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1 [The R.M.C. 803 session was called to order at 1328,
2 1 April 2019.]

3 MJ [COL WATKINS]: The commission is called to order. The
4 accused is present.

5 Lieutenant Colonel Primoli, good afternoon.

6 TC [Lt Col PRIMOLI]: Good afternoon, Your Honor.

7 MJ [COL WATKINS]: Could you please account for the
8 prosecution team? Additionally, please state legal
9 qualifications and status regarding oath and detail for each
10 member.

11 TC [Lt Col PRIMOLI]: Sir, this commission is convened by
12 Convening Order 12-01, dated 15 February 2012. Copies of this
13 have been previously furnished to the military judge, counsel,
14 and the accused, and it will be attached to the record of
15 trial.

16 The accused and the following personnel detailed in
17 this commission are present: Colonel Douglas K. Watkins,
18 Military Judge; Lieutenant Colonel Joy Primoli, Trial Counsel;
19 Commander David O'Dowd, Assistant Trial Counsel; Major Richard
20 Mitchell and Lieutenant Brian Hayes may be present but are not
21 detailed to the prosecution.

22 For the defense, we have Mr. J. Wells Dixon and
23 Ms. Katya Jestin, Civilian Defense Counsel; Lieutenant

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1 Commander Jared A. Hernandez, JAG Corps, United States Navy,
2 Detailed Military Defense Counsel; and Mr. Ian C. Moss,
3 Detailed Civilian Counsel. Mr. Moss has not been previously
4 sworn, Your Honor. In addition, Mr. Theodore Lange, defense
5 case analyst; Mr. Sean Ainsworth, defense investigator;
6 Ms. Riley Stevenson, Defense Information Security Officer, are
7 present.

8 Finally, Commander Darren Wall, JAG Corps, United
9 States Navy, the deputy defense counsel for military
10 commissions, is also present but not detailed. The members
11 are absent. The accused is present.

12 In addition, Captain Tim Keeton and Major Chris James
13 are no longer detailed for the prosecution in this case.
14 Ms. Natalie Orpett, Civilian Defense Counsel, is absent for
15 the defense.

16 All trial counsel have been detailed to this military
17 commission by the chief prosecutor. All members of the
18 prosecution are qualified under R.M.C. 502 and have previously
19 been sworn in accordance with R.M.C. 807. No member of the
20 prosecution has acted in any manner that might tend to
21 disqualify us in this proceeding. The detailing document has
22 been marked as Appellate Exhibit 003D.

23 These proceedings are being transmitted by

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1 closed-circuit television to CONUS in accordance with the
2 Commission's order in Appellate Exhibit AE 006A.

3 MJ [COL WATKINS]: Thank you.

4 And to clarify, you said Major Mitchell is not yet
5 detailed?

6 TC [Lt Col PRIMOLI]: He's not yet detailed, Your Honor.

7 MJ [COL WATKINS]: Has Commander O'Dowd been sworn before
8 the commission?

9 TC [Lt Col PRIMOLI]: Not before the commission, but he
10 was sworn by General Martins ----

11 MJ [Col PARRELLA]: All right.

12 TC [Lt Col PRIMOLI]: ---- the chief prosecutor.

13 MJ [COL WATKINS]: Thank you.

14 Commander O'Dowd, could you please stand and raise
15 your right hand.

16 ATC [CDR O'DOWD]: Yes, sir.

17 [Counsel was sworn.]

18 MJ [COL WATKINS]: Thank you.

19 And Colonel Primoli, do all members of the
20 prosecution team present in court have all appropriate
21 security clearances?

22 TC [Lt Col PRIMOLI]: We do, sir.

23 MJ [COL WATKINS]: Good afternoon, Mr. Dixon.

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1 CDC [MR. DIXON]: Good afternoon, Your Honor.

2 MJ [COL WATKINS]: Trial counsel has accounted for the
3 defense team that's present. I can have Mr. Moss do this, if
4 you like, but I would like to have him state his legal
5 qualifications and status regarding oath.

6 DDC [LCDR HERNANDEZ]: Good afternoon, Your Honor.
7 Lieutenant Commander Jared Hernandez, JAG Corps, United States
8 Navy, for the defense. Your Honor, if we may, may we state
9 all qualifications for defense counsel on the record, sir?

10 MJ [COL WATKINS]: Certainly.

11 DDC [LCDR HERNANDEZ]: Sir, I have been detailed to this
12 military commission by Brigadier General John Baker, United
13 States Marine Corps, Chief Defense Counsel for the military
14 commissions.

15 I am qualified and certified under Rule for Military
16 Commission 502, have previously been sworn in accordance with
17 R.M.C. 807, and have previously appeared at prior sessions on
18 behalf of Mr. Khan.

19 I have not acted in any manner which might tend to
20 disqualify me from this military commission.

21 Also present are Mr. Khan's pro bono civilian defense
22 counsel, Mr. J. Wells Dixon and Ms. Katya Jestin. They are
23 qualified, have been previously sworn, and have represented

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1 Mr. Khan throughout these commission proceedings. Their
2 detailing letters are AE 008 and AE 009, Your Honor. They
3 have not acted in any manner which might tend to disqualify
4 them from this military commission.

5 In addition, Mr. Ian C. Moss is present. Mr. Moss
6 has been detailed to this commission by the chief defense
7 counsel. His detailing letter is AE 007E and is qualified and
8 certified under R.M.C. 502 but has not yet been sworn pursuant
9 to R.M.C. 807. Mr. Moss has not acted in any manner that
10 might tend to disqualify him from this military commission.
11 And, as appropriate, all members of the defense possess the
12 highest security clearances and are proud to represent
13 Mr. Majid Khan, Guantanamo's sole high-value cooperator.

14 Thank you, Your Honor.

15 MJ [COL WATKINS]: Thank you.

16 Mr. Moss, could you please stand. Raise right hand.

17 [Counsel was sworn.]

18 MJ [COL WATKINS]: Thank you, Mr. Moss.

19 Good afternoon, Mr. Khan.

20 ACC [MR. KHAN]: Good afternoon, sir.

21 MJ [COL WATKINS]: Mr. Khan, do you want Mr. Ian Moss as
22 part of your defense team?

23 ACC [MR. KHAN]: Yes, sir, I do.

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1 MJ [COL WATKINS]: Okay. Mr. Khan, Ms. Orpett filed a
2 request to be excused from this week's sessions, and I've been
3 provided what appears to be a waiver from you consenting to
4 her absence. Do you consent to proceeding this week without
5 Ms. Orpett being present?

6 ACC [MR. KHAN]: That is correct, sir.

7 MJ [COL WATKINS]: All right. Thank you, Mr. Khan.

8 An R.M.C. 802 session occurred at 1700 hours on
9 31 March 2019 in the deliberation room in AV-34 at U.S. Naval
10 Station Guantanamo Bay. The parties and the military judge
11 were present. The accused was not present.

12 At the R.M.C. 802 session, the following topics were
13 discussed:

14 The commission discussed the order of march today for
15 today's session to include my desire to complete any
16 unclassified argument and all pending motions prior to
17 conducting any 505(h) proceedings or closed 803 sessions.

18 The commission ascertained there was no need to
19 discuss AE 025, a defense request for support, as there was no
20 substantive change in status from the last filing on
21 28 March 2019 at AE 025R.

22 Defense noted they did not believe oral argument was
23 necessary in AE 027, and AE 028 could be handled in an

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1 unclassified setting unless the military judge desired to
2 inquire into specific items of discovery. I stated at that
3 time I desired to ask some questions. I have since determined
4 that I no longer need to, but I'll allow the parties an
5 opportunity to present any additional argument if they feel
6 that's necessary.

7 In the 802, prior to any closed session in Appellate
8 Exhibit 030, the prosecution indicated a need to resolve
9 Appellate Exhibit 030C. I noted I needed to review all the
10 classified pleadings this morning, which I have done.

11 Mr. Dixon requested permission to split argument on
12 Appellate Exhibit 028 and Appellate Exhibit 030 with
13 Ms. Jestin. Mr. Dixon would provide the applicability of the
14 Constitution argument, and Ms. Jestin, the factual portion of
15 the argument. I granted that request.

16 Defense had the following comments. Defense
17 requested the immediate release of Appellate Exhibit 028 and
18 Appellate Exhibit 030 to the media. I said I would take that
19 request under advisement. After considering the request, I've
20 determined the request is not ripe without a formal motion for
21 appropriate relief.

22 Defense asserted a July sentencing date may need to
23 be rescheduled to allow for Mr. Khan to testify in a different

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1 case and thus show substantial cooperation with the government
2 pursuant to the pretrial agreement. This issue is also not
3 currently ripe, but I appreciate -- I appreciate the advanced
4 notice.

5 Defense requested to ask two additional voir dire
6 questions of me, and I granted that request. We'll get to
7 that in a moment.

8 Finally, I closed the 802 conference encouraging the
9 parties to conference with each other to see what additional
10 issues they could work out while on island.

11 Do counsel for either side have anything to add or
12 correct based on the commission's R.M.C. 802 conference
13 summaries held on 31 March 2019?

14 TC [Lt Col PRIMOLI]: No, Your Honor.

15 CDC [MR. DIXON]: Your Honor, the only thing that I would
16 like to do is clarify for the record. You mentioned
17 Mr. Khan's cooperation. The standard for cooperation is set
18 forth in the plea agreement, and Your Honor said, I think,
19 "substantial cooperation." The actual standard is included in
20 the pretrial agreement. I just want to be clear about that
21 for the record.

22 MJ [COL WATKINS]: All right. Thank you.

23 Mr. Dixon, do you have questions or challenge of me?

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1 CDC [MR. DIXON]: I do, Your Honor. Thank you,
2 Your Honor.

3 When this commission last convened in July of 2018,
4 Your Honor indicated at that time that you are retirement
5 eligible and you were contemplating retirement perhaps in two
6 years.

7 My question for you is: Have you made any further
8 plans to retire from military service?

9 MJ [COL WATKINS]: I have not initiated retirement, but my
10 intent is sometime in the summer of 2020 or later.

11 CDC [MR. DIXON]: And has Your Honor explored or applied
12 for any post-retirement job opportunities?

13 MJ [COL WATKINS]: I have not.

14 CDC [MR. DIXON]: So Your Honor has not applied to be an
15 immigration judge with the Department of Justice, for example?

16 MJ [COL WATKINS]: I have not.

17 CDC [MR. DIXON]: Thank you.

18 My other question for Your Honor is: Have you issued
19 any ex parte rulings or orders in this case or otherwise had
20 any ex parte communications with the prosecution, Department
21 of Defense, or others?

22 MJ [COL WATKINS]: I have not. I've reviewed an ex parte
23 pleading filed by the government, which is Appellate

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1 Exhibit 030C, which you've responded to, I believe. I have
2 not engaged in any ex parte communications with the
3 prosecution or defense.

4 CDC [MR. DIXON]: So there have been no -- just so I'm
5 clear, there have been no ex parte rulings or orders issued in
6 connection with AE 030C or any other proceeding in this case?

7 MJ [COL WATKINS]: Not with 030C. And no, I've not issued
8 any ex parte rulings.

9 CDC [MR. DIXON]: Thank you, Your Honor.

10 Based on Your Honor's responses to my questions
11 today, we do not have any objection or challenge to Your Honor
12 presiding over this case.

13 MJ [COL WATKINS]: Very well. Thank you.

14 Mr. Khan, I understand that you've had some time to
15 meet with your counsel this morning to discuss the matters we
16 will be taking up today. However, before we address those
17 matters, I need to advise you of your right to attend these
18 sessions.

19 You have the right to be present during all open
20 sessions of the commission. If you request to be absent from
21 any session, your absence must be voluntary and of your own
22 free will. Your voluntary absence from any session of the
23 commission is an unequivocal waiver of your right to be

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1 present during that session.

2 Your absence from any session may negatively affect
3 the presentation of the defense in your case. Your failure to
4 meet with and cooperate with your defense counsel may also
5 negatively affect the presentation of your case. Under
6 certain circumstances, your attendance at a session can be
7 compelled regardless of your personal desire not to be
8 present.

9 Regardless of your voluntary waiver to attend a
10 particular session of the commission, you have the right at
11 any time to decide to attend any subsequent session.

12 Do you understand what I've just explained to you?

13 ACC [MR. KHAN]: I do, sir.

14 MJ [COL WATKINS]: Thank you, Mr. Khan.

15 Appellate Exhibit 031, the docketing order for this
16 hearing, lists four specific motions we would be addressing
17 this week. As discussed during the Rule for Military
18 Commission 802 conference yesterday evening, there is no
19 substantive change to or need to address Appellate
20 Exhibit 025.

21 As to the remaining three motions, the commission
22 plans to hear unclassified argument on the motions in the
23 following order:

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1 In Appellate Exhibit 027, the defense filed a motion
2 requesting the commission order the government to provide the
3 accused a laptop computer loaded with specific software.

4 In Appellate Exhibit 028, the defense submitted a
5 motion to compel production of Brady material.

6 In Appellate Exhibit 030, the defense submitted a
7 motion to compel the production of witnesses to testify in
8 person in connection with Mr. Khan's sentencing.

9 If required to complete argument in this motion, the
10 commission will conduct a Military Commission Rule of
11 Evidence 505(h) hearing which will be closed to the public.
12 The accused will not be present during any M.C.R.E. 505(h)
13 hearings. Additionally, if necessary, we may need to conduct
14 a closed Rule for Military Commission 803 session to hear
15 classified argument on this motion.

16 Finally, I advised the parties that it's unnecessary
17 to cover the same arguments provided in their pleadings.

18 Moving on, then, to the first motion, in Appellate
19 Exhibit 027, the defense requested the commission order the
20 government to provide Mr. Khan access to a privileged laptop
21 computer loaded with Microsoft Office, Adobe Acrobat Pro, and
22 photo-and video-editing software for his use in assisting his
23 counsel and participating in a meaningful fashion in

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1 preparation of his presentencing case and/or petition for
2 clemency.

3 The defense argued the laptop at issue, albeit
4 without the additional software, has already been made
5 available to Mr. Khan -- or to the defense, I should say --
6 and that the laptop has not been provided to Mr. Khan due to a
7 security incident having nothing to do with Mr. Khan or this
8 case.

9 The defense also argued that Mr. Khan's access to a
10 privileged laptop is necessary to avoid any undue infringement
11 on his constitutional rights, to petition the government for
12 redress, to enjoy meaningful access to the courts, and to have
13 the effective assistance of counsel. The defense argues
14 there's no legitimate government interest in denying
15 Mr. Khan's request.

16 In Appellate Exhibit 027A dated 19 February 2019, the
17 government requested the commission deny the defense motion.
18 The government argued that, first, the accused does not have a
19 legal right or is otherwise entitled to a laptop computer and
20 that the government is unaware of any United States court ever
21 determining that a prisoner or a pretrial detainee has a right
22 to possess and use laptop computers; second, the accused has
23 meaningful access to the courts and effective assistance of

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1 counsel regardless of access to a laptop computer; and third,
2 that the government has legitimate security interests
3 associated with denying law of war detainees, to include
4 Mr. Khan, access to highly sophisticated electronic computing
5 devices.

6 The defense replied in Appellate Exhibit 027B and
7 argued, for all practical purposes, there is no way for
8 Mr. Khan to prepare for his presentencing proceedings fairly
9 and adequately without a computer.

10 As I stated before, I have no questions, but does the
11 defense wish to present any additional oral argument?

12 CDC [MR. DIXON]: Your Honor, I would like to clarify one
13 aspect of what you just said, and then I would like to present
14 the arguments concerning the application of the Constitution
15 to Guantanamo. That is an issue that the prosecution raised
16 in AE 027. It's also an issue that applies in AE 028 and
17 AE 030.

18 With respect to the clarification, I believe
19 Your Honor indicated that Mr. Khan has a laptop or that the
20 defense has a laptop. That's not technically accurate. It is
21 accurate to say that a defense laptop has been obtained and is
22 in possession of the government. The laptop has been
23 processed for security purposes. It has been prepared for

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1 delivery to Mr. Khan.

2 There is, as we understand and believe, a memorandum
3 signed by a number of relevant parties, including the chief
4 prosecutor, authorizing that laptop to be provided to Mr. Khan
5 for rehabilitative purposes. Our motion is asking that that
6 laptop be delivered to Mr. Khan for privilege purposes; that
7 is, for use in connection with his sentencing.

8 As we indicated in our papers, and we will rest on
9 our papers, other detainees in other circumstances have
10 similarly had access to laptops for similar purposes.

11 Beyond that, we rest on our papers, with the
12 extension of the constitutional argument that I am happy to
13 present at any time Your Honor may wish.

14 MJ [COL WATKINS]: I'll leave that to you. I know you
15 want to address it in the other two motions. You can address
16 it now, if you like.

17 CDC [MR. DIXON]: Thank you, Your Honor. I will address
18 it now.

19 MJ [COL WATKINS]: I would like to say, I attempted to
20 clarify myself and I didn't do a good job, but I believe your
21 characterization of who provided a laptop and where it was at,
22 I believe all that to be accurate.

23 CDC [MR. DIXON]: Thank you, Your Honor.

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1 With respect to the issue of the Constitution,
2 throughout these three filings, AE 027, 028, and 030, the
3 prosecution has taken issue with our citation to
4 constitutional authorities. By "constitutional authorities,"
5 what I mean is cases that address the basic right of
6 defendants to a fair trial; that is, a fair trial guaranteed
7 by principles of due process. Now, it's unclear to us whether
8 the government objects to the cases or to the fair trial right
9 principles that they represent.

10 What the government doesn't do is argue that the
11 Constitution does not apply in its totality to Guantanamo, nor
12 could the prosecution do that. I direct Your Honor to
13 Justice Kennedy's concurring opinion in the Verdugo case,
14 494 U.S. 259, where he said the proposition -- this is a
15 quote -- "The proposition is not that the Constitution doesn't
16 apply overseas, but that there are certain provisions that
17 don't necessarily apply in all circumstances in every foreign
18 place." That was a concurring opinion that cites
19 Reid v. Covert, which was, of course, a case arising out of
20 the Uniform Code of Military Justice.

21 What the government argues is that there is no case
22 that specifically recognizes the constitutional rights that we
23 invoke. And that, I submit to Your Honor, is wrong. We have

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1 addressed the government's arguments in our papers. We have
2 addressed the cases that they cite.

3 With respect to the Brady motion, AE 028, the Supreme
4 Court's decision in Boumediene v. Bush affirms that detainees
5 at Guantanamo have the right to obtain and admit relevant
6 exculpatory information; and, in fact, federal courts have
7 relied on that decision in habeas contexts.

8 We cited in our papers, and I want to highlight, the
9 case of Duran v. Trump. It involves another high-value
10 detainee that I actually represent. In the case management
11 order in that case, Judge Walton of the federal court in
12 Washington ordered the government to produce exculpatory
13 evidence, including medical records, which is one of the
14 categories of information that we have requested here.
15 There's also the Bin'Attash case that we've cited, issued by
16 Judge Lamberth, that specifically cites Brady. And so we
17 think that there is clear precedent for the right to receive
18 exculpatory evidence under the principles of Brady.

19 With respect to the motion to compel production of
20 witnesses, the Military Commissions Act, specifically
21 Section 949j, subsection (a)(1), provides that the right to
22 obtain witnesses and the process for obtaining those witnesses
23 is equivalent to the process in Article III courts. Now, the

1 process in Article III courts, of course, and the cases that
2 we've cited bear this out, specifically rely on the Fifth and
3 Sixth Amendments.

4 The government in its opposition has essentially
5 nothing to say about this. They certainly don't cite any
6 cases that would foreclose invocation of the rights that we
7 seek -- that we invoke. Again, these are just basic fair
8 trial rights.

9 I do want to make another point with respect to the
10 Constitution -- application of the Constitution more broadly,
11 and that is, the Supreme Court in the Boumediene case said, of
12 course, that detainees at Guantanamo have a constitutionally
13 protected right to petition for habeas.

14 That decision was not -- it didn't state a new rule
15 of -- it didn't state a new constitutional rule. What it did
16 was it reaffirmed the Supreme Court's longstanding
17 jurisprudence to decide whether certain provisions of the
18 Constitution apply outside of the United States. The court in
19 Boumediene said it's a functional test. You have to ask
20 whether it would be impracticable or anomalous to recognize
21 the right that's at issue. And again, we are talking here
22 about basic fair trial rights.

23 The Supreme Court answered that question in the

1 habeas context. It pointed out that Guantanamo is not a
2 transient possession, right? It's within the constant
3 jurisdiction of the United States. It cited the Rasul
4 decision in 2004, which was a decision litigated by my
5 organization, which said that Guantanamo is in every practical
6 respect a U.S. territory.

7 I do want to point out, looking around this
8 commission, I mean, the only thing about Guantanamo or this
9 commission that is foreign is Mr. Khan's citizenship; and even
10 Mr. Khan has legal status in the United States. He has asylum
11 status.

12 Now, we addressed in our reply brief in support of
13 the Brady motion that it follows from the Boumediene decision
14 and the principles that I have just outlined that detainees
15 have some measure of due process rights at Guantanamo, in our
16 view, certainly fair trial rights. The Supreme Court has been
17 clear in a number of cases that habeas and due process are
18 inextricably intertwined, and there is certainly nothing --
19 there are no practical barriers -- the government has
20 certainly cited none -- that would prohibit our client from
21 invoking cases that simply stand for his right to have a fair
22 trial applying due process principles.

23 The Kiyemba case, cited in -- the D.C. Circuit case

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1 in Kiyemba cited by the government is not to the contrary.
2 That case held that a detainee doesn't have a right under the
3 due process clause to enter the United States, right? And
4 since that decision in Kiyemba, you know, it's been -- the
5 only way to read that decision consistently with Boumediene
6 and subsequent cases in the D.C. Circuit is to acknowledge the
7 limited holding in that case. That's why some of the later
8 Kiyemba decisions, the Aamer case that's addressed in the
9 government's brief, and the Bahlul case, which we have raised
10 which arose out of these military commissions involving the
11 ex post facto clause which the government conceded applies in
12 Guantanamo, I just don't think that there is any other way to
13 read the holding in Kiyemba.

14 Now, it is true, as the government points out, that
15 district courts in Washington have reached different
16 conclusions about whether -- about the scope of Kiyemba's
17 holding. The government cites the Salahi case to say that
18 there are no rights. We cite the Basardh case to say that
19 there are rights; the holding in Kiyemba that the government
20 relies on is dicta.

21 But I do want to point Your Honor to the last word
22 that the D.C. Circuit has said with respect to the issue of
23 the scope of the Kiyemba holding, and that is a case called

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1 Ali v. Trump. This is a case, again, that I am currently
2 litigating in the D.C. Circuit. We petitioned in that case --
3 the case concerns the application of the due process clause
4 and whether it limits duration of detention at Guantanamo for
5 people who are not charged. So that's the issue. It's a
6 different issue than is raised here.

7 That case is on appeal. We petitioned for an initial
8 hearing en banc which was denied, but in connection with the
9 denial of en banc review -- or initial hearing en banc,
10 Judges Tatel and Pillard issued an opinion. That opinion
11 acknowledged that in Kiyemba, the court addressed only one
12 theory of how the due process clause might reach Guantanamo,
13 and that relevant dispute in the Kiyemba case concerned only
14 whether the law gave the detainee at issue in that case a
15 substantive due process right to enter the United States. So
16 members of the D.C. Circuit in this concurring opinion are
17 acknowledging the limited scope of Kiyemba.

18 We also cited the statements by Judge Millett in our
19 reply brief in the case of Mr. Qassim. And the final thing
20 that Judges Tatel and Pillard said was that the limited
21 understanding of Kiyemba was -- the limited nature of the
22 holding in that case explains why subsequent panels of the
23 D.C. Circuit have demurred in reading that case to say for all

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UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 time that detainees don't have any due process rights. It's
2 not the law, Your Honor.

3 The final thing I'll say is, I know -- and I
4 appreciate that the question of the application of the
5 Constitution at Guantanamo is one that has been percolating
6 around these military commissions for a number of years and
7 has not at this point been resolved to my knowledge in the
8 military -- in connection with the military commissions except
9 for the Bahlul case.

10 Having said that, you know, certainly Your Honor can
11 take up that issue in the context of this case if you deem it
12 appropriate. But it's the defense's position that that is not
13 necessary because in connection with the relief that we're
14 seeking, there is clear authority and precedent at least for
15 the citation of the authorities that we rely on. Again, in
16 connection with the Brady motion, that's Boumediene. In
17 connection with the witness motion, that is the Military
18 Commissions Act, explicit adoption and incorporation of the
19 Article III standard, which is based on the Fifth and Sixth
20 Amendment.

21 Thank you, Your Honor. If you have any questions, I
22 am happy to address them.

23 MJ [COL WATKINS]: I do have one for now. In two places

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1 in Appellate Exhibit 028, which is a Brady motion, you assert
2 there is no dispute that Brady applies to both sentencing and
3 in the military commissions. In your second assertion of that
4 nature, you asked the commission to see
5 United States v. Hawkins, 73 MJ 605.

6 Assuming for argument's sake that case can stand for
7 the proposition that Brady applies to sentencing proceedings
8 in courts-martial, Hawkins was an Army private who was
9 court-martialed in a general court-martial.

10 So my question is: How does that case, which has
11 nothing whatsoever to do with military commissions, resolve
12 all disputes about whether Brady applies to military
13 commissions?

14 CDC [MR. DIXON]: Your Honor, we don't rely specifically
15 and exclusively on that case. We rely on Supreme Court
16 precedent, a precedent that Ms. Jestin will address. I don't
17 think that there is any dispute that Brady applies at
18 sentencing. It is, I submit to you, black letter law under
19 the Fifth Amendment of the Constitution. I just don't think
20 there's any dispute about that.

21 MJ [COL WATKINS]: Then I guess I have a second question,
22 if you don't mind. The precedent you cite and the government
23 cites talks about dicta, it talks about analogy, for instance,

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1 habeas petitions, and it talks about assumptions for argument
2 sake.

3 And I think you -- I think you may have answered this
4 just a minute ago, but do you have any authority that
5 explicitly applies the Fifth Amendment due process clause to
6 these commissions?

7 CDC [MR. DIXON]: Well, Your Honor, as I -- I'll say two
8 things. First of all, I just want to reemphasize that Brady
9 itself was a sentencing case.

10 MJ [COL WATKINS]: No, I got that.

11 CDC [MR. DIXON]: Okay.

12 MJ [COL WATKINS]: I'm saying explicit authority that
13 applies the Fifth Amendment due process clause to these
14 military commissions.

15 CDC [MR. DIXON]: Well, I think, Your Honor, respectfully,
16 the question is whether the provisions of the Constitution
17 apply to Guantanamo. And I think the Supreme Court has
18 answered that question with respect to Brady, and I think that
19 the district court decisions that followed Boumediene have
20 answered that question. It's a question of
21 extraterritoriality, not the type of proceeding in which we
22 are operating.

23 But I will say this, that, again, we are talking

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1 about a fair trial right. This is what we're talking about,
2 at minimum. And the government raised -- I believe it's
3 Rule 705 -- indispensable judicial guarantees, and they
4 pointed specifically to courts-martial Rule 705, which
5 explicitly identifies due process of law as one of the
6 indispensable judicial guarantees that may not be bargained
7 away. As Your Honor knows, our position is that -- that core
8 Brady is not waivable as a matter of law, as a matter of
9 Supreme Court law.

10 And again, with respect to the witness motion, the
11 Military Commissions Act specifically incorporates the
12 Article III standards, which are Fifth and Sixth Amendment
13 standards.

14 MJ [COL WATKINS]: All right.

15 CDC [MR. DIXON]: So in that sense, I submit to you that
16 the Constitution does apply to the extent certainly that we
17 have argued in our papers.

18 MJ [COL WATKINS]: I guess what I'm getting at is, you
19 just said this issue is percolating around the commissions and
20 some D.C. courts have demurred, and I understand your argument
21 completely.

22 What I'm getting at is, do you have authority that
23 explicitly applies the Fifth Amendment of the United States

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1 Constitution, and the due process clause therein, to these
2 proceedings?

3 CDC [MR. DIXON]: I cite Your Honor to 10 U.S.C.
4 949j(a)(1), which specifically incorporates Article III
5 standards that include the due process clause. But again, I
6 submit to Your Honor ----

7 MJ [COL WATKINS]: For ----

8 CDC [MR. DIXON]: ---- that the issue is the
9 extraterritorial reach of the Constitution.

10 And when I say that the issue is percolated within
11 these commissions, I mean with respect to questions like the
12 exclusion of torture evidence. Because in any due process
13 analysis, as I know Your Honor is well aware, application of
14 the due process clause raises a question of, well, what
15 process is due?

16 And so, you know, there are procedural due process
17 rights, of course, and substantive due process rights. And
18 this is the only military commission case I am involved in,
19 but, to my understanding, there have been a number of issues
20 raised in a number of contexts, in a number of cases in these
21 military commissions, that have not been resolved.

22 I don't think that that means that there is any doubt
23 that our client is entitled to a fair trial that ensures

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1 minimum due process protections or that he's entitled to Brady
2 material which the Supreme Court has said in the habeas
3 context detainees are entitled to.

4 And why that's important and why it's relevant to
5 this commission is that a habeas proceeding is a more limited
6 proceeding. Detainees have fewer rights in habeas than they
7 do before this commission. And so it necessarily follows that
8 if a detainee in a habeas case can invoke Brady, and district
9 courts will apply Brady in those contexts, that Mr. Khan
10 surely should be able to invoke Brady.

11 I mean, there's no question in my other high-value
12 detainee case that my client is entitled to, for example, CIA
13 medical records, right? There's a case management order --
14 it's on the public docket -- that says that he's entitled to
15 this information. It's one of the categories of information
16 we've requested in our Brady motion.

17 If that's the standard in a case where a detainee is
18 entitled to fewer protections, I respectfully submit that
19 there's no dispute. The government has certainly not raised
20 any question concerning Boumediene. They don't address the
21 argument about whether Mr. Khan is entitled to Brady material.

22 MJ [COL WATKINS]: Okay. I'm going to ask one more time.

23 CDC [MR. DIXON]: Yes.

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1 MJ [COL WATKINS]: Has a higher court said the
2 Fifth Amendment due process clause in toto applies to military
3 commissions?

4 CDC [MR. DIXON]: In toto, no.

5 MJ [COL WATKINS]: All right. That's what I wanted to
6 know. I understand how it applies in different scenarios and
7 different jurisdictions, and you're making an excellent
8 argument that that's kind of an aggregated authority that it
9 should apply in this case to get your client what you're
10 requesting. I understand that argument completely. I'm just
11 trying to understand my authorities as well.

12 CDC [MR. DIXON]: Hopefully, Your Honor, we have convinced
13 you by the -- through the cases and the statutory authorities
14 that we've cited.

15 MJ [COL WATKINS]: I appreciate your argument. Thank you.

16 CDC [MR. DIXON]: Thank you.

17 MJ [COL WATKINS]: All right. Government -- I'm trying to
18 stay organized here, and I went far afield -- do you have any
19 further argument on 027?

20 TC [Lt Col PRIMOLI]: No, sir. We stand by our motion.

21 MJ [COL WATKINS]: Okay. Thank you. All right.

22 And as we've covered to an extent, defense requested
23 the commission in Appellate Exhibit 028 to compel the

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1 government to produce Brady material for use in extenuation
2 and mitigation in sentencing. Is that correct, Defense?

3 CDC [MR. DIXON]: Yes, Your Honor.

4 May we have a moment to confer?

5 MJ [COL WATKINS]: Certainly.

6 CDC [MR. DIXON]: Thank you, Your Honor. May we proceed,
7 Your Honor?

8 MJ [COL WATKINS]: One second. Oh, that was defense's
9 request in Appellate Exhibit 028 on 11 March 2019. In
10 response, the government filed Appellate Exhibit 028A
11 requesting the commission deny the motion. And on
12 15 March 2019, the defense replied.

13 Again, Counsel, I've read all of the written
14 arguments, and I understand, Defense, you would like to
15 present further oral argument on 028. Please proceed.

16 CDC [MS. JESTIN]: Your Honor, at Mr. Khan's sentencing
17 hearing, he plans to put on a mitigation case. That is his
18 right. It's a right he retained under his pretrial agreement
19 at paragraph 21.

20 Critical to his mitigation case is information and
21 evidence favorable to Mr. Khan that is uniquely in the
22 possession of the government. This is specifically evidence
23 that tends to establish and corroborate Mr. Khan's account of

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1 his torture, his severe pretrial punishment at the hands of
2 the United States Government. Without this evidence -- to
3 deprive Mr. Khan of this evidence renders his right to put on
4 a mitigation case somewhat hollow, and it will deprive him of
5 due process and a fair sentencing trial.

6 This issue really strikes at the heart of the
7 Fifth Amendment that Mr. Dixon just discussed and the
8 protections it affords to defendants. The dimensions of
9 Mr. Khan's liberty are at stake. The government has an
10 ethical and constitutional obligation to satisfy the dictates
11 of fairness. The government must produce favorable material,
12 construed broadly, in a timely manner to Mr. Khan. That is
13 what the Constitution requires and that is what the
14 fundamental principles of fairness and legitimacy commend
15 here. It is an indisputable judicial guarantee.

16 But, Your Honor, the government is claiming waiver,
17 that Mr. Khan waived his right to discovery. But Brady,
18 Your Honor, is not a discovery rule. It sounds in due
19 process. It obliges the government to provide criminal
20 defendants with favorable evidence through sentencing. You
21 simply cannot bargain it away. And none of that can really be
22 in dispute.

23 So query why there is such resistance here. Because

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1 the material we seek, that is uniquely in the possession of
2 the government, concerns Mr. Khan's torture. The CIA torture
3 program in this case, Your Honor, appears to be the third
4 rail.

5 Here, we have a defendant who was tortured, but
6 despite that, he has pled guilty, he has accepted
7 responsibility for his crimes, and he has been a committed
8 cooperator for the last seven years. He is not seeking this
9 material because of second thoughts. He is still deeply
10 contrite. He's completely committed to cooperating.

11 He's simply seeking this material because he wants to
12 put on a credible and persuasive mitigation case in an effort
13 to secure his liberty sooner. And he's entitled to the Brady
14 material that we've asked for in advance of that contested
15 proceeding. And respectfully, it is our position that the
16 government should be ordered to provide it.

17 Beyond these remarks, Your Honor, and those of
18 Mr. Dixon, we rest on our papers.

19 MJ [COL WATKINS]: Just a few questions, please.

20 Do you believe it matters in my analysis when the
21 request for discovery is made?

22 CDC [MS. JESTIN]: So, Your Honor, requests for discovery
23 have to be made timely, but this type of material that we're

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1 seeking is not required under the discovery rules; it's
2 required as a matter of fairness and due process. The
3 government, no matter when it comes into possession of core
4 Brady material of an exculpatory nature, has an obligation to
5 turn it over, and that obligation extends through sentencing.

6 In terms of our discussions about this material,
7 they've been ongoing since 2012. I can represent to the court
8 that we discussed them with the prior prosecutor on the case.
9 Mr. Khan mentions them in our proceeding in 2016. We filed
10 the motion to preserve the SSCI Report, which was granted in
11 connection with this motion. So these discussions have been
12 going on during the entirety of this proceeding, since
13 Mr. Khan's guilty plea.

14 MJ [COL WATKINS]: All right. In your oral argument just
15 now, you indicated that Brady material cannot be waived. Did
16 I understand you correctly?

17 CDC [MS. JESTIN]: Your Honor, my argument is that certain
18 core Brady material cannot be waived.

19 MJ [COL WATKINS]: Okay. So ----

20 CDC [MS. JESTIN]: Impeachment material can be waived.
21 Under Ruiz, the court makes clear that a plea agreement that
22 required the waiver of certain types of Brady material,
23 because it went to the fairness of a trial and the defendant

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1 was pleading guilty, did not impact the voluntariness of that
2 plea and that that was therefore appropriate and survived
3 constitutional scrutiny.

4 MJ [COL WATKINS]: Okay. Ruiz is something I wanted to
5 ask you about. Your argument seemed to indicate that in a
6 plea agreement, you can only waive impeachment material, but
7 on page 633 of that opinion, the court says the Constitution
8 does not require the government to disclose material
9 impeachment evidence prior to entering a plea agreement with a
10 criminal defendant, but then they go on and talk about waiver
11 of material that would go to an affirmative defense.

12 We do not -- quoting, We do not believe the
13 Constitution requires provision of this information to the
14 defendant prior to plea bargaining for most, though not all,
15 of the reasons previously stated.

16 Judge Thomas's -- his concurring opinion goes on to
17 state that "I agree with the court, that the Constitution does
18 not require the government to disclose either affirmative
19 defense information or impeachment information relating to
20 informants or other witnesses before entering into a binding
21 plea agreement with the criminal defendant."

22 So -- and you can clarify this for me. I read your
23 arguments to say that the only Brady material you can waive is

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1 impeachment, but clearly the Supreme Court believes that there
2 are other parts of Brady that are clearly waivable in
3 negotiating a pretrial agreement.

4 CDC [MS. JESTIN]: So in Ruiz, what the Supreme Court --
5 my understanding of the opinion, the Supreme Court was saying
6 that the government can be released from its obligation to
7 provide categories of material that would fall under
8 Brady v. Maryland, that fall within what might be helpful or
9 favorable to a defendant in their effort to defend themselves
10 at the guilt phase. That is impeachment material about
11 government witnesses and other information of that ilk.
12 However, the court also made clear that the government is not
13 absolved from providing exculpatory information to the
14 defendant, period; and the type of Brady we're requesting we
15 posit falls into that category.

16 We are not in a situation where Mr. Khan is -- is
17 agreeing to a stipulated sentence. He's about to engage in a
18 contested sentencing trial, one central issue of which is
19 mitigation. So our argument is that the government is
20 obligated to provide favorable information to the defense in
21 connection with mitigation.

22 MJ [COL WATKINS]: Okay. Make that nexus for me, that
23 mitigation evidence is a subset of exculpatory evidence.

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1 CDC [MS. JESTIN]: So it's evidence that tends to show --
2 tends to mitigate the potential sentencing penalty faced by
3 Mr. Khan because of the nature of his pretrial punishment. So
4 it's evidence that could corroborate his recollection of what
5 happened to him; it could establish certain components of what
6 happened to him. And all of that is core Brady material about
7 exactly what he's arguing should mitigate his sentence.

8 And that's why we believe that it falls within the
9 category of Brady material that was carved out by the court in
10 Ruiz as being appropriate to being waived in connection with
11 the plea agreement. It goes to the fundamental fairness of
12 the proceedings, not the voluntariness of his guilty plea.
13 And the proceedings I am referencing are his sentencing -- is
14 his sentencing trial.

15 MJ [COL WATKINS]: All right. Thank you.

16 You cited Johnson v. Zerbst, a 1935 habeas case.

17 CDC [MR. DIXON]: Yes, Your Honor. That's the decision
18 that specifies that waiver of fundamental rights have to be
19 explicit and will not be inferred.

20 MJ [COL WATKINS]: And if you could, either of you, help
21 me with Mezzanatto again that allowed for the waiver of
22 prohibition of use of statements made during failed plea
23 negotiations and cross-examination of the accused at trial.

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1 How does that relate to waiver of discovery of Brady material?

2 And I use "discovery" in the plain sense of the word.

3 CDC [MS. JESTIN]: Understood.

4 So the Mezzanatto case, Your Honor, it's a Supreme
5 Court case from 1995. And it's really cited for the more
6 general proposition that certain rights are so fundamental to
7 the reliability of the fact-finding process that they cannot
8 be waived.

9 And the analogy the court uses in that case is that a
10 defendant can't waive his rights to the point of having a
11 group of monkeys, you know, preside at his trial. So it's
12 really cited for that more general proposition that in
13 criminal cases in particular, there are just certain rights
14 that really go to fundamental fairness. I would characterize
15 them as indispensable judicial rights, and they are critical
16 so that the public has faith in the fairness of the
17 proceedings and in our rule of law. And that's what we think
18 is at issue here.

19 MJ [COL WATKINS]: All right. Thank you.

20 CDC [MS. JESTIN]: Thank you, Your Honor.

21 MJ [COL WATKINS]: Government, any response?

22 ATC [CDR O'DOWD]: Yes, sir. Just to address a few
23 points. Thank you.

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1 So first of all, sir, with regards to defense brought
2 up the point of the accused and the pretrial agreement,
3 paragraph 21., and his right to call witnesses and present
4 evidence subject to any rulings by the military judge
5 regarding matters in aggravation and mitigation for sentencing
6 consideration. And, of course, you know, the prosecution --
7 the government has no objection to that. Of course he can put
8 on a case in extenuation and mitigation.

9 The question is: What does the government have to
10 produce? And as we stated in our motion, the government's
11 position is that the accused entered into a pretrial agreement
12 with the convening authority, a contract. And one of the
13 terms of that contract was that he would waive all discovery
14 except for limited discovery from 701 -- excuse me, sir,
15 701(b)(1) and 701(d).

16 701(b)(1) was provided to the accused I believe
17 approximately seven years ago, after he pled guilty at the
18 commission. And as stated before in our motion response,
19 701(d) material to provide to the accused, we've -- the
20 defense already has the one prosecution exhibit that the
21 prosecution will -- is planning on presenting during
22 sentencing. And at this time, there is no witnesses for the
23 prosecution, so we don't have any names to provide to the

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1 defense there.

2 With regards to the paragraph 12 of the PTA, the
3 accused waived all -- his right to any discovery beyond what
4 the government is obligated to provide pursuant to
5 R.M.C. 701(b)(1) and 701(d). I just draw your attention to
6 701(e)(C) [sic], which is exculpatory evidence to reduce the
7 punishment. This is one of the terms that the accused waived
8 in his pretrial agreement. It's explicit in the document
9 itself.

10 And going back to my earlier point about the accused
11 entering into this agreement with the convening authority, as
12 we know, pretrial agreements serve both sides for various
13 reasons. The accused gets certain benefits out of the
14 agreement, considered -- sentencing considerations. In this
15 instance, he also got a few expert consultants and some other
16 benefits.

17 The government also receives benefits of this. The
18 accused has pled guilty to the charges. He's cooperating,
19 working on that. And importantly also, it provides the
20 government a benefit from having to provide limited discovery,
21 limiting our discovery obligations. And that is one of the
22 key provisions of this pretrial agreement.

23 Compared to other commissions cases that have

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1 extensive and -- have been working on production issues -- of
2 discovery issues for years, this is obviously a time-consuming
3 and taxing burden on the government, and it is a valuable
4 consideration that the government considered when entering
5 into this agreement.

6 It's not as simple as something's on the shelf and
7 the government has it and can just pull the binder off the
8 shelf and hand it to the accused. This is a process, a long
9 and lengthy process, that again is -- is a -- would take an
10 extensive amount of -- of resources from the government if we
11 had to now change what paragraph 12 says is the burden on the
12 government.

13 I think rather than go over my other points, sir, I
14 think those are covered in our motion, so I will stand by
15 those.

16 MJ [COL WATKINS]: Do you have a response to the defense
17 assertion that Brady is not a discovery right and so the
18 waiver is not applicable?

19 ATC [CDR O'DOWD]: Sir, I think as far as, you know, any
20 implication of the constitutional rights or that play into it,
21 I think our motion will speak to that.

22 As far as what is -- you know, the words used from
23 defense in what they're asking for, whether it's called Brady

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1 or exculpatory evidence or whatever, I believe is covered
2 under Rule 701(e)(C), exculpatory evidence. (C) is to reduce
3 the punishment, and I think that is exactly one of the -- one
4 of the provisions that was bargained for in this pretrial
5 agreement seven years ago.

6 MJ [COL WATKINS]: All right. And just to make it clear,
7 at this time, it is not the government's intent to call any
8 witnesses except possibly rebuttal witnesses?

9 ATC [CDR O'DOWD]: Yes, sir.

10 MJ [COL WATKINS]: So no victims or victim family members
11 from the Jakarta bombing either here, in person, or by VTC
12 from CONUS?

13 ATC [CDR O'DOWD]: There is no current plan from the
14 prosecution, yes, sir, to do that.

15 MJ [COL WATKINS]: Okay. Thank you, Commander O'Dowd.

16 ATC [CDR O'DOWD]: Yes, sir.

17 CDC [MR. DIXON]: Your Honor, may we have a moment to
18 confer with our client, please?

19 MJ [COL WATKINS]: You may.

20 [Pause.]

21 CDC [MR. DIXON]: Thank you, Your Honor.

22 MJ [COL WATKINS]: Defense, any rebuttal argument?

23 CDC [MS. JESTIN]: Two very brief points, Your Honor.

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1 With respect to paragraph 12 in the discovery rules, I would
2 just commend Your Honor to Dickerson v. United States. The
3 statutes, rules of the military commission cannot supersede
4 constitutional protections. That's what that case stands for.
5 It's a Supreme Court case from 2000 that's cited in our
6 papers.

7 MJ [COL WATKINS]: Does it specifically say that statutes
8 can't supercede commission regulations?

9 CDC [MS. JESTIN]: No, Your Honor. It states -- it stands
10 for the proposition that the Supreme Court has plenary
11 authority over interpreting the Constitution of the United
12 States and that statutes cannot supersede courts' decisions in
13 that regard.

14 MJ [COL WATKINS]: Okay.

15 CDC [MS. JESTIN]: And we would argue that, by
16 application, rules can't either.

17 And, Your Honor, in terms of the waiver on the plea
18 agreement itself and the pretrial agreement, we would just
19 represent to the court -- and this is also set forth in our
20 papers -- that during the time that that agreement was being
21 negotiated, we were working with Courtney Sullivan, who was an
22 experienced DoJ prosecutor, and we were discussing the
23 provision of Mr. Khan's medical records at that time. And she

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1 was working on -- she was taking efforts to try to get those
2 to us. And it was clear from our discussions with her that
3 Brady was not contemplated as waived.

4 It's also clear from the colloquy between Judge Pohl
5 and our client that the waiver was about relieving the
6 government of its obligations to prove their case beyond a
7 reasonable doubt against Mr. Khan.

8 We've made that representation to the court. And if
9 the court would like to have some further offer of proof in
10 that regard, we'd be happy to accommodate.

11 MJ [COL WATKINS]: Well, it raises a concern to the
12 commission that perhaps the parties didn't have a meeting of
13 the minds when they entered the pretrial agreement.

14 CDC [MS. JESTIN]: That is not a concern that we hold,
15 Your Honor. We believe that the parties did have a meeting of
16 the minds. It was a very carefully and thoughtfully
17 negotiated agreement.

18 MJ [COL WATKINS]: Well, your agreement is with the
19 convening authority, not a former trial counsel who's an
20 experienced DoJ attorney.

21 CDC [MS. JESTIN]: I understand, Your Honor. Our position
22 is that there was a meeting of the minds. We don't think that
23 that is an issue. If the prosecution would like to brief

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1 that, we'd be happy to respond. We certainly don't think --
2 rescission, we think it would be unconscionable. We don't
3 think there is any relief to be had on that score; we are just
4 asking Your Honor to interpret the provision and -- based on
5 the law that we have provided.

6 MJ [COL WATKINS]: All right.

7 CDC [MS. JESTIN]: Thank you, Your Honor.

8 MJ [COL WATKINS]: Thank you.

9 CDC [MR. DIXON]: I'm sorry, Your Honor. May we have
10 another moment?

11 MJ [COL WATKINS]: Please.

12 CDC [MR. DIXON]: Thank you.

13 MJ [COL WATKINS]: All right. The commission has before
14 it Appellate Exhibit 030, which is a defense motion to compel
15 production of witnesses dated 28 February 2019. On
16 14 March 2019, the government filed Appellate Exhibit 030A
17 requesting the commission deny the motion. On 18 March 2019,
18 the defense replied.

19 I'd like to discuss everything we can in open court,
20 and if and when we need to take a break to consider a 505 --
21 consider a 505(h) session or any 803 closed sessions, we'll do
22 that after a recess.

23 TC [Lt Col PRIMOLI]: Your Honor, may I approach the

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1 podium to make a request, please?

2 MJ [COL WATKINS]: Please.

3 TC [Lt Col PRIMOLI]: Your Honor, with regard to AE 030,
4 because of the sensitive classified equities involved are so
5 intricately interwoven within the defense motion, the
6 prosecution would like to strongly request that the commission
7 hold the 505(h) hearing first to -- before holding any
8 unclassified argument.

9 In making this request, the prosecution is by no
10 means suggesting that the commission should not hold
11 unclassified argument on the motion. However, in order to
12 ensure this commission and the parties are more fully aware of
13 the classified information involved and that there's -- that
14 there's no errant release of classified information, the
15 prosecution believes that holding the 505(h) before any open
16 or closed session would be advisable.

17 In addition to this, I'd like to draw Your Honor's
18 attention to M.C.R.E. 505(h)(1)(B), which states, "Upon
19 request by either party under M.C.R.E. 505(h)(1)(A), the
20 military judge shall conduct such a hearing and shall rule
21 prior to conducting any further proceedings."

22 Here, we have done that. We filed the 505(h) with
23 you when we were required to on the litigation scheduling

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1 order. And we strongly request that we have a ruling on that
2 before we do an open or closed session on AE 030.

3 MJ [COL WATKINS]: All right. Thank you.

4 TC [Lt Col PRIMOLI]: Thank you, sir.

5 MJ [COL WATKINS]: I'm cognizant of the rules, and I
6 believe we could discuss certain things in open court which
7 will probably -- will be discussed in open court, but I'm
8 sensitive to the government's request, and I think it's a
9 legitimate request.

10 So what I'm going to do now is recess and consider
11 that request carefully before I proceed, and I will alert the
12 parties to the way ahead. This will not be a long recess, so
13 I intend to come back on the record this afternoon. But I
14 will take a recess to reconsider that and to give everyone a
15 comfort break.

16 Is there anything else we can take up in this session
17 before I recess?

18 CDC [MR. DIXON]: Your Honor, I have two items briefly.

19 First is, I would like to state the defense's
20 objection. We would like to proceed with open argument now.

21 The second is, our client has asked us to please
22 emphasize to the court with respect to the laptop motion that
23 he would like Your Honor to order the laptop both for the

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1 privilege purposes, for which we've moved, but also to
2 reemphasize his need for the laptop for rehabilitative
3 purposes. He's asked us specifically to remind Your Honor, to
4 inform Your Honor of that. And I believe we have now done so.

5 MJ [COL WATKINS]: Very well. Thank you.

6 Anything else?

7 TC [Lt Col PRIMOLI]: No, Your Honor.

8 MJ [COL WATKINS]: The commission is in recess.

9 [The R.M.C. 803 session recessed at 1437, 1 April 2019.]

10 [The R.M.C. 803 session was called to order at 1505,
11 1 April 2019.]

12 MJ [COL WATKINS]: The commission is called to order. All
13 parties present when the commission recessed are again
14 present. The accused is present.

15 The mandatory nature of an R.M.C. 505(h) request is
16 tied solely to classified information. My review of the
17 materials indicates that certain witnesses are not implicated
18 at all by R.M.C. 505.

19 In the interests of judicial economy, I'm going to
20 list certain witnesses by DRW numbers -- that is, defense
21 requested witness numbers -- and I want the parties to tell me
22 whether there is any implication of classified material in
23 discussing these witnesses. The DRW numbers I want to hear

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1 from both parties on are DRW 1, 2, 6, 7, 8, 9, 10, 11, 14, 17,
2 27, and 31.

3 Government, take your time, but I want to know if
4 R.M.C. 505 is implicated by any of those witnesses.

5 [Pause.]

6 MJ [COL WATKINS]: Would the parties like a short recess
7 to consult?

8 CDC [MR. DIXON]: Apologies, Your Honor. I think we
9 have -- we were conferring with respect to the question that
10 Your Honor asked about which individuals could be addressed in
11 open session, and I think we have agreement.

12 MJ [COL WATKINS]: All right.

13 TC [Lt Col PRIMOLI]: Yes, Your Honor. After conferring
14 with the defense, we believe that 2 and 31 will need to be in
15 closed session.

16 And we have reached an agreement -- we conferenced
17 earlier this morning, and we've reached an agreement on --
18 they have it listed as 14, 17, and 21; it was actually 15.
19 There was a mistype in there.

20 MJ [COL WATKINS]: In where?

21 TC [Lt Col PRIMOLI]: Inside their witness list. When
22 they did the motion to compel, they listed 14, but they meant
23 15.

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1 So on those three, we don't believe that we'll need
2 to discuss them at all.

3 MJ [COL WATKINS]: Okay. Give them to me again.

4 TC [Lt Col PRIMOLI]: What you have listed as 14, 17, and
5 21.

6 MJ [COL WATKINS]: You don't believe they need to be
7 discussed at all?

8 TC [Lt Col PRIMOLI]: We've agreed to produce them.

9 MJ [COL WATKINS]: Oh, okay.

10 TC [Lt Col PRIMOLI]: Or for one, there will be a
11 substitute of testimony of some sort.

12 CDC [MR. DIXON]: Your Honor, may I clarify?

13 MJ [COL WATKINS]: Yes.

14 CDC [MR. DIXON]: I believe that the individuals you
15 listed, if I may, are 1, 2, 6, 7, 8, 9, 10, 11, 14, 17, 27,
16 and 31.

17 MJ [COL WATKINS]: Yes.

18 CDC [MR. DIXON]: Okay. I believe we have agreement that
19 number 2 and number 31 would potentially involve disclosure of
20 classified information. And we have reached agreement with
21 respect to 14, which is actually 15. That was an error on my
22 part; I apologize. And we reached agreement on 17; we will
23 have some sort of stipulated or substituted testimony for 17.

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1 27, we have not reached agreement on.

2 MJ [COL WATKINS]: Right.

3 CDC [MR. DIXON]: But we don't believe that calls for
4 disclosure of classified information. To the extent that
5 something may come to mind, we would address that in the
6 closed session.

7 MJ [COL WATKINS]: So 14 and 17 are moot as to a defense
8 motion to compel production?

9 CDC [MR. DIXON]: Correct.

10 MJ [COL WATKINS]: And 14 being 15 in your motion?

11 CDC [MR. DIXON]: Correct.

12 TC [Lt Col PRIMOLI]: That's correct, Your Honor.

13 MJ [COL WATKINS]: We have to be careful with this, so
14 just to be clear, DRW numbers 1, 6, 7, 8, 9, 10, 11, and 27 do
15 not implicate R.M.C. 505?

16 CDC [MR. DIXON]: Correct. And should something arise
17 that I haven't thought of, we will certainly bring it to the
18 attention of Your Honor, and we will take it up in the closed
19 session.

20 MJ [COL WATKINS]: I encourage caution in that regard, but
21 thank you for that.

22 Do you agree with my numbers, Government?

23 TC [Lt Col PRIMOLI]: As currently proffered by defense,

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1 that would be correct, sir.

2 MJ [COL WATKINS]: All right. And I exercise caution in
3 oral argument on these witnesses, but it seems we're all in
4 agreement that 505 is not implicated at present. So I will
5 hear oral argument in open session on those DRW numbers.

6 Defense, do you wish to present any further argument
7 on those numbers?

8 CDC [MR. DIXON]: Yes, Your Honor. And I would request a
9 point of clarification. Would you prefer that we identify the
10 witnesses by number?

11 MJ [COL WATKINS]: By number, please.

12 CDC [MR. DIXON]: Not by name?

13 MJ [COL WATKINS]: For the present.

14 CDC [MR. DIXON]: Thank you.

15 MJ [COL WATKINS]: Do you have further argument?

16 CDC [MR. DIXON]: Yes. May we proceed?

17 MJ [COL WATKINS]: Yes.

18 CDC [MR. DIXON]: Thank you, Your Honor.

19 The defense has tried to narrow our witness request
20 to a reasonable number of named individuals. We've tried to
21 narrow that list substantially from what was initially
22 requested of the government in terms of production.

23 The individuals that we've requested are essential to

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1 Mr. Khan's ability to put on a credible and thorough
2 extenuation and mitigation case. This is very important; as
3 Ms. Jestin indicated during the Brady argument, Mr. Khan's
4 liberty is at stake.

5 We've tried to meet and confer with the government
6 about the individuals we have requested. Those efforts have
7 largely failed for the reasons that we identified, explained,
8 and that go unchallenged in our papers. So we have filed a
9 motion to compel approximately 29 to 30 witnesses. Some of
10 them are now moot as we just addressed. That motion is nearly
11 100 pages in length. And we have explained what each witness
12 would say if called to testify and why that testimony is
13 relevant and necessary to Mr. Khan's sentencing case.

14 I think what's not been challenged by the government
15 is the substance of the testimony that we've proffered. So in
16 our motion, in the full motion, the motion that's almost a
17 hundred pages long, we put in a lot of information about each
18 individual. The substance of that proffered testimony has not
19 been challenged. As a consequence, we submit that the only
20 issue that Your Honor has to address and decide is whether the
21 evidence is relevant and necessary to a fair sentencing
22 proceeding.

23 It's also clear to us -- and I'm mindful of the

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1 caution. It's also clear to us that the government's primary
2 objective is to avoid the discussion of Mr. Khan's torture.
3 As Ms. Jestin said, that is the third rail in this case. The
4 government has gone so far, as we've identified in our
5 unclassified papers, to raise the possibility of withdrawal
6 from the plea agreement if Mr. Khan succeeds in this motion or
7 in his Brady motion. The government has also made clear its
8 intent to seek maximum punishment for its only cooperating
9 witness, the only high-value detainee that has agreed to plead
10 guilty and to cooperate.

11 Now, we respectfully submit that this doesn't make
12 any sense from a practical standpoint, given that Mr. Khan is
13 the only high-value cooperator, but nonetheless, he faces
14 jeopardy as a consequence of that. And it underscores the
15 importance of his ability to put on a substantial extenuation
16 and mitigation case including the presentation of evidence and
17 live testimony of witnesses.

18 I just want to emphasize that this is an
19 extraordinary case. I mean, this is not an ordinary
20 courts-martial case involving someone who may cooperate for a
21 period of a few days, make some illicit drug purchases, and
22 then be immediately sentenced. And I'm mindful of
23 Your Honor's questions during the Brady argument about direct

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1 on-point authority.

2 This is, to some extent, a matter of first
3 impression, this entire case. I mean, there have been very,
4 very few military commission cases that have proceeded to
5 sentencing. More than half of them have been reversed on
6 appeal. I think this is only one of two that has been a
7 contested proceeding, the first one being the Hamdan case, and
8 -- so it is, in a sense, unprecedented.

9 Mr. Khan is also the first former CIA prisoner to be
10 sentenced, and so I respectfully submit that this case is
11 different. It's also different because it covers a 20-year
12 period, as we've outlined in our papers.

13 You know, a central theme to Mr. Khan's sentencing
14 case is to explain -- he didn't just wake up one day and
15 decide to become involved with terrorism. He just didn't
16 decide one day, because he got up on the wrong side of the
17 bed, that he was going to become involved in terrorism. I
18 mean, he is where he is today because of a series of events in
19 his life and a series of decisions in his life and a series of
20 actions that he has taken, all of which he accepts full and
21 complete responsibility for and all of which he's here as a
22 cooperator trying to atone for.

23 Part of that, part of understanding Majid Khan's

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1 journey from Baltimore to Guantanamo, is to understand what
2 happened to him and to understand his decision to cooperate
3 with the United States Government despite what happened to
4 him.

5 Again, I can't say it enough times: He is the only
6 high-value detainee who has agreed to plead guilty and to
7 cooperate. He is the only one to face sentencing. He is one
8 of only two, I believe, detainees at all who's faced a
9 contested sentencing proceeding.

10 And the only way for those who will decide his fate,
11 whether that is Your Honor in connection with pretrial
12 punishment, whether that is the panel in connection with the
13 sentencing range -- which the government has indicated it will
14 try to seek maximum punishment -- or whether that is in terms
15 of clemency is to put on a substantial case and to create a
16 robust record from which these decisions can be made and from
17 which his liberty and his future can be determined.

18 Now, with respect to the individuals that we've
19 identified, that Your Honor has identified for open session
20 argument, I just -- I will make a few comments, and I will
21 save most of my comments for the closed session.

22 With respect to individual number 1 and individual
23 number 8, the government has agreed to produce those two

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1 individuals but not to bring them to Guantanamo. The
2 government has offered to bring that -- to present their
3 testimony via VTC. We submit to Your Honor that that is not a
4 sufficient method for their communication.

5 Individual number 8 does not speak English, will not
6 be able to communicate effectively by video. The emotional
7 reaction of individual number 8 will not be adequately
8 captured by video. There are other factors concerning this
9 individual that we have identified in our classified motion.

10 Likewise, with respect to number 1, we don't think
11 that that individual's testimony would be adequately captured
12 by video, including a lot of the discussion about Mr. Khan's
13 background, his family.

14 And I will say with respect to individuals 1, 6, 7,
15 8, 9, and 10, there is ample precedent in the military
16 commission system for calling such individuals. I point you
17 specifically to the David Hicks case. David Hicks was a
18 client of mine for purposes of appeal. And we've addressed
19 this in our papers, but similarly situated witnesses were
20 brought to Guantanamo for purposes of not only the sentencing
21 proceeding but for other proceedings as well, from a foreign
22 country.

23 I will also point out that individuals number 1, 6,

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1 7, and 8 are U.S. citizens. They have the same ability,
2 Your Honor, to travel to Guantanamo from the United States
3 that any of us here in this courtroom do, but for the fact
4 that they don't have appropriate country clearances, which the
5 government has refused to issue to them.

6 I also want to make one legal argument, which is with
7 respect to the standard for production. Rule 1001(e) is
8 modeled on Federal Rule of Criminal Procedure 17(b). That is
9 the rule that allows for the compulsion of witnesses at
10 government expense.

11 These individuals, numbers 1, 6, 7, 8, and even 9 and
12 10, are not asking to come at government expense. They will
13 come voluntarily. They will appear here voluntarily. If this
14 were an ordinary courts-martial in the United States, they
15 could walk into the courtroom without any assistance from the
16 government. But the fact that this proceeding is taking place
17 in Guantanamo, the fact that the United States chose to
18 prosecute Mr. Khan here instead of in an Article III court or
19 in a court-martial shouldn't change his right and his ability
20 to call these individuals, particularly U.S. citizens. As I
21 indicated, there are some other factors that perhaps we will
22 address in closed session with respect to them.

23 Moving to individual number 11, I believe that this

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1 has been -- this individual has been addressed sufficiently in
2 our pleadings. The only thing I will say is that the only
3 question right now with respect to this individual is
4 Mr. Khan's right to call this individual, to have this
5 individual appear. Whether that individual is ultimately
6 called would be a decision, a judgment that would be made by
7 Mr. Khan in connection with discussions with that individual.
8 All we're talking about right now is the right to call this
9 individual.

10 This is an individual who has been to Guantanamo in
11 connection with this case, this very case. As we've explained
12 in our papers, this individual was brought to Guantanamo
13 previously for purposes of this case by the prosecution.
14 We've made a representation in our papers that's gone
15 unchallenged by the government, that the government fully
16 intended to bring this person back to Guantanamo for purposes
17 of Mr. Khan's sentencing until determining what the individual
18 would say and the fact that the individual would testify
19 favorably to Mr. Khan.

20 I respectfully submit, Your Honor, that is not equal
21 access to witnesses. That is the government using its
22 administrative power to bolster its sentencing case, to avoid
23 evidence, to avoid witness testimony that's favorable to

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1 Mr. Khan. That's improper. That's certainly not the
2 Article III standard. It would never be allowed in an
3 Article III court.

4 Now, with respect to individual 27, this is an
5 individual known to all the parties. All I will say is there
6 is ample precedent as well in the military commission system
7 for this individual to appear in person at Guantanamo. This
8 person has appeared in person in Guantanamo many times, will
9 likely be brought back for other cases, I assume, in addition
10 to this one.

11 And I would point you to the Omar Khadr case. In the
12 Omar Khadr case, witness number 27, this person's predecessor
13 in office testified for -- in support of Mr. Khadr and said in
14 substance: I know terrorists, and Omar Khadr is not one of
15 them.

16 Individual number 27 would say substantially the same
17 thing with respect to Mr. Khan: I know Mr. Khan personally.
18 I spent time with Mr. Khan. He is not like the others.

19 We've provided a more full and complete explanation
20 of this individual's proffered testimony. But I think for
21 purposes of this session, and in light of the Khadr case in
22 which this individual's predecessor provided testimony -- I
23 think in that case, it was by VTC because the predecessor was

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1 deployed overseas -- we should have the right, I respectfully
2 submit, to call this individual.

3 And with regard to number 27, I will just say also
4 there was a question about logistics, dates of availability.
5 Those are details that we are happy to compromise and work out
6 with the individual and with the prosecution. We do not
7 anticipate that this individual will be deployed overseas at
8 the relevant time period for purposes of Mr. Khan's
9 sentencing. This individual would not otherwise present
10 logistical difficulties.

11 I do -- one other point, a final point with respect
12 to logistics, number -- individuals number 9 and 10. 9 and 10
13 are foreign citizens who have the appropriate passports and
14 exit visas from their country of citizenship. We have worked
15 with that country of citizenship in anticipation of their
16 potential travel for purposes of providing testimony in this
17 commission. It's been a longstanding discussion with this
18 foreign government. We expect those discussions to continue.
19 We don't anticipate any problem logistically with the
20 exception of these individuals being denied permission to set
21 foot in Guantanamo.

22 I just want to say by way of emphasis, and for
23 reasons that we have explained in our papers, which we can

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1 address, again, in closed session, individual number 10 is the
2 single most important witness for Mr. Khan for reasons that
3 should be obvious based on our papers. This individual is the
4 most important individual. And if Mr. Khan has the right to
5 call one person to appear in Guantanamo to sit in the witness
6 chair and testify in his behalf, it should be individual
7 number 10.

8 I'll just conclude, Your Honor, by saying that we've
9 tried to be reasonable. We've tried to be deliberate. We've
10 presented -- I'm not a military practitioner, but as I
11 understand it, far more in terms of anticipated testimony and
12 discussion of relevance, necessity, in-person testimony,
13 witness demeanor, all of these factors tried to explain why we
14 need these individuals and to explain why Mr. Khan's case is
15 unique and it's extraordinary.

16 And it is -- whether we're talking about Brady or
17 we're talking about witnesses, it is -- it is, in many
18 respects, a case of first impression. And it puts Your Honor
19 in -- in the position of having to decide that which, from my
20 perspective, may be an unenviable decision -- position, but --
21 but, nonetheless, it's really important to Mr. Khan, because
22 his liberty is at stake.

23 Thank you.

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1 MJ [COL WATKINS]: Thank you.

2 I have to apologize. In reading the pleadings, I was
3 a little bit confused about witnesses for motions versus
4 witnesses for sentencing.

5 So as to the witnesses we're discussing here in open
6 session ----

7 CDC [MR. DIXON]: Correct.

8 MJ [COL WATKINS]: ---- all of those are for sentencing
9 proceedings; is that correct?

10 CDC [MR. DIXON]: May I have a moment, Your Honor?

11 MJ [COL WATKINS]: Uh-huh.

12 CDC [MR. DIXON]: Your Honor, I don't want to waive the
13 ability to call any of those individuals for purposes of
14 motions, but the issue of motions is one I believe should be
15 addressed in the closed session.

16 MJ [COL WATKINS]: Okay.

17 CDC [MR. DIXON]: These individuals that we've been
18 talking about in the open session are not sort of the -- I
19 don't necessarily anticipate them for purposes of motions, but
20 I don't want to waive that.

21 MJ [COL WATKINS]: No. I understand.

22 So the flip side of that is: Of these requested
23 witnesses, you are asking for all of them for the sentencing

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1 proceeding?

2 CDC [MR. DIXON]: Correct.

3 MJ [COL WATKINS]: Yes. Now, you've proffered
4 testimony -- and this is an important question in deciding
5 their relevance and their method of testimony. These are
6 proffers, but has a member of the defense team spoken and
7 interviewed each of these witnesses that you've requested? I
8 just want to make sure that the proffer, you believe in good
9 faith, would be consistent with their testimony.

10 CDC [MR. DIXON]: Your Honor, I can represent to the court
11 that we are in regular contact, and have been since 2006, with
12 individuals number 1 -- and I'm excluding the ones -- the
13 classified ones ----

14 MJ [COL WATKINS]: Right.

15 CDC [MR. DIXON]: ---- 1, 6, 7, 8, a little bit less 9 and
16 10, just by virtue of the fact that they're located overseas.
17 We have had communication with number 11, and I can represent
18 that the proffer in our papers is based on an interview of
19 individual number 11. 14 and 17, yes, we've had direct
20 interaction with. 27, we had had a lot of interaction with.
21 So yes, Your Honor.

22 MJ [COL WATKINS]: Okay. Can you address the commission's
23 authority to compel a civilian witness's presence at U.S.

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1 Naval Station Guantanamo Bay?

2 And the reason I ask is because the Regulations for
3 Trial by Military Commission at 13-5.b. basically says there's
4 no authority to compel attendance on the island.

5 CDC [MR. DIXON]: Well, I will say two things. One, we
6 anticipate that a number of these individuals will travel
7 voluntarily. The other thing I'll say is with respect to 14
8 and 27, I believe they can be compelled in connection with
9 their official duties and responsibilities, employment in the
10 United States Government.

11 Number 17, I think we will have a substitute. I
12 think we agree we will have some form of substituted
13 testimony.

14 With respect to number 11, as I mentioned,
15 Your Honor, this is an ongoing discussion. What we are
16 talking about at this point is Mr. Khan's right to compel the
17 testimony. Whether we would ultimately seek to do that over,
18 say, the witness' objection, I don't know. I think that's an
19 ongoing discussion.

20 And generally with respect to the regulation, I have
21 read the regulation. I don't have it in front of me, but my
22 understanding is with respect to -- again, with respect to
23 civilians who are employed by the government, that they can be

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1 compelled.

2 MJ [COL WATKINS]: Right. I was -- that's a fair point.
3 I was more concerned about witnesses who are not employees of
4 the United States Government.

5 CDC [MR. DIXON]: My understanding is that -- that those
6 individuals would certainly -- these individuals would appear
7 voluntarily, number 11 being the possible exception. I think
8 that we were confident that that individual would appear until
9 that individual had subsequent conversations with the
10 prosecution, and now that individual has raised some doubt.

11 I don't know that that's the final word, but we
12 continue -- we'll continue to have conversations with that
13 individual. And again, whether that person we would
14 ultimately seek to have subpoenaed and dragooned to Guantanamo
15 is a decision for another day.

16 MJ [COL WATKINS]: I have a question about number 13 vice
17 number 14, but I really don't want to get into that right now.
18 I understand 14 was a typographical error and you meant 15.

19 CDC [MR. DIXON]: I think it's 15, Your Honor.

20 MJ [COL WATKINS]: Number 27 ----

21 CDC [MR. DIXON]: Correct.

22 MJ [COL WATKINS]: ---- vice number 21.

23 CDC [MR. DIXON]: Number 21 is an individual as to whom

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1 there is agreement. That's never been an issue.

2 MJ [COL WATKINS]: Okay. But you're also requesting 27?

3 CDC [MR. DIXON]: Correct. 27 is a -- yes. There has
4 always been agreement about 21, and there is disagreement
5 about 27. It is 27's predecessor who testified in the Khadr
6 case, I believe by video, because that individual was deployed
7 at the time overseas, which is not the case with respect to
8 27. 27 will be in the continental United States following a
9 deployment and will be available, I believe, at or around the
10 time of Mr. Khan's scheduled sentencing in July. Certainly,
11 we're willing to accommodate that individual in terms of
12 in-person testimony.

13 MJ [COL WATKINS]: I guess my question -- and I don't have
14 certain things in front of me. 27 offers something that 21
15 cannot, is what I'm getting to.

16 CDC [MR. DIXON]: Yes. Very much so.

17 MJ [COL WATKINS]: Can you flesh that out in open session
18 a little bit?

19 CDC [MR. DIXON]: I'd rather do it in closed session,
20 Your Honor.

21 MJ [COL WATKINS]: Okay. We will do that.

22 CDC [MR. DIXON]: I just want to say, I mean, 21 and 27,
23 21, we are in very frequent contact with. 27, we are also --

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1 notwithstanding where that individual is now, we are also in
2 regular contact with. And Ms. Jestin and I interviewed that
3 individual most recently a few weeks ago. I'm looking at my
4 co-counsel.

5 By virtue of the fact that Ms. Jestin and I have been
6 involved in this case for so long, we have longstanding
7 professional relationships with a number of these individuals,
8 including 27. So this request is not a surprise to 27.

9 MJ [COL WATKINS]: All right. Thank you.

10 One minute, please.

11 [Pause.]

12 MJ [COL WATKINS]: I'm sorry, Mr. Dixon. I'm balancing
13 equities here. I want to make clear -- I want to be clear
14 about priorities.

15 1 and 8 are clearly your priority for in-court
16 testimony as opposed to video teleconference?

17 CDC [MR. DIXON]: We clearly prefer that 1 and 8 appear in
18 person, yes, but our priority witness is number 10.

19 MJ [COL WATKINS]: Okay. I'm sorry.

20 CDC [MR. DIXON]: That is the single most important
21 witness in this case.

22 MJ [COL WATKINS]: Yes, I got that.

23 CDC [MR. DIXON]: We do have something to say about 6 and

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1 7, of course, as well, and number 9, but I think we'll save
2 that for closed session.

3 MJ [COL WATKINS]: All right. Anything else?

4 CDC [MR. DIXON]: No, Your Honor.

5 MJ [COL WATKINS]: Thank you very much.

6 All right. Any government response?

7 TC [Lt Col PRIMOLI]: Yes. Briefly, Your Honor. And I'll
8 try to hit on the ones that he hit on, but there will probably
9 be some that we may need to discuss a little bit more in
10 closed session.

11 I'd like to first hit on the -- Mr. Dixon discussing
12 how they were trying to be -- the defense was trying to be
13 reasonable with their witness requests. As you know, they
14 attached at Attachment C to their motion what was their
15 original witness request. In it, they gave usually one- to
16 two-sentence proffers on what they would testify to on these
17 110 named and unnamed individuals.

18 MJ [COL WATKINS]: Well, is there any relevance for me for
19 this other than sniping at each other? I mean, I've got a
20 final -- I need to worry about these 29 witnesses, so ----

21 TC [Lt Col PRIMOLI]: Your Honor, in their order, they are
22 also requesting you to order us to continue to meet with them
23 to discuss the other 80-something witnesses, which we don't

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1 believe they have met the requirements of 701 or 703 or
2 1001(e), but we did willingly give them originally the seven
3 witnesses that we indicated. But when looking at 703, we are
4 told that I agree with the accused at page 9 of their brief,
5 that he specifically bargained for the right to call live
6 witnesses and present evidence in extenuation and mitigation.

7 That provision in the PTA doesn't give him the right
8 to call any witness he wants. They still have to comply with
9 703(f) and that it be necessary and relevant.

10 MJ [COL WATKINS]: That's the only thing I'm concerned
11 about.

12 TC [Lt Col PRIMOLI]: Yes, Your Honor.

13 MJ [COL WATKINS]: That's the only thing I want to hear
14 about.

15 TC [Lt Col PRIMOLI]: Okay. And our position is that the
16 witnesses that we have before you now that we haven't already
17 made another agreement on, that they do not meet the
18 requirements of 1001(e)(2). They -- you have to meet all five
19 of the conditions laid out in there, and we have said that we
20 would be willing to stipulate at any time.

21 In addition to this, the rules impose these
22 restrictions but allows for alternatives to live testimony,
23 including relaxed evidence and alternatives to in-court

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1 testimony. We have offered to do that in the -- for number 1
2 and number 8, I believe. Yes, for number 1; and 8, we have
3 stipulated to that.

4 They also in their motion state one of the reasons
5 why it is imperative that these 29 witnesses be called is
6 that -- page 10, they said: The prosecution has signaled its
7 intention to present an aggravation case and attempt to
8 maximize the punishment imposed on Mr. Khan.

9 As you know, as we have met all of our deadlines set
10 in place by the litigation scheduling order, we don't have any
11 witnesses coming. We have one piece of evidence that we had
12 agreed to with the defense at the time of the PTA, which is
13 the Prosecution Exhibit 1, which is the stip of fact that he
14 agreed to. So the government is baffled by their allegation
15 that we are going to present extreme matters in aggravation
16 because we have not posted any evidence or witnesses.

17 We also, Your Honor, would like to point out in the
18 case -- with cases that we cited in our briefing with
19 Combs, Briscoe, Mitchell, Courts, there are alternatives to
20 testimony, and they did find on sentencing it is not as
21 imperative as a case on the merits that witnesses be
22 presented.

23 Your Honor, the defense brought up when they got up

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1 here that we had canceled a meeting that we were supposed to
2 have to discuss what was the original witness requests. It
3 was our determination, based on that witness request, that
4 because they didn't meet the requirements of 1001(e) and the
5 number of witnesses were so far away from where we could get
6 to, that it would not have been a productive meeting at all.

7 I would like to go through and address some of the
8 witnesses. Particularly, he discussed witness number 11.
9 Witness number 11, we have spoken with her. What was
10 originally proffered when she was requested as a witness was
11 that she was going to testify regarding what -- in our
12 opinion, her expertise in terrorism, we didn't feel that that
13 was something that she was qualified to do.

14 They have given us further proffer since then, when
15 they narrowed it down to these 29; and we have asked her if
16 she is willing to come, and she has declined. So short of
17 issuing a subpoena to take her to the Mark Center, she is
18 declining participation.

19 With witness number 27, he is currently stationed
20 overseas; he's not stationed in the continental U.S. And I
21 talked -- we spoke with him. He sent us an e-mail last week.
22 And during that time, he will be TDY and in the process of
23 PCS'ing from where he lives, so it would cause an extreme

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1 burden on him. And as you pointed out, what he has to say is
2 largely cumulative to witnesses that we've already agreed to
3 with the defense to produce.

4 MJ [COL WATKINS]: Aside from the cumulative argument, I
5 hear from witnesses almost every day who are PCS'ing or TDY or
6 in school, and the court makes accommodations for that
7 witness.

8 Assuming his testimony is not for days, why is that
9 such a big deal if it were remote testimony?

10 TC [Lt Col PRIMOLI]: Testifying via VTC or something like
11 that; is that what you are asking?

12 MJ [COL WATKINS]: Right.

13 TC [Lt Col PRIMOLI]: I don't think we would have a ----

14 MJ [Col PARRELLA]: Oh, okay.

15 TC [Lt Col PRIMOLI]: ---- problem with that. We don't --
16 we don't have a problem to -- and we put this in our motion,
17 and we put it in the response to them, we don't necessarily
18 have a problem to alternate forms of testimony if someone is
19 necessary, relevant, and meets the other requirements and is
20 not cumulative. I don't think we have a problem. And there's
21 a lot of options available to the defense, whether it be via
22 VTC; if they relax the rules of evidence, they can put it in
23 letters. We can stipulate to a verifiable fact with them to

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1 make this happen. A lot of these we felt were cumulative,
2 however.

3 In this particular witness, he's -- he's very much
4 indicated that during that time when we're currently scheduled
5 to go, it would cause him a personal hardship. Could we
6 probably get him available via VTC? I think he would be
7 amenable to do that. It's better than trying to fly him all
8 the way here from Europe while he's in the middle of a PCS. I
9 think it's a concern on that one.

10 As for witness number 1 and 8, we have agreed to
11 produce them via video teleconference from the Mark Center in
12 the National Capital Region. We feel that due to the
13 practical difficulties of producing the civilian family member
14 here at the very highly secure detention facility just doesn't
15 meet the burdens established by -- the rules established by
16 1001(e).

17 Witness number 6, we just feel that there is no
18 extraordinary circumstances involved. That was a quote used
19 from a number of the cases that we cited, talked about
20 extraordinary circumstances when producing witnesses. There
21 was one case where they did not produce the father of the
22 accused when it was an overseas case. In another one, they
23 didn't produce the mother. It's very standard for -- if

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1 they're not cumulative, to be able to go ahead and do an
2 alternative form of testimony; or the accused is always open
3 to submit, if he relaxes the rules, as many letters as he
4 desires supporting his case.

5 Without discussing the other witnesses that we need
6 to discuss in the closed session, we look forward to
7 discussing each of those with you when we go into closed
8 session. And we're willing to answer any questions that you
9 have at this time regarding the witnesses that we just
10 discussed.

11 But again, we -- we would urge you to deny them in
12 that they have not met the requirements of 1001(e), but we are
13 willing, for noncumulative, relevant witnesses to do a stip of
14 fact or do alternative forms of testimony.

15 MJ [COL WATKINS]: All right. Thank you.

16 I have a couple of questions.

17 TC [Lt Col PRIMOLI]: Yes, sir.

18 MJ [COL WATKINS]: One moment, please.

19 TC [Lt Col PRIMOLI]: Yes, sir.

20 [Pause.]

21 MJ [COL WATKINS]: Thank you. That's all.

22 TC [Lt Col PRIMOLI]: Yes, sir.

23 MJ [COL WATKINS]: I just wanted to check my notes. I

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1 don't have any further questions.

2 TC [Lt Col PRIMOLI]: Yes, sir.

3 MJ [COL WATKINS]: Defense, any rebuttal argument?

4 CDC [MR. DIXON]: Thank you, Your Honor. I'll be brief.

5 I want to begin by addressing a statement that trial
6 counsel made. I believe the trial counsel said that
7 Your Honor had indicated that 21 and 27 were cumulative. I
8 don't believe Your Honor has indicated that.

9 MJ [COL WATKINS]: I have not.

10 CDC [MR. DIXON]: Your Honor did, I believe ----

11 MJ [COL WATKINS]: I wanted to know -- I'm asking
12 questions. I haven't made any assertions about anybody being
13 cumulative.

14 CDC [MR. DIXON]: Let me say with respect to 21 and 27, to
15 be clear -- and I'll be happy to address this tomorrow in the
16 closed session in greater detail, but 21 and 27 have different
17 roles, responsibilities, and involvement with respect to
18 Mr. Khan. It is qualitatively different. There's obviously
19 some overlap, but it's qualitatively different.

20 They also cover different time periods. 27 -- 27,
21 the relevant time period, I believe, is approximately two
22 years, between 2011 and '13. 21 covers a period, I'll just
23 say, begins approximately 2016; I will not give you an end

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1 date for that at this time. So they cover different time
2 periods.

3 That's important for the reason that I outlined at
4 the beginning of my remarks, which is this is not an ordinary
5 case. Mr. Khan has been at Guantanamo since September 2006.
6 He's been cooperating for seven years, and that's -- there is
7 no one or two witnesses who can cover that entire time period
8 adequately for purposes of his sentencing.

9 So it's not just a question of, you know, are you
10 generally relevant and necessary, but over an extended period
11 of time to show things like cooperation over an extended
12 period of time, a period of time that is unprecedented in the
13 military justice system as far as I know. There has not ever
14 been a case as far as I know like Mr. Khan, ever. Whether
15 it's commissions or courts-martial, I'm not aware of a single
16 case that even comes close in terms of the breadth and extent
17 of cooperation.

18 The other thing I want to say is that the government
19 remarked on the narrowing of our request for production of
20 witnesses. As we explained in our papers, we did -- we make
21 decisions all the time for strategic reasons to narrow our
22 case, and we continue to do that. We will continue to do
23 that.

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1 With respect to the meet and confer, I mean, it --
2 our motion to compel is with respect to these 29 or 30
3 individuals. That's now, I believe, been reduced even
4 somewhat during the course of this proceeding today. We would
5 like to meet and confer with respect to the others, but we
6 haven't moved to compel the rest of them. We've moved to
7 compel 29 or 30 individuals. So that's what this motion is
8 about. I just want to be clear about that.

9 With respect to stipulations and other compromises, I
10 would say we've tried, and we've had a little bit of progress
11 here today; and perhaps tomorrow, we'll have a little bit of
12 progress as well in that regard. But we've tried. And we
13 have explained this in our papers, and I will have to say, you
14 know, from our side of the podium, I mean, we're left with the
15 impression that compromise is not an option for the
16 prosecution. And I think that will become crystal clear
17 tomorrow, but, you know, we certainly infer that there really
18 isn't an ability to meet and confer. We've tried.

19 The last point I want to make is with respect to the
20 burden. It is true that the government has offered to produce
21 individuals number 1 and 8 by VTC and is claiming that it is
22 too burdensome to produce them in person and also is claiming
23 that 6 and 7 can't be produced in any fashion.

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1 Those four individuals are U.S. citizens. They live
2 in the United States. They have the same legal rights that we
3 have, that I have, that Your Honor has. They have the same
4 ability to travel. And it is no more or less burdensome for
5 them to travel to Guantanamo than the individuals who are
6 sitting in the back of the courtroom observing these
7 proceedings, the visitors, the NGOs, the media. It is no more
8 or less burdensome for these U.S. citizens to travel to
9 Guantanamo. All they need are country clearances. We're not
10 asking for the United States Government to fund them, just
11 simply allow them to come to Guantanamo the way the observers
12 in this courtroom are allowed to come to Guantanamo.

13 With respect to individuals 9 and 10 -- 10, again,
14 being the single most important witness for Mr. Khan -- there
15 is precedent in these military commission proceedings, direct
16 and on point, and that is the David Hicks case. We addressed
17 this in our papers.

18 In the Hicks case, individuals comparable -- directly
19 comparable to individuals -- to witnesses 9 and 10 were
20 permitted to attend in person on multiple occasions, not just
21 in connection with sentencing. So for purposes of the Hicks
22 case, these individuals should be in the courtroom now
23 observing these proceedings, but they're not because the

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1 government won't let them travel here.

2 So I want to conclude by saying this is not equal
3 access to witnesses and evidence which is guaranteed by the
4 Military Commissions Act, applicable military rules, or the
5 practice in Article III. Your Honor should respectfully grant
6 the motion.

7 MJ [COL WATKINS]: Thank you.

8 Okay. Before I describe the way ahead, is there
9 anything else to take up now in open session by either party?

10 TC [Lt Col PRIMOLI]: No, Your Honor.

11 CDC [MR. DIXON]: No, Your Honor.

12 MJ [COL WATKINS]: Government, I don't need anything else
13 to rule on Appellate Exhibit 030C. I'm required by the Rules
14 of Military Commissions to issue a written ruling on that
15 request, so I'm going to be recessing the court -- or the
16 commission, excuse me.

17 We will conduct an M.C.R.E. 505(h) session starting
18 at 1330 tomorrow. We may need to conduct a closed R.M.C. 803
19 session at some time thereafter. I'll know more about that
20 tomorrow after the 505(h) session.

21 Any questions?

22 TC [Lt Col PRIMOLI]: No, Your Honor.

23 CDC [MR. DIXON]: I'm sorry, Your Honor. Just to confirm.

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1 We are beginning tomorrow at 1330?

2 MJ [COL WATKINS]: Yes. And the delay is because of the
3 requirement for me to complete the ruling on the 505(h)
4 request. And it gives both parties an opportunity to
5 conference with each other or with their clients prior to
6 going into closed session.

7 CDC [MR. DIXON]: Thank you.

8 MJ [COL WATKINS]: The commission is in recess.

9 [The R.M.C. 803 session recessed at 1602, 1 April 2019.]

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