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1 [The R.M.C. 803 session was called to order at 0859,
2 29 April 2019.]

3 MJ [Col PARRELLA]: Good morning. This commission is
4 called to order.

5 Trial Counsel, please identify who is here on behalf
6 of the United States.

7 CP [BG MARTINS]: Good morning, Your Honor. Representing
8 the United States, Brigadier General Mark Martins, Mr. Robert
9 Swann, Mr. Edward Ryan, Mr. Clayton Trivett, Major Christopher
10 Dykstra. Also present in the courtroom is paralegal Mr. Dale
11 Cox and Special Agent Ghailan Stepho of the Federal Bureau of
12 Investigation.

13 These proceedings are being transmitted to
14 closed-circuit locations in the United States pursuant to the
15 commission's order.

16 MJ [Col PARRELLA]: Thank you, General Martins.

17 Mr. Nevin, if you can please indicate for the record
18 who is here on behalf of Mr. Mohammad.

19 LDC [MR. NEVIN]: David Nevin, Lieutenant Colonel Poteet,
20 Ms. Radostitz on behalf of Mr. Mohammad, and he's present.

21 Would this be a good time for me to state my
22 objection, Your Honor?

23 MJ [Col PARRELLA]: Why don't we come back to that ----

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1 LDC [MR. NEVIN]: Great.

2 MJ [Col PARRELLA]: ---- if you don't mind. Thank you.

3 Ms. Bormann.

4 LDC [MS. BORMANN]: Judge, on behalf of Mr. Bin'Attash,
5 myself, Mr. William Montross, and newly detailed Captain Simon
6 Caine, United States Air Force.

7 MJ [Col PARRELLA]: Okay. Why don't we take a second and,
8 Captain Caine, if you can please state by whom you were
9 detailed, your qualifications, your status as to oath, and
10 whether you have acted in any disqualifying manner.

11 DC [Capt CAINE]: Good morning, Your Honor, Captain Caine
12 on behalf of Mr. Bin'Attash.

13 MJ [Col PARRELLA]: Good morning.

14 DC [Capt CAINE]: I have been detailed to this military
15 commission by the chief defense in accordance with R.M.C. 503.
16 I'm qualified under R.M.C. 502, and I have been previously
17 sworn. I have not acted in any manner that might tend to
18 disqualify me in this proceeding. My notice of detailing and
19 appearance is Appellate Exhibit 004II.

20 MJ [Col PARRELLA]: Thank you, Captain Caine, if you'd
21 please raise your right hand.

22 [Counsel was sworn.]

23 MJ [Col PARRELLA]: Thank you. Please have a seat.

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1 Thanks.

2 MJ [Col PARRELLA]: Mr. Harrington.

3 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,
4 James Harrington, Wyatt Feeler, and Captain John Balouziyeh.

5 MJ [Col PARRELLA]: Thank you.

6 Mr. Connell.

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

8 MJ [Col PARRELLA]: Good morning.

9 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi, myself,
10 James Connell; Lieutenant Colonel Sterling Thomas of the
11 United States Air Force; Benjamin Farley. Captain Andreu and
12 Ms. Pradhan have been previously excused by the military
13 commission.

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

15 Mr. Ruiz.

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

19 MJ [Col PARRELLA]: All right. Thank you, Mr. Ruiz.

20 I will now advise the accused of their right to be
21 present and their right to waive said presence.

22 You each have the right to be present during all
23 sessions of the commission. If you request to absent yourself

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1 from any session, such absence must be voluntary and of your
2 own free will.

3 Your voluntary absence from any session of the
4 commission is an unequivocal waiver of the right to be present
5 during that session. Your absence from any session may
6 negatively affect the presentation of the defense in your
7 case. Your failure to meet with and cooperate with your
8 defense counsel may also negatively affect the presentation of
9 your case. Under certain circumstances, your attendance at a
10 session can be compelled regardless of your personal desire
11 not to be present.

12 Regardless of your voluntary waiver to attend a
13 particular session of the commission, you have the right at
14 any time to decide to attend any subsequent session. If you
15 decide not to attend the morning session, but wish to attend
16 the afternoon session, you must notify the guard force of your
17 desires. Assuming there is enough time to arrange
18 transportation, you will then be allowed to attend the
19 afternoon session. You will be informed of the time and date
20 of each commission session prior to the session to afford you
21 the opportunity to decide whether you wish to attend that
22 session.

23 Mr. Mohammad, do you understand what I have just

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1 explained to you?

2 ACC [MR. MOHAMMAD]: Yes.

3 MJ [Col PARRELLA]: Mr. Bin'Attash, do you understand what
4 I have explained to you?

5 ACC [MR. BIN'ATTASH]: [In English] Yes.

6 MJ [Col PARRELLA]: Mr. Binalshibh, do you understand what
7 I have just explained to you?

8 ACC [MR. BINALSHIBH]: Yes.

9 MJ [Col PARRELLA]: Mr. Ali, do you understand what I have
10 just explained to you?

11 ACC [MR. AZIZ ALI]: Yes.

12 MJ [Col PARRELLA]: Mr. Hawsawi, do you understand what I
13 have just explained to you?

14 ACC [MR. AL HAWSAWI]: Yes.

15 MJ [Col PARRELLA]: On 27 April 2019, this commission
16 conducted an R.M.C. 802 conference here in Guantanamo Bay with
17 both trial and defense counsel. The accused were absent.

18 At this conference, an introduction was made for the
19 new defense counsel, Captain Caine, who is joining
20 Mr. Bin'Attash's defense team. We then discussed the order of
21 march for this week's session.

22 I indicated that the commission intended to start
23 this morning's session in an open session with the following

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1 motions: AE 286, 524NNN, specifically to allow for defense to
2 comment on the government's proposed amendments to Protective
3 Order #4 and 617D/620C which relates to hostilities.

4 Next, in a second session held either this afternoon
5 or Tuesday morning, I indicated the commission would conduct a
6 hearing pursuant to M.C.R.E. 505(h) to address notices in
7 AE 523, and if the government still desires in light of CMCR
8 stay, the 616 series.

9 Following this, the commission indicated it would
10 take up any remaining discussion regarding AE 286, 524NNN, and
11 617/620, followed by open argument in AE 523 and 330.
12 Finally, I indicated that the commission would conduct a final
13 session for closed argument pursuant to R.M.C. 806.

14 In response to the order of march, Mr. Connell
15 inquired about the commission's expectations in placing
16 AE 524NNN on the docket and expressed a desire to brief the
17 issue in writing.

18 Ms. Bormann also expressed concern that the
19 government's notice in AE 524NNN was not an appropriate filing
20 and that they believe it should have been sent in the form of
21 a motion triggering the full briefing cycle.

22 I responded that I placed 524NNN on the record -- or
23 I should say on this week's docket for the sole purpose of

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1 affording defense counsel an opportunity to comment on the
2 government's proposed amendments to Protective Order #4, and
3 that the government's filing in AE 524NNN was appropriately
4 submitted in response to the commission's order in AE 524LLL.

5 I further stated that I decided to take up this issue
6 during this week's docket, despite the fact it was recently
7 filed by the government, because I saw the proposed amendments
8 as favorable to the defense and did not want to unnecessarily
9 delay their implementation for weeks or possibly even months.

10 While the commission recognizes that there may be
11 outstanding issues in the 524 series, to include the extent to
12 which Protective Order #4 hinders the defense's ability to
13 investigate and interview certain witnesses, what the
14 commission seeks to know from the defense at this juncture is
15 whether there is any reason the commission should not approve
16 the proposed amendments to Protective Order #4, which, on
17 their face appear to afford defense another option for making
18 requests to interview certain CIA persons.

19 Now, after further consideration of this issue, I am
20 inclined to keep it on this week's docket despite
21 Mr. Connell's and Ms. Bormann's objection. I will, however,
22 afford the defense teams an opportunity to file written
23 comments to the government's proposed amended protective order

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1 in addition to their oral comments they may choose to make
2 this week.

3 Those written filings will be due by 10 May 2019,
4 which is two weeks from when the government filed its notice
5 in AE 524NNN.

6 Now, to be clear, the purpose of these filings, as
7 well as the comments this week, is not to relitigate the
8 AE 524 series; rather, your filings and your argument should
9 be contained to whether the commission should approve the
10 government's proposed amendments to Protective Order #4.

11 I then stated in the 802 conference that based on the
12 Court of Military Commissions' continuation of the stay
13 regarding the taking of the interpreter's testimony, the
14 Office of Military Commissions contacted the trial judiciary
15 about inquiring into the viability of an early return. I
16 consented to OMC doing so since in light of this week's
17 remaining docket I do not expect we will need the full five
18 days for court.

19 So as of right now, OMC does not yet have word on
20 whether this is feasible, but I will, of course, pass word on
21 as soon as it's available. As I indicated, I expect we would
22 leave no earlier than Thursday, and that is if we leave early
23 at all.

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1 Finally, at the R.C.M. [SIC] 802 conference, Mr. Ruiz
2 asked the commission to act upon his recent notice in AE
3 530QQQ, dated 18 April 2019. In response to the commission's
4 inquiry, the government stated that while they still object to
5 the return of Mr. Hawsawi's laptop, they do not take issue
6 with the correctness of Mr. Hawsawi's latest notice. As such,
7 in furtherance of the commission's prior ruling in AE 530GGG,
8 I have issued an order directing the return of Mr. Hawsawi's
9 laptop.

10 Do counsel for either side have any additions or
11 corrections to the commission's summary of the R.M.C. 802
12 conference?

13 Trial Counsel.

14 CP [BG MARTINS]: The United States has none, Your Honor.
15 Thank you.

16 MJ [Col PARRELLA]: Mr. Nevin?

17 LDC [MR. NEVIN]: No, Your Honor.

18 MJ [Col PARRELLA]: Okay. Mr. Nevin, if you want to make
19 an objection at this time, I'll let you go ahead and do so.

20 LDC [MR. NEVIN]: Thanks, Your Honor.

21 Yes, I articulated an objection to proceeding
22 based -- arising from the events that were litigated in
23 AE 615, the last time we were here before you. I simply would

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1 incorporate those remarks at this time, and as before, when
2 you offer me an opportunity to speak, I'll simply restate that
3 I'm relying on the prior objection and not making remarks.

4 And that's what I have to say. Thank you.

5 MJ [Col PARRELLA]: Okay. Mr. Nevin, I do have one
6 question for you: Is it your position that you cannot
7 continue representation of Mr. Mohammad in part because this
8 commission has not ordered you to continue representation?

9 LDC [MR. NEVIN]: That's a factor in our decision about
10 how to proceed, Your Honor, and -- but it is not the only
11 factor.

12 MJ [Col PARRELLA]: Okay. Well to the extent it is a
13 factor, while I think that said order was implicit in my prior
14 rulings finding no conflict of interest, I will now make this
15 order explicit; and I'm not ordering you to resume
16 representation despite an unresolved conflict, but rather
17 ordering you to resume representation precisely because I've
18 found that there is no conflict.

19 And I will say that my intent in issuing you this
20 order is to further relieve you of any concern you may have
21 about violating the applicable rules of professional conduct.
22 I'm not intending to force the issue because I recognize the
23 limitations on my ability to do so, quite frankly.

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1 I will, however, continue to view any unwillingness
2 on your part to represent your client as a waiver of your
3 right to participate in whatever particular issue that is
4 before the commission.

5 LDC [MR. NEVIN]: Okay. And let me say, Your Honor, I
6 wasn't -- didn't have an advisal in advance of your intention
7 to issue that order, and I'll consider that with my
8 co-counsel.

9 For the time being, our intention is to continue to
10 refrain from participation. We do not intend this as a waiver
11 of Mr. Mohammad's right to be heard on any specific issue or
12 on his right to counsel generally, but I understand the
13 court's remarks.

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

15 Ms. Bormann, any additions or corrections to the
16 court's summation of the 802 conference?

17 LDC [MS. BORMANN]: No additions or corrections, Judge.
18 But we are still awaiting a ruling on our most recent filing
19 in AE 615, requesting Your Honor just provide a simple answer
20 to the question about whether or not this involves a matter --
21 the conflict involves a matter where myself, Mr. Montross, and
22 Mr. Perry are all witnesses because that would alleviate any
23 burden of conflict that we have.

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

2 Mr. Harrington?

3 LDC [MR. HARRINGTON]: No corrections or modifications,
4 Judge.

5 MJ [Col PARRELLA]: Okay. Mr. Connell?

6 LDC [MR. CONNELL]: Your Honor, I'd like to clarify our
7 position at the 802 conference with respect to 524NNN.

8 Our position was actually that although I generally
9 object to being required to argue issues without the
10 opportunity for briefing, on this occasion I was prepared to
11 go forward, and I endorsed the reasoning that the military
12 commission articulated that if there is a new tool available,
13 of whatever value to the defense, it makes sense to go ahead
14 and get it in place. It's especially important given that our
15 witness requests are due also on May 10th.

16 So what I -- that's what I said at the 802.

17 Now draw a line there, and say going forward with
18 respect to the new portion that the military commission added
19 this morning, we -- unless something very unusual happens
20 today, I don't expect that we will be filing any written
21 briefing in response to 524NNN, and so we'll expect to waive
22 the opportunity that the military commission has granted us
23 in -- we will file briefing on the effect of this new tool and

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1 the recent disclosures from the government regarding the
2 identities of medical witnesses on the May 10th witness
3 requests, but I suspect that will come in the form of a
4 limited motion to reconsider the deadlines in 524 -- excuse
5 me, that you established in the 524 series rather than a
6 response to 524NNN.

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

8 LDC [MR. CONNELL]: Thank you.

9 MJ [Col PARRELLA]: Mr. Ruiz?

10 LDC [MR. RUIZ]: Nothing to add. Thank you.

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

12 As for prayer time, like the last session, I will
13 endeavor to take a midday recess from approximately 1200 to
14 1330, and to end each day's session by 1730, because it
15 appears the prayer schedule is very similar to the last
16 session that we were here.

17 Anything further from any of the parties before we
18 proceed with the first issue?

19 Mr. Nevin.

20 LDC [MR. NEVIN]: Yes, Your Honor. I ask for a recess,
21 perhaps of an hour, to consider your order that we proceed.

22 And there's a fair amount of complexity that flows
23 from that order, and having had no advance notice of it, I

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1 think we need an opportunity to reflect on the implications of
2 it. I ask -- that's my request, is for an hour's recess.

3 MJ [Col PARRELLA]: What I would propose, Mr. Nevin, is I
4 have given some consideration to the first one on this -- the
5 first motion that's on our docket is the 286 series.

6 In light of the way that the court has sort of
7 specified that issue in the AE 624A, the docket order, with
8 the sort of five specific points, what I'd actually like to do
9 is hear from the government first, because I think four of
10 those five points are largely an update from the government.
11 And then what I would propose is perhaps that would be an
12 appropriate time we can take a recess. You will be afforded
13 an opportunity to discuss my recent order, and then still have
14 an opportunity to decide whether you want to participate in
15 the 286 series.

16 So with that, Trial Counsel.

17 CP [BG MARTINS]: Good morning, Your Honor, and may it
18 please the commission. The United States appreciates that the
19 commission has focused oral argument on five questions. In a
20 moment, I intend to provide a bottom line up front response to
21 each of the questions, and then I propose to circle back and
22 provide a fuller explanation of our response and, of course,
23 entertain any questions, follow-up questions the commission

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1 has.

2 As to the procedural posture of AE 286, writ large, I
3 would like to comment on the United States' position on that
4 procedural posture at the outset.

5 Grouped within Appellate Exhibit 286 is really a
6 series of requests for relief by the defense, individually and
7 collectively as follows: The full unredacted Senate Select
8 Committee on Intelligence Study into the Central Intelligence
9 Agency's former rendition, detention and interrogation
10 program, the so-called Senate Committee Report.

11 Production of all of the unredacted documents upon
12 which that report is based; production of the so-called
13 Panetta Review, unredacted; production of the CIA rebuttal,
14 unredacted, to the Committee Report; and finally, preservation
15 of the full Senate Committee Report; the United States'
16 position is that the commission should no longer defer ruling
17 upon the requests for production of the full, unredacted
18 documents, and should deny them at this point.

19 MJ [Col PARRELLA]: General Martins ----

20 CP [BG MARTINS]: Granting such relief -- yes.

21 MJ [Col PARRELLA]: ---- just a quick question.

22 So that's what -- my understanding of 286. And then
23 286AA, which is the other one, is, as I understood it, the

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1 unredacted copy of the executive summary or the documents
2 underlying the executive summary; is that correct?

3 CP [BG MARTINS]: Yes, that is correct. And I would put
4 that as -- that's part of the full report.

5 MJ [Co1 PARRELLA]: Okay.

6 CP [BG MARTINS]: And I'm going to discuss what portions
7 of the report actually are public already, but that's correct,
8 Your Honor. That's how we see it as well.

9 So our position is that you should no longer defer
10 ruling. You should deny them. Granting such relief would
11 require disclosure to a wide circle of persons very sensitive
12 classified information having nothing to do with this case,
13 inherently risking compromise of sources and methods that
14 continue to protect peaceful people everywhere from attacks.
15 It would also defy well-established classified information
16 procedures in the law that we have been relying on extensively
17 to produce the information the commission has determined
18 pertains to this case.

19 As for preservation, while maintaining that the
20 report is a congressional record, and while noting that it has
21 not been integrated into any agency or department in the
22 Executive Branch system of records, the copy that is with the
23 Department of Defense that was provided by the Senate

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1 Committee for coordination remains locked away, and the United
2 States, of course, is committed to complying with the
3 commission's order in this regard to hold that pending
4 resolution of the issues relating to the RDI information
5 sought by the defense.

6 So now to the five topics or questions and our bottom
7 line, up front answers. Question one: Whether the
8 prosecution has completed its review of the approximately six
9 million documents allegedly underlying the Senate Committee
10 Report? Answer: Yes, subject to additional, targeted reviews
11 that may be necessary as a result of our continuing discovery
12 obligations.

13 Question two: Whether the prosecution has turned
14 over all discovery it intends to provide related to its review
15 under -- of the documents underlying the Senate Committee
16 Report? Answer: No, not all, but the vast majority. And the
17 trickle that should be expected to persist until trial due to
18 continuing discovery obligations under Rule for Military
19 Commissions 701 should cause the commission neither to defer
20 ruling on this motion nor to delay litigation of defense
21 motions to suppress evidence of guilt for which the commission
22 has issued milestone dates.

23 Question number three: Whether the prosecution views

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1 any portion of the Senate Committee Report, the Panetta
2 Review, or the Central Intelligence Agency rebuttal to be
3 discoverable, as opposed to the documents underlying the
4 report -- those reports? Answer: No, nothing beyond what the
5 defense now has.

6 Question number four: Whether the defense requests
7 made pursuant to AE 286 are still ripe in light of additional
8 discovery provided by the prosecution? Answer: No. The
9 prosecution reviews -- or, I'm sorry, the prosecution views as
10 overcome by discovery provided the following requests, and
11 I'll go ahead and list them.

12 Request number 51 from Mr. Ali's defense team, dated
13 21 May 2013; request number 78 from Mr. Ali's defense team,
14 dated 15 July 2013; those portions of the consolidated RDI
15 discovery request from Mr. Ali's defense team, dated 16 April
16 2014, seeking information from the Senate Committee Report,
17 CIA response, and the so-called Panetta Review.

18 Request numbers 192, 193, and 194, dated 15 and 16
19 December 2014 of Mr. Bin'Attash's defense team. The request
20 mentioned by the Hawsawi team in AE 286 of 29 January 2015,
21 and request number 34, dated 5 October 2016, of Mr. Mohammad's
22 defense team, as well as any defense requests from
23 Mr. Binalshibh's team that it construes as covering the SSCI

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1 Report, the Panetta Review, or the CIA rebuttal. I could
2 discern no particular request, and they didn't cite any in
3 this motion series.

4 As to question five, whether the original rationale
5 articulated in support of the defense requests has changed in
6 light of the additional discovery provided, we see that as a
7 question for the defense. We are familiar with the rationales
8 contained in the aforementioned eight requests, as well as
9 with all of the defense pleadings and are listening intently
10 today.

11 And now, a fuller explanation of each answer:
12 Topic 1, whether we have completed review of the six million
13 documents. Yes, we were given access to the full, unredacted
14 report of the Senate Select Committee on Intelligence on
15 18 February 2015. We were given access by the committee. We
16 reviewed the entire 6,000-plus page report onsite at a
17 committee sensitive compartmented information facility or
18 SCIF.

19 The report contains tens of thousands of footnotes
20 that reference underlying documents with single footnotes
21 often referencing multiple documents, and we've reviewed every
22 one of those references.

23 The Senate Select Committee on Intelligence Report

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1 involved no interviews with personnel involved in the RDI
2 program. It was based solely on documents. We were able to
3 confirm -- and this is one important reason we went and looked
4 at all of them so carefully -- that we had access to all of
5 the underlying documents upon which the Senate Committee
6 Report was based.

7 Your Honor, because it bears upon the nature and
8 thoroughness of our review, I would like to draw the
9 commission's attention to the way we approached the
10 oft-referenced six million documents, which is a figure the
11 Senate Committee puts into its foreword to the
12 publicly-released portions of the Senate Committee Report. As
13 it has a duty to seek out information that is potentially
14 favorable to the defense in law enforcement records as well as
15 other databases readily available to it, the prosecution
16 looked to five main repositories of information beyond
17 criminal investigative files maintained by the Federal Bureau
18 of Investigation.

19 Repository 1 was returns from intradepartmental and
20 interagency search requests. In 2016, when we last described
21 this repository to the commission, we had issued four dozen of
22 these compulsory search requests related to RDI information.
23 That number is now more than five dozen.

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1 Repository 2 is records from investigations conducted
2 by Acting United States Attorney for the Eastern District of
3 Virginia, John Durham, into CIA interrogations of detainees.
4 We have previously described our review of these materials in
5 the -- to the commission in Appellate Exhibit 397G of
6 September 2016. The commission has also denied, in Appellate
7 Exhibit 497B of 17 July 2017, a motion to compel production of
8 Durham investigation materials beyond which -- beyond what we
9 have produced.

10 Acting U.S. Attorney Durham's original mandate from
11 Attorney General Mukasey in 2008 was expanded in 2009 and
12 extended by Attorney General Holder. He had a team of 14 FBI
13 special agents, five career federal prosecutors. The
14 prosecution has submitted summaries of the FD-302s that
15 recorded interviews of witnesses with the special agents as
16 well as summaries of testimony that was taken before grand
17 juries in that case.

18 We also confirmed that we have had access to all of
19 the materials that were subpoenaed by Acting U.S. Attorney
20 Durham. I mention this because this body of material was not
21 reviewed by the Senate Committee. We gained access to it
22 under Federal Rule of Criminal Procedure 6(e).

23 Repository 3 is the full unredacted Senate Select

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1 Committee on Intelligence Report that is the subject of this
2 motion; some 6,000 pages and tens of thousands of footnotes.
3 Though publication of the 499-page unclassified executive
4 summary of the Report resulted from many factors and
5 considerations, I do want to note that the process by which
6 the Legislative and Executive Branches made that document
7 public did include consideration of military commission
8 trials.

9 The 10 February 2014 correspondence between counsel
10 to the President and chairwoman of the Senate Select
11 Committee, which is in the record of this commission at
12 AE 397B Attachment N, confirms this. Thus, availability of
13 the 499-page exec sum was, in part, the result of this
14 commission's work with original classification authorities
15 through trial counsel to seek declassification of potential
16 evidence that may be used at trial consistent with
17 national security.

18 Repository 4 is internal investigations conducted
19 between 2002 to the present by the Central Intelligence
20 Agency's Office of Inspector General and other components.
21 These included two major reviews. One was a 2004 special
22 review, a redacted form of which was declassified and made
23 public, and some 30 other audits and inquiries. Work product

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1 of these OIG investigations included records of interviews as
2 well as reports containing findings, conclusions, and
3 recommendations.

4 MJ [Col PARRELLA]: Does the Panetta Report fall into this
5 category?

6 CP [BG MARTINS]: Your Honor, the Panetta Report is a
7 summary that was prepared -- and I was going to get -- that's
8 repository 5 ----

9 MJ [Col PARRELLA]: Okay. Sorry.

10 CP [BG MARTINS]: ---- I was going to talk a bit about the
11 other things that the Panetta Report was relied upon, but yes,
12 the Panetta Report did have access to and review OIG
13 materials.

14 Repository 5 was -- is the CIA's own repository of
15 RDI information, known as the
16 Rendition-Detention-Interrogation Network, RDINet. It was
17 built by the CIA in 2009 as a main repository for RDI-related
18 documents and other materials in order to enable their review
19 by, among others, Senate Committee staff members.

20 On 26 March of 2009, the Senate committee had advised
21 then-CIA Director Panetta that the committee would conduct
22 what became its review. RDINet provides unredacted access to
23 millions of documents, including many that still -- that

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1 are -- you know, still bear upon sensitive operations and
2 others that are only tangentially related to the former RDI
3 program. They were collected in a more or less targeted
4 fashion at CIA Director Panetta's direction.

5 The prosecution does have access to the RDINet and
6 has searched and reviewed relevant and material files within
7 this massive database. So those are the five -- the five
8 repositories.

9 So the more expanded answer to topic two, whether the
10 prosecution has turned over all the discovery it intends to
11 provide related to its review of the documents underlying the
12 Senate Committee Report ----

13 MJ [Col PARRELLA]: General Martins, before we go on to
14 number two ----

15 CP [BG MARTINS]: Sure.

16 MJ [Col PARRELLA]: Just going back to number one ----

17 CP [BG MARTINS]: Sure.

18 MJ [Col PARRELLA]: ---- if you can elaborate for a moment
19 on -- the gist of the answer is, yes, you reviewed but subject
20 to additional targeted reviews. So if you could elaborate on
21 what you mean by the targeted reviews and what that entails.

22 CP [BG MARTINS]: Yes. That's our continuing obligations
23 under -- we're finalizing production of witness-specific and

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1 R.M.C. 701(d) sentencing information. I referred to our
2 continuing discovery obligations under paragraphs (a)(5) and
3 (i) of Rule for Military Commission 701, and final servicing
4 of several still open defense discovery requests.

5 Your Honor, we've been through it. There is a
6 trickle that remains and believe will persist. No new
7 techniques. No new black sites. No new incidents. These are
8 our due diligence to go back through and then as we get a new
9 request or a new elaboration of a theory comes up, we'll go
10 back to the databases and these repositories and think through
11 it again.

12 But that's the nature of what I'm speaking.

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

14 CP [BG MARTINS]: And I would note, Your Honor, that we do
15 not concede that every item in this trickle is discoverable as
16 a matter of legal obligation. We are producing many of these
17 things in view of guidance for prosecutors in criminal
18 discovery issued by the deputy attorney general that,
19 consistent with applicable law of privilege and with the
20 interests of the United States, prosecutors are encouraged to
21 provide discovery broader and more comprehensive than
22 discovery obligations in order to promote truth-seeking,
23 provide a margin of error in case good-faith determinations go

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1 awry, and we've done that. And we will continue to do that as
2 applicable.

3 In Appellate Exhibit 397G is a table providing an
4 estimate of the approximate numbers of pages that would be
5 provided to each accused from RDI materials. This was
6 30 September 2016, and those estimates have been borne out,
7 Your Honor, because we were putting a lot of material before
8 the judge at that time, so we didn't know exactly how much was
9 going to come out of that and couldn't give precise numbers,
10 but that has been borne out.

11 In total, each accused has received more than 23,000
12 pages of material across all of the ten categories of RDI
13 information and pertaining to the four theories of relevance
14 the commission named in Appellate Exhibit 397F.

15 These include many hundreds of pages of reports,
16 photographs, and witness statements regarding conditions of
17 confinement at the CIA detention sites; many hundreds of pages
18 of standing operating procedures, policies, and guidelines; as
19 well as scores of communications between the CIA and the
20 Department of Justice that were ordered by the commission in
21 AE 112; many thousands of pages of statements of each accused
22 while in CIA custody; Unique functional identifiers for CIA
23 interrogators, medical personnel, and guards who had direct

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1 and substantial contact with the accused so that they could be
2 distinguished within the discovery provided; commendatory,
3 disciplinary, and training information regarding those CIA
4 personnel; and summaries of all of the instances in which
5 so-called enhanced interrogation techniques were requested and
6 then approved.

7 Except for the materials that came from the Durham
8 investigations, these productions were from the so-called six
9 million pages that the Senate Select Committee Report referred
10 to.

11 An expanded response to topic 3, whether the
12 prosecution views any portion of the Senate Select Committee
13 Report, the Panetta Review, or the CIA rebuttal to be
14 discoverable as opposed to the documents underlying the
15 Report, the short answer was no, nothing beyond which the
16 defense now has.

17 The fuller answer really needs to note that the
18 defense has the 499-page unclassified executive summary, in
19 its redacted form, which they can discuss with their clients
20 and we have indicated we will not object to uses of that.

21 Similarly, there is an unclassified version of the
22 CIA rebuttal that is publicly available, and we do not object
23 to their using that. It is modestly redacted.

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1 As for the Panetta Review, it's important to observe
2 that this review was done some six years after any of the
3 accused were subject to a so-called EIT at a black site. The
4 documents underlying it have been reviewed. We have confirmed
5 that we have reviewed all of those. The documents in this
6 Panetta Review itself have been publicly described by the CIA
7 as summaries prepared for internal use by Director Panetta in
8 2009 regarding information that was simultaneously being
9 reviewed by the Senate Committee staffers. The Panetta Review
10 summaries were exclusively document-based, involving no new
11 interviews of the personnel actually involved in the RDI
12 program, and we gained access to the Panetta Review documents
13 in December of 2015. As with the full Senate Committee Report
14 and also the Minority Views document, which is another one of
15 the Senate documents here, a redacted public version of which
16 is available.

17 As with the full Senate Committee Report, we have
18 confirmed that we have access to all of the underlying
19 documents in the Panetta Review. Those underlying documents
20 included more than just data, as the commission expressed some
21 interest. They also included the OIG findings and conclusions
22 that themselves were based upon actual interviews of
23 participants. And just a small sampling of the reports and

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1 interviews read by Mr. Groharing during oral argument in the
2 motion to reconsider AE 524LL last November indicates that
3 this material provides rich -- we would submit, rich and vivid
4 accounts of the accused's experience in the RDI program, as
5 well as admissible types of conclusions and opinions that were
6 being stated by those connected to the program.

7 Having reviewed the entire Panetta Review, as -- the
8 full thing, as well as the piece distinct from the underlying
9 documents, we did not find that to be discoverable. We don't
10 believe that it is relevant to these proceedings. It was an
11 internal document that the agency has steadfastly maintained
12 is privileged, and on information and belief -- I have not
13 actually eyeballed this document myself -- but I understand
14 the District for the District of Columbia in 2015 ruled that
15 it was deliberative process privileged, and we have seen
16 nothing to cause us to question the CIA's determination of
17 that document as privileged.

18 A fuller explanation of topic 4, whether the defense
19 requests made pursuant to AE 286 are still ripe in light of
20 additional discovery provided by the prosecution, and the
21 short answer was no. We viewed all eight specific AE 230/286
22 related discovery requests overcome by the discovery provided.

23 A bit more explanation on that answer. Besides the

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1 eight specific requests that were cited by the defense in this
2 litigation, there have been some 170 total requests pertaining
3 to RDI information. We count that we have given definitive
4 responses in 139 of these, with 31 still having bits that keep
5 us from declaring with finality the rest is denied and so
6 forth, and this goes to this trickle and this
7 abundance-of-caution type of approach.

8 And like the trickle, as I said early, at the outset
9 of this, Your Honor, the trickle that should be expected to
10 persist until trial due to the continuing discovery
11 obligations of the United States, none of this -- none of this
12 should cause the commission either to defer ruling on this
13 motion nor to delay the suppression litigation for which it
14 has issued milestone dates in the AE 524 series.

15 And I won't further discuss topic 5.

16 Your Honor, to prove that the five accused planned
17 and executed the attacks of September 11, a note on the larger
18 discovery context, I believe, is order -- a brief note on that
19 larger discovery context.

20 Discovery pertaining to which the hijackers used
21 airliners to crash them into civilian -- civilian targets and
22 the Pentagon, the prosecution has produced relevant phone
23 records; travel documents; receipts for purchased items

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1 relating to the conspiracy; miscellaneous business documents;
2 items seized from raids of safe houses associated with the
3 accused; physical evidence gathered in the United States after
4 the attacks; videos of the actual attacks; phone calls of
5 observations from the planes that were hijacked; cockpit voice
6 recordings; air traffic control recordings; summary evidence
7 presentations on the Pentagon, World Trade Center, and
8 Flight 93 crime scenes; ----

9 LDC [MS. BORMANN]: Judge ----

10 CP [BG MARTINS]: ---- surveillance ----

11 MJ [Col PARRELLA]: Hold on one second.

12 LDC [MS. BORMANN]: ---- I have an objection. I didn't
13 understand that we were going to go into discovery writ large
14 on this argument, and so my objection is I don't understand
15 the relevance of General Martins' argument.

16 MJ [Col PARRELLA]: Okay. The objection is overruled for
17 right now. I'll let you continue, General Martins.

18 CP [BG MARTINS]: Your Honor, the statements from all five
19 accused made to law enforcement agents in January, February,
20 and October which are the subject of the suppression
21 litigation impending, and much more.

22 All told, the defense teams for each accused have
23 received more than 500,000 pages of discovery, approximately

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1 85,000 pages of that are classified, approximately 415,000
2 pages are unclassified. And as discussed here, 23,000 pages
3 have dealt with this RDI topic. 15,000 pages of the 23,000
4 are classified; some 8,000 of that 23,000 pages are
5 unclassified. And, of course, that 23,000 is the information
6 sought in this motion to compel.

7 Your Honor, in the summer of 2018, this commission
8 stated that the United States deserved a trial date. This
9 remains even truer now. AE 286 should no longer be deferred,
10 it should be denied, and the milestones in AE 524 should be
11 adhered to.

12 Subject to your questions.

13 MJ [Col PARRELLA]: General Martins, is the government's
14 position that the full SSCI Report, which is currently being
15 preserved at the direction of the commission, that should the
16 commission resolve this, that that report would then -- or
17 feasibly could be returned without impeding your obligation,
18 your continuing discovery obligation?

19 CP [BG MARTINS]: Yes. We have never been denied access
20 to the full Senate Report. We didn't use this version that
21 was sent to DoD. That was sent over for coordination. We
22 went to the Committee, were provided access, and have never
23 been denied access.

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1 So that would have no bearing on our ability to
2 continue to comply with our obligations.

3 MJ [Co] PARRELLA]: I understand. Thank you.

4 Okay. At this time, I think it's -- based on
5 Mr. Nevin's request, we'll go ahead and take a slightly early
6 recess. The court will stand in recess until 1000.
7 Commission is in recess.

8 LDC [MR. NEVIN]: Your Honor, can I -- you're giving me
9 ten minutes instead of an hour?

10 MJ [Co] PARRELLA]: Yeah. I'm sorry.

11 LDC [MR. NEVIN]: 15 minutes.

12 MJ [Co] PARRELLA]: 15 minutes.

13 LDC [MR. NEVIN]: So you understood I asked for an hour to
14 sort this out?

15 MJ [Co] PARRELLA]: I understand.

16 LDC [MR. NEVIN]: You're only giving me 15.

17 MJ [Co] PARRELLA]: I'm giving you 15 minutes, and if you
18 would like to, you know, certainly in terms of the order that
19 you want to argue, if you want to wait until the end, that's
20 fine, too. And if you want to present a compelling reason why
21 you need more time after this, Mr. Nevin, you can do so.

22 Obviously, I think this conflict issue has been around long
23 enough that this shouldn't be too difficult of an issue to

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1 wrestle with, is the commission's position, at least.

2 All right. Commission is in recess.

3 [The R.M.C. 803 session recessed at 0949, 29 April 2019.]

4 [The R.M.C. 803 session was called to order at 1008,
5 29 April 2019.]

6 MJ [Col PARRELLA]: All right. The commission is called
7 back to order. It appears all parties who were present
8 previously are again present subject to counsel ----

9 CP [BG MARTINS]: Your Honor, Mr. Ryan is absent on
10 commission business.

11 MJ [Col PARRELLA]: Okay. All right.

12 Mr. Nevin, have you had enough time to decide whether
13 you want to proceed or what you want to do?

14 LDC [MR. NEVIN]: No, Your Honor.

15 MJ [Col PARRELLA]: Okay. So before you go, let me -- let
16 me propose this to you. What I propose we do, then, is let's
17 hear from the other counsel on 286 so that we don't delay the
18 commission. And since I think we'll have ample time, what I
19 would propose is that I'll give you an opportunity after the
20 lunch recess to then come up and give you more time to decide
21 whether you want to continue to participate.

22 LDC [MR. NEVIN]: All right.

23 And so we would hear argument on the -- on 286, then?

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1 MJ [Col PARRELLA]: Yeah. I -- just for you, I'd give you
2 an opportunity to come back after chow and if you wanted to
3 then present argument on 286, you can do so.

4 LDC [MR. NEVIN]: All right. And, Your Honor, I can tell
5 you, it's going to take longer.

6 And I will say, it was at least an issue in our
7 decision about how to proceed that the military judge had not
8 ordered us to proceed, and if -- and I will say, with all
9 respect, if we had known about this in advance of this morning
10 when I was standing on my feet and you issued the order, we'd
11 have been able to provide you with a more organized response.

12 And so I do request additional time beyond this kind
13 of filling in around the edges. This is -- I recognize it's
14 going to cause delay, but that's -- that's just inherent in
15 the situation. And if we had had more time to deal with this,
16 we could have ----

17 MJ [Col PARRELLA]: Yeah.

18 LDC [MR. NEVIN]: ---- we could have probably avoided this
19 delay.

20 MJ [Col PARRELLA]: I understand your position, Mr. Nevin.
21 I guess, as I think I said earlier, the commission considered
22 it implicit in its earlier rulings that you were ordered to
23 continue to represent your client. I mean, the commission was

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1 quite clear that there was no conflict.

2 It wasn't until I saw your appellate filing that I
3 realized that you may have been operating under the assumption
4 that you hadn't been ordered, so I wanted to make that
5 explicit.

6 LDC [MR. NEVIN]: Well, and I -- yeah. No, I understand
7 you've said that before. I understand that, although it was
8 not -- it wasn't implicit, and particularly given
9 the circuit's -- or, sorry, the district court's holding about
10 whether the military judge has contempt power, I took it that
11 you had advisedly refrained from issuing that order.

12 And, I mean, I will say the normal circumstance here
13 would be that I don't have an appellate remedy. I may or may
14 not have a mandamus remedy. But the normal situation would be
15 that the military -- that a -- that the judge, military or
16 otherwise, would hold me in contempt and that would give me
17 the right to take an appeal. It's part of the process. And
18 your not having that power changes the way this works
19 procedurally.

20 So, you know, I have told you previously that I
21 consider myself to be conflicted because of my own, I guess
22 you would say, emotional reaction to the problem that was
23 presented in AE 615.

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1 You see it in a different light because, you know,
2 you stand in a different place. But I've told you that I feel
3 this conflict, and it comes from the long history in this case
4 that I have that I explained to you in argument, and I'm not
5 going to argue it again now.

6 But now I need to do several things. I need to reach
7 ethics counsel to ask for advice about how to proceed in view
8 of the -- of your order, which, respectfully, changes the
9 circumstances to a certain extent. I need to have -- make a
10 request for independent counsel to explain this to
11 Mr. Mohammad. I walked back in here five minutes late. I
12 apologize for that, but we were trying to get this under
13 control. Mr. Mohammad looks across at me and says, "What's
14 going on?"

15 I haven't had a chance to go over, even walk up and
16 down to the end of the table and talk to him and say, "Here's
17 the deal, as best as I can tell you, and I am conflicted
18 counsel telling you that. So what should you make of that?
19 So it's a complicated situation.

20 MJ [Col PARRELLA]: I understand.

21 So -- and certainly, as I've told you all along,
22 Mr. Nevin, the commission -- although I have made it quite
23 clear that I don't view that you are conflicted, I want to do

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1 everything possible to alleviate your concerns and to have you
2 actively participate.

3 So what I can do or will do, and we've done this in
4 the past when we had the mold issue down here earlier, is
5 afford you as much time as I can to discuss this, research it,
6 but what I won't do is just delay the commission and hold up
7 the remainder of the parties from proceeding.

8 So what I will do is give you an opportunity to
9 address this or any other unclassified motion session or
10 motion series you want to address at the latest possible
11 opportunity. So if it means in the last open session giving
12 you an opportunity to come up and argue any of the AE series
13 that we've addressed earlier in the week that you want to take
14 up, I will allow you to do that, just as I afforded
15 Ms. Bormann's team that opportunity when they were unable to
16 access their trailer.

17 Does that make sense?

18 LDC [MR. NEVIN]: Well, I would just make one last
19 observation about the timing of this, Your Honor. We have a
20 week set aside here in which we've come down here for five
21 days and we probably -- but for the issue that I'm presenting
22 to you now, we probably have a full day's worth of argument,
23 if that.

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1 We've got plenty of time within which to take a
2 24-hour break here and give us the chance to look at this in a
3 principled, correct way. And I -- this is an issue that has
4 arisen in the past, that the desire to go forward sublimates
5 the defense's right to be prepared to go forward. We have to
6 go forward first, and we -- if you can't get prepared to go
7 today, then that's the way it is.

8 I mean, it -- this is a situation that has arisen, in
9 the way it's arisen, that's -- it's not our -- in other words,
10 I return to the remark I made before about if we'd had
11 additional time within which to deal with this, we would have.

12 MJ [Col PARRELLA]: I know.

13 LDC [MR. NEVIN]: But it's just a complicated issue. I
14 ask you to give us the time we need, which I respectfully
15 suggest is 24 hours.

16 MJ [Col PARRELLA]: Well, I think I'm giving you more than
17 24 hours, because I'm going to give you an opportunity to
18 argue at the last possible moment. But what I'm not going to
19 do is hold up other counsel from arguing their positions in
20 the meantime.

21 LDC [MR. NEVIN]: I understand.

22 MJ [Col PARRELLA]: Thank you.

23 Mr. Ruiz.

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1 LDC [MR. RUIZ]: Judge, I just want to catch your
2 attention before we move on. I have an issue that I'm going
3 to need the commission to help me resolve this morning, and we
4 can either do it now or when you think it's appropriate.

5 But we've asked the staff judge advocate to return
6 Mr. Hawsawi's computer to him today pursuant to your order.
7 We have provided the order to the staff judge advocate and
8 they have it. They're refusing to allow Mr. Hawsawi to take
9 his computer back with him today. The response that I'm
10 getting when I ask why is because they have to determine what
11 the process is and put a process in place. When I asked what
12 the process was, they don't know.

13 What I can tell the commission is that for the past
14 few years, the process has been that that case that is sitting
15 over there is given to the guard force. The guard force takes
16 it, brings it to the camp, brings it from the camp to the --
17 to the commissions. When we go to meetings in the ELC, they
18 take the case, they bring it, they take it back, and then they
19 do whatever else they need to do with it. I understand that
20 it's not searched. I understand that they simply transport
21 it.

22 So I'm not really sure what the difficulty is in
23 implementing your order, and I would like your assistance with

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1 that.

2 MJ [Col PARRELLA]: Okay. Well, I'm not sure either, and
3 I think in the commission's order I put in there that if you
4 had difficulty in returning the computer that you should seek
5 the assistance of the prosecution. So before the commission
6 gets involved, I'd ask that you give the prosecution an
7 opportunity to assist in maybe explaining to the JTF that ----

8 LDC [MR. RUIZ]: Actually, I did. I spoke to Mr. Ryan
9 during the break. Mr. Ryan explained to me that he had talked
10 to the SJA and indicated to him that the order complied, and
11 so he has done that.

12 MJ [Col PARRELLA]: Okay.

13 LDC [MR. RUIZ]: And I have talked to them after Mr. Ryan
14 has already talked to them.

15 MJ [Col PARRELLA]: All right. Trial Counsel, do you have
16 a position on this?

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

18 MJ [Col PARRELLA]: Good morning.

19 MTC [MR. TRIVETT]: So in the long, sordid history of the
20 laptop issue, whenever the laptops left the accused's
21 possession, whether it was from an attorney-client meeting or
22 when it left the courtroom, before it would go back and before
23 JTF-GTMO allowed it to go back, it would have to go through a

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1 convening authority IT review. So they'd look at it. There's
2 a bunch of boxes they check, I think all of which -- and I'm
3 doing this on the fly here -- were approved by the defense, at
4 least as to the new laptops.

5 It was simply a security process to make sure that
6 everything had been disabled. My understanding and belief is
7 that the CA piece of this is not substituted by the forensic
8 examination piece. It's two different things. The forensic
9 examination piece had to deal with whether it had been
10 manipulated while it was in the possession of Mr. Hawsawi.
11 This piece is just a standard, common piece. Whenever it's
12 removed from the defense -- or from the accused and goes back
13 to the accused, it goes through this process. So I know at a
14 minimum that JTF-GTMO would require that. I believe that we
15 put this in our filings on this issue. Again, I haven't had
16 an opportunity to review it. I'm just getting up now in
17 response to what Mr. Ruiz is saying.

18 So that has always been the process. It was an
19 agreed-upon process. It really hadn't been much of an issue
20 for the defense counsel, but we believe it's still necessary
21 from JTF-GTMO's perspective to have that go through. It's a
22 fairly quick process. It doesn't take a long time.

23 But it was an independent arbiter that the JTF-GTMO

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1 felt comfortable that if they attested to the things on the
2 checklist, that they would permit the laptops back into the
3 camp.

4 MJ [Col PARRELLA]: Is this a JTF policy or is this a
5 convening authority policy?

6 MTC [MR. TRIVETT]: Part of -- it's a JTF policy, sir, but
7 part of the issue and part of what got us in this whole mess
8 is that we agreed to give brand new laptops. It was our
9 understanding when we gave the brand new laptops that the old
10 laptops were going to be taken from the camp, given back to
11 the defense counsel.

12 What had happened was that somehow the accused got to
13 keep both their old laptops and their new laptops. As part of
14 the agreement for the new laptops, the parties who agreed --
15 and again, I don't remember if it was all five or four of the
16 five -- agreed to this checklist and that this had been the
17 checklist that had been in place for the old laptops and the
18 new laptops.

19 So it's a J -- in order to get us -- to get JTF-GTMO
20 comfortable with having computers in the camp, this was
21 required, and it had been done often in the pendency of these
22 proceedings over the last seven years, but it is different
23 than what the forensic examiner did on behalf of Mr. Hawsawi.

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1 So at a minimum, JTF-GTMO was going to require that, and we
2 believed that that's consistent with the spirit of us turning
3 the laptops over pursuant to the judge's order.

4 MJ [Col PARRELLA]: When do you anticipate they would
5 complete this different review?

6 MTC [MR. TRIVETT]: Well, my understanding is that it
7 simply goes to them and they review it. I don't think it
8 takes a long time. We have not usually been involved in that
9 process. That's always been a defense counsel driven process
10 once we agreed to the parameters of it. But if I may take
11 leave of the commission for a second to speak with Mr. Ryan?

12 MJ [Col PARRELLA]: Sure.

13 MTC [MR. TRIVETT]: Thanks.

14 [Pause.]

15 MTC [MR. TRIVETT]: Subject to your questions, sir.

16 MJ [Col PARRELLA]: Well, what I'd like from the
17 government is I'd like to see this JTF policy that -- or maybe
18 it was in a previous order that requires this sort of
19 convening authority review before JTF can -- can accept the
20 computer. Because just on its face, I mean, I've read the
21 certification. I can't imagine what other type of
22 certification needs to be redone. I mean, the commission
23 ordered an independent -- you know, funded a forensic

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1 certification. The certification has been done.

2 MTC [MR. TRIVETT]: I understand, sir.

3 MJ [Co] PARRELLA]: And a plain reading of 530GGG seems to
4 me to indicate that that means that this computer should be
5 returned to the accused. So what I'd like to see is what
6 policy, what order, is the government relying on to not turn
7 it over?

8 MTC [MR. TRIVETT]: Yes, sir. And I'll get those
9 appellate exhibit numbers for you. I'm sure we have someone
10 looking that up right now. Like I said, we're answering this
11 on the fly so we don't have all of that.

12 MJ [Co] PARRELLA]: I understand, but I do intend to get
13 this resolved as soon as possible. So why don't you consult,
14 you know, with Mr. Ryan, with the JTF, and then simply we can
15 readdress this maybe as soon as the lunch recess is over.

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

17 MJ [Co] PARRELLA]: Okay.

18 LDC [MR. RUIZ]: Thank you, Judge. Just a couple of facts
19 that I want to correct.

20 Number one, the two laptop issue. The reason that
21 the new laptop was not utilized -- and it's probably too much
22 information, but just I think it's important for you to have.
23 This is a long and sordid issue opinion.

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1 The bottom line is that the government at one point
2 decided that they wanted to take these computers away. We
3 went through extensive litigation. Judge Pohl looked at all
4 of the evidence that was provided. And in Mr. Hawsawi's case,
5 he said there was no evidence that would support the
6 prosecution's claims, and then he set forth the ruling that we
7 have now complied with.

8 So this computer has now been through two
9 certifications. The first one was certified by our defense
10 IT, but, of course, they didn't have the forensic capability
11 that was then funded and then is a much more comprehensive and
12 invasive examination that the computer has now gone through.

13 The procedures that Mr. Trivett's referring to in
14 terms of the convening authority certification were ones that
15 were deemed to be necessary if you were going to take the new
16 laptop. The old laptop had been in Mr. Hawsawi's possession
17 for a very long time. Actually, even before I got on this
18 case that laptop had been provided to Mr. Hawsawi. So this is
19 a red herring.

20 The bottom line is they do not want to return this
21 computer to Mr. Hawsawi, they don't want to implement your
22 order, and this is obstructionist at this point. So in
23 addition to the standard operating procedures, or whatever

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1 procedures they're citing, I'd ask that you call a witness and
2 take testimony as to why they're refusing to implement your
3 order at this point.

4 MJ [Col PARRELLA]: Thank you, Mr. Ruiz. We'll see
5 where -- give the government an opportunity to get those
6 documents the commission has asked for and we'll go from
7 there.

8 Okay. Mr. Connell.

9 LDC [MR. CONNELL]: Thank you, sir. I rise not because
10 Mr. al Baluchi has direct involvement in here, but only
11 because I don't want the government's proffer that it just
12 gave to go unobjected to in case it's held against us later.
13 I think purely probably because the government is speaking on
14 the fly here and has not had an opportunity to review in
15 detail the historical facts, some of the recitation of the
16 historical facts was not as accurate as it could have been. I
17 just don't want it to be held against us in the future.

18 MJ [Col PARRELLA]: I understand.

19 And with that, I believe with 286, Mr. Connell, I
20 believe you were the original proponent, so I'll give you an
21 opportunity to go first, if you so choose, unless there's been
22 some other agreement among the defense counsel.

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

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1 Okay. Sir, on 2 April 2014, Mr. al Baluchi filed
2 AE 286 and moved for four elements: An unredacted version of
3 the SSCI Report, which had not been released in any form at
4 that time; the Panetta Review, which was very much in the news
5 at that time; the CIA -- an unredacted version of the CIA
6 official response, which was widely reported the CIA had a
7 media strategy around it, although it had not been released in
8 any form at that time; and the underlying documents
9 relating -- referring or relating to Mr. al Baluchi.

10 As far as Mr. al Baluchi is concerned, AE 286AA,
11 which the commission asked the government about, is redundant
12 with respect to him. I understand that it was filed because
13 the original 286 referred to documents referring to or
14 relating to Mr. al Baluchi, which may not be of such
15 substantial use to other defendants.

16 The request was given additional specificity in
17 AE 286 (3rd Sup), which was filed on 18 March 2016, which was
18 at a time after the government had committed to provide
19 discovery about RDI, but while the -- all of -- most -- the
20 vast majority of that information was still in process. Some
21 of it was still being gathered by the government, some of it
22 had been submitted for 505 reviews and was under review by
23 Judge Pohl.

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1 I would like to draw the military commission's
2 attention to the relief requested in AE 286 (AAA 3rd Sup),
3 because it really focuses the question.

4 And in the fifth question asked by the military
5 commission, to what extent have the rationale for the
6 production been overcome by events, I was -- in reviewing
7 this, I would suggest that the -- these specific question aged
8 remarkably well in that the things that I thought were going
9 to be important and would not be addressed by the government
10 back in 2016 turned out to be the things that were important
11 and have not been addressed by the government.

12 I say that as an introductory matter first, because I
13 think that that gives us some specificity about what we're
14 looking for, but second because I am not here to say that the
15 government has not provided us any discovery and we need
16 everything. That is not the tenor of my argument today.

17 The tenor of my argument today is that the government
18 has made enormous strides toward providing the information
19 that the defendant -- that at least Mr. al Baluchi needs -- I
20 speak on behalf of no one else -- that Mr. al Baluchi needs to
21 present his defense. There is a delta remaining, and a
22 substantial portion of that delta is addressed in the SSCI
23 Report.

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1 So I rise to talk about the information contained in
2 the Report and its underlying documents and -- versus what we
3 have versus what we need.

4 So I'm also prepared to answer specific questions
5 about that. So I'm here to get to the -- what I see to be the
6 heart of the matter, which is what's left. And if you have
7 questions, specific questions, for me about what's left, I
8 will answer them today; or if they're a little more obscure,
9 then I will get the information to the military commission as
10 fast as I can.

11 So a little bit of history. When this was -- AE 286
12 was filed, none of this would have felt like history. I
13 notice that we have recently passed the five-year anniversary
14 of this document, and I agree with the government in about 80
15 percent of what they -- of their argument. I draw different
16 conclusions on some points but their facts seem to be quite
17 solid, and I also agree that I think that this issue is
18 largely ripe for -- is ripe for decision, although there might
19 be a little bit of remaining piece with respect to the Panetta
20 Review, which is something that I'll discuss because it really
21 falls into a different category than the other material.

22 On 11 March 2014, Senator Feinstein on the Senate
23 floor laid out information about the SSCI Report and its

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1 related documents. Her statement is found in the record at
2 AE 286 Attachment D, and she laid out how this inquiry came
3 about in the first place.

4 It came about because of the 2005 destruction of
5 videotaped evidence of torture of a capital defendant,
6 Mr. al Nashiri in this military commission, involving the
7 current director of the Central Intelligence Agency, in
8 violation of an order from the Eastern District of Virginia,
9 at a time that several members of this prosecution team were
10 members of the high-value detainee Prosecution Task Force,
11 which combined CIA, DoD, and DoJ, among other assets.

12 The involvement of the CIA in this particular case is
13 extensive. The prosecution team's intelligence information
14 technology is hosted by the CIA. Their PTF, meaning
15 Prosecution Task Force, .gov e-mail addresses are resident on
16 CIA.gov servers. The CIA is the central stakeholder in the
17 classified information in this case and is the one who
18 occasionally issues clarification guidance such as that found
19 in the record at AE 013RR Attachment B.

20 A *New York Times* article in December of 2007 revealed
21 the destruction of the evidence in violation of Judge
22 Brinkema's order, and the Senate Select Committee on
23 Intelligence began to look into the question. A preliminary

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1 report from staffers in 2009 was described by Senator
2 Feinstein as, quote, chilling.

3 The interrogations and the conditions of confinement
4 at the CIA detention sites were far different and far more
5 harsh than the way the CIA had described them to us. A full
6 inquiry into the CIA documents began in 2010. There was a
7 serious dispute between the CIA and the Senate Committee on
8 Intelligence in which CIA personnel, without authorization,
9 removed documents from the database available to the SSCI, the
10 so-called RDINet described by the government, and then lied
11 about the fact of doing so and their reasons for doing so.

12 During the course of that, staffers found drafts of
13 the Panetta Review. The Panetta Review, I quote, documented
14 at least some of the very same troubling matters already
15 covered by Committee staff, end quote. It contained analysis
16 and, I quote again, acknowledgement of significant CIA
17 wrongdoing, end quote.

18 In December 2012, the SSCI approved a 6300-page
19 committee study of the RDI program, and on 27 June 2013, the
20 CIA provided a redacted -- excuse me, provided an official
21 response not released to the public at that time, in which
22 Mr. al Baluchi features quite prominently.

23 The Panetta Review is significant because it

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1 contradicts that official response, according to Senator
2 Feinstein, and supports the 6300-page study.

3 On 9 December 2014, about six months after the filing
4 of AE 286, the SSCI released a redacted foreword, a redacted
5 findings and conclusions, and a redacted executive summary,
6 and redacted Minority Views regarding the study itself. On
7 the same date, the CIA released a redacted version of its
8 official response and a fact sheet. There's only one detainee
9 mentioned by name in that fact sheet, which is drawn from the
10 redacted official response. That Mr. Detainee is -- that
11 detainee is Mr. al Baluchi, who was used by the CIA as a
12 poster child for the effectiveness of their torture program.

13 After the filing of AE 286, there were several
14 supplements including AE 286 (2nd Sup), which includes the
15 redacted documents themselves. But most important for the
16 specified issues that the military commission laid out is
17 AE 286 (3rd Sup), which specifies the categories of documents
18 underlying the SSCI Report that we are specifically looking
19 for.

20 The fourth question that you issued specifically for
21 us to discuss today is whether the defense requests made
22 pursuant to AE 286 are still ripe in light of additional
23 discovery provided by the prosecution, and the answer to that

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1 is mostly.

2 Our specific areas of interests are indicated, as I
3 said, in the third supplement. And the prosecution has
4 provided a substantial amount of summarized CIA cables,
5 reporting the results of black site interrogations of these
6 five men and the cables involved were originally reporting
7 from the CIA to the FBI and other intelligence community
8 partners.

9 When we analytically -- and we have been through
10 every page of that document -- of that material. We have
11 carefully analyzed it. We have used it for leads and
12 investigation, and we have done our best to understand and
13 construct some kind of chronology, which is the question we're
14 going to return to.

15 When we review the portions of the SSCI torture
16 report that mention Mr. al Baluchi by name, like a control-F,
17 look for "Baluchi," we generally recognize the documents that
18 the SSCI is referring to. Now, it's a lot harder than it
19 should be because the identification numbers of those
20 documents are clearly unclassified because they're contained
21 in the public, unredacted portion of the SSCI Report. But
22 none of those identification numbers appear in the discovery.
23 They've all been blurred out of the discovery, so it's not

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1 possible to -- when the SSCI says document 55391, it's not
2 possible for to us look for document 55391 to see if we
3 actually have it. But in general, we recognize the type of
4 information that the SSCI is referring to.

5 The -- so what I want to address now is the delta
6 between the produced discovery and the needed discovery
7 contained in the SSCI Report and its underlying documents. I
8 understand fully that because of the way that the government
9 produced discovery bit by bit, that neither the defense nor
10 the military commission ever had -- and by military
11 commission, I really mean Judge Pohl there, though I'm sure
12 you've reviewed a substantial amount of information -- ever
13 had a comprehensive view of what was being produced.

14 And I know that I personally, and I strongly suspect
15 Judge Pohl, kept waiting for the other shoe to drop. Like at
16 some point -- and we're going to talk about this in the
17 record -- at some point, isn't there like a this happened to
18 this person and they said this as a result. Isn't that coming
19 at some point?

20 And I certainly thought that that was happening. The
21 government told us today that it's down to what it calls a
22 trickle, meaning that, you know, that sort of key document is
23 not forthcoming, which will be important.

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1 So of the delta, number one, with a star, is dates.
2 This is the absolute number one problem with the substitutions
3 that the government has provided. The government has stripped
4 dates from the -- and with the military commission's approval,
5 don't get me wrong -- from the overwhelming majority,
6 something probably in the nature of 99 percent of the
7 documents that it has provided to the defense.

8 The exception to that is the very last tranches of
9 RDI discovery, which did include specific dates down to the
10 individual day. And that supports my hypothesis that in
11 February of 2018 or so, the classification of dates changed;
12 that the original classification authority no longer
13 maintained that the dates are classified, but that the
14 government did not want to redo all of its discovery.

15 That hypothesis, which I don't have a document to
16 support, is inferred from what actually has happened in the
17 case; both the change in the production of government
18 discovery and the change in the way that the CIA has handled
19 its freedom of information releases, which is fairly well
20 documented in D.C. district court.

21 MJ [Co1 PARRELLA]: Mr. Connell, that last bunch of
22 discovery that you're referring to where the dates were not
23 stripped, is that pursuant to the 397 series?

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1 LDC [MR. CONNELL]: I call it the 308 series.

2 MJ [Col PARRELLA]: 308?

3 LDC [MR. CONNELL]: But it's part of the ongoing
4 production. As the government says, and I completely agree,
5 there have been large tranches and then there have been small
6 tranches. And more recently there have been some smaller
7 tranches, which I understand -- which I believe to be aimed at
8 individual discovery requests or filling gaps, and yes, but it
9 is part of the overall 308, 397, 10-category framework, as
10 opposed to some other -- I am not referring, for example, to
11 the specific sort of ongoing question in the 538 and 561
12 series about FBI/CIA connection.

13 The -- but one of the reasons why I suggest that
14 there was kind of an expectation that this was all going to
15 be -- you know, that the big document was coming, is that on
16 10 January 2018, which is a time after reviewing almost all of
17 the substitutions and both RDI indices, Judge Pohl said at
18 page 18453 to 454 -- 354 of the record if there is no dispute
19 what was done to them, why doesn't the government just say
20 here, we will give you a complete timeline of what was done,
21 when it was done to them? And I'm not talking about the
22 policy stuff. I'm talking about the tactical-level stuff. I
23 won't get too much into dates yet, but Mr. X was subject to

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1 this EIT for this period of time at this location, and on this
2 day there were -- just lay out the whole RDI program in one
3 thing, and then we don't have to call 200 witnesses. The
4 government did not choose to take that approach.

5 So rather than providing a chronology or the means to
6 build our own chronology, the government produced a -- two
7 documents, in fact, that you called, in AE 582R, a rather
8 insipid table. This table is rife with problems as we
9 demonstrated in AE 534 and AE 562. We believed, in good
10 faith, that the solution to that problem was to ask the
11 military commission to produce the documents underlying the
12 sort of critical pieces, the 2.d profiles, but the military
13 commission disagreed. And I am a person who, when the
14 military commission rules, I either ask to reconsider it or I
15 honor that ruling and move on, and I have moved on.

16 But I did note that in AE 534M, you said -- the
17 military commission said, "While Mr. Ali has succeeded in
18 demonstrating possible flaws contained within the RDI
19 paragraph 2.d/f/g Profiles and indices, these possible flaws
20 do not justify throwing out the abundant time invested by the
21 Commission to ensure that -- the adequacy of the summaries and
22 substitutions approved pursuant to M.C.R.E. 505. At best,
23 these issues highlight possible limitations within the current

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1 ten-category construct that may require the Commission to
2 expand the breadth of tools available to the Defense to
3 provide a clear and accurate picture of what transpired during
4 the RDI time-frame."

5 Now, we, after you ruled against us in 534M, tried
6 desperately another attempt to build a chronology. We made a
7 new compilation where we took every document listed in the
8 second RDI index, did the electronic equivalent of printing it
9 out and putting them in a stack, the -- on the theory that
10 maybe if we just put them all in that order and if they had --
11 you know, if they had 12 copies, if they listed the same
12 document 12 times, we'd put it in 12 times; maybe if we just
13 went through that, that some sort of chronology would emerge.
14 It did not help.

15 The -- and when I compared that process, that
16 enormous process that we went through, with the redacted
17 executive summary of the torture report, I find that the
18 redacted executive summary contains some dates, and every
19 reason to believe that the full report contains more.

20 In fact, page 388 to 89, note 2214 of the SSCI
21 Report, contains more dates in Mr. al Baluchi's experience in
22 the RDI program than all -- and I'm specific to Mr. al Baluchi
23 here, because the new dates that the government produced did

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1 not apply specifically to Mr. al Baluchi. They principally
2 applied to Mr. Mohammad -- than all of the RDI discovery put
3 together.

4 It is -- that is the place where we learned the date
5 of Mr. al Baluchi's kidnapping off the streets of Karachi. It
6 is the place where we get the dates of -- that Mr. -- that the
7 CIA began to use EITs on Mr. al Baluchi. That footnote, 2214,
8 is the place that we learned when the CIA stopped using EITs
9 on Mr. al Baluchi and switched to other interrogation methods.

10 None of those dates appear in the discovery. But the
11 same footnote, 2214, points the reader to an intelligence
12 chronology in Volume 2 of the full SSCI Report, which gives me
13 every reason to hope that there is a chronology that exists
14 in -- perhaps globally and perhaps specifically with respect
15 to Mr. al Baluchi in the frequently cited chapter on
16 Mr. al Baluchi in Volume 3 of the SS- -- full SSCI Report.

17 Perhaps the SSCI Report, or some segments of it, is
18 the additional tool that the military commission referred to
19 in AE 534M. I hope so, because dates are incredibly powerful.
20 The extremely compelling argument that the defense presented,
21 that al Baluchi presented in AE 538, about the complex
22 interplay between the CIA, the DoD, and the FBI in the
23 interrogation -- and foreign government partners, in the

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1 interrogation of Majid Khan, Uzair Paracha, and Saifullah
2 Paracha, Ammar al Baluchi, and Khalid Shaikh Mohammad, the
3 complex interweb of how -- demonstrating how closely tied
4 those things were together was only possible because we had
5 dates. It was only possible because the unredacted portions
6 of the SSCI Report contained some dates and the newly released
7 CIA information under FOIA, which was either obtained by
8 BuzzFeed or released on the website at CIA.gov, contained
9 dates.

10 And because we had dates, we were able to demonstrate
11 to the military commission a very close connection between FBI
12 and CIA, which is the most important part for here, that
13 ultimately led the government to reluctantly produce some
14 additional discovery on that material -- on that matter.

15 MJ [Col PARRELLA]: Are you hypothesizing that there's
16 been a change in classification with respect to dates simply
17 based on the discovery that's been received, or is this
18 something you've confirmed through discussions with the
19 prosecution?

20 LDC [MR. CONNELL]: I have not confirmed it. They have
21 not -- this is not something that I have confirmed. My
22 hypothesis comes from a couple of places, two I already
23 mentioned: change in discovery practices, change in FOIA

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1 practices.

2 And the reason why I believe it happened in February
3 is that during some earlier arguments in the military
4 commission -- and I can find you a citation, the government --
5 and it might have been in a closed hearing -- but the
6 government made a reference to -- when it was trying to
7 explain why there was an RDI index and a second RDI index,
8 made an oblique reference to the military commission saying:
9 You remember there was that thing that we filed ex parte, and
10 that thing led us to change the way that we handled dates?
11 That's not -- that's not an exact quote. I can look for it
12 for you.

13 But, you know, I -- I have to look through a brick
14 wall to see what is happening in this ex parte -- extensive
15 ex parte practice between the government and the military
16 commission. And I believe, in good faith, but unconfirmed,
17 that -- putting together these different pieces, I infer that
18 there was a change in classification practice or guidance,
19 that we never had access to, about the way dates are handled.

20 There was a settlement between the Central
21 Intelligence Agency and the National Security Archive around
22 that time where the National Security Archive -- the CIA
23 agreed that it would produce dates in its FOIA documents.

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1 When I say that there's been a change in FOIA
2 practice from the CIA, I don't simply mean I see different
3 things coming out of them, which is the inference that I have
4 to draw with respect to the -- to the discovery, but with --
5 in fact, there was an actual case, I think it was called
6 National Security Archive v. CIA, but I could check the
7 plaintiff, and in that, the negotiation -- there were
8 negotiations between the CIA and the National Security
9 Archive, and a settlement took place where the CIA agreed to
10 reproduce documents principally about the interrogation of
11 Mr. Abu Zubaydah, and they agreed to reproduce them with dates
12 intact.

13 The -- there are now -- at -- the last time that we
14 brought this issue before the military commission, we brought
15 before the military commission an example of what the
16 government had produced to us in discovery, and then the exact
17 same document produced by the CIA to the public -- to BuzzFeed
18 under FOIA, and what we learned was that the -- the public
19 version had dates in it, along with a few other changes, but
20 dates were the key piece; dates and the identification numbers
21 that the SSCI refers to, that I sort of began with, those were
22 all contained there.

23 Now, since that -- and the government's position at

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1 that time was -- which the military commission adopted, was
2 that that -- those documents -- that document had been
3 produced in error.

4 That position, now there's no chance that it holds
5 water, because the CIA has produced dozens and dozens and
6 dozens of documents since that time that have been released
7 into the public, either directly by the CIA or through the
8 media, in which -- which include both identification numbers
9 of the CIA cables, and this is all RDI information that I'm
10 talking about, as well as specific dates, specific dates both
11 of the Report and the underlying conduct which is described in
12 the report.

13 So, is that a hypothesis? Yes. Is it confirmed?
14 No. But that is my belief.

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

16 LDC [MR. CONNELL]: The last thing that I want to point
17 out about how important dates are is the Minority Views. The
18 Minority Views of the SSCI Report don't get a lot of
19 attention. In fact, the government didn't even mention the
20 Minority Reviews [sic], but they are a part of the SSCI Report
21 and they draw a direct causal relationship between torture and
22 statements. I don't think -- you know, to them, that's a
23 policy question. Does -- does the use of these EITs, does it

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1 produce intelligence?

2 When viewed in a criminal context, that is a much
3 different inquiry. Like the policy question and the criminal
4 law question are much different from each other because the
5 causality is critical to an attenuation analysis, among other
6 things, and the redacted Minority Views, were able to state,
7 for example, because they had access to dates, that EITs --
8 the CIA's EITs made Mr. al Baluchi -- and they list him by
9 name -- provide information; and they said that this
10 information relating to Abu Ahmad Al-Kuwaiti, occur -- which
11 we're going to talk about more later, occurred directly during
12 the time of EITs. Now, is that true? I don't know. I don't
13 have the ability to know, but they had access to dates and
14 they can make that sort of claim. Whether it's true or not,
15 we'll -- we may never know if we never get the dates.

16 Now, moving on from the date question, the second
17 category in 286 (AAA 3rd Sup) was described at the time as
18 capture, rendition, detention and interrogation. And the
19 government has provided an enormous amount of information
20 about the results of the interrogations. I don't have any
21 reason to believe that there is additional forthcoming
22 information on that topic.

23 But they drew lines not contemplated by the military

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1 commission in 308 or 397 that excluded everything before what
2 the government defines as rendition, including very
3 substantially, the arrest of -- or kidnapping or capture,
4 however you want to describe it, of Mr. al Baluchi in Pakistan
5 in what might be April 2003.

6 That's described in some detail at Attachment D to
7 286 (2nd Sup), pages 243 to 245. That portion of the SSCI
8 Report contains within it ten substantive redactions, and the
9 government has produced only one highly informal document
10 regarding the process by which Mr. al Baluchi originally came
11 into custody.

12 Now, the government argued to the military commission
13 that they unilaterally restricted the parameters of the RDI
14 program and their discovery production on 3 May 2018 in the --
15 this was in a closed hearing, but an unclassified transcript
16 was produced -- the -- Judge Pohl asked or posited: "The
17 accused is apprehended and there's a period of time where he's
18 not in U.S. control." Mr. Groharing said, "Right."

19 Judge Pohl said, "Mr. Connell proffered that during
20 that period of time there was some CIA questioning of them."

21 Mr. Groharing said, "Correct."

22 Colonel Pohl asked: "Okay. Would that be considered
23 part of the RDI program?"

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1 Mr. Groharing said, "No, no." And Mr. Groharing
2 said, "When he was rendered to the United States, rendered to
3 the CIA, that's" ----

4 And then Colonel Pohl said: "Okay, just so I'm
5 clear, the RDI program begins with the R, then, the rendering.
6 Not the detention, not the interrogation, but the rendering,
7 right?"

8 Mr. Groharing said, "Yes."

9 This was a restriction on the production of
10 information that the military commission had never previously
11 considered. The idea that when we were talking about
12 detention information or interrogation information that that
13 would be limited by the rendition itself.

14 MJ [Col PARRELLA]: I recalled this same discussion.

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

16 MJ [Col PARRELLA]: You -- and I don't think it's the
17 government's position -- and you can tell me if you think
18 otherwise -- that that somehow limits their obligation to look
19 at that material and decide whether it's otherwise
20 discoverable.

21 In other words, it may not fall under the ten
22 category construct of 308, but it still is subject to their
23 review like they would any other discoverable -- potentially

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1 discoverable material, correct?

2 LDC [MR. CONNELL]: No, sir.

3 The whole context of the 3 May 2018 discussion that I
4 just read to you was the question of, well, why didn't you
5 produce information about this, about the time period before
6 Mr. al Baluchi was formally rendered to CIA custody? Why
7 didn't the government produce any discovery about it? And the
8 government's answer was we -- that RDI program begins when he
9 is rendered to U.S. custody. And so even though, as we know
10 from Mr. Groharing's confirmation, but also from page 243 of
11 the SSCI Report, that the CIA was involved in Mr. al Baluchi's
12 pre-rendition questioning, the government did not consider
13 itself bound to produce information about that.

14 Now, I want to be clear that the government has
15 produced or went -- after this process, the government went
16 back and identified -- made some additional production and
17 identified a previous production as involving pre-rendition
18 interrogation.

19 That was, in fact, part of the flaws that we pointed
20 out in AE 534 and 562, as you might recall, because the
21 time -- the RDI index does not place things in its proper
22 context if that's actually what happened.

23 But to this day, the government has not produced

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1 information about the so-called capture information, the how
2 did Mr. al Baluchi come to be in a position whereby the CIA
3 could question him. That information has never been produced;
4 and, as I understand it, the reason that it has not been
5 produced, other than this one informal document that I
6 referred to, is that the government considers that to be
7 outside the scope of 308 and 397. You can ask them, of
8 course, and they'll give you their own position, but that's my
9 understanding of it.

10 MJ [Col PARRELLA]: Okay. I understand.

11 LDC [MR. CONNELL]: The SSCI Report, however, does contain
12 some information about this, some of which is redacted and
13 some of which otherwise. I just referred to page 243. The --
14 there's additional information on page 92 and at page 244 in
15 the SSCI Report.

16 But one of the reasons why this is so important is
17 our outrageous government conduct argument, which is highly
18 specific. It is not generally that the conduct of the
19 government has been outrageous, but it is that the -- there is
20 substantial evidence that the United States Government did not
21 follow its own rules in rendering and abusing Mr. al Baluchi
22 in such a way that I suspect will have an effect on the
23 ability of the military commission to prosecute.

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1 The -- and there's just one example that appears in
2 the SSCI Report, but does not appear in the discovery, at
3 page 289, note 1628, which says that the CIA claimed
4 Mr. al Baluchi provided inaccurate information in foreign
5 government custody ----

6 MJ [Col PARRELLA]: Mr. Connell, let me ask you a
7 question.

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

9 MJ [Col PARRELLA]: Because there's obviously in the
10 course of my time here been several references to a potential
11 outrageous government conduct motion that might be
12 forthcoming.

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

14 MJ [Col PARRELLA]: What are the elements of that, as it
15 pertains to this case? Is there a precedent that you would
16 point the commission to to say these are the elements of what
17 that looks like so that in determining the materiality ----

18 LDC [MR. CONNELL]: Absolutely, sir, so the Toscanino case
19 is the key precedent. It laid out what is involved in the
20 finding of an outrageous government conduct for the purpose of
21 addressing the exception to the Ker-Frisbie Doctrine.

22 So let me back up just a little bit and say, in
23 general, it does not matter how a court or a courts-martial or

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1 a military commission acquires the body of a defendant, right?
2 That's known as the Ker-Frisbie Doctrine. It doesn't matter
3 if you kidnap them. It doesn't matter if you extradite them.
4 It doesn't matter if you find them on the street and arrest
5 them. If they're there, then court has jurisdiction over
6 them.

7 There is a possible exception to that where the --
8 that arises out of the due process shocks the conscience
9 jurisprudence of the Supreme Court, because the Supreme Court
10 has decided that there are certain ways of acquiring
11 information or personnel that shock the conscience of the
12 court and thus essentially as sort of an integrity of the
13 court issue, the court will not participate. And the classic
14 example of that is when there is a bullet in a defendant and
15 they went and operated on the bullet -- Rochin is the name of
16 the case. They went and operated on the defendant to take out
17 the bullet. The Supreme Court said, look, it's not that that
18 was an invalid search under the Fourth Amendment so much as it
19 is that that just shocks the conscience of the court. We're
20 not going to invade people's bodies to gather evidence from
21 them without judicial process.

22 Drawing upon that area, Toscanino described a
23 possible exception to the Ker-Frisbie Doctrine whereby when

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1 the method of acquiring the defendant, the defendant's
2 presence in the tribunal shocks the conscience of the court,
3 the court can decline to essentially hear the case, can
4 decide -- in practical terms that means dismiss, but in sort
5 of theoretical terms what it means is that it would impugn the
6 integrity of the court to take cognizance of a person who had
7 been brought before them in that way.

8 What the Toscanino court described was -- and this is
9 the Second Circuit that we're talking about. What the
10 Toscanino court described was a process of bringing someone
11 which both flaunted the -- you know, the civilized standards
12 for bringing a person before a tribunal and involved torture.

13 And there has never been a situation in which an
14 actual Toscanino violation has been found in which a court has
15 followed this, because -- truly because of -- generally
16 because of the professionalism of American law enforcement;
17 that American law enforcement, military or civilian, generally
18 does not flaunt judicial process, generally does not hold
19 people in black sites, and generally does not torture them.
20 I'm not saying that there's not the occasional exception, but
21 generally, that's the way that things work.

22 And this case is unique, I suggest, in the fact that
23 it very well may fit within that Toscanino exception. An

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1 important part of that, to me, and I believe in my discussions
2 with Judge Pohl at some level to the military commission, is,
3 well, was it okay what they were doing? Like almost a
4 good-faith question of, well, were they following their own
5 rules? I know that these are -- the CIA had its own rules;
6 they were very unique. They were not what the DEA or the ATF
7 would have followed, but what did they think about their own
8 rules?

9 And that's where, for example, the Office of
10 Inspector General reports become important because they assess
11 whether the CIA followed its own rules in rendering, deciding
12 to use EITs, and standard -- what they considered standard
13 interrogation techniques in this situation.

14 So the reason why I'm giving this particular example
15 is that I can completely understand why a military commission
16 or the government would argue, well, maybe it was unorthodox,
17 but they followed their own rules, whereas it seems to me
18 there is substantial information available in the SSCI Report,
19 and from other areas, that, at least in Mr. al Baluchi's case,
20 they did not follow their own rules.

21 Did I successfully answer the military commission's
22 question?

23 MJ [Col PARRELLA]: You did.

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1 LDC [MR. CONNELL]: Thank you.

2 The third area, it's little (c.), in 286 (AAA 3rd
3 Sup) is the role of Mr. al Baluchi in other United States
4 efforts. The most famous one, of course, with respect to
5 Mr. al Baluchi is the identification of a courier known as Abu
6 Ahmad al-Kuwaiti, which was basically the plot line of *Zero*
7 *Dark Thirty*.

8 And because of that sort of media push by the CIA,
9 the CIA mentions only one detainee by name in its fact sheet,
10 its public response to the SSCI Report. That fact sheet is
11 found in the record at AE 286 (AAA 2nd Sup) Attachment H, and
12 involves the claim that enhanced interrogation techniques,
13 specifically, I -- I use that phrase advisedly because
14 Mr. al Baluchi was tortured in many ways, only some of which
15 are formally enhanced interrogation techniques -- that those
16 induced Mr. al Baluchi to reveal that Abu Ahmad al-Kuwaiti
17 served as courier to bin Laden. This is the story that the
18 CIA pitched to Hollywood filmmakers that ultimately became
19 *Zero Dark Thirty*. That fact sheet draws on a partially
20 redacted paragraph in the CIA response, which is found at
21 second supplement -- AE 286 (2nd Sup) Attachment G, page 38.

22 It was also important to the minority in the SSCI
23 Report. The Minority View states at AE 286 (2nd Sup)

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1 Attachment E, XVII, specifically, Ammar al Baluchi, who
2 appears to be the first detainee to mention Abu Ahmad
3 al-Kuwaiti's role as a bin Laden courier, provided this
4 information at a CIA black site during a period of enhanced
5 interrogation.

6 That's why I mention the importance of dates, because
7 I have no way of saying whether that is true or not. I know I
8 have statements about Abu Ahmad al-Kuwaiti that were released
9 in cables from the CIA. But how that matches up with the
10 EITs, I have no idea.

11 The -- it's also important because of sentencing. In
12 the Hamdan trial in 2006, there were two witnesses who
13 testified in closed session during the trial itself. From the
14 comments that were made about that -- and I have no access to
15 classified information in that case. I don't have the closed
16 transcript. I don't know -- but from the comments that are
17 made in the open transcript, it appears that they testified
18 about the importance of information that Hamdan provided under
19 interrogation. And I believe that that is a substantial
20 factor in the short sentence that Mr. Hamdan received, five
21 years with four and a half years of credit for time served,
22 and it demonstrates the exculpatory power of why it is
23 important to know what information a prisoner gave and under

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1 what circumstances they gave it.

2 The fourth category in AE 286 (AAA 3rd Sup) is the
3 rendition, detention, and interrogation of people who provided
4 information about Mr. al Baluchi. One of the things we know,
5 and the Minority Views in the SSCI Report set this out in
6 partially redacted material in -- with extraordinary power,
7 actually, is that Abu Zubaydah was subjected to abusive
8 techniques during April of 2002. And in April of 2002, there
9 was no such thing as an Enhanced Interrogation Technique, all
10 caps -- or capitalized. It had not been invented yet. It
11 wasn't invented until the end of July or the beginning of
12 August of 2002.

13 But then separately, in August of 2002, we do know
14 from the Minority View that the FBI was a full participant at
15 least during the April portion of that. That's found at
16 second supplement Attachment E, page 38, and identified
17 Mr. Binalshibh and Mr. Mohammad to the CIA and the FBI during
18 those -- those abusive techniques.

19 According to page 43 of the Minority Views, that
20 information from Abu Zubaydah resulted in the arrest of
21 Mr. Binalshibh. And information from Mr. Abu Zubaydah and
22 Mr. Binalshibh identified Mr. al Baluchi and Mr. Bin'Attash,
23 and that's found in the Minority Views in page 43 to 47. That

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1 didn't necessarily lead to their custody, but it was critical
2 to their rendition.

3 And the reason why that's important is that the
4 prohibition on use of information obtained by torture provided
5 in 10 U.S.C. 948r is not limited to the use of torture on the
6 defendant, which the legislative history makes clear.

7 If you torture person A to capture -- to find
8 witness B, and witness B is -- is going to testify against
9 defendant C, that is prohibited by 948r. It may also be
10 prohibited by the due process clause, which is exactly the
11 situation in Ghailani in the Southern District of New York,
12 when witnesses were excluded from being able to be used by the
13 government because of the method by which those witnesses had
14 come to the attention of the law enforcement -- the abusive
15 methods by which they had come to the attention of law
16 enforcement.

17 But it's certainly critically important here where we
18 have a chain of information: Abu Zubaydah, who has not been
19 in -- covered in our discovery, and -- but is extensively
20 covered in the SSCI Report, and then Mr. Binalshibh and
21 Mr. Mohammad, who are covered in our discovery.

22 The fifth category was the rendition, detention, and
23 interrogation of people who may testify. I only know of one

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1 person who falls under this category, and there might be more,
2 and that's Mr. Majid Khan, who had a close connection. His
3 detention and interrogation both in -- by foreign partners and
4 by the CIA had a very close connection to Mr. al Baluchi's and
5 Mr. Bin'Attash's.

6 He currently has an agreement to testify in this
7 case, and the convening authority has imposed a restriction
8 that he cannot provide a classified interview to the
9 defendants. So our real only source of information about
10 exactly what happened to Mr. Khan are public statements that
11 he might make, through his lawyers or otherwise, or through
12 the discovery.

13 The sixth category was RDI leading to searches.
14 The -- it is the torture of Mr. Abu Zubaydah, which at least
15 in April of 2002 included the FBI, led a joint FBI/CIA/foreign
16 partner searches on 11 September 2012 that produced a
17 substantial amount of evidence that the government has said
18 that it intends to try to use in this trial, and also the
19 arrest of Mr. Binalshibh. That's described in the SSCI Report
20 at second supplement Attachment E, page 43.

21 The last category that we had laid out, attachment --
22 category g., the seventh category, was about CIA destruction
23 of evidence. And I will anecdotally tell the military

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1 commission that I have a piece of paper on my wall in my
2 office that says "destroyed evidence" on it, and each time the
3 government says, oh, we can't -- we don't know who that -- you
4 know, we used the pseudonym Chris, and we don't know who Chris
5 is, we have destroyed or lost that information, I write it on
6 the sheet.

7 When the government says, yes, I know that there are
8 redactions in the early September 2006 medical records. We no
9 longer -- we've lost or destroyed the unredacted versions of
10 those early records or the early DIMS records, the -- I write
11 it on the sheet.

12 So destruction of evidence, at some point there will
13 be a look at all of this evidence that has been destroyed.
14 But it's important because Senator Feinstein, in her
15 statement, noted that the CIA, quote, withheld and destroyed
16 information about its detention and interrogation program. We
17 already saw that with the destruction of the Nashiri tapes
18 that led to the -- this inquiry in the first place. We've
19 seen it -- you know, I was certainly struck when the
20 government said that it was committed to comply with the
21 public order for the preservation of the SSCI Report, that it
22 had publicly committed to publicly comply with the public
23 order for preservation of the black site that was at issue in

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1 AE 425. We've already seen how that worked out.

2 The -- and finally, with respect to these categories,
3 there's substantial information in the SSCI Report about CIA
4 custody during January 2007 -- or there's -- I say there's
5 substantial information. There's this one critical sentence
6 is what there really is and -- about CIA custody during FBI
7 interrogation in January of 2007.

8 And at least a half dozen times the government has
9 relied on President Bush's 6 September 2006 speech to claim
10 that it transferred Mr. al Baluchi to DoD custody at GTMO.
11 That was in AE 009A, AE 013, AE 016A, AE 028A, AE 031A,
12 AE 119A, AE 200F, and AE 200L.

13 And part of the government's claims of voluntariness
14 is that the FBI advised prisoners that they were no longer in
15 CIA custody. Just as one example, they made that claim at
16 AE 119A at 17 note 6, and I'm sure that they will repeat it in
17 the suppression motion, but I believe the SSCI Report contains
18 information, including an underlying document which is
19 identified specifically, that that statement is false and that
20 the FBI knew it, and that this was really just a ruse that
21 they were -- that they were using.

22 Because the executive summary contains one sentence,
23 and this is found in the record at AE 286 (2nd Sup)

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1 Attachment D at page 160, and it says that "After the 14 CIA
2 detainees arrived at the U.S. military base at Guantanamo Bay,
3 they . . . remained under the operational control of the CIA."
4 The SSCI Reports -- cites to an e-mail to John Rizzo with some
5 detail, an e-mail that has never been produced in discovery
6 and that we've never seen.

7 Now, what I have been doing is addressing why at
8 least portions of the SSCI Report are important, and the
9 documents which underlie those portions are important. But I
10 want to conclude by talking about these documents in and of
11 themselves, like not for their instrumental or factual value,
12 but the -- these documents in themselves. And this actually
13 came up quite substantially in the AE 112 series, when we were
14 talking about the military commission addressed the Department
15 of Justice memoranda. And AE 112 is the one place where the
16 military commission ruled that the government had to produce
17 original documents with redactions as opposed to producing
18 substitutions or summaries.

19 And the military commission used this phrase,
20 alliterative phrase, which has stuck with me ever since, and
21 it said, "This is because of the power and provenance of the
22 original documents."

23 And with respect to these documents that we are

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1 talking about, the SSCI Report in its multiple dimensions, the
2 CIA official response, and the Panetta Report, the same
3 reasoning applies.

4 According to the foreword of the SSCI Report, the
5 AE 286 (AAA) (2nd Sup) Attachment B, I quote, the full study
6 is more than ten times the length of the executive summary,
7 and includes comprehensive and excruciating detail. The study
8 describes the history of the CIA's detention and interrogation
9 program from its inception to its termination, including a
10 review of the 119 known individuals who were held in CIA
11 custody.

12 Now, in AE 286S, Senator Feinstein wrote directly to
13 the Secretary of Defense and cc'd this military commission.
14 She talks about the incredible, factual, rich and vivid detail
15 which is contained in the full report and the importance of
16 its preservation.

17 But on the Senate floor, she said, "If the Senate can
18 declassify this report, we will be able to ensure that an
19 un-American, brutal program of detention and interrogation
20 will never again be considered or permitted."

21 We intend to make the same argument to the panel,
22 that their decision not to impose a death sentence on
23 Mr. al Baluchi, if he is convicted, will help ensure that such

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1 an un-American, brutal program will never be repeated. In
2 order to do so, the power and provenance of these original
3 documents comes into play.

4 And as my last point, I'd like to say that the
5 Panetta Review itself -- and I flagged this early in the
6 argument -- the Panetta Review itself is unique in that there
7 is no publicly available version of it, and at least,
8 according to Senator Feinstein, it supports the view of the
9 majority and identifies -- is essentially an admission of
10 wrongdoing by the CIA. It's not the underlying facts that are
11 important, it's the confirmatory opinion that's important.

12 And if the military commission is considering, among
13 the various tools that it has available to it, an in camera
14 review of some of these documents, the Panetta Review is the
15 best candidate for that.

16 I say that with humility, because it's the document
17 which I can't say exactly what it says. I can only say what
18 people have said about it, what the CIA has said about it,
19 what Senator Feinstein has said about it, and it is different
20 from, for example, the sentence about CIA operational control
21 over Mr. al Baluchi, because that's an unredacted sentence. I
22 can tell you what it says, and I can point you to the footnote
23 which contains its underlying support for that view. I cannot

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1 do the same with the Panetta Review.

2 And I note -- I listened very carefully to the
3 government's argument for why it did not produce it, and its
4 principal reason, it said that it had made a relevance
5 determination that it was not relevant to the -- to these
6 proceedings. And I know that in many cases the government
7 makes relevance determinations. But in something as highly
8 contested as this, it makes a great deal of sense for the
9 military commission to look at the Panetta Review and make its
10 own relevance determination.

11 There was also a reference to a deliberative process
12 privilege. It wasn't actually like fully claimed under 506 by
13 the government, and it seemed to be a sort of side issue. But
14 if in fact there is a claim of deliberative process privilege,
15 it should be addressed through the 506 process, which includes
16 in camera review by the military commission.

17 MJ [Col PARRELLA]: Thank you.

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

19 MJ [Col PARRELLA]: Okay. Mr. Nevin, I'm going to give
20 you an opportunity to -- as we discussed, to deliberate a
21 little further.

22 Ms. Bormann.

23 LDC [MS. BORMANN]: Mr. Connell did a terrific job summing

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1 up where we are as well with his division of the seven areas,
2 and ending with the argument we intend to make before a panel,
3 if we get to sentencing.

4 I have a little bit more to add that I can't, and
5 that's because we are currently under conflict because we have
6 a good-faith basis to believe that we are witnesses, and, in
7 part, being investigated by the Federal Bureau of
8 Investigation.

9 And as Mr. Connell indicated, there is a CIA/FBI
10 connection that I will not mention any further here, but
11 suffice it to say that any conversation I have about that
12 connection and any implication of the FBI puts me at risk
13 personally.

14 And so I will submit something in a classified
15 fashion to the court to explain more fully what that conflict
16 involves and why I don't believe I can say anything here, but,
17 with that, we would adopt Mr. Connell's argument.

18 MJ [Col PARRELLA]: Thank you, Ms. Bormann.

19 Mr. Harrington.

20 LDC [MR. HARRINGTON]: Just a few comments to, in a sense,
21 supplement what Mr. Connell said. But in any trial,
22 obviously, it's about storytelling; and in a death penalty
23 case, it's a storytelling on steroids.

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1 And the way that most of us think, and the way that
2 most of us understand stories is usually chronological,
3 although that -- although not always. But what Mr. Connell
4 emphasized to the court about the lack of dates is highly
5 critical. It's almost impossible to put together the
6 chronological story, where you have a document that refers to
7 the approximate time of the year, and so you've got to say
8 mid-2004 or something like that, and you have no idea of how
9 that -- how that relates to other documents with mid-2004 and
10 whether -- whether you can put together that -- that -- that
11 message or that story.

12 And the second thing is that I think what's behind
13 some of the argument of the government from them objecting to
14 us having the full Report is -- they don't -- haven't said
15 this, but perhaps it's cumulative. You've been told what's
16 happened to your client, and then you've got that information.
17 You do whatever you want to do with it.

18 But in this particular case, there's a whole section
19 in the 6,000-page report that deals with Mr. Binalshibh as
20 opposed to the 15 or so pages directly about what's happened
21 to him in the -- in the Senate Report.

22 And it's impossible for us to think that there
23 aren't -- there isn't much more graphic information than what

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1 we have in the -- in the sanitized portion, which even the
2 sanitized portion is powerful, but it can be nowhere near as
3 powerful, especially in view of the comments of Senator
4 Feinstein and other persons who have commented on it, that
5 help us to tell that story. It is essential to the
6 determination that the members are going to make here about
7 whether this is a factor in deciding life or death, how much
8 of a factor it is, and whether it is one that will persuade
9 them not -- not to impose death.

10 And they have a right to hear this information and --
11 in order for them to make the proper decision. And that
12 decision can go either way, we understand that, but they have
13 a right -- they have a right to hear it.

14 And the question about the decision of who decides
15 which of those facts are turned over to us is -- it seems to
16 me is something that should not be made by the people who have
17 a vested interest in not turning it over in terms of
18 prevailing in the position that they take with respect to this
19 case. And I'm not impugning their integrity or anything else
20 like that. I'm talking about who the proper decision-maker
21 should be and what information is presented to the members in
22 this case.

23 Judge, we -- we'll take the opportunity to present

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1 something in writing to the court as you offered earlier.

2 Thank you.

3 MJ [Co] PARRELLA]: Thank you, Mr. Harrington. Just in
4 response to your last statement, and as well as for
5 Ms. Bormann, I just want to make it clear, the court's
6 invitation to submit different -- additional documentation
7 pertained to 524NNN, not with respect to this 286 series.

8 Mr. Ruiz.

9 ADC [MS. LACHELIER]: Judge, we adopt the comments of our
10 colleagues, and we certainly echo Mr. Connell's list of
11 concerns about the productions. I really just stood up to
12 give you an illustration because we -- Mr. Connell referred to
13 specific areas of interest. We actually litigated a specific
14 area -- one, only one so far before you, actually, in 589 --
15 and so I wanted to illustrate for you what the product of that
16 was, and so that you can hopefully get a better understanding
17 of what Mr. Connell is referring to in terms of what we're
18 getting, why it's difficult to put together a chronology, why
19 it needs more information, and we don't have what we need.

20 If I may approach, I have one copy.

21 MJ [Co] PARRELLA]: You may.

22 ADC [MS. LACHELIER]: So in 589, we litigated the
23 production of specific aspects of the SSCI, and that was

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1 cables referenced in the SSCI Report regarding sleep
2 deprivation policy, and we had requested of the government
3 specific items from the SSCI Report. So this is in addition
4 to what we already requested in 286 (MAH Sup).

5 Essentially, we were trying to drill down in specific
6 areas to see if we could try to get at this. And you issued a
7 ruling which you instructed to the government that they should
8 provide us, and I have the -- it's ruling 589B -- identify for
9 Mr. Hawsawi any discovery that's regarding the al Hawsawi
10 incident, which we believe involves sleep deprivation, and any
11 change in CIA policy therefrom.

12 What I had just handed to you, and the parties just
13 got a copy of it, was what I'm going to call just a key card
14 from the government of a long list, two and a half pages of
15 Bates numbers of documents that are supposedly responsive to
16 our request.

17 Because there are no dates in the documents that they
18 identify on that list, because there is no, "Hey, this is this
19 cable, and it's a summary of this cable," there's no way to --
20 for us to know that those documents were responsive to what we
21 needed until we got a key card from the government, and that
22 key card that I'm referring to is the three pages of Bates
23 list.

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1 And we could repeat this over and over again for
2 every specific area of interest we have in the SSCI Report
3 where we need some type of Rosetta Stone from the government
4 to decipher what it is they've produced that is, in fact,
5 responsive.

6 And once we have that, we get into the issues that
7 Mr. Connell briefed as well, which is there's no dates; the
8 dates are lacking; we don't have the details that would allow
9 us to produce a chronology.

10 So -- and I can -- I gave you 589 and the response
11 from 589, because, one, it's particularly apt because we had
12 to get to litigation and an order from you in order to even
13 get to the Rosetta Stone that will get us to now looking at
14 these documents, analyzing them, probably producing more
15 discovery requests.

16 But I have several others, and I'm not going to --
17 several other responses like that from the prosecution where
18 we've had to drill down in specific requests related to the
19 SSCI Report, asked for some identification from the
20 prosecution, if they believe that they have actually produced
21 what we asked for, please tell us where, because the
22 information you give us in your summaries is not -- is
23 essentially over-summarized and deletes too much information

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1 for us to be able to know what we have.

2 So I -- like I said, I have several of those. Some
3 are classified, some are unclassified, and I'm happy to
4 provide them to the court if the court wants more evidence of
5 that separately. We can file them.

6 But just so that you know what I have just provided
7 you is one example of four or five that we have that we have
8 needed. And we are still not done.

9 MJ [Col PARRELLA]: With respect to this example, if I
10 understood you correctly, in addition to what's been marked as
11 286EE, the government at your request did provide a key of
12 sorts that put context in terms of dates associated with
13 these.

14 ADC [MS. LACHELIER]: No, sorry. Maybe I'm not being
15 clear. That is the key, I'm referring to what you're looking
16 at, and those documents do not have dates.

17 So we're still several steps away from getting what
18 we need, but just to get to the point of understanding what
19 they claim they provided that's responsive, it's not just a
20 question of turning over Bates-stamped documents. It's us
21 going back to them and saying, okay, of the 23,000, that
22 General Martins referred to, 23,000 pages that you've provided
23 that are supposedly RDI-related, what of those are the

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1 al Hawsawi incident? We have another incident in the SSCI
2 Report that talks about a 14-hour interrogation of
3 Mr. al Hawsawi. We don't have any discovery that identifies
4 here's the documents related to the 14-hour interrogation of
5 Mr. al Hawsawi. We have a list of EITs that were applied to
6 Mr. al Hawsawi, completely out of context, just a list of
7 EITs. We don't know if those were applied in the 14-hour
8 interrogation. We don't know if those were applied. We don't
9 know when -- I don't think we know, except maybe from the SSCI
10 Report, when that 14-hour interrogation took place. We don't
11 know how long the EITs were applied, none of the EITs were
12 applied, we don't have any of those -- that granularity. If
13 they think they provided it in the 23,000 pages, they need to
14 clarify that to begin with. And then once we get the
15 clarification, these are the Bates numbers -- again, I want to
16 return to Mr. Connell's points -- still don't have the dates,
17 we can't put together a chronology in the proper way.

18 So that -- again, just to illustrate for you the
19 issues, and one other piece I wanted to -- this is going to
20 seem a little bit like a non sequitur, but Mr. Connell talked
21 about the sort of -- I'll call it a black wall that the
22 government created behind capture and detention information,
23 because they've decided unilaterally that that capture and

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1 detention information is not RDI specific if it predates
2 rendition to the United States.

3 They've created another similar self-defining area in
4 the production of SSCI documents, and that's the reference to
5 direct and substantial contact. This goes back to Judge
6 Pohl's order in 397F. Judge Pohl said provide the names --
7 not the names, but the UFIs for personnel who had direct and
8 substantial contact. And personnel was supposed to be medical
9 personnel, guards, et cetera. It was a very broad category
10 under the 397 ten-category construct.

11 The government has never defined what they mean by
12 direct and substantial, but I can tell you that the list of
13 people that we have gotten that supposedly had direct and
14 substantial contact with Mr. al Hawsawi, one, the lists -- we
15 have gotten several. The lists are inconsistent; and
16 secondly, the list is -- cannot possibly be complete if one
17 takes a certain definition of direct and substantial. We're
18 not clear what definition the government has taken, but it --
19 it seems to be some kind of they sat with him for 24 hours
20 straight for the three and a half years that he was in
21 custody, and then that's direct and substantial, because we
22 have people who by our standards would have direct and
23 substantial contact, are listed in the discovery by UFI, and

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1 [The R.M.C. 803 session was called to order at 1330,
2 29 April 2019.]

3 MJ [Col PARRELLA]: All right. This commission is called
4 back to order. All parties present when the commission last
5 recessed are again present, with the following exceptions, if
6 there are any.

7 General Martins?

8 CP [BG MARTINS]: Good afternoon, Your Honor. Mr. Swann
9 is out of the courtroom on commission business.

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

11 Mr. Nevin.

12 LDC [MR. NEVIN]: Your Honor, thank you. Let me start by
13 saying I, in view of your order this morning, have asked
14 Ms. Radostitz to return to the National Capital Region at the
15 earliest possible time, and I don't know whether we will need
16 to consult with your office or ask for assistance in trying to
17 get that handled, but it's just something I wanted to say at
18 the outset.

19 The second thing is, you are ordering us to go
20 forward to represent Mr. Mohammad, and I will say that I have
21 consulted with ethics counsel, and I believe that obligates us
22 to do our best to do that, and we'll comply with that.

23 I want to say, though, that, again, we've identified

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1 two issues that generate the conflict. And I said this
2 morning, I feel myself to be laboring under a conflict because
3 of -- and I feel that what I am doing is pulling my punches,
4 and I am in this position of not feeling fully free to
5 litigate.

6 I tell you that as a matter of fact. I say it as an
7 officer of the court in good faith. And it has to do with the
8 long history of my involvement in the case and the various
9 investigations and so on that have taken place. And you did
10 speak clearly to the question of whether there is an
11 investigation.

12 And I will say that we raised -- I pointed out to you
13 there were a number of unanswered questions on the question of
14 whether there was an investigation. The military judge may
15 recall me saying, "What about that guy saying what's going on
16 with the other defense teams?" And we've never had an
17 explanation of that, just a blanket statement that that wasn't
18 an investigation. And it's hard for us to know what that
19 means, particularly in the context of this long history.

20 But there was a second issue as well, and that is the
21 confidentiality of our defense communications, and the attempt
22 to possibly place a plant on one or more defense teams, the
23 history of that being done in this case, the history of trying

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1 to acquire information from within the privilege on these
2 individual teams.

3 And with all respect, the military judge, you, have
4 never spoken to that, and you've never -- you acknowledged it
5 at one point during the course of argument, but you never gave
6 us information on that subject upon which we could make a
7 decision.

8 And that is part of why we have maintained our --
9 and, of course, you will recall as well, we married this up
10 with the military commission previously holding that our
11 continued filing of pleadings constituted something like a
12 waiver of the question of whether we were under a conflict,
13 and that all led us to standing down from going forward.

14 The second aspect of this is that it's -- it goes
15 beyond, of course, my personal comfort level in whether or not
16 I think I'm complying with the rules of evidence -- sorry, of
17 professional conduct, and in particular the obligation of
18 diligence. It goes beyond that.

19 Mr. Mohammad has been told by me, and he's heard me
20 say it to him and he's heard me say it to you, that I feel
21 myself under the -- laboring under the -- under a conflict of
22 interest. He has a right to be advised by conflict-free
23 counsel on the question of how he should react to that.

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1 Should he -- should he ask that I be excused? Should he go
2 pro se until this gets resolved? He has the right to have
3 advice from somebody who has not told him, "Sir, I am under a
4 conflict of interest."

5 And I understand the military judge's desire to move
6 forward, but there are values in a capital case that are
7 higher than efficiency, and Powell v. Alabama speaks to those,
8 and that famous phrase about nothing short of judicial murder,
9 if when you -- when we don't -- when we don't dot every "i"
10 and cross every "t" in this kind of a matter. And I'm --
11 really, you could summarize where we are by simply saying to
12 you we think we should do that, and we have -- and
13 Mr. Mohammad pointed out to me that he's the one that looked
14 up and saw a smoke detector that turned out to be a
15 microphone.

16 And when you have this kind of history in a case like
17 this, your reaction to things like AE 615 are colored by --
18 you know, your history and your perception of this. And, you
19 know, Mr. Mohammad is part of that as well, is really what I'm
20 trying to say, and that I would much prefer to have him have
21 the advice of counsel who clearly is laboring under no
22 conflict of interest. And you will also perhaps be aware that
23 no such counsel is available to Mr. Mohammad in the near term.

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1 There's just not someone in the MCDO stable who is capitally
2 qualified and unconflicted and able to give that kind of
3 advice.

4 So -- but I -- we are pursuing a mandamus remedy.
5 We'll pursue it as far as we can pursue it on this subject,
6 and in the meantime, we'll do our best to represent
7 Mr. Mohammad. But I ask you -- and I just will say, I'm
8 reminded that there is one other aspect of this, and that is
9 that the people who have participated in the intrusions into
10 our defense camp in the past have been the same people that
11 you worked for previously. So this connects to the motion to
12 recuse you. And that is also ----

13 MJ [Co] PARRELLA]: And Mr. Nevin, though, we're getting
14 into argument, and I've sort of allowed you to kind of make a
15 record, but we're done with that point and we're not going to
16 get into rehashing either the conflict issue because, as I've
17 made it clear, the commission finds no conflict. As you've
18 pointed it out, that's currently pending with our higher
19 authority. So in the meantime, let's move on.

20 LDC [MR. NEVIN]: Okay. But you understand that I offer
21 that in support of the argument I'm making at the present time
22 as well.

23 And then finally, I would just say, Your Honor, I

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1 gave notice to the military commission -- or actually not
2 notice, it was a motion for -- to excuse Mr. Sowards early
3 last week; I don't remember the exact day -- in which I said
4 we will not be participating this week. And now for the
5 reasons that we have -- have not participated in previous
6 rounds of hearings, and so I spent the available time to me
7 for preparation applying my time to other things, to be -- to
8 put it simply.

9 And so I do not feel prepared to make argument on the
10 remaining issues that are on the docket sheet for this round
11 of hearings. So I will say something to -- if I feel that I
12 can add to the argument, I'll do it. I'll do my best to do
13 it, but if I feel that I'm not prepared, I'll tell you that as
14 well. And I request some continuance, some reasonable
15 continuance to allow me to become prepared to make arguments,
16 substantive arguments, on the motions that are on the docket
17 sheet.

18 MJ [Col PARRELLA]: So with respect to the one that we're
19 currently in the midst of, 286, would you like some additional
20 time?

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

22 MJ [Col PARRELLA]: All right.

23 So, then, I will afford you that time; however, I

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1 will tell you it will be this week in terms of the oral
2 argument on that issue.

3 Specifically since 286AA, your pleading has -- is --
4 there's been previous oral argument and the commission has
5 gone back and looked at the transcript and was very specific
6 about what it was interested in hearing by re-placing it on
7 the docket.

8 So I will certainly afford you, like I've said
9 earlier, an opportunity to talk about that, any additional
10 thoughts. I think your colleagues did a very good job in
11 putting forth some positions, and -- but I'll give you an
12 opportunity to kind of revisit that this week.

13 As for Ms. Radostitz, I will tell you that in terms
14 of seeking assistance from the commission in getting her off
15 island, you probably know from history that I'm probably about
16 the worst person you want to ask for assistance getting off
17 the island. I wish her luck.

18 LDC [MR. NEVIN]: Well, we're not talking about medevac,
19 Your Honor, we're just talking about the rotator.

20 MJ [Col PARRELLA]: Okay. Thank you, Mr. Nevin. And
21 Trial Counsel, I'll give you an opportunity to -- any other
22 points you want to make on 286? If not, I do have a few
23 questions for you.

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1 And Mr. Ruiz, I will get to your laptop.

2 LDC [MR. RUIZ]: Judge, could we do that before we go to
3 the next series?

4 MJ [Col PARRELLA]: Yes.

5 LDC [MR. RUIZ]: Thank you.

6 CP [BG MARTINS]: Your Honor, I do have four points just
7 in response to counsel's argument.

8 First, Mr. Connell mentioned the Ghailani
9 prosecution, which resulted in a Southern District of New York
10 decision, a memorandum opinion regarding Ghailani's motion to
11 dismiss for alleged outrageous government conduct. I wanted
12 to provide the commission a copy of that memorandum opinion.
13 We're furnishing copies to counsel at this time.

14 I understand that if the commission accepts it, it
15 will be Appellate Exhibit 286FF.

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

18 CP [BG MARTINS]: That opinion does interpret -- I may
19 have given you one additional page. There we go.

20 That opinion does treat the opinions or the
21 decisions -- Supreme Court decisions Mr. Connell mentioned of
22 Ker v. Illinois, Frisbie v. Collins, Rochin v. California, as
23 well as the Second Circuit decision in the United States v.

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1 Toscanino, and this was in a case that involved a high-value
2 detainee who had been in CIA custody.

3 So we believe that -- offer that opinion up for you,
4 realizing, of course, you're not dealing with the outrageous
5 government conduct motion. You're talking now about theories
6 of discovery and relevance. So that was the first item.

7 Your Honor, second, I mentioned during my argument
8 that on information and belief, the district for the
9 district -- United States District Court for the District of
10 Columbia had ruled the so-called Panetta Review to be
11 privileged. I went -- we went back and furnished -- hard
12 working paralegals hunted that down for me. I wanted to
13 furnish that as well and to clarify our position in light of
14 Mr. Connell's and your exchange over the deliberative process
15 privilege, and if the commission accepts that, that would be
16 Appellate Exhibit 286GG.

17 MJ [Col PARRELLA]: Okay. Let's ----

18 CP [BG MARTINS]: If I may also, let me just say for the
19 record, the -- the Ghailani opinion that I mentioned is at 751
20 F. Supp. 2d at 502. That's a Southern District of New York
21 decision by Judge Kaplan in 2010. And this 286GG is Leopold
22 v. CIA, 89 F. Supp. 3d at 12. That's a district for the
23 District of Columbia case 2015. Again, copies being furnished

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1 to counsel.

2 And on that Leopold case, Your Honor, I wanted to say
3 that we are not informally invoking Rule 506, the government
4 information privilege under Military Commission Rule of
5 Evidence 506. I mention and provide a copy of that memorandum
6 opinion, because Judge Boasberg describes the Panetta
7 materials at some length, and also describes why he finds and
8 ruled in a summary judgment motion under the Freedom of
9 Information Act why it was deliberative process privilege, and
10 some of those factors that he mentions, prepared by junior
11 personnel to inform the director of the fact that it was a
12 summary of materials. These things figure also into why we
13 deemed it to be not relevant and not discoverable, again
14 having looked at all of the underlying materials and produced
15 the discoverable material from those. So I wanted to clarify
16 that.

17 Your Honor, third, Mr. Connell and Ms. Lachelier
18 spent some time on dates, and lack thereof, in their
19 materials. There was reference by Mr. Connell to the
20 commission's description in Appellate Exhibit 562R of an
21 insipid -- somewhat insipid table, and in that case, having
22 gone and looked it up over the lunch period there, it was a
23 table of three-digit designators for interrogators, medical

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1 personnel and guard force personnel who had direct and
2 substantial contact with the accused, and it listed medical
3 personnel X26, a three-digit designator associated with a
4 particular accused. And we would agree. That's not giving
5 you a whole lot of content, but it does identify those
6 three-digit designators that will help the discovery that was
7 provided be understood.

8 Ms. Lachelier spoke of wanting a Rosetta Stone. I
9 listened carefully, and I did not hear either speak of a
10 detailed date sequencing index that we provided each of the
11 accused last spring, a little over a year ago. In response to
12 this kind of endemic complaint, we went back through and put
13 in sequence -- in the case of Mr. Connell, it was a 34-page
14 index with scores of rows on a page, document by document, and
15 Bates number and putting it in order.

16 So we had given them early, mid, late dates, but we
17 then sequenced them. In Mr. Connell's case, that begins at
18 Bates numbers MEA-10018, page number 94226. And that's a
19 34-page document. Mr. Hawsawi's is 40 pages long. It begins
20 at Bates number MEA-10011, at 14364, and this places in
21 sequence the many reports received -- they received about the
22 accused's experience in CIA custody, black site by black site.

23 In addition, we provided last spring -- again,

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1 hardworking paralegals pulling this together -- actual dates.
2 It's a much -- it's a shorter index, it's about four pages for
3 Mr. Connell's team that was the same Bates number sequence.
4 Page 9461 is when this document starts for Mr. Connell, and
5 that has specific dates to the documents included there.

6 We're not claiming this is every bit of date
7 information, but it is -- it is -- it gives them the ability
8 to create a chronology.

9 MJ [Col PARRELLA]: So, General, let me ask a question
10 here.

11 CP [BG MARTINS]: Yes.

12 MJ [Col PARRELLA]: Did the classification guidance with
13 respect to dates change?

14 CP [BG MARTINS]: Your Honor, we were able to provide
15 more -- more date information starting in the spring of last
16 year, and we proceeded to do that in these -- these tables.

17 MJ [Col PARRELLA]: So when that changed, did the
18 government go back and apply the maybe more liberalized
19 standard to the discovery that had already been provided?

20 CP [BG MARTINS]: We did, Your Honor, and that's what
21 resulted in those tables.

22 And if I may, Ms. Lachelier provided an example,
23 which was our best effort to -- you know, they asked about a

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1 specific incident; we give -- gave them all of the materials
2 by Bates number that dealt with that incident. And we're
3 prepared to do that if they've got questions.

4 But if I -- we just -- just with the time we had over
5 the recess, you know, we found that we have given them a date
6 for Bates number 2871 on the first page, and we're going to go
7 through this and give them feedback on that.

8 MJ [Col PARRELLA]: When you say "this," are you referring
9 to what she had marked as Appellate Exhibit ----

10 CP [BG MARTINS]: Yes, Appellate Exhibit 286EE. This is
11 our 3 December 2008 effort to say, hey, here's what we know is
12 in your discovery related to what you're interested in.

13 MJ [Col PARRELLA]: Hold on one moment, General.

14 [Pause.]

15 MJ [Col PARRELLA]: Okay. Please proceed.

16 CP [BG MARTINS]: So if you look, for example, Your
17 Honor -- if you look at the first page -- and we didn't get a
18 chance to scan all of these, but we went through the document
19 we gave them, these indexes, the state sequencing index and
20 the date index, and we've given them a specific date for --
21 look on the first page there under paragraph 3,
22 MEA-10011-2871. They've got -- we gave them the date for
23 that. They've got it.

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1 And then, Your Honor, if I could draw your attention
2 to paragraph 4. You know, these are -- these are interviews
3 occurring years after the events in question.

4 MJ [Co1 PARRELLA]: So, General, when you say you gave
5 them the date, ----

6 CP [BG MARTINS]: Yep.

7 MJ [Co1 PARRELLA]: ---- is that date contained on this
8 document, or is it ----

9 CP [BG MARTINS]: It's not -- it's not contained on this
10 document.

11 MJ [Co1 PARRELLA]: It's a separate document?

12 CP [BG MARTINS]: It's a separate document. It's that
13 date sequencing index.

14 MJ [Co1 PARRELLA]: Okay.

15 CP [BG MARTINS]: So in that sense, the date sequencing
16 index and the date index, the shorter date index that we gave
17 them are a Rosetta Stone to what she's saying she wanted with
18 regard to that document, and we'll go through all of these.

19 MJ [Co1 PARRELLA]: So if the defense has a document
20 that's been provided in discovery that's undated, is it the
21 government's position, then, that the government would be
22 willing to -- to, within the confines of the current class
23 guidance, associate a date with any document the defense has?

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1 CP [BG MARTINS]: No, no. No, Your Honor. We have
2 provided the ones for which we have been able to get -- you
3 know, put it through original classification authorities and
4 apply the privilege. And these are -- a number of these
5 documents are ones that have previously been presented to you
6 and we have explained in declarations why it would damage
7 national security to provide what we haven't provided, and yet
8 subsequent to the clearance of the commission on these, we've
9 had new date guidance and we've gone back and provided what we
10 could.

11 So I'm not at all saying that just ask and we'll
12 deliver, but I am saying they have a lot of date information.
13 And, in addition to that, they've got date sequencing
14 information. If the idea is to get a chronology, tell a story
15 in order, they've got 40 pages of all the different reports
16 and statements the accused made and black site by black site.
17 They can do this.

18 MJ [Col PARRELLA]: And I don't know what specific example
19 either party is referring to, but as I can see it, sequencing
20 is not quite the same as providing a date, because you could
21 have a sequence over three years that's spread out equally.
22 You might know which sequence they're in, but it could be
23 spread out over 36 months as opposed to ----

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1 CP [BG MARTINS]: No, no, no, no. We've -- each of them
2 already has an early, mid, late range.

3 MJ [Col PARRELLA]: Okay.

4 CP [BG MARTINS]: So what we were doing is taking
5 something that was mid 2004 and all of the ones that are in
6 mid 2004 are now in serial order. So it couldn't possibly be
7 you don't know what year it is. They've already got month and
8 year.

9 MJ [Col PARRELLA]: But it could still be within ----

10 CP [BG MARTINS]: Or I'm sorry, early, mid, late, and
11 year. I'm sorry. Your Honor.

12 MJ [Col PARRELLA]: Sure. I was just going to say, even
13 knowing the sequence, you're still talking about a four-month
14 range.

15 CP [BG MARTINS]: Correct, but now you know where it is in
16 relation to these other things.

17 Your Honor, again, we're not saying every bit of date
18 information. What we are respectfully submitting is we
19 disagree on the powerlessness to create a chronology. We've
20 given them a lot of material to do that. And the material
21 that we have not provided is legitimately withheld under
22 this because of classification concerns.

23 The -- Your Honor, I did -- so on that one example,

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1 just to give you the one example responsive to Ms. Lachelier,
2 so you have that number 2871 on the 3 December 2018 memo.
3 This is Appellate Exhibit 286EE. It's the first item listed
4 under paragraph 3 in the upper right-hand corner of that
5 paragraph.

6 That document, the date for that is in -- it's on
7 Bates number -- it's on the index that we gave them last
8 spring. She can find that right there. So I did want to
9 mention dates.

10 We are -- we are in the process of responding to the
11 commission's ruling, the footnoted item about starting the
12 discussion over rich and vivid stipulation. We are doing
13 that. In fact, that's why Mr. Groharing is not here is he's
14 developing an example of that and other -- of how this could
15 be done. We're working off of these indexes we gave them.
16 And we're pulling, you know, the paragraphs, cut-and-pasting
17 them from what we gave them.

18 So again, I would respectfully submit that we
19 disagree on the -- on how much can be done to create a
20 chronology.

21 The fourth item I would mention is Mr. Connell's
22 comment about power and provenance and the commission's ruling
23 in the Office of Legal Counsel memoranda motion. This is

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1 Appellate Exhibit 112EE. And the -- I remember that, too,
2 quite well because that required us to go back and meet a --
3 you know, prevail upon some great soldiers and paralegals to
4 not see their families several weekends and work through and
5 get those scores of memoranda ready for discovery.

6 And the actual phrase -- Mr. Connell's got a great
7 memory, but the actual phrase was, "Unique character,
8 provenance, and preeminence." I had to absorb that and
9 reflect on what that meant. And I took it to mean uniqueness
10 and authority of these documents in the area of policy and
11 SOPs, which was the category within the ten that this material
12 dealt with. It was SOPs, policies on what happened to the
13 accused in a particular black site.

14 The commission did not say power. I mean, we have
15 not -- and I'm sure that's -- the power of the discovery is
16 important to the defense and should be. We are not looking
17 for power or not. We are going to the files. We're pulling
18 what is relevant and discoverable under the law in our best
19 application of it. If it's -- if it can't be presented
20 directly, we're bringing it to the judge and we're producing
21 it.

22 And so, again, we think there's going to be a
23 disagreement. After all of the argument -- no matter how much

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1 we argue, there's going to be a sense that they don't think
2 they've got enough, and that's why we think that this really
3 needs to be decided. I go back to my initial comments about
4 it shouldn't be deferred any longer and we should -- the
5 commission should decide the matter. And subject to your
6 follow-up questions.

7 MJ [Col PARRELLA]: General, I just have one. Going back
8 to the issue of preservation we discussed earlier, what's the
9 government's position with respect to whether a copy should be
10 retained by DoD for appellate review?

11 CP [BG MARTINS]: Your Honor, we oppose the incorporation
12 of it into the record. It is a congressional record. We
13 believe this is a separation-of-powers issue. It's Congress'
14 document. They've asked for it back, and we have -- we will
15 certainly abide by the orders of commission with regard to
16 this. It's being kept under lock and key, and there's very
17 restricted access to it other than to just make sure it's
18 still there.

19 MJ [Col PARRELLA]: So short of -- let's just say ----

20 CP [BG MARTINS]: Yes.

21 MJ [Col PARRELLA]: ---- short of putting it in the
22 appellate record, what about just retaining it under its
23 current status quo while an appellate review is underway?

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1 CP [BG MARTINS]: Your Honor, the ruling actually, as you
2 know, says pending these -- the issues in this litigation. If
3 the issues in this litigation mean RDI-related issues --
4 because this motion, as we've pointed out, goes to some 70
5 different requests for discovery and so on -- if it means that
6 through the pendency of this case, you know, we'll comply. I
7 mean, we are obligated as a government to oppose an Executive
8 Branch entity here from owning it, because that's inconsistent
9 with respecting the separation of powers and the congressional
10 record that it is.

11 That said, we'll comply and we've told the Senate
12 committee that it's subject to your order, and thus, we are
13 retaining it, respectful as we can be, of their -- their
14 ownership of it, and being consistent with maintaining that.

15 That's the position of the United States. So we
16 object to it based on separation of powers, and the fact that
17 the commission shouldn't create attributes of ownership, but
18 we will, of course, comply with the commission's order.

19 MJ [Col PARRELLA]: And, General, one final question. I
20 think we -- I know we've discussed this in previous motion
21 series, but with respect to responding, Mr. Connell made the
22 point that he doesn't believe there's been any sort of review
23 of material that is pre-rendition. Is that a correct

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1 statement?

2 CP [BG MARTINS]: That's not a correct statement.

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

4 LDC [MR. CONNELL]: Sir, I'll begin where you left off.

5 My statement was not, in fact, that there has been no review
6 of pre-rendition material. In fact, I specifically identified
7 ten documents or mentioned that there were ten documents
8 relating to results of interrogation by, let's just say,
9 people, who are -- or information that was obtained and
10 reported by the CIA. So it is not my position, and was not
11 earlier, that there was no review.

12 My position is that for the idea of the government's
13 view of what is the RDI program, it does not consider itself
14 obligated under the ten-category construct to search prior to
15 what it considers to be rendition. The significance of that
16 is, I have no reason to believe that we do not have every CIA
17 cable that reports the results of pre-CIA interrogation. I
18 don't have any reason to believe that there are more cables
19 about the results of interrogation that we don't have.

20 What I know that we do not have, however, is other
21 aspects of that. And the context in which I brought this up
22 was the context of capture; capture, rendition, detention and
23 interrogation as four phases in which the -- there is

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1 generally government information which exists, and how the --
2 we have exactly zero information about how the United States
3 Government came to be in a position to interrogate
4 Mr. al Baluchi prior to his transfer to the CIA, which is
5 quite significant, but is a different proposition from
6 claiming that there was no review of pre-rendition
7 information.

8 MJ [Col PARRELLA]: All right.

9 LDC [MR. CONNELL]: Does that distinction make sense, Your
10 Honor?

11 MJ [Col PARRELLA]: It does, yes, and thanks for
12 clarifying that and I apologize if I mischaracterized your
13 argument. I do understand.

14 LDC [MR. CONNELL]: No problem. There's a lot of nuances
15 here, sir.

16 The second point that I'd like to make, and I feel
17 that I have this, but the government's claim about the Panetta
18 Review is, as I stated, only a claim of relevance. It is not
19 claiming a privilege under 506, and in the Leopold case, the
20 examination is not for deliberative process privilege in the
21 sense of a government information privilege which would
22 justify withholding under 506 or the common law equivalent in
23 a federal court. It is an examination of Exemption 5 under

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1 the Freedom of Information Act. And as we know, the Freedom
2 of Information Act exemptions often are much broader than a
3 common law privilege would be as asserted by a court or by a
4 party to avoid production.

5 So I do not understand them to be claiming privilege
6 in the sense of a 506 privilege. I understand them simply to
7 be relying, as the government just explained, on some of the
8 factual analysis which was set forth in Leopold.

9 The third issue is the government just argued that I
10 had not mentioned the date sequencing index, when, in fact --
11 you know, maybe I was too boring and they fell asleep, but I
12 addressed it at some -- ad nauseam in which I talked about the
13 efforts that we had gone to to use what the government calls
14 the date sequencing index, is known to the record in this case
15 as the second RDI index. There was a first RDI index. This
16 is the second RDI index, which is actually the topic of
17 AE 534, among other arguments.

18 And the -- I will just refresh the parties on -- but
19 I won't repeat myself fully -- just refresh the parties on the
20 fact that -- the efforts that we went to to build the exact,
21 you know, stack from the second RDI index. And it has many
22 problems in, like -- it has many coherence problems completely
23 separate from the very specific ideas that the military

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1 commission inquired about of the difference between sequencing
2 and the actual dates.

3 Fourth, I understood the government to just have
4 confirmed my hypothesis that sometime early last year, there
5 was a change of the classification guidance. As I understand
6 it from prior somewhat oblique comments from the government,
7 you, sir, should have access to that. And I don't mean should
8 in the moral sense; I mean I believe that there is a document
9 that the government has submitted to you that describes that
10 change in classification guidance.

11 I believe that it is already in the record in one of
12 the ex parte pleadings because the government has made a -- as
13 I mentioned on direct argument, that there was an oblique
14 reference to it before, and so I believe that you can actually
15 make your own evaluation of that.

16 But it does -- that confirmation of my hypothesis on
17 that throws some evidence already in the record into
18 substantial relief, and I would like to bring that to the
19 military commission's attention, which I can do one of two
20 ways.

21 One, I can point you to where it is in the record,
22 and if you have a computer you can pull it up on; or I can put
23 it up on the screen, but not display it to the gallery; I can

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1 just display it to the parties.

2 MJ [Co1 PARRELLA]: Why don't we start with the former
3 option.

4 LDC [MR. CONNELL]: Yes. Sir, if you would go to AE 573
5 Attachment B.

6 MJ [Co1 PARRELLA]: Okay.

7 LDC [MR. CONNELL]: Thank you, sir. So if you will just
8 look at the beginning, you will get the sense of attachment --
9 AE 573 Attachment B, which is a summary that was provided to
10 the defense of a statement of Mr. al Baluchi. The -- excuse
11 me. I'm going to grab my computer if we're doing it this way.
12 [Pause.]

13 LDC [MR. CONNELL]: So you will notice, sir, for example,
14 that the document says -- states that during a custodial
15 interview conducted in mid 2003, Mr. Ammar al Baluchi made
16 some statements.

17 The points that you made earlier, I think, were very
18 valuable, because when you compare this with Attachment C,
19 you'll see how significant these differences are. So if
20 you'll move three pages forward to Attachment C, Attachment C
21 is a document that was released by the CIA to Jason Leopold,
22 the same Leopold who is in Leopold v. CIA, that the government
23 just cited, laying out -- this is released to the public and

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1 is now available on the CIA.gov website. And what you will
2 see here is the idea that -- is around dates.

3 So if you look at the fourth line, which says,
4 "SUBJECT: EYES ONLY, 2 MAY 2003, AMMAR al Baluchi INTERVIEW,"
5 that lays out the date of the -- of the interview itself. But
6 further than that, it actually -- the document actually lays
7 out the time of the report as well.

8 If you will move down to essentially the dead center
9 of the page where the acronym TOR appears, for time of
10 report -- and my eyes are not what they once was, so I'm going
11 to blow this up -- the -- it lays out 02, which refers to the
12 second of May, and then 1654 ----

13 CP [BG MARTINS]: Counsel?

14 LDC [MR. CONNELL]: Yes.

15 CP [BG MARTINS]: Could I ask you what page you're on?

16 LDC [MR. CONNELL]: How is yours numbered?

17 CP [BG MARTINS]: You can give me Bates numbers page.
18 You're on your own exhibit?

19 LDC [MR. CONNELL]: I'm on AE 573 Attachment C, page 1 of
20 that Attachment C.

21 CP [BG MARTINS]: Okay. Thank you.

22 LDC [MR. CONNELL]: And where it says TOR -- and this is
23 the way that the CIA numbers -- and in fact, we're going to

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1 talk about sequencing in just a second. But this is the way
2 they number their documents. The 02, the first two numbers,
3 refer to the date; and then the second four numbers, numbers 3
4 through 6, if you will, 1645, are the time. Zulu of course is
5 Zulu time, universal time coordinator, and then May 03.

6 Then after that, there is something that was
7 withheld, and then there's essentially the report number,
8 14291.

9 I point that out to the military commission for a
10 couple of reasons. The first is that this provides actual
11 information, right? This time is not arbitrary. This is the
12 actual time that the report was sent. And if there were
13 anything that were classified around that, surely the actual
14 information of what actual time things happened, the actual
15 date of the interview, the actual time that the report was
16 sent, would be what would be classified.

17 But it's also significant that the report number
18 appears here. Because one of the observations that I made
19 earlier was the substantial -- one of the substantial
20 differences between the SSCI Report and the summaries that we
21 receive is that we can't go to the SSCI Report and say, all
22 right, they're citing 14291; let's go see if we have 14291.
23 We can't -- there's no way to cross-check against each other,

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1 whereas both the date and -- I should say, all of the date and
2 the time and the serial number are all actually unclassified,
3 at least after spring of last year.

4 The one other point that I will make is there is a --
5 an additional time that appears just under the dashed line
6 that says NatSectAct. There's an additional time, 021643Z
7 MAY 03 STAFF.

8 I suspect that has to do with the internal workings
9 of the CIA, like, for example, 1643 Zulu was the time it was
10 sent and 1645 Zulu is the time that it was received, but I
11 don't actually know that for sure. But what it does appear to
12 me is that it provides some kind of information about the
13 workings of the CIA, and if anything was going to be
14 classified about it, that would probably be it.

15 The report number appears again just below that, and
16 then finally under the -- once we're done with the cable
17 headers and we're at the cable itself, the subject again
18 repeats the 2 May 2003 Ammar al Baluchi interview. All of
19 that is significant for dates, and I do want to say -- to
20 point out that this document also vividly demonstrates that
21 dates are not classified even with -- paired with other
22 information.

23 The other information below says that a blank officer

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1 monitored, via CCTV, and actively participated in planning --
2 and then further on the next page the material goes on to say
3 that -- to provide the substance of what the actual, you know,
4 interrogation was.

5 So this has essentially the same sort of information
6 that our version has in it, but the public gets much more
7 information than we do because they get dates.

8 The last thing that I will -- observation that I will
9 make about ----

10 MJ [Col PARRELLA]: But isn't that -- Mr. Connell, that's
11 not really up to the commission to decide what's classified
12 and -- what is or what isn't classified. I mean, if ----

13 LDC [MR. CONNELL]: That's precisely right, sir, so
14 there's the actual point.

15 It is up to the commission, within the boundaries of
16 classification guidance from an OCA, to decide in what format
17 the government has to provide discovery.

18 The commission initially made that decision under
19 certain classification guidance under certain representations
20 from the government. Those conditions changed. But when
21 those conditions changed, the government did not come back to
22 the military commission and say, look, the conditions have
23 changed, we're resubmitting this information for you to review

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1 under the new classification.

2 I mean, at least arguably, and maybe more than
3 arguably, you don't actually have the authority under
4 M.C.R.E. 505 to authorize the withholding of nonclassified
5 information.

6 MJ [Col PARRELLA]: So I understand that -- the point with
7 respect to dates, and you're saying that the government didn't
8 go back and update, based on the change in classification
9 guidance, which they have now confirmed here in court.

10 The government's position is they did do that, which
11 is the essence of the second RDI index. I assume the second
12 point you're making after dates would be report numbers.

13 LDC [MR. CONNELL]: Report numbers is sort of a -- is sort
14 of a sideline, because we mentioned report numbers, but yes,
15 it's valuable.

16 MJ [Col PARRELLA]: Okay.

17 LDC [MR. CONNELL]: The real point -- the real point is
18 the review that the military commission engages in, the
19 ultimate inquiry in 505, is a balancing of the need to protect
20 national security information and the ability of the defense
21 to prepare a defense.

22 That balance has changed with the change in the -- in
23 the classification guidance. I say this because -- for two

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1 reasons. The first is, I cannot stress how important the date
2 factor is, and when you go back and re-read the argument in
3 538 that I made based on this document, right, this 2 May 2003
4 date became the lynchpin of an incredibly complex argument
5 that we could not have made if it were not for the fortuitous
6 event that Mr. Leopold had pursued and obtained this document
7 by -- under the Freedom of Information Act.

8 The second and final point that I ----

9 INT: [Interpreter translation in Arabic.]

10 MJ [Col PARRELLA]: So sorry, I didn't -- where -- who was
11 speaking here?

12 LDC [MR. CONNELL]: All right. I didn't get a slow down
13 notice. I stare at this thing. Maybe that was slow down.
14 I'll slow down anyway. Or maybe it was an accident. I'm not
15 sure.

16 The -- but the other point that I wanted to make on
17 this is I understand that this is a -- 286 is a clumsy vehicle
18 to be addressing this date problem because it is sort of a
19 tertiary issue. So what I will tell the military commissions,
20 we're not working on a single thing until May 10th other than
21 the motion to suppress and the witness request. But after --
22 a relatively short time after that, I will present a motion to
23 the military commission on this so that you have a cleaner

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1 vehicle to address this date problem.

2 MJ [Co] PARRELLA]: Okay. Now I understand and I
3 appreciate it, and I do appreciate the need for the defense --
4 I mean, I think, ultimately, with the RDI discovery, what
5 we're after is this defense's ability for a rich and vivid
6 account, and that shouldn't -- necessarily includes a
7 chronology. I do appreciate that.

8 So I guess in the meantime, too, we'll get an
9 opportunity, hopefully, to see what General Martins referred
10 to in terms of a government's sample stipulation and see what
11 that looks like.

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

13 MJ [Co] PARRELLA]: Thank you.

14 Okay. So anything else on 286 at this time? In that
15 case, we will progress on now to 524NNN.

16 LDC [MR. RUIZ]: Judge, may we address the 530 issue?

17 MJ [Co] PARRELLA]: Oh, yes. Thank you, Mr. Ruiz. Please
18 go ahead.

19 LDC [MR. RUIZ]: I'll wait for Mr. Ryan.

20 TC [MR. RYAN]: Good afternoon, Your Honor. Edward Ryan
21 on behalf of the United States.

22 MJ [Co] PARRELLA]: Good afternoon.

23 TC [MR. RYAN]: Judge, as a preliminary matter, this

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1 morning when this -- the issue of 538 -- 530 arose, I was
2 outside the courtroom actually trying to gather information
3 about it. Mr. Trivett was called upon to jump in. I'm going
4 to ask your permission that I -- 530 has always been my
5 motion.

6 MJ [Col PARRELLA]: Please. I understand. Yep.

7 TC [MR. RYAN]: Your Honor's question, as I recall it from
8 this morning, essentially was to the prosecution, what is the
9 authority that has been in place in regard to having the
10 convening authority's IT staff certify the laptop before it
11 goes back in. Of course, excepting all of the events that
12 have happened.

13 MJ [Col PARRELLA]: Well, and I can probably even narrow
14 the question down a little further ----

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

16 MJ [Col PARRELLA]: ---- is the defense has now certified
17 that they've -- the required forensic analysis was done. So
18 what is it that the government wants to do that wasn't already
19 just done? I guess that's the bottom line up front.

20 TC [MR. RYAN]: Well, Judge, going back, this has been in
21 place for a significant period of time, at least in terms of
22 the way it was designed to happen. And I'll concede up front
23 that what I'm talking about right at this moment was the

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1 process that was put in place for laptops, quote, generally
2 referred to as the new laptops that were to be issued out to
3 the various accused. It did not happen as to Mr. al Hawsawi
4 and others as well.

5 But in the agreement, which counsel accepted, the
6 statement was that the defense IT would go through the process
7 of certifying that, you know, no software that shouldn't have
8 been there was there, and so on, and then within that
9 agreement there was this statement, "The convening authority
10 IT staff will verify the certification without opening any
11 nonexecutable files."

12 So this has been the rule that we insisted upon based
13 upon considerations and conversations with other persons as
14 well.

15 Now, jumping ahead -- and by the way, sir, that
16 was -- that agreement was signed by counsel back in 2016 in
17 November.

18 Now, jumping ahead to where Your Honor kind of jumps
19 into this mix, when the prosecution objected to Mr. Hawsawi's
20 first attempt at certifying that the laptop had been, in fact,
21 examined and it was acceptable under all purposes, Your Honor
22 will recall the prosecution objected on the grounds that the
23 certification did not indicate that it had been forensically

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1 examined as opposed to just generically examined.

2 And in our notice, in our -- of objection, which is
3 530JJJ, the prosecution stated, ". . . to make clear to the
4 Commission the United States' position regarding the position
5 of the laptops by the accused, any laptop that leaves the
6 detention facility, the attorney-client meeting room, or the
7 courtroom cannot be returned to the Accused without Convening
8 Authority IT personnel first ensuring that the computer has
9 been adequately disabled by Defense IT personnel, per the
10 attached checklist that we provided.

11 "The Convening Authority IT certification must still
12 occur in this case because JTF-GTMO will permit the laptop to
13 re-enter the detention facility, regardless of the sufficiency
14 of the Defense examination. Thus, even if the judge finds the
15 current Defense certification adequate and orders the return
16 of the laptop, the neutral" -- and this is to answer Your
17 Honor's question, finally -- "the neutral Convening Authority
18 IT certification process must still take place before JTF-GTMO
19 will determine whether to permit the laptop to re-enter the
20 detention facility for Mr. al Hawsawi's use, as has been its
21 standard policy in these proceedings."

22 And Judge, I will at this point just note for you --
23 MJ [Col PARRELLA]: Mr. Ryan, just excuse me, what was it

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1 that you were just reading from, again, sir?

2 TC [MR. RYAN]: Say again, sir? I'm sorry.

3 MJ [Col PARRELLA]: You were just you reading that from
4 what document?

5 TC [MR. RYAN]: That was the prosecution's notice of
6 objection to Mr. Hawsawi's initial certification announcement,
7 and it appears at 530JJJ (Gov).

8 MJ [Col PARRELLA]: And -- would you agree, though,
9 that -- I mean, Judge Pohl, in issuing his ruling in, I guess
10 it would be 530GGG, is it your position, then, that that came
11 after the ruling and somehow is in addition to it or should be
12 read into it? Because I read Judge Pohl's ruling in GGG to
13 basically say once it's been examined forensically and
14 certified with respect to those four factors, it should be
15 returned.

16 TC [MR. RYAN]: Well, our statement, Judge, is that Judge
17 Pohl's order was in regard to our specific -- the
18 prosecution's intent and specific attempt to take these
19 laptops out.

20 Now, you as we have heard in a few other instances,
21 that was a heck of a fight, and prosecution -- or rather,
22 Judge Pohl made an order as to Mr. al Hawsawi, although while
23 finding that the potential or attempted manipulation of the

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1 laptops represented a threat to force protection and a
2 potential threat to national security.

3 That being said, we read Judge -- and that's why we
4 made that statement in our pleading. We read Judge Pohl's
5 order to be in addition to the procedure that had been in
6 place; that is, that the neutral party, that being the
7 convening authority IT staff, had to make the certification as
8 well.

9 And I submit to you, sir, that this isn't just a
10 matter of lawyers, you know, nitpicking. This is something
11 that gives a certain degree of comfort to the JDG and Camp VII
12 and JTF in terms of knowing that the persons who are saying it
13 doesn't have things on it that it shouldn't have, even with
14 all the terrible history of 530, would allow the camp to at
15 least rest assured in that concept.

16 MJ [Col PARRELLA]: So assuming I were to agree with you
17 for a moment, what's the timeline we're talking about? Is
18 this something that takes place on island, off island?

19 TC [MR. RYAN]: On island, sir. On island is to the best
20 of my understanding, and I believe that's true.

21 MJ [Col PARRELLA]: So how -- how much of a delay are we
22 talking about?

23 TC [MR. RYAN]: Well, let me say it, Judge, the -- and,

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1 Your Honor, I don't know if you had this when you were asking
2 the question, but Your Honor's order, which is 530LLL, the
3 last paragraph states, "The Commission declines to direct any
4 change in the ordinary practices of JTF-GTMO and/or the Office
5 of the Convening Authority with regard to standard
6 examinations of IT prior to its entering or re-entering the
7 detention facility."

8 So I think Your Honor had at least a chance to
9 consider that concept as a whole at some point.

10 Now, to your exact question, sir. In addition to
11 what I have submitted is the normal process and the better
12 process of allowing the neutral convening authority staff to
13 certify the return of the laptop, certify the findings of the
14 forensics examiner, in addition to that, I want to say, this,
15 sir, and this is after being in consultation for much of the
16 morning: At the -- the conditions, the living conditions, and
17 I can describe it in no further detail in an open setting, but
18 the standard daily living conditions that exist in the camp
19 today are considerably different than they were on the day
20 that the laptops were seized.

21 So what I am asking Your Honor is: Based upon
22 consultation -- and I represent that after hearing all of the
23 facts, that this is not done for purposes of delay or with any

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1 false motives -- I ask for Your Honor -- of Your Honor to
2 allow the JDG -- and, by the way, with a chain of command at
3 JTF -- to put in place the circumstances that will comply with
4 the military judge's order while at the same time protect --
5 allowing for force protection.

6 And I asked the specific question of do the changes
7 in living conditions mean that the JDG finds it unworkable for
8 the laptop to exist at all, and I was told that was not the
9 case; that there was the intention to comply with this
10 commission's order, but that a few days -- and that was the
11 words that were used, meaning three days -- were necessary to
12 find the circumstances that would allow for the competing
13 concerns.

14 MJ [Col PARRELLA]: And going back to the question, what
15 is it that they intend to do other than check the math, so to
16 speak, of the previous forensic certification?

17 TC [MR. RYAN]: The convening authority's IT staff, as I
18 understand it, goes through, for purposes of determining
19 that -- it really ensures a secondary or backstop measure to
20 what has already been stated in very brief terms by the
21 forensic examiner as to the certification.

22 So, in other words, it's a double-check, and it's by
23 the neutral party, that JTF and JDG has always insisted upon.

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1 And I don't think unreasonably, sir.

2 MJ [Col PARRELLA]: Okay. Thank you, Mr. Ryan.

3 Mr. Ruiz.

4 LDC [MR. RUIZ]: Judge, this should definitely be one of
5 the exhibits that anyone wanting to ask the question why
6 military commissions take so long should append to that
7 explanation.

8 What we're asking for here is to return
9 Mr. al Hawsawi's laptop to him so that he can use it in the
10 preparation and the assistance of his defense. And in order
11 to do that, I just want to give you a little bit of a
12 background.

13 In October of 2008, it was a culmination of extensive
14 litigation in the first round of military commissions where
15 the defense had made resourcing requests and asked that
16 Mr. al Hawsawi and his co-accused receive the ability to use
17 laptop computers. Back then it was with the foresight that
18 there were going to be an incredible amount of documents that
19 would need to be reviewed and that having a laptop would be
20 something that would allow them to do so in a manner that was
21 efficient, organized, and that would certainly alleviate a lot
22 of the concerns with the amount of paper that would be
23 produced in the future in terms of the expected discovery.

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1 Fast-forward to 2019, ten years or so after the fact,
2 General Martins spoke to you today about the 500,000-plus
3 documents that have been provided to the defense counsel in
4 discovery; and certainly the idea of a new laptop was
5 conceived and discussed in the context of the amount of
6 discovery that was being produced, the manner in which it
7 would be produced to Mr. al Hawsawi and his co-accused, the
8 manner in which it could then be digested, but also taking
9 into account some of the logistical issues that came along
10 with storing that amount of material.

11 Now, I visited Mr. al Hawsawi's cell, pursuant to a
12 court order, and I was able to see how this material was being
13 stored in spite of the fact that he still had a laptop.

14 We've had to litigate, we've had to discuss on the
15 record issues such as the amount of legal bins that the men in
16 this case will be allowed to have so that they can store this
17 material. It's an incredible amount of paper, an incredible
18 amount of information. Also, the ability to retrieve that
19 information in order to have discussions with counsel that are
20 pinpointed, that are on point on specific topics was made a
21 lot easier by having a laptop computer.

22 Fast-forward to March of 2016. Mr. Ryan has talked
23 to you about an Office of the Convening Authority

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1 certification. In AE 182L, which was submitted on March 8 of
2 2016, it was a government notice of status of compliance with
3 the 182K order. Attachment D in that particular series is a
4 certification by the Office of Military Commissions on
5 Mr. al Hawsawi's Panasonic Toughbook which is, in fact, the
6 one that we seek to provide to Mr. al Hawsawi.

7 So after the 2008 round of military commissions
8 which, as the commission may know, was stopped by President
9 Obama's executive order, the computers were taken away and
10 they were stored. Before those computers could be returned,
11 we went through an inordinate process again of trying to
12 figure out how to do that in a way that was consistent with
13 appeasing the government's concerns and also getting the
14 computers back to Mr. al Hawsawi and his co-accused.

15 And in March of 2016, the military commission's
16 office, in fact, certified that Mr. al Hawsawi's laptop
17 complied with all of the requirements by the government,
18 satisfied their concerns, certified it, returned it to
19 Mr. al Hawsawi, and that is, in fact, the laptop that he
20 continued to use until it was seized in 2017.

21 And I should add that he continued to use without any
22 incident, without any violation, without any concern, without
23 any problem. It was the laptop he used. We would use an

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1 external hard drive. We would upload discovery, we would
2 provide it to him, and we would discuss it during the meetings
3 and it didn't involve him bringing in a half dozen or three or
4 four different bins to ----

5 MJ [Col PARRELLA]: Can I interrupt you for a second,
6 Mr. Ruiz?

7 LDC [MR. RUIZ]: Sure.

8 MJ [Col PARRELLA]: I don't think you need to convince the
9 commission that he gets the laptop back. He gets the laptop
10 back. What I'm interested in knowing from you is, in light of
11 what we just heard from Mr. Ryan, why should the commission
12 not wait 72 hours, given that he's waited a very long time
13 obviously and -- but what's -- in terms of the 72-hour period,
14 what's the harm to Mr. Hawsawi?

15 LDC [MR. RUIZ]: Judge, I have been around here -- I have
16 been around here for a long time. 72 hours turns into a
17 month, it turns into two months, it turns into three months.
18 And the reason I took the time to go back and give you the
19 timeline is because I want to highlight for you, as well as
20 for everyone listening to this argument who may be wondering
21 why -- why is there this protracted argument about the return
22 of a laptop.

23 Number one, I think it's important to understand how

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1 it actually is a more efficient means of moving this case
2 forward, and why from our view it is important that
3 Mr. al Hawsawi have that laptop, which was seized in two
4 thousand -- and I'll answer your question in one moment, but I
5 think it's important to talk about the timeline.

6 In 2017, it was seized on 19 October. When that
7 computer was seized, we had two weeks of hearings, and it was
8 seized, as I recall, towards the end of that week. At that
9 time I asked Judge Pohl to address this issue before we left
10 the island to try to resolve it, because I didn't want it to
11 turn into a lengthy proposition.

12 In that case, we actually still had an entire week of
13 hearings left the following week. Judge Pohl declined to take
14 up the issue at the time, and that was in October of 2017. So
15 here I am in 2019 addressing the military commissions again
16 being asked to provide more time on an issue that we have
17 sought to resolve a very, very long time ago.

18 The fact of the matter, Judge, is that you issued a
19 ruling. The ruling says that we have complied with the order
20 that was in place by the military commission. It's a judicial
21 ruling from this bench, from this commission, which clearly
22 articulates that we have complied after extensive litigation.
23 Mr. Ryan said it was a heck of a fight, and I agree. It was a

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1 heck of a fight, and we won. And we won the ability to return
2 this laptop to Mr. al Hawsawi by following the procedures that
3 the military commission set forth.

4 Now, at the 802, you spent Monday -- you spent a
5 great amount of time today reciting the 802 and the contents
6 of 802. You asked the question when I raised the issue of
7 530, and the question was, prosecution -- and your comment
8 was: Prosecution, I assume there's no objection because I
9 haven't heard anything from you. Did you hear anything at
10 that time about an additional procedure, additional time that
11 was required, additional procedures that needed to be set
12 forth? There was nothing. There was nothing.

13 Today we come to court, and they're refusing to
14 provide Mr. al Hawsawi his laptop. So my position, Judge, is
15 that JTF doesn't get to have comfort when this court issues a
16 ruling. That's what Mr. Ryan said. He says, well, it would
17 give JTF a greater degree of comfort. If comfort is what
18 we're after once the court has issued a ruling, Judge, then I
19 have a whole lot of reconsideration for the court coming.

20 Because I will tell you that there are many rulings
21 from the commission that do not give me comfort, but they are
22 rulings and they should be followed expeditiously after
23 years -- and this is years of litigation where we provided

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1 evidence, where we made extensive arguments, we have brought
2 in experts. There's been funding that's been approved.
3 It's an incredible amount of time and energy expenditure that
4 led to the point where you reviewed that and you issued a
5 ruling. And that should be it.

6 It should be the end of the line; it should be the
7 end of the words. It shouldn't be that JTF needs a little bit
8 degree of comfort so they can allow the computer come into
9 their facility after a ruling has been issued by this military
10 commission.

11 So then the question that I beg is, what then does
12 your ruling mean? If they can continue to defer it, if they
13 can continue to come up with additional reasons why this
14 computer can't go back, then what exactly does it mean? It
15 doesn't mean anything more than JTF can come up with
16 additional excuses -- why they're going to obstruct the
17 implementation of your ruling.

18 What I'm asking you to do is simply to say, "Send
19 that computer back to Mr. al Hawsawi. The litigation has led
20 to this point. I have looked at it. I have issued a ruling.
21 Judge Pohl spent months doing this, it's time for the computer
22 to go back to Mr. al Hawsawi."

23 Judge, in terms of the certifications. So I hold in

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1 my hand right now a certification from today. All right. And
2 this is certification that allows this computer to be brought
3 into this expeditionary legal complex. I think, as you know;
4 I think you have one on the back of your computer, and all of
5 us that bring computers into this courtroom have one on the
6 back of that computer, because our computers would not be
7 allowed to into this courtroom if we didn't go through that
8 process. And what this property pass says is that this
9 device -- and I'm referring to Mr. al Hawsawi's computer
10 sitting back there in that case -- has had its wireless and
11 audio-video capture capabilities disabled and is approved for
12 use in the expeditionary legal complex, ELC, located at
13 OMC-South Guantanamo Bay, Cuba, issued 4/29/2019, by a person
14 named -- by Mr. Batista, IT specialist. The pass is good
15 until May 4, 2019.

16 That's Mr. al Hawsawi's laptop.

17 So he's had a certification in 2016. It's had a
18 certification today. It had a certification when we initially
19 submitted the first certification. It has a forensic
20 certification. This is the most certified computer in this
21 courtroom. It has four different certifications over the
22 course of four years, for a computer that has never been
23 connected to any type of wrongdoing because that's what we

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1 spent all of this time doing, going through evidence about if
2 there was any evidence whatsoever that would suggest that
3 Mr. al Hawsawi's computer needed to go through this process.

4 The forensic examination process that this court
5 required and that the government objected to, by the way;
6 continued until the date of the return of this computer, was a
7 more comprehensive process than what they are requesting that
8 this court do.

9 I mean, this is a forensic examination where the
10 expert actually utilized forensic software and went in and
11 took a look at the computer and examined the computer in order
12 to answer our questions and make sure that when I put my name
13 to pen and paper, when I put that in before the commission as
14 well as the lawyers on my team, certifying to this court that
15 this computer had these capabilities that were disabled, that
16 that was correct.

17 And, Judge, I would say that that's a fifth
18 certification. That's my word. It's my license. It's my
19 clearance as well as that of every attorney who signed onto
20 that, and I think that should be comfort enough. I think it's
21 time for JTF to accept the judge's ruling as all of the
22 comfort that it needs. Quite frankly, I don't think there
23 should be any comfort required when a judge issues a ruling.

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1 In terms of the living conditions, Judge, the living
2 conditions haven't changed. The way this computer has been
3 transported from place to place, is Mr. al Hawsawi doesn't
4 even transport it. The transportation guard force takes it
5 from point A to point B and then back from point B to point A.
6 That's the way it works. When it's at the camp,
7 Mr. al Hawsawi did not have unfettered access to it.

8 So what would happen would be Mr. al Hawsawi would
9 request his laptop. One of the guards would go get it,
10 wherever it was stored. He would bring it back, give it to
11 Mr. al Hawsawi, Mr. al Hawsawi would use it; and then when he
12 was done using it, he would give it to the guard, who would
13 then take that computer and then secure it back wherever it is
14 that they secured it.

15 How difficult is that? That's the procedure that
16 existed at that time. What's the need for additional time to
17 implement a procedure that they have used for two or three
18 years? The procedure is when this guard force gets to
19 Camp VII, they give it to whoever that person is who has been
20 doing this for the past three years. They lock it up wherever
21 they used to lock it up, and whenever Mr. al Hawsawi needs it,
22 he asks for it, they bring to him, when he is done he gives it
23 back to them and they put it back in a locker.

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1 Is it really so difficult? So we object to any
2 additional requirements for what Mr. Ryan describes as an
3 additional check. Like I said, we've got four certifications,
4 including one today, allowing us to bring this laptop into
5 this courtroom. Once this laptop leaves this courtroom, I'm
6 not going to have control of it. It's going to go to the
7 guard force. They're going to take it. So I think this
8 should be enough, Judge, and I think you should stand on your
9 ruling and you should ask them to return this laptop to him
10 today.

11 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

12 Okay. Let's go ahead and proceed to 524NNN.

13 And with respect to this, I'm just going to start
14 from the front and go to the back. So Mr. Nevin, I'll give
15 you an opportunity.

16 LDC [MR. NEVIN]: Would you allow me to defer my argument,
17 Your Honor, please?

18 MJ [Col PARRELLA]: I will, and I think with respect to
19 this one, this is the series that I indicated I would give
20 parties an opportunity to submit in writing.

21 LDC [MR. NEVIN]: Yeah. I'll be asking for permission to
22 do that in lieu of argument, in oral argument.

23 MJ [Col PARRELLA]: Okay. Thank you. Ms. Bormann.

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1 LDC [MS. BORMANN]: Judge, I first saw this on Thursday
2 evening because I was traveling on Thursday. We're not
3 prepared to argue it. I'm asking for time to brief it.

4 MJ [Co] PARRELLA]: Okay. And just for the reminder, I
5 think that's -- well, I -- that's to be submitted by May 10th.
6 Mr. Harrington?

7 LDC [MR. HARRINGTON]: Judge, I think I only have a few
8 comments with respect to the order, but since we're going to
9 brief it, I think we can include them in the brief.

10 MJ [Co] PARRELLA]: Okay.

11 Mr. Connell.

12 LDC [MR. CONNELL]: Sir, I'm busy between now and May 10th
13 so I don't intend to brief it. I'll make my comments orally.

14 You know, in the course of any kind of long
15 engagement, there are sort of catchphrases that those of us
16 who lead others basically bore them to death with sometimes.
17 And mine is that no one ever won a case sitting in their
18 office. My lead investigator has a somewhat coarser version
19 of that, which is essentially get off your butt and knock on
20 doors.

21 Since January of 2018, Protective Order #4 and its
22 predecessor threats have crushed our domestic RDI
23 investigation. Investigation continues apace, but on other

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1 topics. There are -- you know, there are a few --
2 General Martins has used the word "seams" before. There are a
3 few seams in Protective Order #4 and we do what we can with
4 those, but mostly I have to continually decline leads. When I
5 receive investigative packages, I mostly have to say no, you
6 can't interview them about that.

7 That's important here because that's the context in
8 which this is occurring. But there's another special feature
9 of Protective Order #4 that makes it like -- I almost do not
10 get a vote in this, and that is unlike every other thing which
11 has come before the military commission, Protective Order #4
12 represents a government invocation of classified information
13 over information which would otherwise be critical to the
14 defense. If it were not for this government invocation and
15 its codification in Protective Order #4, we would be free to
16 investigate. And that is because the government has the right
17 to withdraw information from the case at the cost of the
18 prosecution itself or some aspect of that prosecution.

19 The military commission a little while ago made the
20 comment, the military commission doesn't get to decide what's
21 classified. That's true. That's been beaten into my head
22 over the years. And the corollary to that is the government
23 does get to decide what's classified, and it can decide

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1 whether and on what conditions it is going to waive that
2 classified information privilege.

3 And so the government has the right to rescind part
4 of its invocation of classified information privilege or
5 extend another condition, if you will, and that's what 524NNN
6 is. And I'll be honest, I am desperate. I will take any
7 scrap of investigative authority that the government sees fit
8 to grant me. And so I don't think it's going to make any
9 difference, but I'm perfectly happy for the military
10 commission to enter 524NNN, the proposed order, today.

11 The reason why it's not going to make any difference
12 is a couple. First, with respect to the UFI witnesses, we're
13 not writing on a clean slate. These are not witnesses who
14 will first receive a letter from me, no matter how well or
15 poorly written it is. These are witnesses who have already
16 been influenced by, to some extent, the FBI, but what we have
17 learned from the five witnesses that we've interviewed, very
18 much by the general counsel's office for the CIA about -- in
19 fact, what seems to be, and perhaps unintentionally, perhaps
20 intentionally, misled about the interview, the conditions for
21 the interview, the need for interview by telephone and the
22 need for light disguise.

23 Second, this investigative obstacles placed by option

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1 1, the telephonic or the request through the government, now
2 option 2, a request through the government but in my
3 handwriting, essentially, is not simply a matter of argument,
4 but it is a matter of evidence.

5 We have repeatedly submitted declarations to the
6 military commissions explaining why we are successful when we
7 knock on doors, and why we are unsuccessful when we send
8 letters or the equivalent.

9 Mr. Futrell -- excuse me, Chief Warrant Officer 4
10 Futrell's declaration describes the reasons for our success,
11 and none of them have anything to do with brilliant
12 letter-writing. They have to do instead with the stock and
13 trade of law enforcement, rapport building.

14 And, in fact, this was a little bit prior in the
15 military commission, but we, in fact, tried letter-writing
16 and -- because you may recall in the 502 series that Judge
17 Pohl required that before we list our witnesses in AE 502Y
18 that we are -- our amended witness list in AE 502Y that we
19 make a statement as to what efforts we had made to contact
20 people.

21 So for many of those people, we knocked on the door,
22 would they talk to us, and we were able to represent, yes, we
23 contacted them. There were other people that we were not able

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1 to reach either because we did not know where they were or we
2 only had an office for them and they declined. But for all of
3 those people we -- for whatever reason we couldn't knock on
4 their door, we sent them a letter, and our response rate was
5 zero.

6 It's not -- it is no surprise, I suggest, that after
7 having restrictions on RDI domestic investigation in place
8 for -- in one form or another for 15 months that 12 days -- 12
9 days before our request for witnesses on the suppression
10 motion, this exact topic, is due, we have before the military
11 commission AE 524NNN. If I were to write the letters today, I
12 could -- there is no reasonable way in which I could
13 interview -- and people agreed, with the best will in the
14 world, there is no way that I could interview them and --
15 and -- before May 10th.

16 The third major problem is that this UFI witness --
17 these 64 UFI witnesses that this procedure, option 2, applies
18 to and the previous procedure applies to, are a tiny slice of
19 the RDI domestic witnesses. Because the Protective Order #4
20 prohibits investigation of any CIA employee or any CIA
21 contractor, which have a specific legal meaning, the -- we --
22 and who is connected to the RDI program, we cannot approach
23 them.

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1 But the UFI process, the -- you know, the protocol,
2 as the government called it, applied only to the 64 UFI
3 witnesses.

4 So just take flights, for example, right? There's
5 been a -- I have -- I can't -- I don't even actually know if
6 this is true or not, but there's been a published -- what
7 appears to be well-authenticated published report of 11,000
8 CIA rendition flights. All right? Think how many pilots,
9 flight attendants, mechanics, know something about those
10 flights.

11 Now, whether those people are CIA contractors or
12 employees is a different question. But I say that to say that
13 there are an enormous, enormous number of people who have some
14 information about the RDI program that we are prohibited -- if
15 they are CIA contractors or employees, we are prohibited by
16 Protective Order #4 from approaching, but only 64 of those do
17 we have a route to get to.

18 So the universe -- you know, I have heard the
19 military commission describe this process many times, and even
20 today the military commission framed it as -- you know,
21 ultimately one of the questions is is Protective Order #4
22 interfering with the ability to reach these witnesses, but
23 the -- the subset of -- the UFI witnesses are only a tiny

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1 subset, and a very important subset, don't get me wrong -- but
2 only a small subset of the total amount of investigation that
3 is prohibited by Protective Order #4.

4 So the fourth issue is that the difficulties in
5 making this -- even this option 2 work. So the order, as
6 written, says that the defense is supposed to prepare a sealed
7 letter and give it to the government, and the government will
8 deliver it.

9 And so the military commission -- I have taken the --
10 it's not easy, but I have taken the military commission's
11 repeated instructions to heart about I should take these
12 issues to the government, right, and that I should try to talk
13 to them about it.

14 The -- so I raised the question of, all right, well,
15 if the letter is sealed, how will you know who to deliver it
16 to? How will the government know who to deliver it to?
17 Option 1 has a cover letter from the defense in which the --
18 in which the defense says, I would like to speak to UX1 or
19 whatever. There's no equivalent cover letter for option 2;
20 there's just a sealed envelope. How will you know who to
21 deliver it to? And so they went and thought about that and
22 came back and said, well, you should tell us.

23 And that leads to the second question of what about

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1 people who are -- don't have a UFI. And when I raised that
2 question, the answer was, well, if you were to write the UFI
3 in the letter anyway, or the name of the individual who does
4 not have a UFI who you believe through open source to be a
5 relevant witness, you would -- in either of those two
6 situations, you would make the letter classified and we
7 could -- and so it couldn't be delivered anyway.

8 So if it is -- if we're talking about UF1, and I
9 write in my letter, "Dear UF1, listen, here's who I am, here's
10 the information that I think I know, here's why I'd like to
11 talk to you, here's the guarantees of safety that I can
12 provide, I can offer you the use of our SCIF," et cetera, that
13 letter would become classified and it would be a violation of
14 law for me to give it to someone or someone to deliver it.

15 So I don't know what the -- at this point, after
16 that, I don't even know what the sealed letter is supposed to
17 say, because it can't say, "Dear Ms. Jones, listen, I saw on
18 your LinkedIn that you worked in a covert detention facility
19 for the CIA and you offer consulting offices about -- you
20 know, based on that experience, and I'd like to talk to you
21 about that experience." I can't write that anymore because
22 I'm linking a name and RDI information that, you know, I got
23 off their LinkedIn or whatever. So I don't understand how

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1 it's supposed to work at all now.

2 And I could just stop there because, like I said,
3 this is the government's, you know, aperture to slightly open
4 if they choose to do so and I don't really get a vote. But
5 one of the things that I have noticed from the military
6 commission's orders over the last six to eight months is that
7 there seems to be an interest in solving problems, like
8 creating workable solutions that balance issues. And I've
9 seen that with the website, I've seen it with a couple of --
10 several other orders that the military commission has ordered.

11 So I'm just going to take this opportunity to throw
12 my idea out there. The military commission can do with it
13 whatever it chooses, which is that there is a much better
14 solution available to the military commission, which we argued
15 and briefed originally way back in the 524 series, but it kind
16 of went by the wayside, which is: To use the authority
17 granted by the discussion under Rule 702 to have depositions.

18 I mean, we're dancing around the idea of what if
19 someone were to successfully and persuasively communicate some
20 idea to a person who is otherwise being blocked from
21 investigation by the government. You know, why don't we just
22 depose these people? We don't have to do it here at
23 Guantanamo. You can do a deposition anywhere in the United

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1 States. If six of them are in Atlanta, let's go to Atlanta
2 and set up a day of depositions, depose the people and get it
3 done with. Right?

4 There are paths that would solve this problem. I
5 mean, that would solve the whole 524 problem, right? There
6 would no longer be a problem with rich and vivid accounts.
7 There would no longer be a problem with ----

8 MJ [Col PARRELLA]: I heard that in 350 though, and aren't
9 we here still waiting to take the interpreters' testimony?

10 LDC [MR. CONNELL]: It's not a deposition, sir.

11 MJ [Col PARRELLA]: Okay.

12 LDC [MR. CONNELL]: The -- you know, the one -- we --
13 there's something that we know about depositions, which is
14 that they work differently than open court. And I understand
15 what you may be saying, boy, I wish I had chosen option B
16 instead of option A, but the -- you know, the -- I'm not
17 talking about -- and I don't know the military word. I ran
18 into this with Judge Pohl. The Virginia word is de bene esse.
19 Right? A de bene esse deposition, Virginia loves his Latin,
20 is a deposition to be used in place of trial. It is the same
21 as an Article 15 deposition under the Federal Rules of
22 Criminal Procedure.

23 That's not what I'm talking about. I'm talking about

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1 a rule-based variation on the argument that I made to Judge
2 Pohl that -- citing what I thought was very persuasive
3 military authority that, in fact, he has the authority to
4 require people to submit to interviews. But if he doesn't
5 have the right to submit them to interviews, let's just do an
6 ordinary deposition. Let's just take depositions of the
7 people and move on, right?

8 All of this -- the thought of the experiment that is
9 being conducted in 524 as to whether we can successfully put
10 on a suppression motion as test of prejudice as to whether the
11 government's limitation on -- limitations on our investigation
12 truly prejudice us or not is kind of like the long way around
13 this problem, when in fact if we just -- had what is
14 essentially a -- an interview by subpoena, a deposition, then
15 we could just move past -- we could get rid of this problem,
16 we could get rid of the rich and vivid problem. We could get
17 rid of the suppression as a sanction problem. We could get
18 rid of a whole lot of problems if we just took what is a
19 relatively easy and rule-based solution to this.

20 So I know this is purely gratuitous because the
21 government can do whatever it wants in 524 and I can't stop
22 them, so -- but there's my views, for what they're worth, sir.

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

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1 Mr. Ruiz.

2 LDC [MR. RUIZ]: Judge, as I understood your focus for
3 this particular issue is you wanted to know if there were any
4 reasons why you should not adopt the prosecution's proposed
5 changes. On behalf of Mr. al Hawsawi, I see no reason why you
6 should not; however, I do not want that to be our final word,
7 and I would like the opportunity to assess whether we need
8 additional briefing on it.

9 But secondly, I also wanted to be perfectly clear on
10 behalf of Mr. al Hawsawi that we do not see this as curing the
11 defects with Protective Order #4. We do not think that it
12 provides additional meaningful relief for us in our ability to
13 conduct an investigation.

14 But in terms of your pinpoint question on the issue
15 as to whether there's any reason not to adopt those proposed
16 changes, I see no reason. I just do not think it is useful.

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

18 All right. Anything from the government or any other
19 party? General Martins.

20 CP [BG MARTINS]: Your Honor, briefly, we believe the
21 commission has a good feel for what we're trying to do here,
22 open the aperture a bit.

23 The -- I did want to say, Mr. Connell's comment that

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1 it seemed to be restricted to the UFI persons is not how we
2 understand it. If he wishes to interview someone, I mean, we
3 have to know who it is in order to deliver it. We're the
4 mailman. We admit we're the mailman in this, but it's a
5 sealed letter. But if he provides us who this person is,
6 we'll get it to them.

7 There's a need to ensure that the person opens the
8 letter and there isn't a spill of some kind. That's why the
9 letter needs to go through a security review on their side,
10 walled off from us.

11 And then the -- the advisement that we placed in
12 there would be something that the FBI or TCIU agent could
13 ensure they get. But I did want to correct that. This is not
14 limited to the UFI persons. We see this as -- if he has some
15 kind of identifying information, he's got somebody he believes
16 has got a connection that he wants to investigate, if he gets
17 us a sealed letter, we'll figure it out how to get it to them.

18 MJ [Col PARRELLA]: Thank you.

19 Mr. Connell.

20 LDC [MR. CONNELL]: I know how they get it to them, sir.
21 They'll say, "Hey, listen, I'm from the FBI. This is my
22 friend from the CIA. We have this letter for you. But before
23 we give you that letter, we'd like to interview you, because

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1 you were just identified to us by the defense as someone that
2 they want to interview, so you must know something
3 interesting. Why don't we talk for a while."

4 The idea that we should provide not just a -- tell
5 the prosecution who we want to talk to out of their identified
6 list -- like the UFI witnesses, that's not a concern, the
7 government knows them all, they have interviewed them
8 ad nauseam. But with witnesses who are not on the UFI list,
9 that's an entirely different situation. It is yet another
10 interference of the prosecution in our investigation because
11 they're essentially requiring us not just to go through them
12 to get witnesses to court, but to go through them to get
13 witnesses interviewed, and give them the opportunity to
14 interview our witnesses first, and that is the exact opposite
15 of the way this system is supposed to work.

16 We don't get notice of who they interview. They can
17 interview any witness in the world that they want. And they
18 should. We should have the same power.

19 MJ [Co] PARRELLA]: I understand.

20 LDC [MR. CONNELL]: I have a solution for that, if you'd
21 like to hear it.

22 MJ [Co] PARRELLA]: Okay.

23 LDC [MR. CONNELL]: The solution for that is, if we have a

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1 witness who is non-UF1 witness, and we want to write them a
2 letter, we put it through the classification review, though
3 you will have decide whether you want it to go through OSS.
4 In 118M, you said that you wanted classification review for
5 the defense to go through -- I meant to mention this
6 earlier -- you wanted classification review for the defense to
7 go through a POC at the DoD SC/DRT, which I thought it was a
8 great solution. That was one of the ones when I said it looks
9 to me like you're trying to solve problems. I thought it was
10 a great solution. 118M goes in that same category along with
11 the 551 series. But as written, this order requires us to go
12 through OSS and I kind of thought OSS was getting out of this
13 business and we were moving it over to DRT, but you know that
14 better than I do, sir, but I just raise that point.

15 But after it goes through the DRT and we have our
16 walled-off classification review, and if we want to send a
17 letter to someone, we will -- I would be perfectly happy to
18 file a copy of any letter that we send under this protocol
19 ex parte with the military commission and that would give the
20 military commission -- if there were ever a question as to
21 whether we had delivered the advisement or whether we had
22 acted improperly in some way, there would be a repository of
23 all of the letters that we sent with the military commission

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1 ex parte and that would both solve the government's problem of
2 making sure that the system is complied with, but it would
3 solve our problem of giving -- providing the government a
4 bunch of leads that it doesn't have right now.

5 MJ [Col PARRELLA]: I understand.

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

7 MJ [Col PARRELLA]: Thank you.

8 Mr. Nevin.

9 LDC [MR. NEVIN]: I would -- and I'm speaking out of order
10 here because Mr. Connell raised something that I hadn't
11 anticipated being raised, and that is the reference to the
12 thought experiment in 524. And I just wanted to say one word
13 about that. I want to just point out to the military
14 commission that -- and I had thought of it not as a thought
15 experiment, but rather as a trial run.

16 So in other words, if the question in 524 is does
17 this process that's contained in Protective Order #4 give the
18 defense adequate opportunity to conduct an investigation, and
19 we have argued to you that it does not, and we have argued
20 that both in abstract and as a matter of fact, depending on
21 which of the briefs you look at.

22 And I took it that you were saying in the order that
23 you issued for the filing of motions to suppress and the

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1 declaration of -- requests for witnesses and so on, that you
2 were directing that we engage in a trial run, as it were, to
3 see how a motion to suppress would come out under the
4 limitations that are imposed by Protective Order #4, and that
5 you then would assess where we go from there.

6 I just want to point out this: The thought
7 experiment or the trial run, whatever you want to call it,
8 cannot possibly -- as a matter of logic, it cannot possibly
9 resolve the question of whether 524 places an unconstitutional
10 limitation on our ability to investigate, and here's why.
11 Because you may learn what we have been able to find as a
12 result of working under Protective Order #4, but you will
13 never be able to learn what we were not able to find.

14 The problem is one of not knowing what we don't know,
15 and nothing that we do in litigating under that trial run or
16 that thought experiment will allow you to answer that
17 question. In fact, the only intellectually honest thing you
18 will be able to do at the end of this process is to grant the
19 motion to suppress, and it has -- it has crossed my mind that
20 that might occur to you at some point, and that in some odd
21 way it might -- that might be the outcome.

22 But if you want to be intellectually honest about it,
23 you could never say there's not enough evidence to grant a

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1 motion to suppress because you're never going to know what the
2 normal process -- the result of years and years of litigation
3 in all the courts of the United States has produced as the way
4 we do this, you will never know what that process would have
5 produced. You will only know what the restricted process will
6 produce.

7 And it seems to me that in that sense, the thought
8 experiment, or the trial run, is inherently self-defeating,
9 cannot achieve what I assume the military commission intended
10 to achieve when it started down this road.

11 So that's what I wanted to say. Thank you for
12 hearing me out.

13 MJ [Col PARRELLA]: Thank you, Mr. Nevin.

14 Okay. Anybody else?

15 All right. With that, let's go ahead and take a
16 recess for 15 minutes. We'll resume back with hostilities.
17 Please carry on.

18 [The R.M.C. 803 session recessed at 1509, 29 April 2019.]

19 [The R.M.C. 803 session was called to order at 1527,
20 29 April 2019.]

21 MJ [Col PARRELLA]: All right. This commission is called
22 back to order. All parties present when the commission last
23 recessed are again present.

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1 Counsel, is there any exceptions to that?

2 CP [BG MARTINS]: Your Honor, Major Dykstra is also on
3 commission business out of the courtroom.

4 MJ [Col PARRELLA]: Thank you.

5 Okay. With that, we will go ahead and take up
6 617/620. As this was initiated as an issue specified by the
7 commission, what I would still propose is that we afford the
8 government the opportunity to go first and then defense
9 counsel to follow up in whatever order they deem appropriate.

10 So, Trial Counsel.

11 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

12 MJ [Col PARRELLA]: Good afternoon.

13 MTC [MR. TRIVETT]: So the directed brief by the
14 commission really causes the interplay of four different
15 provisions of the Military Commissions Act.

16 The first one being 10 U.S.C. 950p(c), which is
17 common circumstances, states that an offense specified in the
18 subchapter is triable by military commission under this
19 chapter only if the offense is committed in the context of and
20 associated with hostilities. Now, that last line, "in the
21 context of and associated with hostilities," has generally
22 been referred to as the nexus requirement by the CMCR whether
23 it be in Nashiri or al Bahlul or Hamdan.

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1 The second provision of the Military Commissions Act
2 is within the standard for an unprivileged enemy belligerent;
3 that's at 10 U.S.C. 948a, subsection 7.

4 What's important in this for purposes of our argument
5 today is C. That the term "unprivileged enemy belligerent"
6 means an individual other than a privileged belligerent who,
7 and in C says, was a part of al Qaeda at the time of the
8 alleged offense under this chapter. So this is a specific
9 recognition that Congress and the President both in 2006 and
10 then in 2009, when it was a different Congress and a different
11 president, found that we were engaged in hostilities with
12 al Qaeda.

13 The third provision is the jurisdiction section,
14 which is 10 U.S.C. Section 948d. It states that a military
15 commission under this chapter shall have jurisdiction to try
16 persons whether such offense was committed before, on, or
17 after September 11, 2001.

18 So with that as the backdrop, I wanted to first
19 discuss what you as the military commission has authority to
20 do. We believe you have the absolute legal authority to find
21 that the existence of hostilities before September 11th is a
22 nonjusticiable political question. Section 3 of our brief
23 details more than a dozen cases, many of which stand for the

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1 proposition that courts are ill-equipped and that the
2 political branches are better to determine the existence or
3 absence of hostilities.

4 And in this instance, the 2006 Military Commissions
5 Act and the 2009 Military Commissions Act speak louder and
6 more consistently than any of the non-congressionally declared
7 wars that the United States has had.

8 And the cases indicate for the nonjusticiable
9 political question, is that at worst, if you don't take -- if
10 you don't make the determination that it is a nonjusticiable
11 political question, such determinations are given wide
12 deference. So that's what the case law is. I'm not going to
13 repeat all of the case law. It's extensively briefed in
14 Section 3.

15 Other than the 2006 Military Commissions Act and the
16 2009 Military Commissions Act, we also have the President's
17 first military order November 13, 2001, when President Bush
18 determined that hostilities had risen to the level of an armed
19 conflict based on the attacks of the two embassies in Africa
20 in 1998, the attack of the USS COLE, and then what was just
21 two months prior, the attacks of September 11, 2001.

22 We also attached to our response to your directed
23 brief Attachment B, which is an interplay e-mail between

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1 the House Armed Services Committee and at the time the vice
2 president's office clarifying that the before, on, or after
3 September 11, 2001 language specifically encompassed the East
4 Africa Embassy bombings attacks, jurisdiction for that, for
5 the USS COLE attacks, and obviously for September 11th and
6 going forward.

7 The judge also has the absolute authority, if he
8 declines to find it is a nonjusticiable political question, to
9 take judicial notice of what is a legislative fact. And in
10 looking at M.C.R.E. 201(a), which governs adjudicative facts,
11 both courts-martial, the CAAF and obviously various different
12 district courts have found that while adjudicative facts
13 require the military judge to instruct the members that they
14 may but are not required to find the existence of this fact in
15 considering the element, legislative facts are different, and
16 legislative facts, ultimately the military judge is not
17 required to so instruct the members that they are no longer
18 required to consider his determination of judicial notice of a
19 legislative fact.

20 The cases we cited for this are U.S. v. Lopez, which
21 is in the Eighth Circuit; U.S. v. Salyer, which is in the
22 Eleventh Circuit; and we'll ask you to pay particular
23 attention to U.S. v. Chapman, which is an Eleventh Circuit

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1 case in 2017. Because what we're ultimately going to be
2 asking you to do is what U.S. v. Chapman did, and we believe,
3 at least in this regard, there's what you can do and what you
4 should do for the good of the case, and those things are two
5 different things right now.

6 The first question I believe you ask is whether or
7 not the commission was bound by the legal precedent set in
8 Hamdan and Bahlul, which were cases tried under the 2006
9 Military Commissions Act. And our position in our brief was
10 that you are bound by certainly the principles set forth in
11 determining whether or not there's an armed conflict, but that
12 you may tailor the instructions appropriate to this case.

13 And part of our reasoning, you have to understand, is
14 that Hamdan and Bahlul were much different cases than this
15 case was, and not because they were prosecuted under the 2006
16 act as opposed to the 2009 act, but simply how they were
17 charged. Neither Hamdan nor Bahlul were charged as principals
18 in the September 11 attack. They were also charged with
19 material support for offenses that occurred before
20 September 11th as well as after September 11th. And they were
21 charged with conspiracy, not unlike this case, but not with
22 any of the substantive offenses.

23 The material support makes the distinction a bit

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1 different for purposes of the commission's analysis. Now, a
2 conspiracy is a continuing crime, so even if the conspiracy
3 were to begin before a state of hostilities, even if overt
4 acts were taken prior to the beginning of the hostilities,
5 providing that one of the overt acts was taken after the point
6 in time when the hostilities existed, and then the object
7 offense was committed, the commission would have jurisdiction
8 over the entire conspiracy, and all of the overt acts that
9 predated the hostilities would still be significant and still
10 be relevant evidence to prove the accused's involvement in the
11 conspiracy.

12 In federal court it's considered a straddle
13 conspiracy, where the conspiracy may straddle a point in time
14 where it's illegal. We didn't have the opportunity to brief
15 this specifically. This was sort of a unique way in which the
16 judge ordered briefings and we all filed on the same day.

17 But there's some question, I believe, in
18 Mr. Hawsawi's motion, that he believes that every act must be
19 taken during the existence of hostilities. And we would argue
20 that for a material support case that may be true, but for a
21 conspiracy, it is not. Overt acts need not themselves even be
22 criminal. In this case they certainly were, but they're
23 charged with conspiracy in this case, the conspiracy that

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1 culminates in the attack of September 11, 2001. That makes it
2 distinct from Hamdan and Bahlul.

3 If you have a material support case and you're
4 alleging facts taken to materially support al Qaeda and they
5 predate hostilities, then you have a jurisdictional question.
6 Then you have an issue where if the members did not find that
7 those acts were taken during and in the context of an armed
8 conflict, then they would not be able to find guilt beyond a
9 reasonable doubt of those acts.

10 So that's the backdrop that I think needs to be
11 considered when looking at the substantive principles set
12 forth in Hamdan and al Bahlul.

13 Again, much different here. These five accused are
14 charged not only with conspiracy, but with attacking
15 civilians, attacking civilian objects, murder in violation of
16 the law of war, destruction of property in violation of the
17 law of war, and terrorism, all surrounding the September 11th
18 attacks. Period.

19 No one's charged with any acts for al Qaeda other
20 than their involvement in the September 11th attacks.

21 Because September 11th is specifically recognized in
22 the statute, we believe that gives the judge ample opportunity
23 to either take judicial notice of a legislative fact or find

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1 it a nonjusticiable political question in this case. And
2 that's why we believe it can be tailored in this case to also
3 include an instruction that states that two Congresses and two
4 presidents have found the existence of an armed conflict with
5 al Qaeda on and before September 11, 2001.

6 The reason I asked you to pay particular close
7 attention to U.S. v. Chapman is because although you can do
8 this, we're advising that you do take judicial notice of a
9 legislative fact, as opposed to finding it a nonjusticiable
10 political question, and that you ultimately instruct the
11 members that two Congresses and two Presidents have found the
12 existence of an armed conflict, but do it as a 201A
13 adjudicative fact as opposed to a legislative fact, with one
14 nuance; we would like to you find that it is a legislative
15 fact.

16 This is a belt-and-suspenders approach that we're
17 asking you to undertake here. That's what happened in
18 Chapman. Although it was a legislative fact, which is defined
19 by the courts as established truths, facts or pronouncements
20 that do not change from case to case, but apply universally,
21 we're asking you to do this so that there's no concern on
22 appeal that you've invaded the province of the jury in
23 determining the element -- what's been termed by the CMC as

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1 the nexus element to the hostilities.

2 So the six substantive elements in Hamdan and Bahlul
3 point to the number of casualties, the property damage,
4 whether there existed protracted armed violence, whether there
5 was use of military weapons and tactics. It takes into
6 consideration al Qaeda as an armed group; the extent to which
7 the U.S. employed its combatant capabilities; and then the
8 statements of the leaders of the United States and al Qaeda.

9 So both Mr. Binalshibh and Mr. Hawsawi argue that the
10 standard is wrong, and that Tadic is, in fact, the standard.
11 We did cite to Tadic, I think, last time, we were arguing a
12 related motion. We had said that the United States actually
13 proposed the Tadic instruction in Hamdan, but in the end, if
14 you look at the Tadic decision from the trial court level, the
15 actual standard was found by their appellate chamber, and the
16 way the trial court described that finding was really that
17 what the Tadic standard was concerned with was intensity and
18 organization. They just said that those are really the two
19 prongs that they're looking for.

20 That's right in the Tadic decision themselves. And
21 what I would submit to you is that the six substantive
22 elements set forth in Hamdan and al Bahlul are really just
23 fleshing out intensity and organization. They do include a

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1 statement -- statements of the leaders to that effect, because
2 in this case we have a 1996 declaration of war setting forth
3 al Qaeda's plan to attack America. But in many ways, the
4 Hamdan and Bahlul standards are completely consistent, if not
5 a little more fleshed out, than the Tadic standard which by
6 the Tadic trial court's definition really was just focused on
7 intensity and organization.

8 MJ [Col PARRELLA]: So Mr. Trivett, I mean, I think
9 there's some distinctions. The Hamdan instruction contains
10 elements that Tadic does not.

11 MTC [MR. TRIVETT]: It does.

12 MJ [Col PARRELLA]: And Tadic contains elements that I at
13 least don't see, such as organization, I don't see that in the
14 existing Hamdan instruction, unless you read it into the sort
15 of catchall.

16 So my question for you is, if you know, where did
17 this Hamdan instruction come from? In other words, what's the
18 legal basis for it? Or was this just something that the judge
19 in that particular case crafted, you know, based on Tadic or
20 was it the DoD Law of War Manual? Where did it come from?

21 MTC [MR. TRIVETT]: The instructions in Hamdan were done
22 over a weekend prior to charging the jury and closing
23 arguments. We could not find written record of it, so I'm

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1 going off of my recollections almost 11 years ago.

2 We had proposed the Tadic standard, and ultimately
3 the judge had been considering other briefs that had been
4 done, as well as other legal treatises. And I remember he had
5 me call one of the professors that he relied on when we
6 believed that he had instructed incorrectly, but it was too
7 late to change the charge to the jury.

8 So I would say he went on Tadic principally and then
9 filled it in with other things that he found in his own
10 research or research of the parties, but certainly not by the
11 U.S. Government itself.

12 MJ [Col PARRELLA]: So is the basis for the government
13 wanting the commission to adopt that standard, is that simply
14 because of the limited appellate precedent that maybe endorses
15 to some extent the instructions given in Hamdan and Bahlul?

16 MTC [MR. TRIVETT]: It was. "In the context of and
17 associated with armed conflict or hostilities" are not words
18 that are commonly used.

19 So when they came out in -- whether it would be the
20 President's military order of 13 November or in the acts, we
21 certainly looked to international law and thought that it was
22 not coincidence that they used the same exact term, "in the
23 context of and associated with armed conflict."

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1 That was obviously a jurisdictional limitation on
2 both the ICTY, the International Criminal Tribunal of
3 Yugoslavia, the Rwanda one as well, and we believed that it
4 certainly was supported. We were a party to the Rome Statute,
5 although didn't later sign on to the International
6 Criminal Court. So the initial Rome Statute was something
7 that the United States had looked at. So we believed that it
8 was something that was a standard we could propose and
9 ultimately could establish beyond a reasonable doubt that an
10 armed conflict existed with the United States and al Qaeda
11 based on what the International Criminal Tribunal of
12 Yugoslavia had just done a few years before.

13 So that was the basis for it. We never took the
14 position that it doesn't represent customary international
15 law. It was the first contested tribunals, I believe, since
16 World War II to consider the issue. And it was also
17 considering issues that were outside of a typical
18 international armed conflict where you had state-to-state
19 conflict. It specifically authorizes jurisdiction at the ICTY
20 for protracted armed violence between government authorities
21 and other organized groups, as opposed to just two
22 international states.

23 MJ [Col PARRELLA]: So you would agree -- I'm assuming the

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1 government agrees with the defense briefs that were in the
2 category here of not state/state, but state and nonstate.

3 MTC [MR. TRIVETT]: Absolutely.

4 MJ [Col PARRELLA]: Okay. And if I understood the
5 government's position, you believe that the commission does
6 have the ability to tweak Hamdan instruction to the facts of
7 this case. Would you propose that the commission reinsert the
8 prong of Tadic that seems to be missing dealing with
9 organization or stick with the elements that are articulated
10 in Hamdan?

11 MTC [MR. TRIVETT]: I think what Mr. Connell said earlier
12 is appropriate when he said, "When we get rulings of the
13 commission, we either file for a motion to reconsider or we
14 just move out."

15 Ultimately, one could say that in Hamdan, we lost.
16 And if it was just limited to the Hamdan trial court level, to
17 the commission level, I think we could disregard that to the
18 extent we thought it was inconsistent with law. It's now
19 before the CMCR. The CMCR, both en banc decisions in Hamdan
20 and al Bahlul -- both made a determination that the military
21 judge correctly instructed the members, and that they required
22 the members to find both the nexus to and existence of
23 hostilities.

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1 MJ [Col PARRELLA]: Do you believe that that's a binding
2 precedent upon this commission?

3 MTC [MR. TRIVETT]: I think the principles set forth in
4 the standard are, but I do believe that they can be tailored
5 appropriate to this case.

6 MJ [Col PARRELLA]: What about the -- I guess Mr. Hawsawi
7 and Mr. Binalshibh who indicate that the catchall factor is no
8 factor at all or no standard at all?

9 What's the government's position as to whether that
10 should be excised from the Hamdan instruction?

11 MTC [MR. TRIVETT]: It should be excised especially in
12 light of this case and the fact that they're charged with
13 September 11 and the fact that Congress and the President have
14 found that September 11 and before there existed a state of
15 hostilities.

16 I agree with that principle. You can't read it to be
17 limitless. That would -- it would completely swallow the
18 entire standard, and I know that that's Mr. Ali's position,
19 that he believes he's entitled to argue whatever he wants to
20 argue as to whether or not there existed hostilities, to
21 include every action of every executive agency that may have
22 been less than kinetic action in our response to al Qaeda, and
23 that would clearly swallow the entire rule.

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1 We did not propose it. I don't even know necessarily
2 that the defense proposed that. I know that Mr. Ali cited to
3 the fact that the judge then made a comment and said, "I'll
4 let you wander around a bit here to make whatever arguments
5 you want to make." But again, in the context, that was the
6 morning -- that was the weekend before we actually closed. So
7 this was -- they were not using the standard as a means by
8 which to get additional discovery from the accused -- from --
9 from the government. This was simply to be able to argue the
10 facts in front of the commission, and I think you can read
11 into it that the commission can have questions.

12 I mean, the commission is obviously better suited to
13 do this than a civilian jury and will have some insights as to
14 their own knowledge and understanding of the law of war, and
15 that they may have questions, and that those questions may
16 become relevant.

17 But ultimately keeping that last catchall, which is
18 not in Tadic, which is not what we requested, and quite
19 frankly, if you read it the way Mr. Ali reads it, it swallows
20 the entire rule. So I would certainly agree with both
21 Mr. Binalshibh and Mr. Hawsawi that that -- that part of the
22 standard isn't a standard at all. But that's what was
23 ultimately requested in both the al Bahlul case and the Hamdan

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1 case.

2 And so I wanted to tie it back to the discovery that
3 we have provided, because when we went through Mr. Ali's
4 discovery requests for related information regarding
5 hostilities, we provided all the background stuff that we're
6 going to rely on for al Qaeda, all of their '96 declaration of
7 war, their '98 fatwa. We gave video evidence of the actual
8 attacks of the embassies, the aftermath of the attack on the
9 USS COLE. We gave them a large number of videos of the actual
10 World Trade Center being attacked, the best surveillance video
11 we had of the Pentagon being attacked.

12 So we've satisfied that piece of it, whether it be
13 al Qaeda or the actual attacks, but then we went a step
14 further. We provided all of what we thought was relevant and
15 discoverable information on Operation Infinite Reach, which
16 was our initial -- the United States' initial attack on Usama
17 bin Laden's pharmaceutical company in Sudan along with
18 training camps in Afghanistan. We turned over all of the
19 discoverable information on Operation Infinite Resolve, which
20 was our follow-on attempts to continue to target and kill
21 and/or capture Usama bin Laden.

22 We went so far as to give them all of the statements
23 that President Bush made and President Clinton made regarding

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1 their perceptions, because that was one of the standards set
2 forth in the Hamdan and Bahlul case, including
3 executive-privileged documents where the President was
4 speaking to foreign leaders. With President Clinton, we gave
5 over statements made to Tony Blair and Hosni Mubarak. And we
6 excised the responses back, but all of the statements made by
7 the President we disclosed.

8 MJ [Col PARRELLA]: I understand you gave some stuff, and
9 you held back others. So what I'm more interested in knowing
10 is what was sort of the standard? Was the standard you used
11 in determining relevance the Hamdan instruction?

12 MTC [MR. TRIVETT]: It was.

13 MJ [Col PARRELLA]: Okay. So in your brief, and I think
14 it's on page 11, you say, "The defense cannot, however, create
15 its own legal standard for hostilities by arguing irrelevant,
16 nonkinetic actions of other federal agencies to prove the
17 nonexistence of hostilities." And, ----

18 MTC [MR. TRIVETT]: Right.

19 MJ [Col PARRELLA]: ---- you know, I assume that that
20 statement ties in part to what was at issue in 617 and 620,
21 specifically that the actions of detainee operations, I think,
22 vice criminal holding.

23 MTC [MR. TRIVETT]: Yes, sir, but certainly not limited to

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1 that. I mean, we have been arguing over hostilities-related
2 standards in discovery well before your time as well, but,
3 yes, it was specifically in reference to that.

4 MJ [Col PARRELLA]: Okay.

5 MTC [MR. TRIVETT]: That unless you -- unless you read
6 that last element, that last sort of catchall, I think you
7 described it, as completely swallowing the rule, then none of
8 that information is relevant to any part of the standard set
9 forth in Hamdan.

10 MJ [Col PARRELLA]: Well, that's where my question comes
11 in, because I'm looking at Hamdan and it says, "One of the
12 factors is whether and when the United States decided to
13 employ the combatant capabilities of its Armed Forces to meet
14 the al Qaeda threat."

15 So when we're talking about not necessarily the
16 admissibility of evidence, but simply at this point discovery,
17 it's hard to see how that's not material.

18 MTC [MR. TRIVETT]: It was a bombing war, sir.

19 So in August -- I believe it was August 7, 1998, they
20 attacked two embassies simultaneously, killing over 200
21 people. We respond about two weeks later with over 80
22 Tomahawk missiles into two different countries. We have
23 conceded that that was the only time that we actually directed

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1 kinetic action against Usama bin Laden's group before
2 September 11, 2001. We'll concede that. We'll stipulate to
3 that.

4 But it's whether and when, and we did, and we did it
5 specifically on August 22nd, 1998. It's not everything else
6 you were doing. We also said we would always stipulate to the
7 fact that because we believe it's not mutually exclusive, that
8 we would also stipulate to the fact that the FBI was
9 attempting to deal with the threat, that the State Department
10 was attempting to deal with the threat, that the intelligence
11 agencies were attempting to deal with the threat.

12 MJ [Col PARRELLA]: But the stipulations and everything
13 is -- I understand the government's position, and that again,
14 I think, goes more back towards, you know, the admissibility
15 of this evidence at trial, whether the defense intends to use
16 it.

17 But again, we're talking discovery, and the
18 government's arguing Hamdan. The government is arguing these
19 factors are the factors to apply, one of which is when the
20 Armed Forces -- or when the country decided to employ its
21 Armed Forces vice some other solution, and this is discovery
22 that seems to address that question.

23 So that's sort of where I was -- the question I'm

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1 posing is, is, you know, if you want the commission to take
2 Hamdan on as the instruction, then that would seem to
3 incorporate that as well. It seems to be pretty broad, maybe
4 even broader than Tadic.

5 MTC [MR. TRIVETT]: I understand -- I understand your
6 position on that. We do not agree.

7 MJ [Co1 PARRELLA]: Okay.

8 MTC [MR. TRIVETT]: Because we do believe not only can we
9 tailor it specific to this case, which makes it different
10 because it's the 9/11 attacks and Congress has already found
11 that that -- hostilities existed in that regard ----

12 MJ [Co1 PARRELLA]: And so -- and that's -- that's -- and
13 maybe this will help us get to the point.

14 So if I understand the government's position, you
15 believe that it's appropriate for the court and, in fact, you
16 would ask the court to take judicial notice that hostilities
17 began before, on, or after September 11, but refrain from
18 taking judicial notice that they began on a particular date;
19 is that a correct summation?

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

21 MJ [Co1 PARRELLA]: And so you would still want the
22 question of when to be presented to the members.

23 MTC [MR. TRIVETT]: Yes, sir. I mean, we think that that

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1 is the safest approach. This case obviously has historical
2 significance. It needs to be done correctly. It needs to be
3 done one time. It needs to be done as a joint trial that can
4 adjudicate death. We have always argued that from the very
5 beginning when the judge asked about -- ordered sua sponte
6 whether or not the case should be severed.

7 And if you do it that way, and if you take it as an
8 adjudicated -- if you instruct it as if it's an adjudicative
9 fact, but find that it's a legislative fact so that it might
10 be ripe for CMCR decision at some point on that, that that is
11 the safest way to ensure that there is no appellate issue.
12 It's within your discretion to do. The federal courts that we
13 have asked that -- that we have cited in our briefs allows you
14 to do that within your discretion. We think that that's the
15 safest way to do it.

16 But I did want to get back -- we're not asking to
17 foreclose entirely the issue of existence, but what -- my
18 point in describing all of the discovery that we provided, and
19 then talking about the elements, there's certain arguments
20 within the Hamdan and Bahlul standard that the defense can
21 choose to argue if they want. They can claim that the fact
22 that there were only ten attacks in three years does not
23 constitute protracted armed violence. They can say that the

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1 number of casualties or the property damage wasn't sufficient
2 to rise to the level of hostilities.

3 They could argue that we only used the kinetic force
4 of the United States one time before September 11, 2001, with
5 the 80 tomahawks we fired. They could claim that al Qaeda
6 wasn't sufficiently organized. They could claim that there's
7 one or two statements of the leaders of the many that we have
8 argued or that we have provided that indicate that there was a
9 belief that we were at peace, as opposed to at war. They can
10 do all of those things. We're not preventing them from doing
11 it.

12 But we also have no fear of it, just like we had no
13 fear of it in Hamdan or Al Bahlul. We're not afraid of the
14 standard at trial, but the standard can't be that we have to
15 go through every executive agency of the United States
16 Government to figure out what else we were doing.

17 We don't believe the whether and when they employed
18 constitutes all of the other discovery, even at the discovery
19 level, even at the 701 level, that they would be entitled to
20 all of the information about what else the government was
21 doing, especially when we're willing to stipulate to it.

22 The stipulation, although I don't believe relevant
23 and I don't believe necessary, is a way to inoculate the

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1 record that they -- if they didn't get everything that the
2 State Department was doing and the FBI was doing because we
3 concede and stipulate that every agency was trying to do
4 whatever they could within their powers to stop the threat.

5 MJ [Col PARRELLA]: What does tailoring -- you mentioned
6 that this commission can tailor this instruction for the facts
7 of this case.

8 What does the government see as tailoring for the
9 9/11 case? What does that look like?

10 MTC [MR. TRIVETT]: Specifically the finding by two
11 Congresses and two Presidents that hostilities existed before
12 al Qaeda, before -- on, and before September 11, 2001, with
13 al Qaeda.

14 MJ [Col PARRELLA]: Okay. Even though I gathered that you
15 want the question of when specifically to go to the members,
16 and the government is taking on the burden to prove when
17 beyond a reasonable doubt?

18 MTC [MR. TRIVETT]: Yes, sir. And I think quite -- it's
19 not just when, it's whether. We're going to prove both.

20 Our case doesn't change, and I just wanted to sort of
21 explain that.

22 But our proof of the conspiracy to attack civilians
23 and to murder in violation of the law of war and for all of

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1 the other object offenses which they're also charged with
2 substantively is a lot of the same proof that we would use to
3 establish the existence of the hostilities. The fact that
4 they declared war on the United States, that they determined
5 that American citizens were legitimate targets in their war,
6 and then they systematically started attacking American
7 civilians overseas and our soldiers and sailors in Yemen, and
8 then the attacks of September 11, it all proves the conspiracy
9 as well. So our evidence doesn't change at all, and we're not
10 taking the question away completely from the members, but we
11 don't think it's going to be a hard call for them to make.

12 Ultimately, constitutionally, the President's got the
13 authority to do it. Congress has the authority to do it.
14 They have done that. They need to know that, and that was
15 certainly what we brought up in context of arguments last time
16 about whether or not experts on the law of war should be able
17 to testify as to whether or not we were in existence. Because
18 if they are, we're certainly entitled to have the members be
19 instructed that the two constitutionally responsible branches
20 of the political branches under our Constitution have decided
21 this issue.

22 A lot of the case law, whether it be military case
23 law about the lawfulness of an order or the district court

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1 case law that we cited whether or not it was a venue issue,
2 whether drugs should be on a Schedule I or a Schedule II
3 standard, ultimately, as long as it goes to the members for
4 them to decide and that they're clear that they can decide, it
5 doesn't matter that the issue is easy for them to reach, or
6 that the decision to take judicial notice pretty much solves
7 the issue. I mean, all of those venue questions, it does.
8 But if the venue questions are set forth like in the Chapman
9 case as an adjudicative fact as opposed to a legislative fact,
10 it ensures that they have the right to make the determination.

11 So we'll prove when and whether, but we're asking for
12 the tailoring of the legislative fact specific to 9/11 and
13 only because these individuals were charged substantively with
14 the 9/11 attacks for which both Congress and the President
15 have already determined constituted the existence of armed
16 conflict hostilities.

17 MJ [Col PARRELLA]: So if you're not intending to change
18 the way you prove this case, ----

19 MTC [MR. TRIVETT]: No.

20 MJ [Col PARRELLA]: ---- then why ask the commission to
21 take judicial notice at all? Because, you know, it seems to
22 be taking a path of the safest possible route. What's the
23 benefit?

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1 MTC [MR. TRIVETT]: The benefit of doing that is that
2 there is a -- these are universal facts, and having the
3 members understand that under our constitutional system, that
4 there are political branches that are entitled to either wide
5 deference or, you know, absolute decision on the existence of
6 hostilities, it becomes very confusing. We've always argued
7 under the 403 analysis, if they're able to present evidence
8 that we believe doesn't go to any of the standards under
9 Hamdan or Bahlul, that it can become very confusing and we can
10 be prejudiced by that.

11 So it clearly -- we have given you enough
12 information -- meaning the commission -- enough information to
13 make the determination that you can take judicial notice of
14 that legislative fact.

15 Courts should have uniformity in these instructions
16 when it comes to the existence of hostilities so that you
17 don't have inconsistent verdicts as well.

18 Again, it will be their decision, but these are facts
19 by Congress. I think we also, in our motion, indicated you
20 could also just take judicial notice of law on that issue, but
21 we believe it's -- we believe it's both. I think a lot of
22 times there's probably -- there could be legislative acts that
23 are not -- there can be legislative facts that aren't

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1 necessarily law; this one happens to be both.

2 But we believe that that's the proper way to do it,
3 and we believe that it's appropriate for you to take judicial
4 notice of it. We can certainly prove it another way, but that
5 becomes awkward with, you know, who's the right witness to do
6 that when it's a Congressional determination and a
7 Presidential determination.

8 MJ [Col PARRELLA]: Well, if I were to find or take
9 judicial notice that it's a domestic law, then would that be
10 still an issue that would even go to the members?

11 MTC [MR. TRIVETT]: No. You could take -- I think it's
12 less likely to. Like I said, our initial position is it needs
13 to be judicial notice of a legislative fact, but instructed in
14 a way as if it's an adjudicative fact so that the members know
15 that they can make the determination and are not bound by that
16 determination.

17 MJ [Col PARRELLA]: I understand.

18 MTC [MR. TRIVETT]: Subject to additional questions, sir.

19 MJ [Col PARRELLA]: I have none. Thank you.

20 MTC [MR. TRIVETT]: Thanks.

21 MJ [Col PARRELLA]: Mr. Nevin.

22 LDC [MR. NEVIN]: Your Honor, I have the objection to
23 proceeding that I've -- that I tendered earlier, and we

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1 recognize in view of your order we're proceeding to do our
2 best to defend.

3 However, I anticipate that we will file a motion for
4 leave out of time to state a different -- to unjoin existing
5 pleadings on this question and file a separate position, and
6 as a result -- and I also have the preparation issue that I
7 referred to earlier today, so I will not be asking you to hear
8 argument from me.

9 MJ [Col PARRELLA]: Okay. Thank you, Mr. Nevin.

10 Ms. Bormann.

11 LDC [MS. BORMANN]: Judge, we specifically unjoined any of
12 the -- any of the motions filed by Mr. Hawsawi and by
13 Mr. Connell on this very issue for reasons we provided to the
14 then-military judge still in the record. We are not prepared
15 to take a position with respect to this, and will not be.

16 MJ [Col PARRELLA]: Okay.

17 Mr. Harrington.

18 LDC [MS. BORMANN]: Judge, one -- I'm sorry, I hate to
19 interrupt, but one correction: We anticipate that at some
20 point in the future, based upon the reasons we outlined to
21 Judge Pohl, we will be in a position to do so, we just don't
22 have the resource right now to be able to do that.

23 MJ [Col PARRELLA]: Please direct me to what specifically

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1 you are referring to that was before Judge Pohl?

2 LDC [MS. BORMANN]: It was our declination of joinder on
3 the hostilities issue, which I don't have the brief in front
4 of me as I sit here. I can ask somebody to locate it. I just
5 sent away the only paralegal we had here.

6 MJ [Col PARRELLA]: Okay. If you can just -- maybe when
7 you have it, if you can direct the commission to what the AE
8 number is.

9 LDC [MS. BORMANN]: I will.

10 MJ [Col PARRELLA]: Thank you.

11 Good afternoon.

12 DC [CPT BALOUZIYEH]: Good afternoon, Your Honor.
13 Mr. Binalshibh's position on the questions posed by AE 617D
14 and 620C are as follows: Both the proof of existence of
15 hostilities and nexus to hostilities are components of the
16 common substantive element established by 10 U.S.C. 950p(c),
17 and this commission is not bound by the -- and this commission
18 is not bound by the erroneous instruction issued in United
19 States v. Hamdan and United States v. Bahlul.

20 Two, the military judge may not determine the
21 existence and duration of hostilities for the purpose of
22 Section 950p(c) as an instructional matter. The question must
23 be left to the panel.

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1 Three, the existence of hostilities for purposes of
2 10 U.S.C. -- the existence of hostilities for purposes of
3 10 U.S.C. Section 950p(c), in this case is not a
4 nonjusticiable political question; rather, it is a justiciable
5 question that falls within the commission's power to decide.

6 And, four, the existence of hostilities for purposes
7 of 10 U.S.C. 950p(c) in this case is not subject to judicial
8 notice as a matter of legislative fact.

9 Before entering into these questions, Your Honor,
10 it's necessary for us to state on the record Mr. Binalshibh's
11 reservation of rights. He was not joined in the 502 series
12 of -- that was put forward by Mr. al Hawsawi with respect to
13 this commission's lack of jurisdiction due to the absence of
14 hostilities. He did not have an opportunity to present his
15 own witnesses or his own evidence. There were times when we
16 attempted to cross-examine witnesses that had been put forward
17 by Mr. al Hawsawi's team, and we were told by the judge at the
18 time that because we were not joined to the motions that we
19 would not be able to cross-examine the witnesses; that if
20 the -- those issues that had been litigated were deemed to
21 later be relevant to motions that we would present at a later
22 time, that we would be able to bring them back to re-examine
23 at a later time.

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1 And therefore our view is that because we had not
2 been joined to those motions, we are -- in response to Your
3 Honor's order to brief the court on these questions, we are
4 complying with that order, but at the same time are not
5 waiving our rights to present our own evidence, our own
6 witnesses, our own arguments with respect to ----

7 MJ [Col PARRELLA]: Yeah, let me -- let me just stop you
8 there, because I think we're -- you know, that's issues
9 dealing with personal jurisdiction, and nothing in the
10 commission's orders has indicated that Mr. Binalshibh, should
11 he so choose, can't file a motion challenging personal
12 jurisdiction.

13 The only aspect of it is is that in the resolution of
14 that motion, should it be filed, Mr. Binalshibh, as is the
15 case with the other accused, are bound by the commission's
16 determination as to the existence, but that's the existence as
17 it relates to personal jurisdiction.

18 So this afternoon, what we're talking about is just
19 950p(c), and whether the existence, to what extent and so
20 forth, is a part of the substantive element.

21 So let's -- let's stay on the substantive element. I
22 don't want to get sidetracked back into personal jurisdiction.

23 DC [CPT BALOUZIYEH]: Your Honor, I understand, but the

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1 order specifically -- the -- a ruling came out on April 4th, I
2 believe it was, that specifically stated that the finding of
3 Judge Pohl with respect to the existence of hostilities as it
4 relates to personal jurisdiction was applicable to all of the
5 defendants, which we ruled Judge Pohl's ruling -- we read
6 Judge Pohl's ruling as applicable solely to Mr. al Hawsawi,
7 and I just want to make sure that's clear on the record.

8 MJ [Col PARRELLA]: Well, I understand that's your
9 position, but that's exactly contrary to the commission's
10 ruling. So the commission's ruled that it applies to
11 everybody, but that's personal jurisdiction again. And I
12 believe there's already been a motion filed for the commission
13 to reconsider that by one of your colleagues. So in due
14 course, we'll take that issue up.

15 But this afternoon, I'd like to stay with just how it
16 relates to the substantive elements, so the 950p(c) argument.
17 And I think I understand your arguments that you made in your
18 brief. So let me just -- maybe I'll ask you questions and see
19 if that can focus us back on the topic.

20 We've heard a little bit about what the government's
21 position is on the applicable instruction or what should be
22 the instruction. Am I correct in understanding that you would
23 have the commission provide an instruction that is consistent

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1 with Tadic?

2 DC [CPT BALOUZIYEH]: Yes, Your Honor.

3 MJ [Col PARRELLA]: Okay. Would you suggest any variation
4 of that in light of the Hamdan and Bahlul opinions?

5 DC [CPT BALOUZIYEH]: No, Your Honor.

6 MJ [Col PARRELLA]: Okay. Okay.

7 Is there anything else on the issue of the existence
8 as it relates to the substantive element?

9 DC [CPT BALOUZIYEH]: Yes, Your Honor. We ----

10 MJ [Col PARRELLA]: Okay.

11 DC [CPT BALOUZIYEH]: I would like to present our
12 arguments with respect to the four questions that you
13 proposed.

14 MJ [Col PARRELLA]: Please do so.

15 DC [CPT BALOUZIYEH]: Okay. So I will start with the
16 question of justiciability, because I believe that will answer
17 many of the other questions. It might take 10 or 12 minutes
18 or so, but then I think the other questions will be answered
19 as we're going through the various arguments.

20 So the question is whether the existence of
21 hostilities is in this case to any extent a nonjusticiable
22 political question. To answer that question, we need to look
23 at the text of 10 U.S.C. 948a(9) which defines hostilities as

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1 any conflict subject to the laws of war, and the definition
2 makes no reference whatsoever to al Qaeda. In those eight
3 words, no reference to any nonstate armed group is made.
4 Rather, we have only a single reference: the law of war, or
5 the law of armed conflict, or international humanitarian law.

6 Now, if Congress had intended for the conflict
7 between the U.S. and al Qaeda to be a nonjusticiable political
8 question, Congress could have done exactly what it had done in
9 the definition that it established for unprivileged enemy
10 belligerents. It could have simply made -- Congress could
11 have simply made a reference to al Qaeda in that definition as
12 it had done for the definition of unprivileged enemy
13 belligerents. Congress failed to do so.

14 The government has repeatedly stated, and stated in
15 their brief, that Congress came to the finding that
16 hostilities between the United States and al Qaeda existed on,
17 before, and after September 11, 2011 [sic], nor does the
18 Military Commissions Act state that. The Military Commissions
19 Act grants jurisdiction to this commission to try acts of
20 hostilities that occurred on, before, and after September 11,
21 2001. Never does the act state that those hostilities existed
22 between the United States and al Qaeda at any date.

23 Congress could have made its intent to make the

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1 question of hostility with al Qaeda a nonjusticiable fact by
2 simply adding to the definition of hostilities the following
3 phrase. In the definition, it could have stated that
4 hostilities are defined as any conflict subject to the laws of
5 war or the conflict -- or the conflict between the United
6 States and al Qaeda, or Congress could have added the
7 following clause to clarify its intention after the definition
8 of hostilities: For the avoidance of doubt, the conflict
9 between the United States and al Qaeda is a conflict subject
10 to the laws of war. Congress didn't do so. Nowhere in the
11 act is al Qaeda referenced anywhere other than that one
12 section under 948a(7)(C) in the definition of unprivileged
13 enemy belligerents, which leads us to the question of why
14 didn't Congress do so.

15 Why didn't Congress establish hostilities between the
16 U.S. and al Qaeda as a nonjusticiable political question? And
17 it did so for at least two reasons that I can think of, making
18 such a finding would potentially lead to absurd consequences,
19 is the first; and the second because the determination of the
20 existence of hostilities involves a complex fact-based
21 determination that varies day to day because what today might
22 be an armed conflict subject to the laws of war might not be
23 tomorrow, and Congress cannot in a statute make that kind of a

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1 determination.

2 The first reason, the absurdity of trying to
3 establish hostilities between al Qaeda and the United States,
4 if Congress had stated, as I suggested they could have done,
5 that hostilities between the United States and al Qaeda
6 existed for the purpose of the definition of hostilities, it
7 would imply that without specifying a beginning date or an end
8 date, it would imply that hostilities between the United
9 States and al Qaeda have always existed. Of course, that
10 could not be possible because the United States and al Qaeda
11 have not always existed as entities; and even if they did
12 always -- had always been, even if their relationship had
13 always been characterized by a state of hostilities since the
14 foundation of al Qaeda, generally pinpointed to 1988 by most
15 scholars, still, we would result in absurd consequences such
16 as the fact that in the early days of al Qaeda, many of the
17 mujahideen who had been supported by the United States
18 Government in the efforts of the United States to end the
19 sphere of influence of the Soviet Union in Afghanistan
20 continued to receive the support of the United States well
21 into the late 1980s and into the early 1980s [sic] as the
22 United States continued to train, finance, equip and arm the
23 mujahideen in overthrowing the Soviet occupation.

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1 Those very same mujahideen who had been living in
2 Afghanistan and trained by United States forces were among the
3 founders and the members of al Qaeda, which at that time -- at
4 that time had been promoting U.S. interests in the region in
5 ending the Soviet sphere of influence in Central Asia.

6 Now, clearly, it would not have been within Congress'
7 intention to haul within this commission a member of al Qaeda
8 who had joined the organization and had never engaged in
9 actual hostilities against the U.S., but whose only membership
10 and nexus in the organization was within the context of the
11 Soviet/Afghan war to bring them before this tribunal even if
12 that mujahed who was simultaneously a member of al Qaeda had
13 undertaken or violated one of the -- or had been guilty of one
14 of the offenses enumerated by the Military Commissions Act.

15 As an example, one of the -- one of the offenses
16 enumerated by the Military Commissions Act is the offense of
17 pillaging. A member of al Qaeda may have, in the late 1980s,
18 after the early nascent days of al Qaeda, gone into a Soviet
19 installation in Afghanistan and engaged in the crime of
20 pillaging, which, though not a violation of the law of war, is
21 possibly a violation of the Military Commissions Act, if it's
22 done without proper permission in the chain of command by an
23 officer or another person in authority.

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1 He may have committed that violation because in the
2 early days of al Qaeda there was no chain of command. He
3 would have been a member of al Qaeda; therefore, if we take
4 the government's position as it is that Congress somehow saw
5 that these hostilities existed between the United States and
6 al Qaeda, personal jurisdiction would be met.

7 The element of the subject matter jurisdiction would
8 be met by virtue of the fact that the offense, the pillaging
9 offense, had been met. And yet he had undertaken no act that
10 was in any way hostile to the United States. He undertook an
11 act that was hostile towards the Soviet Union. This is an
12 absurd consequence as it -- could it have possibly been the
13 intent of Congress to haul before this commission at the
14 taxpayer dollar such an individual who was a member of
15 al Qaeda, a nonstate armed group, who had committed an
16 offense? Clearly not.

17 Congress recognized this ludicrous consequence and
18 sought to avoid it by ensuring that the commissions, the
19 courts, would look to every individual who was brought before
20 it to determine whether or not he or she had engaged in
21 hostilities against the United States. It isn't enough that
22 an individual, regardless of whether he committed the alleged
23 offense, was a member of al Qaeda. There must also be an

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1 offense.

2 As a similar example, tomorrow we might sign an
3 armistice with al Qaeda, and the next day an individual might
4 join al Qaeda and engage in hostilities against some other
5 third-party state.

6 During the membership with al Qaeda, al Qaeda's only
7 role might be to have engaged in spiritual jihad. They may
8 have laid down all of their arms. Can we say that the member
9 of al Qaeda who engaged in some hostile act or some offense,
10 but that wasn't within the context of hostilities against the
11 United States, could fall under the personal jurisdiction of
12 the United States? This, again, is an absurd consequence that
13 Congress specifically sought to avoid by not stating, as they
14 very easily could have in the definition of hostilities, that
15 membership -- that the relationship between the United States
16 and al Qaeda is characterized by hostilities.

17 They didn't do it because it leads to these very
18 ludicrous consequences that they sought to avoid.

19 But there's a second reason why Congress avoided
20 doing so, and it's because determining whether hostilities
21 exist is not a question that can be determined in just a
22 sentence or two in a piece of legislation. It's a complex
23 question that's determined by rules under customary

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1 international law that are most clearly articulated in the
2 Tadic standard, but that have been articulated by countless
3 other cases and rulings and learned treatises, including the
4 United States Department of Defense Law of War Manual that
5 every judge advocate in this room would have studied prior to
6 becoming a commissioned officer that's been declared in other
7 international criminal courts and tribunals, including the
8 International Criminal Tribunal for Rwanda. It's a rule that
9 first looks to the nature of the conflict.

10 If it's an international armed conflict, one set of
11 rules -- if it's an international armed conflict, one set of
12 rules will apply. If it's a noninternational armed conflict,
13 a separate set of rules will apply. If it's an international
14 armed conflict, then any level of hostility, any level of
15 violence between two states will be sufficient to trigger the
16 entire panoply of international humanitarian law. It's the
17 rule that was determined by Tadic. It's the rule that the
18 ICRC has -- that has been referred to as the one prisoner --
19 one shot, one prisoner rule. A single-fire shot between two
20 states is enough to trigger the application of the Geneva
21 Conventions. A single prisoner of war that's taken between
22 two states in a state of hostilities is enough to trigger the
23 entirety of Geneva Convention 3 for the treatment of prisoners

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1 of war.

2 However, if we're in the realm of a noninternational
3 armed conflict, the calculus is far more complicated. It's
4 not a matter of simply one bullet, one round being fired.
5 It's not a matter of merely a single detainee being taken. If
6 that were the case, the law of armed conflict would apply to
7 every single criminal offense that's committed on the streets
8 of America every single day. If every time a single fire -- a
9 single round was fired, if every day a single individual, a
10 single civilian were murdered, then we would apply the entire
11 panoply of customary international law that applies to
12 noninternational armed conflict to all of the crimes that take
13 place on the streets of America.

14 That is a result that the United States would never
15 accept and has never accepted. Rather, the United States
16 accepts the position of customary international law, which was
17 articulated by Tadic.

18 The violence doesn't trigger the application of the
19 law of armed conflict unless it rises to the level of
20 intensity that is required and unless the parties rise to the
21 level of organization. Sporadic violence between gangs on the
22 streets, sporadic acts of terrorism, random acts of violence,
23 these do not constitute the acts that are required to trigger

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1 Common Article 3. They aren't sufficient to trigger the
2 application of those provisions of Additional Protocol 2 that
3 constitute customary international law. These fall within the
4 realm of criminal law.

5 Congress knew that. Congress could not state that
6 these acts, even acts of terrorism, fall within the realm of
7 the law of armed conflict. The United States has never
8 accepted such a rule. The United States historically has
9 always bound itself to the custom that has -- that has been
10 articulated by Tadic, by Haradinaj, by other cases that have
11 come out of the ICTY and the ICTR, by the rule that was
12 established and is established by the ICRC in its Customary
13 International Humanitarian Law Manual -- treatise, which looks
14 to intensity and looks to organization of the parties.

15 In light of the fact that despite the government's
16 position, nothing anywhere in the Military Commissions Act
17 states that hostilities between the United States and al Qaeda
18 existed on or before September 11, 2001, we can conclude that
19 Congress intended for that question to be litigated among the
20 parties and decided by the -- by the courts.

21 And I would add one more point, Your Honor. In the
22 definition itself of unprivileged enemy belligerents, it makes
23 very clear that all three of the categories require a showing

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1 of hostilities in order for this court to hold personal
2 jurisdiction. The first category states it explicitly:
3 Individuals who have engaged in hostilities against the U.S.
4 That's in 10 U.S.C. Section 948a(7)(A).

5 The second category also states it explicitly:
6 Individuals who have supported hostilities against the U.S.
7 That's in 10 U.S.C. Section 948a(7)(B). And the third
8 category makes it clear, but it's implicit. The third
9 category states that it's members of al Qaeda -- members
10 who -- individuals who are members of al Qaeda at the time of
11 the alleged offenses, 10 U.S.C. Section 948a(7)(C). In order
12 for there to have been an offense under the Military
13 Commissions Act, the existence of hostilities is required.

14 All of the categories of offenses that can be tried
15 by this commission, whether they are the 10 U.S.C. 950t
16 offenses, whether they are the offenses of Articles 104 and
17 106 of the UCMJ, whether they're the other offenses of the law
18 of war, all assume the pre -- all assume the preexistence of
19 hostilities or conflict subject to the law of war.

20 Therefore, this commission must find the existence of
21 hostilities, regardless of whether the government can prove
22 that any of the accused were members of al Qaeda.

23 With respect to the first question, Your Honor, of --

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1 as to whether proof of the existence of hostilities as opposed
2 to merely nexus to hostilities is a component of the common
3 substantive element established by 10 U.S.C. Section 950p(c),
4 our view is that, as discussed, both proof of hostilities as
5 well as nexus of hostilities is a component of the common
6 substantive element.

7 And the text of 950p(c) makes clear that nexus to
8 hostilities is required, but for there to be nexus, there must
9 be hostilities, because there can be no nexus to something
10 that doesn't exist. And if we have no hostilities, there can
11 be no nexus.

12 And this commission is not bound to use the erroneous
13 member instruction used in the United States v. Hamdan or that
14 in United States v. Bahlul for several reasons, the first of
15 which is that the -- the instruction was no more than dicta;
16 the second is it's found in a footnote to the rule; the third
17 is that the rule has absolutely no precedent and cites no
18 legal authority whatsoever and pulls a standard out of the
19 air; the fourth is that both decisions were overruled; and the
20 fifth is that the standard is absolutely no standard at all.

21 It does not restate Tadic. It does not state
22 customary international law. It does not restate
23 jurisprudence which has come out of the International Criminal

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1 Tribunal for Rwanda. It does not state jurisprudence which
2 has come from learned treatises, including the ICRC's
3 definitive and authoritative customary humanitarian law
4 treatise; rather, it states that you may consider any facts or
5 circumstances you consider relevant to determining the
6 existence of armed conflict, which essentially means that you
7 can consider anything that you want.

8 It doesn't even pretend to be an objective standard.
9 It doesn't even pretend to state that members of the panel can
10 consider that which they reasonably consider to be relevant.
11 Whether or not it is reasonable is not -- whether or not it is
12 reasonable is not in any way a part of that instruction.

13 If a member felt that an accused was a member of the
14 mujahideen in Afghanistan in the 1980s was relevant for the
15 question of whether armed conflict between the United States
16 and al Qaeda existed, the member could consider that fact. If
17 the member believed that it was relevant whether or not it
18 rained or snowed or whether it was too hot or too cold on
19 September 11th, the member could consider that fact in
20 determining whether hostilities existed.

21 If a member believed or felt that Dumbo and the size
22 of his ears were relevant for the question -- and I'm sorry if
23 I sound disrespectful, but I believe it's important here to

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1 make clear just how absurd the standard is. If a member
2 believed that it was relevant whether his ears were big enough
3 that if it flapped with sufficient speed it would create
4 enough thermodynamic energy that could cause Dumbo to become
5 airborne, he could consider that if he believes subjectively
6 that that's relevant to the question of whether or not armed
7 conflict exists.

8 MJ [Col PARRELLA]: I think, Captain, you've made that
9 point and I think that the government agrees with you.

10 DC [CPT BALOUZIYEH]: But I can't -- but I don't
11 understand the government's position because the government
12 states that this commission is bound by the standard, but the
13 government states that the last portion of that standard isn't
14 part of the standard, so what then is the standard?

15 If the standard is legally binding, should we not
16 consider the size of Dumbo's ears? And if it isn't binding,
17 then I think we need to throw it away and apply customary
18 international law, which this commission and this country sees
19 as binding upon itself through its own state practice
20 established by decades of -- of state practice undertaken by a
21 sense -- through a sense of legal obligation or opinio juris.

22 That is what is binding upon the United States. That
23 is how the United States conducts itself, and has conducted

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1 itself both in the way it has treated hostilities -- both in
2 the way it has treated acts of terrorism and the way it has
3 negotiated, both in the way the United States has treated and
4 adjudicated and prosecuted cases of terrorism in the past, as
5 well as the statements that the United States has made in
6 international summits in negotiating international treaties,
7 including additional protocols ----

8 MJ [Col PARRELLA]: Give me -- take a breath for a second.
9 Bottom line up front, are you advocating that the commission
10 use the Tadic standard?

11 DC [CPT BALOUZIYEH]: Yes, sir.

12 MJ [Col PARRELLA]: Okay. Let's move on.

13 DC [CPT BALOUZIYEH]: Question two, whether the military
14 judge may determine the existence and duration of hostilities
15 for purposes of 10 U.S.C. Section 950p(c) as an instructional
16 matter while reserving the question of nexus to hostilities
17 of -- to the panel, the military judge can determine neither
18 the existence and duration of hostilities nor the question of
19 nexus to hostilities as an instructional matter. Both the
20 question of the existence and duration of hostilities and the
21 question of nexus must be reserved to the panel, for reasons
22 that I previously stated.

23 And as for question four, whether the existence of

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1 hostilities for purposes of 10 U.S.C. 950p(c) in this case is
2 to any extent subject to judicial notice as a matter of
3 legislative fact, Your Honor, I've also covered that
4 previously. The answer to that question is no. Congress has
5 not established it or made a finding or engaged in legislative
6 fact-finding with respect to the existence of hostilities
7 between the United States and al Qaeda on, before, or after
8 September 11, 2001.

9 Subject to your questions, Your Honor.

10 MJ [Col PARRELLA]: I have none further. Thank you.

11 DC [CPT BALOUZIYEH]: Thank you, sir.

12 MTC [MR. TRIVETT]: Sir, may I just take a moment to
13 correct the record of something I said during my argument?

14 MJ [Col PARRELLA]: Please.

15 MTC [MR. TRIVETT]: To the extent that I said that the
16 United States was a party to the Rome Statute, I misspoke. We
17 certainly had certain participation within the drafting of it,
18 and we looked to certain aspects of it for customary
19 international law. But to the extent that I said that we were
20 a party to it, that was incorrect and I wanted to correct the
21 record.

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

23 So at this point, two parties are left to argue on

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1 this issue, but we're getting close to the end of the day. So
2 what I would propose we do is go ahead and recess, begin
3 tomorrow morning with the 505 hearing so that they can make
4 the appropriate adjustments to the courtroom.

5 Trial Counsel, have you made a decision as to whether
6 you want the commission to take up your notices in 616
7 tomorrow?

8 TC [MR. RYAN]: We would like that, sir.

9 MJ [Col PARRELLA]: Okay.

10 So even with that, I think we only have three
11 notices. What I would propose is to commence with an open
12 session at 10:30. I think an hour and a half is plenty of
13 time to take up those three notices and, you know, still have
14 time to take a recess to get the courtroom set back up.

15 So plan again 9:00 a.m. for the 505(h) hearing. I
16 think we will end probably well under an hour, so plenty of
17 time to then transition the courtroom. So, government, if we
18 could ensure that the accused that do want to attend are
19 available by 10:30, and we'll finish the open argument on the
20 hostilities issue.

21 I know I owe you, Mr. Ruiz, a ruling, and you will
22 have that as soon as I can get that to you.

23 LDC [MS. BORMANN]: Judge, do you anticipate another open

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1 session on Wednesday, as you indicated earlier?

2 MJ [Col PARRELLA]: Yeah, I -- I do. Because I think
3 we're going to need to take up -- the commission's going to
4 need to, depending on how the 505(h) hearing goes, if
5 appropriate issue closure orders. We will then take up the
6 open session for 523, 330.

7 So depending on how the rest of the hostilities go,
8 we could get into that tomorrow. We can also push it until
9 Wednesday. And I will definitely, you know, take your input
10 on that. But I anticipate we would have an opportunity for an
11 open session Wednesday.

12 Unless anybody -- you know, if you have contrary
13 input, we can do an 802 conference and discuss it further.

14 LDC [MS. BORMANN]: Mr. Bin'Attash wanted to know for
15 planning purposes. We were trying to figure out how to do two
16 things at once.

17 MJ [Col PARRELLA]: Yeah. I can't promise it, because if
18 we have an opportunity to finish open tomorrow, we can
19 certainly do that.

20 But it's -- I think we'll certainly be here on
21 Wednesday.

22 Okay. Anything further before the commission
23 recesses?

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1 LDC [MR. RUIZ]: Yes, Judge.

2 MJ [Col PARRELLA]: Mr. Ruiz.

3 LDC [MR. RUIZ]: My question on the ruling is when do you
4 think you will expect to have it -- the logistics of getting
5 the computer back to the camp? If your ruling is to affirm
6 your ruling, it would be significantly easier if the guard
7 force can just transport it back with Mr. al Hawsawi.

8 However, if it comes in after that, then it creates,
9 I think, significant logistical issues that will probably
10 de facto delay getting the computer back to him in any sense.

11 So that was the reason why I tried to get that before
12 you so we could get it back to him now, the guard force can
13 just transport it as they always have back to the camp.

14 MJ [Col PARRELLA]: Okay. So if I understand, though, if
15 I were to issue this ruling say first thing in the morning,
16 what would be the repercussions?

17 LDC [MR. RUIZ]: I don't know. I just know that
18 Mr. al Hawsawi will not be here. I don't know if they
19 transport him when they're not here, but if you could -- I
20 mean, I guess, if they're willing to transport the computer
21 back or if there's some way of doing it, that's fine. It's
22 just the easiest thing would be today to transport the
23 computer back with him, and I do not believe Mr. al Hawsawi

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1 plans on attending tomorrow, so that was the reason for our
2 urgency.

3 MJ [Col PARRELLA]: Okay. I unfortunately do not -- I'm
4 not ready to issue the ruling right now. I will endeavor to
5 have it first thing in the morning. So I'm going to leave it
6 to the government to figure out how to get the computer there,
7 back wherever it's supposed to be. I'm not, frankly, going to
8 get into that right now, but I will issue the ruling as soon
9 as I possibly can do it.

10 LDC [MR. RUIZ]: Thank you.

11 MJ [Col PARRELLA]: Anything further?

12 LDC [MR. NEVIN]: Yes. May Mr. Mohammad remain in the
13 courtroom until ----

14 MJ [Col PARRELLA]: How about 1730, is that enough time?

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

16 MJ [Col PARRELLA]: Okay. Anything else?

17 All right. This commission is in recess.

18 [The R.M.C. 803 session recessed at 1644, 29 April 2019.]

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