it's in  
3 such permissive and broad terms.

4           There is nothing at all logical about imposing  
5 findings from one accused on others who were not joined to the  
6 motion. I think you know the Rules for Military Commission  
7 forbid any such thing; the Fifth Amendment does as well. When  
8 you have people who are tried separately, you can't start  
9 imposing findings from one trial court on the other without  
10 letting the other one litigate.

11           Since the other accused explicitly unjoined 488 and,  
12 you know, more or -- more or less or completely unjoined 502,  
13 that leaves them, as it should leave them, free to make their  
14 cases separately. That, as I think we discussed before, back  
15 in 2014, we tried to sever Mr. Hawsawi's case, and if that --  
16 if we had succeeded, which we did not, then it would have been  
17 very clear that our determination is separate from theirs and  
18 nobody would think of imposing the one on the other. The fact  
19 that we have been forced to stay together shouldn't change  
20 that fact and, under the rules, doesn't change that fact.

21           Tadic is indeed only part of the law of war, but it  
22 is the part that is relevant to the question of determining  
23 whether you've got a noninternational armed conflict versus

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1 something that doesn't rise to the level of armed conflict at  
2 all.

3           And in 502JJJJ, our explicit joinder, Attachment B is  
4 the testimony of Professor Watts. Attachment C is the  
5 affidavit of Professor Sassòli. And then I think we also have  
6 D, an extract from a treatise by Professor Green. As you know  
7 from Professor Watts' testimony, all three of them are  
8 extremely prominent and excellent authorities on the subject.

9           His cross-examination is indeed well worth reading as  
10 well. If you look at the relevant parts Mr. Trivett was  
11 talking about, I think you will find he said that in the  
12 common language sense of the term, an attack that kills a  
13 bunch of people is indeed intense. But if you're looking at  
14 this as a technical term in the law of war, on his direct  
15 examination we talked about it, what really matters is not a  
16 bunch of people dying in a short space of time; it matters  
17 more the actual fighting between the armed forces of the state  
18 party and the members of the non-state party.

19           And it's very logical. We talked a little about the  
20 logic behind that. Because if you look at the things the law  
21 of war is meant to regulate, it's the sort of things you get  
22 when you have sustained fighting. And I believe "sustained  
23 fighting" is in the Tadic decision on jurisdiction that's

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1 before the trial decision.

2           So as an example, if you have sustained fighting,  
3 you're going to have wounded on the battlefield. The law of  
4 war regulates that you leave hospital units alone. You can  
5 make truces; there's law of truces. One side or the other may  
6 occupy territory friendly to the other. The law of war  
7 governs how do you treat the civilians in that territory. But  
8 when you have an instantaneous terrorist attack or something  
9 like that, those situations just don't come up. And  
10 governments always insisted on treating that exactly as just a  
11 criminal matter before 9/11.

12           And I know that he talked a little bit with  
13 Mr. Trivett about, you know, on the other hand with  
14 international armed conflicts, which no one says this is, you  
15 have a way different standard. An international armed  
16 conflict can actually be brought into existence just by  
17 somebody saying so, by a party declaring war, or by even a  
18 very small clash -- there's some debate as to just how  
19 small -- between the forces of two different countries. But  
20 international and noninternational armed conflicts just don't  
21 operate on the same standards.

22           A point he made -- I don't say I quite agree with him  
23 on this -- he said the life of law is not really logic, but

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1 what he then said that I think that is logical, international  
2 law really does consist of a set of areas where governments  
3 generally around the world or signatories to a particular  
4 treaty have agreed to reduce the scope of their own  
5 sovereignty.

6 I mean, making war is part of what governments do.  
7 But when they sign on to conventions or create a customary  
8 standard, they're saying we agree from now on here's something  
9 we used to be able to do that we can't do anymore, most  
10 famously things like attacking civilians, which were under a  
11 different standard in World War II or on Sherman's march  
12 through Georgia than they are now.

13 And accordingly, governments are -- when they were  
14 creating these standards through the 20th century, they were  
15 not willing to set a low standard for armed conflict -- and  
16 this was early in my questioning of Professor Watts -- because  
17 as long as they considered it terrorism, crime, something  
18 internal, they wanted to keep full sovereignty; and that is  
19 something that could not be changed retroactively simply  
20 because the government now wants tactical advantages in a  
21 military commission.

22 As for when the law of war begins, one of the cases  
23 we cite, it's Tadic or Delalic, I believe, says it very

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1 plainly, the law of war starts with the beginning of such  
2 conflicts, not before. The Nuremberg Major War Criminals  
3 Tribunal said the same. When they were looking at crimes  
4 against humanity in connection with armed conflict, which they  
5 had to put it that way to make it a pre-existing war crime,  
6 they said if it happened before September 1st, 1939, it  
7 doesn't matter how revolting it is, it doesn't matter how  
8 horrible it is, we just don't have jurisdiction.

9           For jus in bello war crimes, before the beginning of  
10 the conflict is just not there. This concept of a bridge  
11 conspiracy, however important it may be in domestic law, is  
12 not a law of war concept I've seen, nor have I seen it in any  
13 law of war authority.

14           May I have a moment to confer with my team?

15           MJ [Col COHEN]: You may.

16 [Pause.]

17           MJ [Col COHEN]: Major.

18           DC [MAJ WILKINSON]: Yes. Just two more points.

19           MJ [Col COHEN]: Okay.

20           DC [MAJ WILKINSON]: First, I wanted to be clear, when we  
21 said we agreed with what Mr. al Baluchi's team had to say,  
22 it's particularly on the subject of the incompatibility of  
23 617K with 502BBBB.

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1 MJ [Col COHEN]: I understand.

2 DC [MAJ WILKINSON]: Although 617K is not perfect, if it  
3 allows you to go beyond the Tadic standard, it's a lawful  
4 improvement. But, of course, either reading of the law does  
5 lead to dismissal.

6 In addition, my understanding of today's oral  
7 argument, it began with you just wanted to hear about the 617K  
8 thing, and it's kind of broadened because you had some  
9 questions that took it beyond that.

10 So, you know, we would still like to have oral  
11 argument on 502 and 488, reconsideration to the extent that  
12 such a thing might be useable, so we're not waiving or saying  
13 that this is all there was to say. I just tried to keep it to  
14 what you were talking about today.

15 MJ [Col COHEN]: No, I appreciate it. Thank you.

16 DC [MAJ WILKINSON]: Yes, sir.

17 MJ [Col COHEN]: I'd like to thank the counsel for the  
18 significant preparation that went into the matters that were  
19 presented today, for your willingness to answer questions  
20 posed by the court or the commission with respect to these  
21 issues.

22 These are weighty matters. I understand the  
23 significance of them. I'll take the matters that were

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1 presented today under advisement and take a look at the  
2 options that are available to me and decide what I believe is  
3 in the interest of justice.

4           Moving forward, tomorrow will be a closed session.  
5 I'd like to go over the list of what I currently have or what  
6 I believe I've added to 505(h)'s, which is significant. So  
7 if -- I'll give you guys just a second to kind of look at what  
8 the -- your personal lists may be.

9           First I'd like to start off with -- from (AAA), I had  
10 the -- previously my staff has reminded me that we have --  
11 that 538I, 538N, and 561G were deferred. Are those ripe and  
12 something we should take up this week?

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

14           MJ [Col COHEN]: Okay. In addition, I have 538S (AAA),  
15 538T (WBA), 561N (AAA), 5610 (WBA). I had a question about  
16 AE 616EE (AAA). In light of the court's ruling on the  
17 deposition, is that still ripe, or ----

18           LDC [MR. CONNELL]: No, sir. It's moot.

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

20           LDC [MR. CONNELL]: We can withdraw it.

21           MJ [Col COHEN]: All right. I'll treat it as withdrawn.  
22 Thank you.

23           Moving on, then, AE 628P (AAA), AE 628R (AAA),

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1 AE 628T (AAA), AE 628V (AAA), AE 628W (AAA), AE 631F (WBA),  
2 AE 632G (MAH), AE 632K (MAH), AE 643H (WBA), AE 645 (AAA),  
3 AE 650K (WBA), and I had AE 632J (Gov).

4 Am I missing anything? Because it's possible.

5 LDC [MR. CONNELL]: No, sir, but this is the same issue  
6 that came up last time. 645 is not actually a 505 notice.  
7 It's just that we incorrectly marked the unclassified notice  
8 505.

9 MJ [Col COHEN]: Thank you.

10 LDC [MR. CONNELL]: With the Court's permission to solve  
11 that problem, I would like to file a corrected version so that  
12 we can make it a little bit -- I know it's -- we often rely on  
13 the unclassified document because it's easier to see. We'll  
14 file a corrected version and resolve that problem.

15 So 645 should not be on your list. It is a  
16 substantive motion.

17 MJ [Col COHEN]: You have leave to do so.

18 LDC [MR. CONNELL]: Thank you.

19 MJ [Col COHEN]: All right. From any of the other  
20 parties, is there anything I'm missing from the defense side?  
21 Negative -- Mr. Ruiz?

22 LDC [MR. RUIZ]: Not on this issue, but I do want to just  
23 put another issue on the record.

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1 MJ [Col COHEN]: Okay. Absolutely. Just give me a  
2 moment, and I'll take that up. Okay.

3 Nothing from anyone on 505(h).

4 Anything I'm missing from the government, or is there  
5 anything that I listed that is a surprise?

6 CP [BG MARTINS]: No, Your Honor.

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

8 Tomorrow morning I will add AE 643 to the ones to be  
9 discussed tomorrow morning so that we can make sure that we  
10 take that up, the nonclass -- unclass argument up on Wednesday  
11 while we're here in open session. In addition we'll take up  
12 AE 538, AE 561. We'll discuss the classified portions of  
13 AE 650 and AE 643H -- oh, I already said AE 643H. Sorry.

14 Are there any of the other ones -- I don't know how  
15 long these -- I mean, it's a 505 not the 806. So my question  
16 is, I'm willing to cover as many as I can, but at the same  
17 time I had a few SIPR issues which I -- so I'd like to start  
18 around 10:00 tomorrow instead of 9:00 to make sure that I've  
19 had sufficient time to read through those things but I can go  
20 the whole day if we need to.

21 So if there are additional ones that the parties  
22 would like to take up tomorrow as opposed to pushing them to  
23 Thursday because you'd like some additional time, we can

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1 possibly move the 806 into Thursday instead of Friday which  
2 would give you additional prep time for the weekend, so that's  
3 an option that I'm throwing out there right now if that's  
4 something that you are interested in.

5 LDC [MR. CONNELL]: Sir, I'm not sure if I followed that  
6 100 percent. But we are in favor of the idea of 505(h)  
7 tomorrow, open Wednesday, closed Thursday, Friday dark.

8 MJ [Col COHEN]: Okay. Government?

9 CP [BG MARTINS]: Your Honor, we concur in that.

10 MJ [Col COHEN]: Okay.

11 CP [BG MARTINS]: We are looking hopefully to get through  
12 the -- your specified issues so that you can reach those  
13 underlying motions, so we are in favor of front-loading as  
14 much as possible.

15 MJ [Col COHEN]: Excellent. Okay. Then we'll start  
16 around 1000 hours tomorrow with the 505(h), which will be very  
17 limited in nature just telling me what it is and whether or  
18 not we all agree that we need an 806 so I can issue the ruling  
19 tomorrow afternoon, tomorrow evening, and then we'll have the  
20 closed session.

21 And this gives me a full day in case someone had  
22 issues with that decision, then that gives us we can have the  
23 806 on Thursday, and then Friday I will authorize as

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1 preparation time for testimony beginning at 0900 on Monday.

2 All right.

3 I think we've got a way forward for this week. And  
4 then, Mr. Ruiz, you said you had another matter that you  
5 wished to put on the record?

6 LDC [MR. RUIZ]: Yes, Judge. I just want to bring to your  
7 attention a ruling that we're awaiting.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. RUIZ]: It's on AE 646 (MAH). It was an ex parte  
10 under seal filing pertaining to an expert matter. And it was  
11 filed on July 11, 2019. So I just wanted to bring that to  
12 your attention.

13 MJ [Col COHEN]: Okay, thank you. I'll go back to refresh  
14 my recollection of what the rule is. I know that I have  
15 addressed at least -- or at least I think I have addressed one  
16 ex parte. This may be different. So let me go back and see  
17 what it is, and I'll get that to you this week.

18 LDC [MR. RUIZ]: Yeah, I know -- I know you have addressed  
19 one of the matters ex parte. This one has been out there for  
20 a while. I think this may be ----

21 MJ [Col COHEN]: Thank you. Thank you. Because my intent  
22 is, to the extent we can get you rulings while we're down  
23 here, we're going to try to.

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1 LDC [MR. RUIZ]: Thank you.

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

3 Mr. Nevin.

4 CDC [MR. NEVIN]: May we remain in the courtroom until  
5 1730?

6 MJ [Col COHEN]: Government, is that going to be a  
7 problem? I have no objection if you guys ----

8 CP [BG MARTINS]: We have no objection to that.

9 MJ [Col COHEN]: Okay. Then that sounds fine. Then I'll  
10 allow you all to remain in the courtroom until 1730. Just  
11 give me a moment to clean up my stuff, and then I'll call us  
12 into recess. Okay.

13 We're in recess until 1000 hours tomorrow.

14 [The R.M.C. 803 session recessed at 1632, 9 September 2019.]

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