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1 [The R.M.C. 803 session was called to order at 0906,
2 09 December 2021.]

3 MJ [COL ACOSTA]: The commission is called to order.

4 Good morning, Counsel. Good morning, Government.

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

6 TC [MR. MILLER]: Good morning, Your Honor.

7 MJ [COL ACOSTA]: Please account for the parties for the
8 United States -- the members of the team for the United States
9 that are present and ----

10 TC [MR. MILLER]: Good morning, Your Honor. These
11 proceedings are being transmitted via CCTV to locations in the
12 United States pursuant to your order.

13 Present for the United States as identified in
14 detailing memorandum: Myself, Mark Miller; Mr. John Wells;
15 Lieutenant Commander Cherie Jolly; Lieutenant Commander Keven
16 Schreiber; Major Michael Ross. Also present for the
17 prosecution are Mr. Forrest Parker Smith, Mr. Louis Hracho
18 Marmo, Joleen Sanders, Chief Kenneth Traylor, and Master
19 Sergeant Laura Speranza. All persons have the necessary
20 clearances, Your Honor. Thank you.

21 MJ [COL ACOSTA]: Thank you.

22 Defense?

23 LDC [MR. NATALE]: Good morning, Your Honor. Anthony

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1 Natale, along with the following individuals on behalf of
2 Mr. al Nashiri: Captain Mizer, Ms. Carmon, Ms. Morgan.
3 Although not present in the courtroom, I expect the following
4 individuals to be coming in in order to aid in our preparation
5 and presentation; that would be Mr. Dolphin, Ms. Janes,
6 Mr. Hoffmann, Mr. Roy.

7 At the present time, we -- our interpreter is not here
8 because our client has not -- is not going to be here.

9 All of those people have the proper classification and
10 qualifications to be present.

11 In the RHR, Commander Piette is present, and also he
12 maintains all of the proper credentials necessary to be
13 present.

14 MJ [COL ACOSTA]: Thank you, Counsel. And I have before
15 me the statement of understanding of his right to be present,
16 essentially a waiver from your client; is that correct?

17 LDC [MR. NATALE]: Yes, Your Honor.

18 MJ [COL ACOSTA]: The waiver? Okay. Thank you.

19 Government, do you have someone to call about the
20 absence of the accused?

21 MATC [MR. WELLS]: Yes, Your Honor.

22 TC [MR. MILLER]: We do. Mr. Wells will handle that, Your
23 Honor.

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1 MJ [COL ACOSTA]: Thank you.

2 MATC [MR. WELLS]: Take a seat. Commander from ----

3 MJ [COL ACOSTA]: Go to the microphone before you call
4 the -- and call the witness.

5 MATC [MR. WELLS]: Yes, sir. Hold on just a minute.

6 MJ [COL ACOSTA]: Can you call the witness.

7 MATC [MR. WELLS]: Yes. Your Honor, we call the commander
8 from the staff judge advocate's office. He's now taken the
9 stand. I ask that he raise his right hand, please.

10 **COMMANDER, U.S. NAVY, was called as a witness for the**
11 **prosecution, was sworn, and testified as follows:**

12 MATC [MR. WELLS]: Please take the seat and remove your
13 mask. Thank you.

14 **DIRECT EXAMINATION**

15 **Questions by the Managing Assistant Trial Counsel [MR. WELLS]:**

16 Q. Commander, good morning.

17 A. Good morning.

18 Q. Did you have an opportunity to meet with the accused
19 this morning and advise him about his rights to attend this
20 proceeding?

21 A. I did.

22 Q. I have in front of me a statement of understanding,
23 right to be present in commission proceedings dated 9

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1 December. Did you use a form like that with the accused?

2 A. Yes.

3 MATC [MR. WELLS]: Your Honor, may I approach the witness?

4 MJ [COL ACOSTA]: You may.

5 MATC [MR. WELLS]: Thank you, Your Honor. Your Honor,
6 I've presented the commander with the statement of
7 understanding, right to be present, commission proceedings.

8 Q. Commander, do you recognize that document?

9 A. I do.

10 Q. And how do you recognize it?

11 A. This is the form I used this morning.

12 Q. Okay. And could you walk us through the procedures
13 that you used to advise the accused of his rights?

14 A. I read the statement on pages 1 and 2 to the accused
15 in English. I had an interpreter present to be able to answer
16 any questions in Arabic that the accused may have. I read the
17 form, made sure he understood everything and sought if he had
18 any questions, and if he did not, and he had decided to waive
19 his right to attend. I had him sign on page 2.

20 Q. Okay. And just to confirm again, did he indicate to
21 you that he did not want to attend today's ----

22 A. Yes.

23 Q. And did you draw an opinion whether or not that was

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1 voluntary?

2 A. I did. I believe it was voluntary.

3 Q. All right.

4 MATC [MR. WELLS]: Your Honor, I have no further
5 questions. I'd like to retrieve the exhibit and present that
6 back to the court reporters and you.

7 MJ [COL ACOSTA]: For the record, that's AE 375 ----

8 MATC [MR. WELLS]: Kilo, sir.

9 MJ [COL ACOSTA]: ---- K. Yes.

10 Defense?

11 LDC [MR. NATALE]: No questions or objections.

12 MJ [COL ACOSTA]: All right. Thank you. I have no
13 questions. Commander, you can step down and return to your
14 duties.

15 WIT: Yep.

16 **[The witness withdrew from the courtroom.]**

17 MJ [COL ACOSTA]: All right. As the accused has
18 voluntarily waived his right to be present today, we will
19 proceed.

20 We were going to talk today about AE -- we're going to
21 start with 444. Defense?

22 DDC [MS. MORGAN]: Thank you, Your Honor. Good morning.

23 MJ [COL ACOSTA]: Good morning.

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1 DDC [MS. MORGAN]: Your Honor, 444 has been somewhat of an
2 evolving motion, but I'm going to try and distill this down to
3 ultimately the simplest issue, and that is what sentence or
4 sentences in the 2019 D.C. Circuit opinion in this case, so
5 al Nashiri III, are classified. So that's ultimately what
6 we're asking for.

7 But as this commission knows, this is symptomatic of a
8 much larger issue that has plagued this case. We're coming to
9 the commission with two requests. We have asked in our motion
10 initially to abate the proceedings until we get an answer to
11 this question about classification, and we filed this motion
12 in June of 2021. We hadn't requested oral argument because we
13 had hoped an order from this commission would really just
14 knock the answer loose.

15 We had also requested as alternate relief that this
16 commission implement the trial conduct order that it had
17 proposed in December of 2019 in AE 4 -- I'm sorry, 414. And
18 really, that is what the defense is going to ask that you do
19 here today, because this is a big-picture issue.

20 Standing before you today, it feels a little bit like
21 *deja vu*. When we were here as a group in person last, we were
22 talking about this issue in relation to 403B. In October of
23 2019, the defense had tried to file 403B, and it had gone --

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1 gotten hung up in this months-long ambiguous security review.
2 We just couldn't get an answer of what in that pleading
3 someone somewhere was saying was classified.

4 And eventually this commission got involved. We got
5 somewhat of an answer. The information that was purportedly
6 classified was information that had appeared in a number of
7 unclassified pleadings that were filed by the prosecution.
8 The defense ultimately filed that pleading as a classified
9 pleading, and we moved on.

10 But that led this commission to recognize that we have
11 a problem here. We can't go months and months without having
12 pleadings filed. And so you proposed the trial conduct order
13 in 414, and the defense fully embraced that proposal. And
14 that proposal is grounded in law and -- of the case and then
15 also in law governing how classified information is dealt
16 with. It's governed by Executive Order 13526, by 32 CFR 2001,
17 and by the DoD Manual 5200.45. And I'll talk to each of those
18 a bit as I go through my presentation.

19 But getting back a bit to the history of this case,
20 you make your proposal in December of 2019, and it makes the
21 docket for January of 2020. As things do, the commission is a
22 bit fluid, we don't get to it, and COVID happens.

23 But in January of 20 -- January of 2020, maybe it was

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1 December of 2019, the defense tries to file a motion for
2 classification guidance in this case in order to essentially
3 foreclose this becoming a systemic issue. We want to litigate
4 this case, we want to get our motions filed, and we don't want
5 to consistently run into this problem.

6 And that motion gets kicked, and we, defense, does not
7 know why. Ultimately, what -- and I'm going to do a little
8 bit of soft-shoeing here, Judge, because I don't want to kick
9 the hockey light. I think it's really important that the
10 public is able to know what's going on in this case, so I'm
11 going to speak in vague terms.

12 But that motion highlights three different issues, and
13 what it does is it juxtaposes that there's a retroactive
14 classification of information that occurs. And it talks about
15 the SSCI Report, it talks about James Mitchell's book, and it
16 talks about the D.C. Circuit opinion. And what it does in
17 each one of those three situations is it says, hey, you have
18 unclassified information that exists open source, and then
19 when the defense says it, we get flagged for a spill.

20 That motion gets -- we attempt to file it, and it gets
21 kicked. And so we ask why. And what the defense is told is
22 that it has something to do with the D.C. Circuit opinion.

23 Now, I think it's important for the commission to

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1 understand the defense's process when we file motions. Prior
2 to the defense attempting to file any motion, we run it
3 through our defense information security officer. And the
4 defense information security officer is an individual who's
5 assigned as a full member of the defense team, and this comes
6 from the Protective Order #2. This individual is assigned to
7 the team specifically to assist us in applying the
8 classification guides.

9 And that's an important term, Your Honor, because in
10 reality, we don't have classification guides. It's something
11 we're asking for, but we don't. So this individual helps us,
12 looks at all of our pleadings, and gives us the best guess we
13 got right now. And so we did that in this motion. We got
14 cleared hot. We tried to file it. It gets kicked.

15 So then the next step is to e-mail the motion to the
16 defense walled-off team, and then that group takes it to the
17 OCA. And when it came back, we were told to follow the
18 guidance in AE 399F on the public-facing website.

19 Now, Your Honor, 399F, as you know, is an order that
20 was issued by this court in November of 2019. And that order
21 was issued Unclassified. The defense, to this date, has never
22 been informed that that order contained any amount of
23 classified information. It was never recalled from our

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1 e-mail, and it has never been treated as a spill.

2 And as the trial judiciary is aware, when things are
3 treated as a spill, someone comes in, they wipe our devices.
4 It's very inconvenient for all persons involved. That's never
5 occurred.

6 But in response to the guidance from the walled-off
7 team, we went to the public-facing website, we looked at 399F,
8 and it was the first time the defense was aware that someone
9 had redacted 399F. And that redaction is unhelpful, to say
10 the least, for how we should proceed in filing our motion for
11 classification guidance.

12 And I -- again, I'm going to soft-shoe here, but I
13 think there's some things that it's very safe to say have been
14 redacted from that pleading that are absolutely not
15 classified. Someone has redacted the date of the decision,
16 April of 2019. Someone has redacted the name of the court
17 that decided the decision, the D.C. Circuit. Someone has
18 redacted a series of unclassified AE numbers, those pleadings'
19 names and the date they were filed. Someone has redacted
20 references to unclassified portions of the transcript in this
21 case. Someone has redacted the case citations to the CMC.

22 Someone has redacted a footnote using a term that is
23 not "legacy microphone," which is the term the defense has

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1 been told we are authorized to use in this case, but is not
2 the term that is used by all parties. And if you do an
3 unclassified search of the record for a term other than
4 "legacy microphone," you will find it, and that term is being
5 used both by the commission and the prosecution.

6 Someone has, in fact, redacted the case citation to
7 the D.C. Circuit opinion. And so if I am to believe what I
8 was told by the walled-off team, I cannot cite to the
9 D.C. Circuit opinion in an unclassified pleading. And that's
10 absurd.

11 So in response, we followed up and asked a very
12 specific question in January of 2020: Can you please tell me
13 what sentence or sentences in this opinion are classified?
14 And it has been a year, and we do not have an answer. And
15 that is why we are coming to the commission.

16 Now, Your Honor, what we are asking for is guidance,
17 both specifically and generally. I think I've walked through
18 pretty clearly what the specific guidance is, but again, this
19 is symptomatic of a much larger problem, and it highlights the
20 need for general guidance.

21 I understand that our motion for classification
22 guidance is not before the commission; however, the defense
23 does believe that the commission is in the position to issue

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1 an order for classification guidance that can foreclose the
2 defense's need to file the motion.

3 I will attempt to foreclose a bit of my colleague
4 across the aisle's arguments, and I believe they raise them in
5 their reply to 444. My colleagues have asserted that they
6 have -- that we have been, the defense has been provided
7 timely and accurate guidance. And as I stated, we don't have
8 a response to our very specific question. I don't know what
9 we can do beyond asking that question. We don't have another
10 avenue.

11 And what we're asking for is an obligation that the
12 government has. The government is obligated to create
13 classification -- to not just answer our question, but to
14 actually create classification guidance, and I can point to a
15 few specific sources.

16 So in 32 CFR Section 2001.15, it specifically says
17 classification guides shall be disseminated as necessary to
18 ensure the proper and uniform derivative classification of
19 information. It's not a "may." It's a "shall."

20 The executive order specifically discusses the need
21 for uniform safeguarding of information -- of information, and
22 states: Agencies with original classification authority shall
23 prepare classification guides to facilitate the proper and

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1 uniform derivative classification of information. And, Your
2 Honor, that's been adopted as law of this case in AE 013S, the
3 second protective order in the case.

4 The government has also suggested that we just file
5 these pleadings as Secret. But the rules of this commission
6 do not allow for that. The rules of this commission require
7 that it is -- state that it is the responsibility of the
8 filing party to identify and mark classified information in
9 their pleadings. As this commission is aware, these aren't
10 general markings. They are required to be paragraph by
11 paragraph.

12 Now, it goes beyond the rules of this commission. The
13 law actually prohibits the over-classification of information.
14 We must be -- classification must be able to be replicated by
15 all derivative classifiers of information. The public and
16 Mr. al Nashiri have a right to know what is in these
17 pleadings. And under the executive order, you cannot conceal
18 violations of law, embarrassment to a person or organization
19 or agency by over-classification.

20 Government has also argued that you're stuck with
21 whatever the OCA says. First of all, Judge, the defense
22 doesn't know what the OCA has said because we don't have a
23 classification guide. What we have is a game of whisper down

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1 the alley. And as we've repeatedly seen in this commission,
2 we all think things are classified a little differently.

3 It came up this week. And again, I'm going to
4 soft-shoe a little bit here. But when we were discussing the
5 holding area behind this courtroom, the -- you had mentioned
6 that your understanding of the classification has to do with a
7 name. And that name is, in fact, something that was invented
8 by a journalist at the *New York Times*, not the DoD. The
9 defense has been told the classification has something to do
10 with attaching a detainee with that location. I don't know
11 what the prosecution thinks it is.

12 And I only highlight that to say that it has been
13 repeatedly made clear we're all operating on different sheets
14 of music. And when the purpose of classification is to ensure
15 that we are all protecting our nation's secrets, we can't --
16 we can't do that if we're all on different pages. We need
17 something to give us consistency.

18 Additionally, to the point of we are stuck with what
19 the OCA says, that's not true, and the executive order says
20 it's not true. Section 1.8 of the executive order actually
21 requires a process for challenge. So that if you believe
22 something is over-classified or improperly classified, you
23 must be able to challenge that classification.

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1 Well, the defense has never been given the guidance
2 for how to challenge that classification. We don't know. But
3 we're entitled to it because it is most certainly implausible
4 to believe that the D.C. Circuit opinion is classified.

5 And let's talk about what went into producing that
6 opinion. The prosecutors on this case, who are absolutely
7 stewards of the nation's secrets, wrote the factual statements
8 that form the basis of that opinion. They most certainly
9 checked with their security officers. They most certainly ran
10 that up through their OCAs. Their colleagues at the
11 Department of Justice certainly did the same.

12 The facts that are purportedly being classified in
13 that opinion came from their brief, came from their
14 unclassified statement of fact. Prior to issuing that
15 opinion, the D.C. Circuit certainly ran it through their
16 security officer. They are certainly more than capable of
17 handling classified information. They do not distribute
18 opinions lightly. As far as I'm aware, the D.C. Circuit has
19 never been informed that they purportedly spilled information.

20 And this commission absolutely takes classified
21 information seriously. When issuing 399, the defense has no
22 doubt, Your Honor, that you ran it through your security
23 officer, that the trial judiciary is well skilled and adept at

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1 handling classified information, and that it did not issue
2 399F in an unclassified manner before it was certain that it
3 was, in fact, unclassified.

4 The defense comes before this commission today, Your
5 Honor, and is requesting a measure to advance judicial
6 economy. We don't want to come before you every few months
7 with yet another motion that we can't file, with yet another
8 issue that we can't just resolve. We want to know what is
9 classified so that we can stay right of the line. Frankly,
10 this seems like something that our colleagues would absolutely
11 support, and it seems like something that would move us all
12 along in the right direction.

13 Pending questions from this commission, that concludes
14 my presentation.

15 MJ [COL ACOSTA]: None at this time. No questions at this
16 time. Thanks.

17 Government?

18 MATC [MR. WELLS]: Good morning, Your Honor.

19 MJ [COL ACOSTA]: Good morning.

20 MATC [MR. WELLS]: Sir, to begin with, we rest on our
21 filings in the 444 series, but also I believe in the 414
22 series too, since our colleague has raised that issue.

23 MJ [COL ACOSTA]: And that was raised in their pleading as

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1 well. They said -- they asked the commission to impose that
2 order, right? So ----

3 MATC [MR. WELLS]: Yes, sir. And I think in the 444
4 series we finally, in their rebuttal, find out the specifics
5 of what they're concerned about. Of course, that's a
6 classified filing.

7 So to begin with, with the first step, any
8 classification guide that would talk about, in a general
9 nature, security needs and interests of the JTF to keep the
10 detainees safe, the guards safe, and visitors safe, that's
11 what the guide will say.

12 From there, it's a discussion about how you
13 characterize it. And I think their classified filing ventures
14 into an area where they just have a dispute with the
15 classification guide that relates to security issues. It's
16 not that they want to follow the security issues, it's that
17 they want to disagree with it. So I don't think the
18 commission will ever be able to satisfy the defense in that
19 regard, even if you ordered or directed a certain guide.

20 Now, Second Amended Protective Order #1 already
21 provides a general guide as it relates to the charges in this
22 case and the particular evidence that will be at issue. What
23 the defense has raised is a collateral litigation issue

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1 arising out of the 369 series, the 399 series also; and we've
2 already conducted an evidentiary hearing on that matter in
3 which specific classification guide in a 10 U.S.C. 949p-6
4 arena engagement was helpful to the defense.

5 Additionally, discovery was provided to them with
6 proper classification banners, headers and footers, and
7 paragraph markings and functional identifiers used to protect
8 identities. The parties used it well. That was sufficient
9 information for derivative classifiers like the prosecution
10 and the defense and the commission to understand what is
11 classified.

12 If there's a particular question about a
13 characterization of a matter that relates to a security need
14 or interest, then you can go to your defense information
15 security officer, your court information security officer, and
16 then I think the prosecution has processes to go to the
17 original classification authority and ask for a -- a
18 clarification. Is it proper to do ----

19 MJ [COL ACOSTA]: Is that what she's ----

20 MATC [MR. WELLS]: ---- unclassified ----

21 MJ [COL ACOSTA]: Is that what -- is that what Ms. Morgan
22 for the defense said they did? They asked, hey, we want to
23 know what in this opinion is classified? You know, they --

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1 they asked specifically and they didn't get an answer back?

2 MATC [MR. WELLS]: You know, it would be wonderful if they
3 would actually attach that communication, but they haven't
4 shared it with the prosecution or with the commission. We're
5 not privy to their walled-off communications.

6 And actually, I think what happened in the 416 series
7 and otherwise is that they just went ahead and filed it
8 Unclassified. They didn't attach a statement from their DISO
9 that said I reviewed this and coordinated with the OCA and I
10 certify that the information in this filing to the commission
11 and prosecution is unclassified.

12 It went to the commission. The commission had their
13 court information security officer review it, and said, wow,
14 I -- this looks classified to me. Over to the OCAs for review
15 and then back through the walled-off procedure. And then
16 apparently, she's revealing today that look at this 399F
17 ruling from the court, and she pointed to a number of things
18 that are redacted that do not make sense to her. Instead of
19 just following that guidance and applying it and then filing
20 it Classified, they want to resist that call by the OCA. So I
21 understand the procedure and the process.

22 The prosecution in 369MMM, I think, was subject to a
23 classification. We used a document that had been produced by

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1 the JTF. It was attached and was unclassified, but it related
2 to security matters at the JTF, and the OCA properly said that
3 should be classified, and went back and educated everybody
4 that was involved in producing that document and properly
5 classified it. We attempted to refile it Classified, and
6 eventually, we did.

7 So this process works. We have sufficient information
8 through the discovery that we get what is classified. The
9 defense makes an argument that the D.C. Circuit has cited
10 certain information. That information which is offending and
11 is classified and cannot be in an unclassified setting did not
12 come from the government. It comes directly from the filings
13 and pleadings of the defense on appeal and their
14 characterization.

15 If they had stuck with the unclassified information
16 that the commission asked the prosecution to work with the
17 OCAs to declassify as it relates to the characterization of
18 the microphones in their attorney-client meeting area and what
19 occurred there, then we wouldn't have this problem. But the
20 D.C. Circuit did not do that. They borrowed directly from the
21 defense characterization, which causes a problem because it's
22 too detailed in information.

23 As it relates to the detainee cells here in support of

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1 the ELC, the public does not need to know the location, the
2 security arrangements that are needed to protect the accused,
3 and also counsel who meet with the detainee back there.
4 That's really not relevant for the public to need. That's not
5 relevant for the commission to resolve these charges. So the
6 defense continuing to pursue that and press to reveal those
7 security measures really causes the OCAs grave concern.

8 So if the court in dealing with 444 -- again, we rest
9 on our filings, and we believe there's adequate processes and
10 procedures for the defense to properly file classified
11 information with this commission and move the process along.

12 And we do recommend that the commission not seek to
13 add additional processes and procedures that are already in
14 place.

15 MJ [COL ACOSTA]: Do you oppose the 414 proposed order?

16 MATC [MR. WELLS]: Sir, we do in our filings in that
17 regard. And I would say this: The specific proposal that the
18 commission had that if a unclassified filing from a party, the
19 OCA determines that there's classified information in that
20 filing, will have five days to produce a declaration and cite
21 to the source document.

22 That approach places the burden now on the OCA to know
23 everything about the case, everything about the information

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1 that the defense or the prosecution is putting forward. That
2 puts the cart in front of the horse.

3 It's the obligation on the prosecution and the defense
4 as derivative classifiers to know that the information they're
5 submitting to the commission is unclassified. And the
6 guidance is clear in the protective orders, the regulation,
7 and the rules for the commission: If you do not know, then
8 you file it Classified until you get a determination.

9 We would love to have the OCAs working with us hand in
10 glove in everything we do on every step; but, frankly, they're
11 covering so many bases and the discovery in this case is so
12 voluminous, anything that you might pull in a moment and put
13 into a filing where you have 14 days to respond or you're
14 preparing a motion for a few weeks or months is really
15 unreasonable to expect from the OCA.

16 I would recommend a procedure, and I think we
17 suggested in this filing, that you file it Classified until
18 it's been determined by the OCA that it can be filed
19 Unclassified. Then you could still proceed forward with the
20 litigation.

21 The public will get the information and they will know
22 that the process is working. They don't need to know it
23 immediately upon the filing. That would meet the interest of

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1 the accused to have a public proceeding and trial.

2 Any further questions, Your Honor?

3 MJ [COL ACOSTA]: I do. I'm aware that in the 9/11 case,
4 the government produces or has created an amalgamated
5 procedural guide. And this is coming from the prosecution.
6 It's essentially in the form of a notice of, hey, we're going
7 to talk about this issue in this case, so here's the issues
8 that are in there, and here's how you can talk about each of
9 those in that. And that that has worked relatively well.

10 Does the government agree that that has worked
11 relatively well in that process?

12 MATC [MR. WELLS]: Your Honor, I do, when the commission
13 can predict a set piece as it relates to litigation.

14 MJ [COL ACOSTA]: Oh, and we have that coming up and
15 that's what I ----

16 MATC [MR. WELLS]: Yes.

17 MJ [COL ACOSTA]: Because here's the issue. Like you
18 said -- and Ms. Morgan, I think, was -- and you're both
19 talking -- you are agreeing on certain things. Like, yes,
20 Ms. Morgan stood up and she says we're not asking to abate any
21 longer. We're asking for just give us some guidance so that
22 we can proceed in the future, right? And you're saying here's
23 how we think we should proceed in the future, right, and --

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1 through this process.

2 We do have some larger issues that are going to come
3 up: Admission of hearsay, suppression of statements. Those
4 things, right, we know those are on the horizon ----

5 MATC [MR. WELLS]: Uh-huh.

6 MJ [COL ACOSTA]: ---- right, for our law motions, for our
7 motions that are coming up that we're going to need to
8 resolve. So you know what those are. I know what they are.
9 The defense knows where they are. We haven't put them -- we
10 haven't put the mark on the wall of where we're doing each of
11 those yet.

12 You're getting some assistance.

13 MATC [MR. WELLS]: Your Honor ----

14 MJ [COL ACOSTA]: The -- so if we have that and we say,
15 okay, we're going to go into the issue of the admissibility of
16 hearsay and you're going to have your motion and say, here's
17 where we're going to present why this hearsay should come in,
18 at that point when you say, hey, here it is, can you provide
19 guidance, before we get into that litigation that -- those
20 arguments, a guide to the defense on here's your left and
21 right limits within that universe.

22 MATC [MR. WELLS]: Yes, sir. Absolutely. We agree with
23 you. And, in fact, that is the p-6 process that we're talking

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1 about that 9/11 experienced. We experienced that in the
2 369/399 experience, and we did that.

3 However, in 337E we specifically asked the commission
4 as it relates to the 302s and the hearsay statements that
5 PSO/MOI be revealed but functional identifiers be provided for
6 the Yemeni identities in a public forum. And you issued your
7 order providing both parties guidance to use those documents.

8 You will see, I think, in 461 the defense did not use
9 the discovery that we produced with those documents. Our
10 response to that, use some of those documents but we're still
11 in the process of other documents behind the hearsay
12 statements where PSO/MOI identities may be included,
13 perfecting those documents, presenting them back to the
14 commission for review and approval to make sure that we did
15 the proper job and then produce them to the defense.

16 But we have structured our approach to support the 319
17 series, the 166 hearsay notice proceedings, and we
18 specifically did 337 with that in mind.

19 MJ [COL ACOSTA]: I -- but that -- the guidance that is
20 provided in the -- the specific guidance, the types of notice
21 is much more specific that has been done in the -- in the 9/11
22 case, is it not? I mean, it is truly a notice of, hey, here's
23 the topics, here's what you can say, and here's what we've got

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1 to stay away from, right?

2 I mean, it's not just, hey, we want you to use these
3 -- it's not just the names issue. It's not just that. It's
4 a -- it's a much more -- and it looks like ----

5 MATC [MR. WELLS]: Right.

6 MJ [COL ACOSTA]: ---- what a classification guide looks
7 like. And it's -- and it's on the specific issues.

8 MATC [MR. WELLS]: Yes, sir. And that takes time ----

9 MJ [COL ACOSTA]: Yes, it does. And that's what I'm ----

10 MATC [MR. WELLS]: ---- with the prosecution working with
11 the defense working through that.

12 MJ [COL ACOSTA]: And that's what I'm -- I'm asking
13 whether or not I should implement in this commission for those
14 upcoming larger motion sessions, right, that we're going to
15 have, for you to produce that type of a guidance so that you
16 can say here it is, here's what you have, here's what --
17 because on some of those, like where it's your motion to use
18 certain things, you want to be able to say here's what we're
19 going to say and here's why -- here's the limits of what we
20 can say about those topics, so, Defense, here's the limits
21 that we're all going to live in for that. Does that make
22 sense to the government?

23 MATC [MR. WELLS]: It does, sir. The litigation that

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1 we're anticipating, I think, relates to our case in chief,
2 which is supposed to be unclassified, with the exception of
3 these few privileges that we need to protect as it relates to
4 Yemeni identities.

5 MJ [COL ACOSTA]: No, I understand, but what I -- yeah.

6 MATC [MR. WELLS]: Don't know if the defense has
7 approached to talk about conditions of confinement and
8 treatment, much like the 9/11 case has done, in depth on those
9 issues, where that type of detail guidance would be beneficial
10 to the parties, and we will pursue that. So any litigation
11 that we have in 2022 or 2023 that relates to this, yes, we are
12 open to work with the OCAs to identify the specific issues.

13 I will say the M.C.R.E. 505 process contemplates that
14 with the notice from the defense. I am personally not pleased
15 with the general notices that we get of, say, these topics
16 that the prosecution believes is classified. It's not the
17 prosecution believing it's classified. The discovery has been
18 marked.

19 But the defense does not give the courtesy to the
20 commission or the prosecution to even cite the Bates numbers
21 from which they're going to be drawing the information that
22 might be classified, to allow us to go to the OCAs and say
23 this is the source document which you have reviewed, this is

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1 unclassified, but this is classified, so we could put it into
2 a guide to submit it to the commission so all parties know the
3 left and right boundaries.

4 So that 505 process ----

5 MJ [COL ACOSTA]: And that's when they're providing notice
6 that they want it. But for, like, specifically for the
7 hearsay, that's you coming and saying we want to provide these
8 things and we're going to have to present things in a manner,
9 right ----

10 MATC [MR. WELLS]: Well, sir, it's unclassified.

11 MJ [COL ACOSTA]: ---- so ----

12 MATC [MR. WELLS]: And we've produced it in 337 in the
13 302s with the functional identifiers in the document. We had
14 counsel say yesterday we have no idea what the identities and
15 the functional identifiers are because we need a key. Well,
16 it's in the documents that we just produced to you.

17 We could put that on a piece of paper separately as a
18 guide, say see the discovery and this Bates numbers with
19 these ----

20 MJ [COL ACOSTA]: Right. What I'm asking for is much more
21 of a -- of a -- I'm asking you whether or not -- and
22 again ----

23 MATC [MR. WELLS]: Yes.

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1 MJ [COL ACOSTA]: ---- you're saying we've already done
2 the things that the 9/11 Commission has done but we've done it
3 in parts and pieces. The convenience, I think, of what the --
4 the 9/11 case has done for that, and I know that they're
5 dealing with a myriad of other issues which include -- quite
6 frankly, assuredly the number of individuals that they're
7 dealing with there makes it -- it takes the scale up a little
8 bit. And here -- so I think that they found it helpful for
9 that.

10 The reason that I'm suggesting it here is because --
11 because of the tension between the parties on you saying, hey,
12 we've given it to you, I don't like the -- the notice they've
13 given. And, you know, I've mentioned that, you know, the
14 notice wasn't super -- wasn't extremely explicit as to what
15 was going to be discussed, and we had to get into that a
16 little bit.

17 But what I'm asking is: Why are we not -- or why
18 should I not say to the government, when we get to those
19 issues, can you produce something in this line and give you,
20 you know, the -- essentially the format similar to that case
21 so that you can say, hey, here it is. Here's the identifiers.
22 Here's the -- here's the terms, the connections and things
23 that you cannot make as we're doing this in an unclassified

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1 setting so that they know, oh, I can -- this is how I need to
2 refer to it.

3 I know you're saying it's unclassified. Right, I got
4 it. That's what they need to be able to say. Here's how you
5 can say the things you need to say in the open setting.

6 Should we do that ----

7 MATC [MR. WELLS]: Yes, Your Honor.

8 MJ [COL ACOSTA]: ---- before -- before we get into that
9 hearing ----

10 MATC [MR. WELLS]: I ----

11 MJ [COL ACOSTA]: ---- and say let's -- let's have a
12 playbook or at least a, you know, a rule book of the -- of the
13 set of rules that we're going to follow in the courtroom for
14 that date so that everybody is aware of where we are, instead
15 of saying a word or a phrase or making a connection.

16 You know, because that's truly -- you know, we talk
17 about it being a word or a phrase, but it's really connections
18 that are -- as much as anything, make the ----

19 MATC [MR. WELLS]: Correct. Yes, sir.

20 MJ [COL ACOSTA]: ---- that are the problem ----

21 MATC [MR. WELLS]: Absolutely.

22 MJ [COL ACOSTA]: ---- so ----

23 MATC [MR. WELLS]: Yes, sir. I think so. If we can

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1 identify those in sufficient time for us to work with the
2 OCAs. And let me just confer with trial counsel.

3 MJ [COL ACOSTA]: No, it's okay. Commander Jolly really
4 wants to talk to you, and that's completely fine.

5 [Counsel conferred.]

6 MJ [COL ACOSTA]: Just so, you know, whenever you need to
7 confer, don't hesitate. I have no problem with that at all.
8 Just if you could just raise your hand, you know, like you
9 were doing, that's fine. You're not interrupting me. We're
10 here to have this, for lack of a better term, discussion
11 amongst us about what's the best way to proceed forward, so go
12 ahead.

13 MATC [MR. WELLS]: Yes, sir. Thank you.

14 My co-counsel has reminded me that, you know, that the
15 M.C.R.E. 505 notice and hearing process is very important
16 because it's supposed to be particularized notice. But we've
17 gravitated to, as counsel across the aisle have described as
18 pro forma notice, and that really is not meeting the intent.

19 If you look in the 9/11 notices, the counsel give
20 Bates numbers, they give phrases that they want to use ----

21 MJ [COL ACOSTA]: Right.

22 MATC [MR. WELLS]: ---- from the documents. That's very
23 helpful for us to discuss with the OCAs, and it's our

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1 obligation to work with the OCAs to declassify it.

2 Now, a good example, I think, is 398D and our response
3 and request for a hearing where we realized that if you're
4 going to talk about the attorney-client meeting area out at
5 the camp, here's some information that can be declassified,
6 and we attached it. So that's the type of thing that we can
7 do to help the parties bring down and clarify what is
8 classified and what isn't.

9 And so you're on the right track, moving to the ----

10 MJ [COL ACOSTA]: Thank you.

11 MATC [MR. WELLS]: ---- p-6 process and then telling us
12 directly here's a format, here's a procedure, work it out,
13 tell me the left and right limits so that we make sure that we
14 don't jeopardize classified information.

15 MJ [COL ACOSTA]: Okay. Again, I just want to clarify for
16 the parties, I'm not interested in -- and I am not persuaded
17 by -- and I -- poking a little bit of, well, you didn't give
18 me this here or I don't know what -- you know, I'm interested
19 in some momentum and forward progress and how we're going to
20 resolve the future issues, and I know that you are too. And
21 that's what I want to resolve is -- I'm looking at those
22 milestone, those cornerstone motions that we're going to have
23 to resolve and to make sure that we do that in a clearly

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1 identified easy way so that I don't come -- that we don't come
2 down here to do the motion and we have a discussion about,
3 well, we can't really do it because we're -- we're hemmed up
4 by the rules.

5 The defense doesn't want that. The government
6 certainly doesn't want that. I don't want that. So you can
7 expect -- I ask the -- I'm not going to issue a ruling right
8 this second on whether or not there's going to be a motion.
9 I'm going to let Ms. Morgan respond in a second. But,
10 Government, if you don't have anything else, I don't have any
11 other questions for you.

12 MATC [MR. WELLS]: Sir, I would just ask this, though.
13 When you're in your chambers contemplating this and weighing
14 this issue, if there's an -- a chance that the information
15 could jeopardize national security and all the interests that
16 fall behind that, then it's classified. And we can have in a
17 classified forum possibly the OCAs authorize the accused to be
18 present during that proceeding, or say, no, he cannot be
19 present during that proceeding.

20 And that gives us a little more freedom to talk with
21 the commission about the specific issues. On this issue today
22 that we're arguing in an open session, co-counsel admitted
23 that she cannot talk in details and just talks in

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1 generalities. That's not particularly helpful to the
2 commission on a particular issue. But I would tell the --
3 and -- and advocate this.

4 The issue is not that -- a lack of clear guidance.
5 It's disagreement on the particulars of the information with
6 the OCAs' determination and ----

7 MJ [COL ACOSTA]: Right.

8 MATC [MR. WELLS]: ---- what the defense wants to do.

9 MJ [COL ACOSTA]: Again, I -- again, that goes back to the
10 point -- you know, pointing to particular things and some of
11 the things you would agree to -- to strike out the citation to
12 the district court, the -- the district court citation, to the
13 Reporter, does that seem rational?

14 MATC [MR. WELLS]: Here's what I would say, Your Honor. I
15 don't know why they haven't ever asked me to go work with the
16 OCA to determine why that was struck. I am frequently told,
17 though, that if you cite a classified filing and you want to
18 quote from it, you cannot cite to the classified filing. You
19 cannot use the AE number.

20 MJ [COL ACOSTA]: It's not the AE. This is the
21 United States ----

22 MATC [MR. WELLS]: Correct.

23 MJ [COL ACOSTA]: ---- Court of Appeals for the

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1 D.C. Circuit.

2 MATC [MR. WELLS]: So the D.C. Circuit -- apparently the
3 OCAs have determined that that citation should not have any
4 further dissemination in this commission on that matter. It's
5 not for me to countermand that decision. I can ask them, that
6 doesn't sound really cogent and reasonable. Can you relent on
7 that? If I had been asked, I have an obligation to go work
8 with them to see if they could declassify it, but the defense
9 never asked for that.

10 MJ [COL ACOSTA]: Right. They said that they did work
11 through their process and didn't get a response. If you're
12 volunteering to have them -- when they get a response, they
13 don't -- you know, I know you're not volunteering, but you're
14 saying if they come to the government and say we're stuck
15 here, can you go to the OCA?

16 MATC [MR. WELLS]: Well, 949p-1 ----

17 MJ [COL ACOSTA]: Right.

18 MATC [MR. WELLS]: ---- says we have an obligation for
19 information that's going to be used at trial to work with the
20 OCAs to declassify it. So we could do that if it's going to
21 be used at trial.

22 But really, this is a collateral matter that we're
23 talking about, not on guilt and innocence ----

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1 MJ [COL ACOSTA]: I know, but it's indicative of other
2 areas. The defense's point is not that it's on that issue any
3 longer, but that it's indicative of problems that they don't
4 want to have in the future, right?

5 MATC [MR. WELLS]: Well, we're going to have this problem
6 in the future because we're not the professionals on the
7 classification and security needs and interests of the
8 United States. We are downstream from that, and we are
9 derivative classifiers. And we can disagree all day with the
10 OCAs, but once they've made a decision, we have to defer to
11 that professional judgment.

12 I don't know why that citation was struck. I do know
13 why the information in the unclassified portion that was used
14 was redacted. It did not come from the U.S. Government, and
15 it provides too much information that the OCA thinks offends
16 national security. The defense disagrees with that because
17 they want to put a particular characterization in a particular
18 form instead of in the proper channels on the classified side.

19 MJ [COL ACOSTA]: Okay.

20 MATC [MR. WELLS]: All right, sir. Thank you.

21 MJ [COL ACOSTA]: All right. Thank you, Mr. Wells.

22 Ms. Morgan.

23 DDC [MS. MORGAN]: All right, Your Honor. Just starting

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1 out, this isn't about 505. 505 is what happens after a motion
2 is filed. This is about the fact that we can't file motions
3 because we don't know what the heck is classified.

4 And then the next point I'd like to make is I just
5 want to correct a misstatement about that D.C. Circuit
6 opinion. Mr. Wells seems adamant, but it -- that fact that is
7 purportedly classified comes from the prosecution's
8 unclassified statement of fact that was filed with the D.C.
9 Circuit, which is the first time that the defense learned
10 about a different number of objects. And I believe that's the
11 extent of what I can say right now.

12 Judge, Mr. Wells seems to think this process works.
13 Maybe it does if you're the prosecution because apparently you
14 can say lots of things in unclassified pleadings. We can't
15 repeat them. And the problem that we're running into is we
16 don't know what's going to be retroactively classified
17 tomorrow.

18 And let me give you a very concrete example: The
19 SSCI Report. If you go to AE 013S, the actual basis for why
20 there was an amended protective order is the declassification
21 of the executive summary of the SSCI Report. It's cited in
22 the preamble to that.

23 We attempted to cite facts from the executive summary

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1 of the SSCI Report in our petition for cert to the Supreme
2 Court in 2017, and it was flagged as Classified. That is one
3 of a litany of examples that I can cite to.

4 Judge, if you want me to go through every time that
5 the defense has had this happen, I would be here more than the
6 two weeks we're allotted. And I don't say that flippantly.
7 This is a constant problem, and we can't have a moving target.
8 I need to know what's going to be classified next Tuesday.

9 Mr. Wells made the assertion that the OCAs don't know
10 everything about the facts of our case. A fact is classified
11 or it is not classified. Case theory does not impact that.

12 As for the notion that somehow producing guidance
13 would be onerous, the United States government,
14 representatives of the United States government do not get to
15 pick and choose which executive orders and which regulations
16 they are going to abide by.

17 The Executive Order 13526, Section 2.2 and 32 CFR
18 Section 2001 contain mandatory language. It is not
19 discretionary whether or not classification guides are
20 produced. And there is explicit criteria for what must be
21 contained in the classification guide.

22 In CFR -- in the CFR under Section B, classification
23 guides shall, mandatory, at a minimum contain -- at a minimum

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1 identify the subject matter -- material of the classification
2 guide, identify the original classification authority by name
3 and position or personal identifier.

4 To date, we do not know who the OCA is. I don't need
5 their name, but I would like a personal identifier.

6 Identify an agency, point of contact, or points of
7 contact for questions regarding the classification guide.
8 Provide the date of issuance or last review. State precisely
9 the elements of information to be protected. State which
10 classification level applies to each element of information,
11 and when useful, specify the elements of information that are
12 unclassified. State, when applicable, special handling
13 caveats. State a concise reason for classification which, at
14 a minimum, cites to applicable classification category or
15 categories in Section 1.4 of the order, citing back to the
16 executive order, which lists specified reasons for
17 classification.

18 It is not willy-nilly. It's not because someone feels
19 like on Tuesday the defense can't say something that's in a
20 D.C. Circuit opinion.

21 And, finally, prescribe a specific date or event for
22 declassification.

23 The prosecution, the government, the OCA, they're not

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1 above the law. They don't get to choose not to comply with
2 this.

3 My colleague intimated that the defense should just
4 file everything Secret and then wait for someone to review it
5 and make it public. I'm sure many of us have visited the
6 public-facing website. To say that it's dilatory would be
7 kind. Often years pass before something is published, if it
8 is ever published.

9 Mr. al Nashiri has a right to a public trial, and the
10 American people have a First Amendment right to observe that
11 trial and be aware of the prosecution that is being undertaken
12 in their name.

13 Finally, I think I just need to make a really
14 commonsense point. By not knowing what is classified, by
15 being left to guess, I am endangering national security. The
16 prosecution is endangering national security. We need
17 guidance to ensure that our actual nation's secrets are
18 protected.

19 Pending any questions from the commission, that
20 concludes my presentation.

21 MJ [COL ACOSTA]: All right. I have none. Thank you.

22 All right. We're going to take a -- oh, Mr. Wells,
23 you had something?

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1 MATC [MR. WELLS]: Nothing further, sir.

2 MJ [COL ACOSTA]: Are you sure? Just making sure.

3 MATC [MR. WELLS]: Yes, Your Honor.

4 MJ [COL ACOSTA]: Is there something else you wanted to
5 bring up?

6 MATC [MR. WELLS]: No, sir.

7 MJ [COL ACOSTA]: Okay. I just didn't want to cut you off
8 if you had something you wanted to bring up before I recess.
9 We're going to take a brief recess before we go into the next
10 topic.

11 All right. We're going to take a 20-minute recess.
12 The commission is in recess.

13 [The R.M.C. 803 session recessed at 1001, 09 December 2021.]

14 [The R.M.C. 803 session was called to order at 1022,
15 09 December 2021.]

16 MJ [COL ACOSTA]: The commission is called to order.

17 Government, all parties present as before?

18 TC [MR. MILLER]: Yes, Your Honor.

19 MJ [COL ACOSTA]: Same with defense?

20 LDC [MR. NATALE]: Yes, Your Honor.

21 MJ [COL ACOSTA]: All right. Government, you requested
22 that we take up the issue of potentially the standing to argue
23 the -- the 437 issue of the defense; is that correct?

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1 TC [MR. MILLER]: That is correct, Your Honor.

2 MJ [COL ACOSTA]: Is it your position, largely based upon
3 standing, is it -- and whether or not the Fourth Amendment
4 applies at all or -- because the standing cases -- and you can
5 approach. You can give me your position. Why don't I let
6 you -- let you start and then I'll follow up.

7 TC [MR. MILLER]: Well ----

8 MJ [COL ACOSTA]: And I know that you're stating -- you're
9 stating you largely -- well, you pointed to that Fifth Circuit
10 case that was referring to the -- an accused in the case has
11 the obligation to prove that they have standing to challenge
12 a search.

13 TC [MR. MILLER]: Correct. The -- initially, the whole
14 notion of standing is one, I think as the court's recognized,
15 is one that must be determined by the court prior to taking
16 evidence on a motion to suppress. Once that standing is
17 established, the burden is -- shifts to the government to
18 prove that the search was otherwise lawful.

19 In this particular case -- and generally, the standing
20 is not an issue. You know, we searched Joe's house. We
21 searched Mary's car. There was a search of a person on the
22 street. So the aggrieved party, the evidence was taken from
23 them or something over which they had a possessory interest.

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1 MJ [COL ACOSTA]: And that's what most of the case is
2 about standing talk about that are in are in our American
3 courts.

4 TC [MR. MILLER]: Correct.

5 MJ [COL ACOSTA]: They're about the ones that address
6 standing are generally Joe was riding in Mike's car. Mike's
7 car got searched. Joe didn't consent. But it's -- he can't
8 challenge Mike's right to not be searched ----

9 TC [MR. MILLER]: Correct.

10 MJ [COL ACOSTA]: ---- right?

11 TC [MR. MILLER]: But in this particular case, we have a
12 Supreme Court precedent I think that deals directly with the
13 whole issue of standing and whether or not an individual who
14 is a noncitizen alien outside of the United States who is, for
15 the lack of a better term, aggrieved by a search or believes
16 he was aggrieved by a search.

17 The government has cited United States v.
18 Verdugo-Urquidez -- I'll just call it Verdugo -- in which
19 the ----

20 MJ [COL ACOSTA]: The Mexico house search.

21 TC [MR. MILLER]: Correct, in which the DEA, in
22 conjunction with the Mexican authorities, conducted a search
23 of Verdugo on Mexican soil, grabbed some documentary evidence

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1 which they believed was indicative of narcotics trafficking
2 related to the murder of DEA Agent Enrique Camarena.

3 The District Court of the Ninth Circuit initially
4 suppressed that evidence but the Supreme Court noting that the
5 Fourth Amendment has never been held to apply outside the
6 territorial jurisdiction of the United States, and
7 particularly where that individual is an alien. It says:
8 Aliens receive constitutional protections only when they come
9 within the territory of the United States and develop
10 substantial connections with this country.

11 I don't think it's disputed in this particular case
12 that the accused has never been inside the United States, does
13 not have substantial contacts, and that the search did not
14 occur within the territory of the United States and instead
15 occurred here at Guantanamo Bay.

16 The Verdugo precedent has also been interpreted by
17 other circuits, particularly the Second, which noted that,
18 again, the Fourth Amendment protections don't apply to such
19 individuals, although they did expand it as far as searches
20 outside the United States where the person who was subject of
21 the search or whom the evidence is to be used against is a
22 United States citizen.

23 Again, citizenship and substantial contacts to the

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1 United States dictates whether those particular protections
2 are available to the individual. Here, the nonresident alien,
3 the accused, doesn't fall within that particular exception
4 either.

5 The notion that, I imagine, there may be some argument
6 that the base here is, although not in United States
7 territory, we do have de facto control over it has been
8 rejected in other contexts. Some of the D.C. Circuit Court
9 cases that are cited in the government's brief, as well as
10 Congress and the Detainee Treatment Act of 2005, and the
11 Immigration and National -- Nationality Act, which is also
12 cited in the government's brief.

13 I would also point out for the court that no federal
14 court sits here, right? Can't issue a warrant to search and
15 the individuals here on the base are not subject to the power
16 of the magistrate, or federal magistrate, to issue a
17 particular warrant which was something that was pointed -- has
18 been pointed out both in the Verdugo case, even by the
19 Justices in dissent, and as well as the appellate courts which
20 have decided it.

21 I would also point out that this has major
22 implications just for U.S. interests generally. The whole
23 notion that the Fourth Amendment would apply to nonresident

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1 aliens to searches outside the United States would certainly
2 be unique and a step that no court has been willing to take.
3 That would be our standing.

4 Unless he can fall -- establish that somehow he falls
5 within some exception or within the protections, I don't think
6 we even take evidence on this particular matter.

7 MJ [COL ACOSTA]: Okay. I'm going to ask you a question
8 when I'm done with him about that issue, about whether or
9 not -- on the prudence of taking evidence on the issue as soon
10 as I hear from the defense, okay?

11 TC [MR. MILLER]: Thank you, Your Honor.

12 MJ [COL ACOSTA]: All right.

13 DDC [CAPT MIZER]: Good morning, Judge.

14 MJ [COL ACOSTA]: Good morning.

15 DDC [CAPT MIZER]: Mr. Miller is certainly correct that
16 when Verdugo-Urquidez was decided in the late '80s, that the
17 Supreme Court was advocating a citizenship and substantial
18 context test.

19 But the case that he doesn't mention is Boumediene,
20 Judge, which in 2008 harmonized, if you will, both the
21 Eisentrager decision, the post-World War II Supreme Court case
22 along those same lines, saying that the Germans who had been
23 captured after the armistice with Germany fighting alongside

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1 the Imperial Japanese Army in China and, therefore,
2 unprivileged enemy belligerents, because they were no longer
3 at war, didn't have due process rights because they were
4 outside of the United States and didn't have those substantial
5 contexts.

6 Both of those decisions harmonized, I think is
7 probably the way that the Supreme Court would prefer to say
8 it, but implicitly overruled has been suggested by some court
9 opinions, and I think the D.C. Circuit in the Ali decision
10 which we've cited in our pleadings adopts that impractical and
11 anomalous standard from Boumediene.

12 Mr. Miller mentions the Detainee Treatment Act of
13 2005, Judge. I mean, that was specifically overruled in
14 Boumediene, the habeas corpus provisions, because this is, in
15 fact, de facto United States sovereign territory according to
16 the Supreme Court.

17 It is within the special maritime jurisdiction of the
18 United States. Judge, I know that it's not lost on you that
19 the former base commander was prosecuted in Florida for
20 obstruction of justice that occurred here.

21 It's not 2002 here anymore, Judge. You know, we are
22 here because an administration made the determination that
23 this was the legal equivalent of outer space, I think is the

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1 famous quote. That's not true. A lot has happened since
2 then. 2006, the Supreme Court decided Hamdi. You have Rasul
3 in 2004, Boumediene in 2008.

4 And right now, pending before the D.C. Circuit,
5 en banc on one question, Judge, is whether or not the due
6 process clause of the United States applies to another name
7 that you're going to be familiar with, al Hilah. The court is
8 sitting there en banc, wanting an answer to that question, and
9 that one is very short. You don't need an argument or briefs
10 if what Mr. Miller said about Verdugo-Urquidez is still the
11 law.

12 Now, in his defense, one of the cases that he cited is
13 the panel decision that has now been vacated by the en banc
14 court which adopts this very argument that has been presented
15 to you. I submit to you that after Boumediene it isn't the
16 law. The decision that they cite has been vacated. The Ali
17 decision hasn't been vacated, which applies Boumediene to --
18 in the habeas context there.

19 Judge, it simply cannot be the case that in a
20 territory that is situated as this naval base, where applying
21 Boumediene -- no one is speaking Spanish here. We're not
22 buying whatever the Cuban currency is at this point. We don't
23 have Cuban juries sitting over here, which is what the insular

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1 cases referenced in Boumediene are talking about, it being
2 impractical and anomalous to enforce our constitutional
3 rights.

4 And that's what is at issue in Verdugo, Judge. I
5 mean, if you look at, Judge ----

6 MJ [COL ACOSTA]: Right. Their talk there was -- and I
7 believe the -- the Justice writing the opinion was that -- was
8 that Kennedy? -- that wrote and said the issue is the -- the
9 ability to contact magistrates and get warrants and judges for
10 that, correct?

11 DDC [CAPT MIZER]: Yes, Judge. That's right. And you're
12 looking at 494 U.S. 279 there. And you can see why the DEA
13 trying to get a search warrant for a house in Mexico is miles
14 away from where we are in this case, which is simply either
15 getting a military magistrate in a military proceeding to
16 issue or coming to Your Honor or one of your predecessors
17 in -- in this process.

18 The military commissions, Judge, have been going on
19 since 2002 in one iteration or another. There was judicial
20 process. They blew past it. And again, this is the special
21 maritime jurisdiction of the United States.

22 If Mr. Natale goes and kills someone, God forbid, the
23 U.S. attorneys, like Mr. Miller, aren't going to throw their

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1 hands up and say there's nothing that we can do about it.
2 We're beyond the -- both the statute and the American
3 Constitution.

4 At the same -- by the same token, I mean, if they want
5 to get a warrant from Mr. Natale, or in this case a buccal
6 swab, they're going to find a way to do it. They're not just
7 going to go hold Mr. Natale down and take it. I guarantee it.

8 And so I agree with Mr. Miller that this is an issue
9 of great importance. It's one that, with respect, the
10 military judges of the commissions, like Colonel Pohl, have
11 kicked down the road for some time. And it's not just them,
12 Judge. The D.C. Circuit has kicked this can down the road and
13 appears finally about -- about to give us some much-needed
14 guidance as to what the law here is.

15 But we believe, Judge, that there is standing. We're
16 not talking about, as you pointed out, you know, my friend's
17 car that I was sitting in and you went into the glove
18 compartment. We're talking about -- and this will be the last
19 point -- I mean, one of the most sacrosanct pieces of the
20 Fourth Amendment. We're not talking about a car or a glove
21 compartment. We're not talking about a house. We're talking
22 about a body.

23 And the right of an expectation, the reasonable

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1 expectation to privacy dating back to cases like Rochin v.
2 California which was holding someone down and forcing, you
3 know, heroin packets, I think it was, to expel through --
4 through vomiting in that case. And the Supreme Court was
5 shocked by -- by that process.

6 Judge, I think that the law would be equally offended
7 by not going through the warrant here. And we can talk about
8 the exception to the Fourth Amendment. But, Judge, I think
9 that you should hold that there's standing here, and at the
10 very least, let us proceed with taking the evidence. And
11 ultimately, if it's Your Honor's determination at some point
12 in the future that the Fourth Amendment doesn't apply here,
13 that will be an issue that we will have preserved and take up
14 for appeal, Judge.

15 MJ [COL ACOSTA]: Understood. Okay.

16 Government?

17 TC [MR. MILLER]: Just briefly, Your Honor. Verdugo says
18 what Verdugo says. And I would point out that as late as
19 yesterday in the Tenth Circuit in United States v. Muhtorov,
20 M-U-H-T-O-R-O-V, in the context of intercepts of aliens
21 overseas, the Tenth Circuit reinforced the vitality, the
22 continued vitality of Verdugo, citing that somebody in that
23 position, an alien outside the country, does not have the

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1 right to Fourth Amendment protections.

2 As far as Boumediene is concerned, it was related
3 simply to it, and the court took great pains to indicate that
4 it only applies to the limited situation before it, and that
5 it was not extending ----

6 MJ [COL ACOSTA]: For habeas, correct?

7 TC [MR. MILLER]: ---- it beyond -- excuse me?

8 MJ [COL ACOSTA]: For habeas?

9 TC [MR. MILLER]: Yes. And lastly, the extension of
10 Fourth Amendment rights to aliens held in detention camps
11 overseas would be an extraordinary, an extraordinary stretch
12 of the Fourth Amendment, especially in light of the authority
13 which the government has provided in its brief.

14 But other than that, Your Honor ----

15 MJ [COL ACOSTA]: Understood. And this is where I get to
16 the pendency of a potential ruling coming from the
17 D.C. Circuit and whether or not I should take the evidence so
18 that I have it in order to make a decision should they decide
19 that due process rights do apply. Would it not be efficient
20 to hear the evidence regarding -- regarding it and then make a
21 decision, as Captain Mizer suggested and as -- as I think
22 prior to yesterday when you were like -- when you suggested
23 maybe we shouldn't even proceed with the hearing. And I

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1 understand that was in your brief as well, that there is no --
2 that there is no Fourth Amendment right to litigate, don't --
3 don't allow it. Should I not hear the evidence so that I have
4 it in order to make a decision should one need to be made on
5 that issue?

6 TC [MR. MILLER]: Well, the court can do it out of an
7 abundance of caution. The testimony will be short. I just
8 wanted to raise the issue because the government feels
9 strongly about this extension of the Fourth Amendment to the
10 detainees here ----

11 MJ [COL ACOSTA]: Understood.

12 TC [MR. MILLER]: ---- at Guantanamo in this particular
13 situation. But we'll be ready, stand ready on Monday, Your
14 Honor ----

15 MJ [COL ACOSTA]: Understood. Thank you.

16 TC [MR. MILLER]: ---- to put on the evidence as
17 necessary.

18 MJ [COL ACOSTA]: Thank you. I'll tell you this. I'm
19 going to hold the hearing. By holding the hearing, I'm not
20 stating that the Fourth Amendment applies. I'm going to hear
21 evidence. I have the briefings on that. I think that's
22 really a matter of law. I don't think you're going to be
23 briefing me with any particular -- I don't think I'm going to

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1 be receiving evidence on that issue tomorrow. I'm going to
2 receive evidence on the collection, et cetera.

3 But I'm not implying, suggesting, or forecasting a
4 ruling that the Fourth Amendment applies by holding this
5 evidentiary hearing on Monday.

6 TC [MR. MILLER]: That's certainly understood by the
7 government. Thank you, Your Honor.

8 MJ [COL ACOSTA]: Yeah, I just want to make sure that that
9 is clear to everybody.

10 TC [MR. MILLER]: Thank you, sir.

11 MJ [COL ACOSTA]: Thank you. All right.

12 The next issue I think I wanted to bring up was the
13 portions that we can argue in open session regarding motion to
14 compel witnesses for 354, the open portions for that. We'll
15 take that now.

16 The typical question, Defense, is to both parties, is
17 do both parties consent to my considering your motions, the
18 attachments thereto, and any evidence I receive, in addition
19 to your arguments, in resolving this motion?

20 DDC [CAPT MIZER]: Yes from the defense, Judge.

21 TC [MR. MILLER]: And yes from the government. Thank you,
22 Your Honor.

23 MJ [COL ACOSTA]: Defense, do you have any evidence to

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1 present?

2 DDC [CAPT MIZER]: Other than ----

3 MJ [COL ACOSTA]: Any additional evidence?

4 DDC [CAPT MIZER]: No, Judge, other than what's attached
5 to the pleadings.

6 MJ [COL ACOSTA]: All right. Thank you.

7 Government, any evidence to present other than the
8 pleadings?

9 TC [MR. MILLER]: No, Your Honor.

10 MJ [COL ACOSTA]: Go ahead, defense.

11 DDC [CAPT MIZER]: Judge, if I can briefly pick up where
12 you left off before Mr. Miller and I had our exchange on
13 constitutional law. I agree with Your Honor about some of the
14 big blocks that need to be moved, and this is one of those big
15 blocks, the destruction of the tapes. We would submit that
16 the outrageous government misconduct motion is one of those
17 blocks, obviously 166, which the court has mentioned, and then
18 suppression of the letterhead memorandum statement.

19 And for Your Honor's purposes, and for my colleagues
20 across the aisle, we're going to endeavor to have that filed
21 in January. I think December is probably too ambitious given
22 where we are and the time that we have left. But I agree with
23 Mr. Wells that that should keep us plenty occupied in 2022

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1 and likely into 2023.

2 With respect to what I'm here for, Judge, 354C, and I
3 will beg the court's indulgence to read a little bit more than
4 I normally would, trying to keep this on the rails of the
5 agreement that we made yesterday in the closed session.

6 MJ [COL ACOSTA]: Yes.

7 DDC [CAPT MIZER]: As the court is aware, on April 6,
8 2017, Judge Spath issued 354G, determining that four witnesses
9 were relevant and necessary for the merits of the defense's
10 argument in 354 pursuant to R.M.C. 703(b). As you're aware,
11 that that ruling is one of the rulings that was vacated by
12 Nashiri III.

13 At the time that Judge Spath issued the ruling, the
14 names were classified, but they have since been declassified.
15 And those names are Mr. John Rizzo, Mr. Jose Rodriguez,
16 Mr. James -- or, excuse me, Dr. James Mitchell, and Dr. Bruce
17 Jessen.

18 As you know, the case then went into abatement. And
19 while it was in abatement, and as part of her confirmation
20 hearings before the Senate, Ms. Gina Haspel declassified her
21 involvement in the destruction of the 92 interrogation tapes
22 that are at issue in AE 354. Specifically, as she testified
23 before the Senate, it was she who was one of the proponents

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1 for destroying the tapes, and she drafted a cable that Jose
2 Rodriguez sent to the field ordering the destruction of the
3 tapes.

4 With the death of Mr. Rizzo in August and new facts,
5 the defense is again before the commission renewing the now
6 vacated order, or the request for the vacated order, for four
7 witnesses. Those are Mr. Rodriguez, Dr. Mitchell, Ms. Haspel,
8 and a fourth witness who is identified by an alphanumeric
9 identifier. Since I'm unclear whether that alphanumeric
10 identifier is classified, I won't say it here.

11 Judge, if I can begin with the law underlying 354
12 before I address the facts, the defense intends to make a due
13 process argument pursuant to Arizona v. Youngblood, which
14 requires a remedy when the government acts in bad faith in
15 failing to preserve potentially useful -- and that's the quote
16 from the case -- potentially useful evidence.

17 But even more broadly than the due process argument,
18 Judge, the Secretary of Defense has promulgated directly from
19 our familiar Manual for Courts-Martial, R.M.C. 703(f)(2),
20 which states that if lost or destroyed evidence is of such
21 central importance to an issue, then it is essential to a fair
22 trial. And if there's no adequate substitute for such
23 evidence, the military judge may grant a continuance or other

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1 relief to produce it, and if it can't be produced, it shall --
2 an emphasis on shall -- abate the proceedings.

3 Judge, moments ago I talked to you about the
4 D.C. Circuit's abstention and the issues that that has caused
5 in these commissions in almost two decades of litigation. But
6 fortunately, this is not one area where you have to speculate
7 as to what the D.C. Circuit will do. And we've cited
8 In re Baluchi, which is 954 F.3d, 363. It's a 2020
9 D.C. Circuit opinion, and it adopts the three-part test of
10 Simmermacher -- Simmermacher, excuse me, which both parties
11 have -- have addressed.

12 Baluchi, Judge, was a petition for writ of mandamus,
13 and the issue there, and it's also been litigated in this
14 case, was the destruction of a black site. The government, as
15 I recall -- and this fact isn't particularly important -- they
16 went ex parte to the judge and got an order that they could
17 destroy a black site and then came back, and the issue in
18 Baluchi was whether or not the government's photographic
19 documentation of that black site was an adequate substitute.

20 And so you have the D.C. Circuit adopting both
21 R.M.C. 703(f)(2) and Simmermacher, the three-part test that I
22 just went through, which is evidence of central importance to
23 an issue. It's essential to a fair trial, there's no adequate

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1 substitute, and the defense is not at fault. I don't think
2 that that's at issue here.

3 And then, importantly, in the decision the court
4 adopted the CAAF's holding that the same three-factor test
5 applies regardless of whether the evidence is unavailable due
6 to inadvertence or malfeasance.

7 I think the last point that I would make with Baluchi,
8 Judge, is it's under the mandamus standard, which I'm sure
9 that you're well aware is very difficult to achieve, and so
10 you always need to keep that lens when you're looking at the
11 case. It's not a case on direct appeal where there would be
12 the abuse of discretion standard. The case there is the
13 defendant or petitioner must be indisputably entitled to
14 relief, and the court denied the mandamus petition in that
15 case.

16 Judge, we don't believe that there is an adequate
17 substitute here. And I would offer two examples that you may
18 be familiar with. The first is from a press release from the
19 Minneapolis Police Department in May of 2020, which was "Man
20 Dies After Medical Incident During Police Interaction."
21 Judge, I don't need to show you an image of Derek Chauvin and
22 George Floyd to get at what is being described in that press
23 release.

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1 The point here, Judge, is the government is saying
2 that there are adequate substitutes because they've written
3 down what was -- what took place in those tapes and you can
4 see how immediately a cable from an interested party may not
5 accurately capture.

6 Now, certainly, Judge, I think the Minneapolis Police
7 Department would say that that was an interaction with police
8 and that Mr. Floyd died of a medical incident after that, but
9 I think most people would agree that that accurately doesn't
10 capture what took place on that street.

11 And if that were the last word, if that -- if those --
12 if that video hadn't been shot by that 17-year-old in that
13 case, I would submit to you that Derek Chauvin would still be
14 on patrol right now in a Minneapolis police officer's uniform.

15 And if that one is too -- if you like football, Judge,
16 there's -- I offer another example. There, you may remember
17 the Ravens winning the Super Bowl in 2011-2012. A very
18 promising running back named Ray Rice was initially suspended
19 for three days for assaulting his girlfriend, and it wasn't
20 until later the video of that assault in the Atlantic City
21 casino came out, and Ray Rice never played football again.

22 I mean, that's the power of video images and being
23 able to see it. It's one of the reasons, Judge, when I'm

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1 talking to appellate advocates, that we're now putting photos
2 actually into appellate briefings because there simply is no
3 way often to capture that seminal piece of evidence.

4 And that's really what this is. I mean, that's what
5 was destroyed is a piece of evidence that could both go to
6 the suppression motion that I discussed and then ultimately,
7 the broad mitigation case that we have.

8 Mr. Miller yesterday gave you a preview of the
9 prosecution's argument that they're going to make in that
10 suppression case, which is, you know, a voluntary chat between
11 the parties, and our preview is, you know, Mr. Nashiri is not
12 told where he's going, he's taken back to Echo II, which we
13 know was a black site, and inside that door are four more
14 Americans. And as a result of previous treatment ----

15 TC [MR. MILLER]: Judge, I thought we were going to argue
16 today what witnesses to call. Aren't we moving a little far
17 afield? So my ----

18 MJ [COL ACOSTA]: Your objection is?

19 TC [MR. MILLER]: My objection is relevance to what we're
20 deciding here today.

21 MJ [COL ACOSTA]: All right.

22 DDC [CAPT MIZER]: Judge, I'm going to get there. I'm
23 pretty close. But I think I can't say what they're relevant

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1 to if I don't lay out the legal framework first.

2 MJ [COL ACOSTA]: I'll allow him to continue his argument.

3 DDC [CAPT MIZER]: And ultimately, Judge -- and this is
4 the last legal point that I would make -- with respect to the
5 mitigation case, Your Honor is well aware of the four gates in
6 the capital court-martial process and that any one of those
7 four gates, the members could have had the opportunity to
8 review this evidence and -- and vote for life should this get
9 to a penalty phase.

10 But all of that begins with the witnesses and the
11 defense building its record, Judge. We believe that we've
12 obviously established the relevance of Mr. Mitchell and
13 Mr. Rodriguez. Spath's ruling -- Judge Spath's ruling was not
14 inaccurate on that.

15 Mr. Mitchell -- or Dr. Mitchell is present at the
16 sites. He can offer testimony as to what was taking place at
17 those sites, what those tapes would have displayed.
18 Mr. Rodriguez is similarly familiar with the tapes, was
19 concerned what they would do to both the United States, the
20 officers of the Central Intelligence Agency, and specifically
21 focused on the gravity. I mean, they're a year out of
22 Abu Ghraib when they destroy the tapes, and they're afraid
23 that what they have in their hands is the CIA's version of

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1 Abu Ghraib, and so they go and -- and destroy those tapes.

2 And that's relevant, Judge, to ultimately the remedy
3 that we're going to get, whether we establish a due process
4 violation and then also a 703 violation.

5 With respect to Ms. Haspel, Judge, we believe that her
6 testimony is relevant. And again, I'm referring to her
7 testimony before the Select Committee on Intelligence of the
8 Senate, which was May 9th, 2018. And I'll just give three
9 vignettes, Judge, from page 33 where Ms. Haspel is being
10 questioned by Senator Angus King from Maine.

11 And he says: I just want to understand that with
12 regard to the cable, Mr. Rodriguez said he asked you to ask
13 two questions of the lawyers the day before the drafting of
14 the cable. One was, was it legal to destroy the tapes?
15 Second, did he have the authority. Did you mention to those
16 lawyers the intention to issue a cable that would destroy the
17 tapes when you asked those two questions or were those the
18 only two questions you asked?

19 And Ms. Haspel responds: No, Senator, I explained
20 that Mr. Rodriguez wanted to get resolution on the issue and
21 that he was planning to have a conversation with the Director
22 of the CIA about it and needed to have validation of those two
23 points.

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1 He then asked: You drafted the cable?

2 And she says: Yes, at his request.

3 And so these are the principles, both on the ground
4 involved in Dr. Mitchell's case, and then the architects, if
5 you will, with respect to Jose Rodriguez and Ms. Haspel of --
6 of the destruction, the order to destroy the tapes.

7 Judge, also on page 33 Senator King says -- in
8 May 2005, Mr. Rizzo reports reading -- quoting Mr. Rizzo: I
9 told Jose and his chief of staff that was you; is that
10 correct? And then he goes back to quoting Mr. Rizzo: I can't
11 recall if I talked to them separately or together. They were
12 crestfallen because they were now on notice that DNI, two
13 successive White House counsels, and the vice president's top
14 lawyer had weighed in strongly against destroying the tapes.

15 Again, we believe that that is relevant testimony that
16 needs to be on the record in this case.

17 And then, Judge, finally, the third vignette also from
18 that same page is quoting from Mr. Morell's report which is
19 also declassified and part of the hearing transcript there.
20 It says, quote: The record is clear that Mr. Rodriguez, and I
21 presume you, was aware that two White House Counsels, the
22 counsel of the vice president, the DNI, the DCIA, the HPCI
23 ranking member, had either expressed opposition or reservation

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1 about the destruction of the tapes.

2 And Ms. Haspel responds: Senator, I don't believe I
3 knew that entire list, but I knew there were some objections,
4 and that is why we were going back to the Director of the
5 Central Intelligence Agency.

6 Judge, this is obviously, as I said at the beginning,
7 a big component of this case. What those lawyers, going all
8 the way to the White House, were concerned about is that
9 eventually a defense lawyer would stand here before a judge
10 and talk about how the CIA had destroyed potentially
11 exculpatory or useful evidence in a criminal case. And
12 Ms. Haspel and Jose Rodriguez decided that they were going to
13 destroy those tapes.

14 And they may have had valid reasons in their mind to
15 do that, but we need these witnesses to come in and testify as
16 to these facts, have these produced on the record. For an
17 issue that, Judge, in the event that there is a conviction in
18 this case, there is no sub-jurisdictional sentence. This is
19 something that's going to be reviewed probably for the next
20 couple of decades, and this is a huge component of the defense
21 case. We would ask that we be allowed to make that record.

22 And then, Judge, yesterday I also asked, you know,
23 with this issue of kind of the wobbling of the existence of

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1 tapes -- and if I could just make one final -- final point,
2 again from the -- the Moussaoui case, which is 591 F3d 263.
3 And again, we're talking about page 305.

4 And there the Fourth Circuit says: On October 25th,
5 2007, during the pendency of the current appeal, the
6 government sua sponte notified the court of the existence of
7 three recordings, two videotapes, and one short audiotape of
8 interviews of one of the ECWs. Again, this is in 2007,
9 they're notifying the Fourth Circuit of the existence of tapes
10 and an audio recording.

11 And then it goes on, Judge, on the same page: The
12 government also disclosed that it had learned of hundreds of
13 hours of videotapes of al Qaeda operative Abu Zubaydah that
14 had been destroyed in the fall of 2005, although Moussaoui had
15 sought access to Zubaydah prior to pleading guilty.

16 And then it skips down: The government also
17 discovered the existence of two tapes, Judge, of an al Qaeda
18 operative to whom Moussaoui had first sought access after
19 pleading guilty. The transcript of one videotape was
20 submitted ex parte to the court -- the court being the Fourth
21 Circuit -- along with a substitution for the witness's
22 testimony prepared for the sentencing proceeding. The second
23 videotape had not yet been relocated.

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1 That certainly suggests, Judge, that we're talking
2 about the same tapes. We're talking about them in the Fourth
3 Circuit's possession, or some variation of them, in 2007-2009.
4 And so I'm going to ask for the same commitment from the
5 government as yesterday, that these tapes don't exist.

6 I mean, because a reader of that would certainly
7 suggest -- and the other context here, Judge, is it's not
8 relevant to Moussaoui's case, because what was on the tapes
9 didn't relate to the 9/11 case, and so that's another clue as
10 to who they're talking about on two tapes. We know that there
11 were two tapes of Mr. Nashiri and 90 tapes. All of that
12 dovetails to then the Fourth Circuit looking at something
13 ex parte in camera in 2010.

14 Judge, at the end of the day I would -- it would be
15 great if there are tapes. We can get on with our job and put
16 those on and use them as we should have been. But if there
17 aren't tapes, there needs to be a remedy, and these are the
18 witnesses that we need to build that record, Judge ----

19 MJ [COL ACOSTA]: Before we even get to arguing about ----

20 DDC [CAPT MIZER]: That's right, Judge.

21 MJ [COL ACOSTA]: ---- what the remedy is, if there is
22 one, right?

23 DDC [CAPT MIZER]: I'm sorry to the court and my colleague

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1 for having to get to the law in that manner, but I think you
2 have to set the table before we can say why these witnesses,
3 who are very important, no doubt, but they are relevant. This
4 case is important. And we would ask the court to order their
5 production.

6 MJ [COL ACOSTA]: All right. Thank you.

7 DDC [CAPT MIZER]: Thank you, Judge.

8 MJ [COL ACOSTA]: Mr. Miller?

9 TC [MR. MILLER]: Thank you, Your Honor.

10 MJ [COL ACOSTA]: And just for the -- before we start,
11 Mitchell and Rodriguez had been previously ordered by my
12 predecessor ----

13 TC [MR. MILLER]: That is correct.

14 MJ [COL ACOSTA]: ---- in this case. And now we're asking
15 for -- the defense is asking for two additional people, one of
16 which we can -- that we're going to discuss here as well,
17 so ----

18 TC [MR. MILLER]: Right. And I'll try to walk the line
19 that counsel offered, as far as things that we're going to
20 talk about in the closed session.

21 MJ [COL ACOSTA]: Absolutely.

22 TC [MR. MILLER]: I think, Your Honor, for the purposes of
23 this discrete issue, which is -- what I'm assuming is is that

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1 the court is going to make a determination as to what
2 witnesses the defense will be allowed to call.

3 354, AE 354 and 354C sort of intersect for the
4 purposes of the decision the court must make, in that what
5 relief is sought in 354 is going to directly impact,
6 obviously, what your ruling is here in 354C.

7 In AE 354, it addresses whether or not an abatement is
8 appropriate, and it involves an application of
9 R.M.C. 703(f)(2), which states, as to unavailable evidence,
10 that a party is not entitled to production of evidence that is
11 destroyed, lost, or otherwise not subject to compulsory
12 process. However, if such evidence is of such central
13 importance to an issue, that is essential to a fair trial, and
14 there is not adequate substitute for such evidence, the
15 military judge may grant a continuance or other relief in
16 order to attempt to produce the evidence.

17 And subsection (B) continues that paragraph (A) cannot
18 or does not result in the production of the evidence, you can
19 grant a continuance or other relief or abate the proceedings.

20 So it sets forth in fairly straightforward manner the
21 findings that you're going to have to make in this matter.

22 MJ [COL ACOSTA]: Am I limited to -- well, this is really
23 for the hearing on the relief.

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1 TC [MR. MILLER]: Right.

2 MJ [COL ACOSTA]: I'm not going to -- the question I was
3 about to ask was related to that, so I will hold that.

4 TC [MR. MILLER]: Therefore, I think, for the defense to
5 obtain the relief, it's going to have to show Your Honor,
6 first, that the lost evidence was of such central importance
7 that it was essential. That's going to be the issue in 354.
8 Is there an adequate or no adequate substitute for the
9 destroyed or lost evidence? And was the loss or destruction
10 of the evidence not the fault of the requesting party? And I
11 think everybody agrees they're not at fault here. So that's
12 not -- that's not an issue. Everybody concedes that they
13 couldn't have stopped what happened, all right?

14 But the application of 703(f)(2) necessarily requires
15 a specific identification of the evidence that was lost or
16 destroyed. And why is that? Because absent such specific
17 evidence of what was on the tapes, 703 becomes a nonstarter,
18 because you can't make a determination of whether or not it
19 was central, or of central importance, unless you know what it
20 is that was destroyed.

21 This is going to require proof on their part of what
22 was on the 92 tapes, 90 of them of Abu Zubaydah, two of them
23 of Nashiri. Now, their motion repeatedly identifies the tapes

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1 generically as evidence of torture. That may or may not be
2 so. But that is only really the starting point.

3 So the first thing they're going to have to show this
4 court, and the witnesses that they call have to show, is that,
5 first, that there were EITs on the tapes, okay, or were they
6 blank? And I believe in the discovery that has been provided
7 to them and which we will discuss this afternoon, the evidence
8 is is that, at least as to the Nashiri tapes, they were blank,
9 right?

10 The Abu Zubaydah tapes, if there was EITs on them,
11 what was -- which EITs? And if there were specific EITs,
12 which sessions? You're going to need that sort of information
13 to make a determination of what, if anything, to do.

14 Now, clearly, R.M.C. 703(f)(2) only requires loss or
15 destruction of the evidence, or the unavailability of it to
16 compulsory process. It does not -- it does not -- and this is
17 very important, Your Honor, does not require intentional
18 action on behalf of the government, improper motivation on
19 behalf of the government.

20 As written, mere negligence satisfies the prayer or a
21 request of relief for the defendant. I put the evidence in my
22 basement, the basement flooded. You get held liable. I mean,
23 the government is liable for that loss of evidence. I put it

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1 in my car and the car was stolen. It's now lost. All right.
2 That's treated under 703 the same way as if I had put it in a
3 55-gallon drum, poured gasoline on it, and set it ablaze.

4 There's no fault here. It's much like Brady where the
5 Court of Appeals has said to prosecutors before, I know your
6 intentions were good. The problem is it was Brady material
7 and you didn't turn it over. We're going to have to come up
8 with a remedy.

9 So in that sense, you never get to the Arizona v.
10 Youngblood issue because you are provided with an avenue to
11 grant them relief that is broader and gives them greater
12 protections than the minimal ones set in Arizona v.
13 Youngblood. So we never get to that issue. It is a
14 constitutional avoidance, much like what the government argued
15 before the Court of Appeals for the D.C. Circuit.

16 Clearly, 703(f)(2) does not look to punish the
17 government. It's not saying here Jose Rodriguez is a bad
18 person, Dr. Mitchell is a bad person, and we're going to
19 punish them. That's not what they're doing here. What it
20 does is it affords the defense a remedy in the case of lost or
21 destroyed evidence.

22 The government does not dispute that there are -- that
23 there were various sessions involving Nashiri and AZ, Abu

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1 Zubaydah, where EITs were applied and they were videotaped.
2 The issue, however, is what was on those tapes at the time of
3 their destruction.

4 Any witness that the defense calls, the government
5 believes, and the court should find, should speak to what was
6 on those tapes. Either I was there when the activity was
7 recorded or I later reviewed those tapes and this was what was
8 on them.

9 And we'll talk a little bit, I think, more this
10 afternoon about there is one witness who I'll just refer to
11 right now as Mr. Doe. He's probably the only person who's
12 ever actually looked at the tapes from beginning to end. That
13 is the type of witness we believe is relevant to the
14 consideration of this particular motion.

15 So what will the court have to determine in the 352 or
16 the 354 motion? You're going to have to determine, Your
17 Honor, what was on the tapes, was it central, is there a
18 substitute, and if not, what do I then do?

19 Jose Rodriguez was not present during the EITs, he was
20 not present during the taping of them, and he did not review
21 them. He can offer this court absolutely nothing as to what
22 was on those tapes. There is no dispute that the tapes were
23 destroyed, and there is no dispute that he was responsible for

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1 their destruction.

2 There is no dispute that there are no tapes.

3 If Captain Mizer is asking me, Mr. Miller, are there still
4 some tapes out there, there are no tapes out there. Those
5 were the tapes, and they were destroyed.

6 MJ [COL ACOSTA]: So the references of the Moussaoui
7 ruling that he was referring to -- that Captain Mizer was
8 referring to about tapes ----

9 TC [MR. MILLER]: I ----

10 MJ [COL ACOSTA]: ---- are not tapes that are related to
11 this case. They're not the tapes of the accused or of Abu
12 Zubaydah?

13 TC [MR. MILLER]: I -- we have no other tapes other than
14 those that have been destroyed.

15 MJ [COL ACOSTA]: That's not the question that I asked.

16 TC [MR. MILLER]: All right. What's the question?

17 MJ [COL ACOSTA]: The question that I asked was, are you
18 saying that the tapes referred to ----

19 TC [MR. MILLER]: I can't speak to Moussaoui.

20 MJ [COL ACOSTA]: ---- in the Moussaoui case, they're not
21 them?

22 You have -- have you checked? Have you -- has
23 there -- has the government ever gone and said what are those

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1 that they're referring to and do they still exist?

2 TC [MR. MILLER]: I -- no ----

3 MJ [COL ACOSTA]: Just a question.

4 TC [MR. MILLER]: ---- I don't think I have because I
5 don't -- I'd have to go back and look, Judge. It's -- I've
6 been concerned with this case ----

7 MJ [COL ACOSTA]: I understand.

8 TC [MR. MILLER]: ---- so ----

9 MJ [COL ACOSTA]: If there are tapes that are of this
10 accused, they are concerned about this case, right?

11 TC [MR. MILLER]: If I had the tapes of this, I'd turn
12 them over. The whole notion that we would hold these back
13 is -- I've always said is -- I don't want to say -- if I had
14 them, I'd give them.

15 MJ [COL ACOSTA]: Understood.

16 TC [MR. MILLER]: I don't have them. But anyway ----

17 MJ [COL ACOSTA]: So you're talking about Mr. Rodriguez
18 has no idea what was on the tapes ----

19 TC [MR. MILLER]: Right. On these ----

20 MJ [COL ACOSTA]: ---- but he did order their destruction.

21 TC [MR. MILLER]: No. And his motivation is really
22 irrelevant under 703. He could come in here, as Captain Mizer
23 anticipates he would testify, and consistent with what I think

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1 everybody knows, he would say this is what I did, all right?

2 That doesn't help you at all in making a decision
3 because you can't, under 703, impose a different remedy simply
4 because we don't like what Mr. Rodriguez did. You impose it
5 because it's of central importance to their case and there is
6 no adequate substitute for what was lost. That's what this
7 court is deciding.

8 We're not punishing Jose Rodriguez. We're not
9 punishing the government. We're not taking things away from
10 their case because we might not have liked what the CIA did in
11 this particular case. We're doing this because this is kind
12 of a remedy for the lost evidence.

13 Again, the same thing is true of Ms. Haspel. Again,
14 we can call her all day, but she's going to offer nothing
15 that's going to help you make a decision as to what remedy
16 should be imposed in 354.

17 And I would also point out -- Captain Mizer quoted
18 some of her testimony before Congress in an open hearing, and
19 I would just point out on page 30 of that hearing,
20 she indicated in response to a question by Senator Heinrich
21 where he asked: Do you think that a transcript that says the
22 detainee continued to scream or that the detainee appeared to
23 be drowning has the same gravity, the same reality as an

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1 actual video?

2 And Ms. Haspel says: Senator, I never saw the videos.

3 So she cannot offer this court anything of relevance.

4 Now, they may be able to use it for other -- they may want to

5 call these for other motions, but as to this particular

6 motion, her testimony we don't believe would be relevant.

7 As to Dr. Mitchell, after reviewing and speaking with

8 persons who are more familiar with him, we don't oppose to the

9 calling of him as a witness. It appears that he may be able

10 to offer the court evidence of what was on the tapes or he was

11 present when some of them may have been recorded. So we

12 withdraw any objection to the calling of him.

13 Pending any questions, Your Honor, that is the

14 government's remarks ----

15 MJ [COL ACOSTA]: All right.

16 TC [MR. MILLER]: ---- in this regard.

17 MJ [COL ACOSTA]: Thank you, Government. I don't have any

18 questions at this time.

19 Defense? Captain Mizer.

20 DDC [CAPT MIZER]: Judge, the government would essentially

21 eliminate R.M.C. 703. I mean, it's kind of hard to prove if

22 they destroyed the evidence exactly what's on the evidence.

23 And if that's our burden, I don't think that there would be

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1 703 cases like Simmermacher where the issue was what was in
2 the urinalysis that was destroyed before charges were filed in
3 that case.

4 Judge, we know generally what was on those tapes, and
5 it scared both Jose Rodriguez and Ms. Haspel. You know,
6 generally it reminded them of Abu Ghraib. And there were 90
7 tapes of Abu Zubaydah, two tapes of Mr. al Nashiri, and they
8 made the decision to destroy them, not because there wasn't
9 anything there that was going to damage the reputation of the
10 United States or the Central Intelligence Agency.

11 And so, Judge, we do believe that they can offer
12 relevant and material testimony as to exactly what it was,
13 whether or not they were reviewing cables, whether or not they
14 talked with Mr. Rizzo, whether they talked to Mr. Doe as -- as
15 my colleague mentions.

16 We know generally what was being recorded there, and
17 that was essentially very early on in the RDI program when, as
18 I understand it, it was Mr. al Nashiri and Abu Zubaydah in the
19 proto-RDI program when things were pretty bad, Judge,
20 according to the SSCI Report.

21 We're entitled to that evidence, Judge. Again,
22 Mr. Miller's right, there doesn't have to be a villain here.
23 But they've decided to proceed with a capital case. It's

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1 obviously relevant to a capital case to where eventually we
2 should be allowed to go before a jury and say do you have to
3 kill him too?

4 And I can't think of a more powerful piece of evidence
5 than those 92 tapes, and decisions were made, right or wrong,
6 to destroy those tapes, and ultimately we're going to be
7 seeking a remedy, whether it's abatement, dismissal of the
8 capital referral, below that.

9 But that begins with us building our record, Judge.
10 We think that these witnesses are relevant and material.
11 Judge Spath already found that Jose Rodriguez was. We think
12 that Ms. Haspel is as well.

13 And I look forward to speaking with Your Honor, unless
14 you have any questions, at the closed session about this as
15 well.

16 MJ [COL ACOSTA]: Right. My one question on the -- on the
17 individuals that we're talking about here is if, as the
18 government says, the individuals didn't see it, they don't --
19 they didn't see the tapes and they only know from others what
20 was on the tapes, why are they relevant to the fact that --
21 that's really, I think, what the -- why are they relevant for
22 the -- for the fact of the remedy when there's no dispute
23 tapes existed, and they -- well, however, the government seems

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1 to now dispute whether or not there was anything on the tapes
2 of your client -- or not now, but at least has raised the
3 issue of -- of whether or not there was actually any
4 recordings on the tapes.

5 DDC [CAPT MIZER]: Yes, Judge. And I think I would just
6 invite the court's attention back to the pleadings where --
7 and Mr. Rodriguez's book where he says things like there were
8 ugly visuals on those tapes and puts it in those types of
9 terms.

10 Judge, the only way to find out if they viewed the
11 tapes is to call them and talk with them on the witness stand
12 about how they knew and why were they so concerned, Judge.

13 I mean, I think it just is incredible to assert that
14 these two very senior CIA agents, CIA officials -- Judge, I
15 don't know what the proper language is ----

16 MJ [COL ACOSTA]: Well ----

17 DDC [CAPT MIZER]: ---- so concerned ----

18 MJ [COL ACOSTA]: ---- Mr. Rodriguez was the deputy ----

19 DDC [CAPT MIZER]: Of CTC, Judge.

20 MJ [COL ACOSTA]: Was he the deputy director ----

21 DDC [CAPT MIZER]: I think he was the director of ----

22 MJ [COL ACOSTA]: ---- of operations?

23 DDC [CAPT MIZER]: ---- of the Counterterrorism Center,

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1 Judge, and I could be wrong on that.

2 MJ [COL ACOSTA]: And her position was his chief of staff?

3 DDC [CAPT MIZER]: And she was his chief of staff, Judge.

4 And for them to be completely in the blind as to what
5 was on the tapes. And know that the Vice President, the White
6 House General Counsel, Ms. Myers at the time, you know, the
7 stack of individuals that I read to you in the open
8 transcript, and to -- and to risk what they risked over
9 nothing being on those tapes, Judge, just I -- that just isn't
10 credible, Judge.

11 And ultimately, look, we've got an obligation to prove
12 that to you, and the way that we do that is with witnesses.
13 We'd like to call three witnesses on this -- or, excuse me,
14 four, and present that testimony as to what they knew, how
15 they knew it. And that's going to be the best way that we can
16 present the picture, whether it's Nashiri. And again, we
17 believe that the Zubaydah tapes are relevant to this case as
18 well, and we can make that presentation on the merits.

19 But first, Judge, we've got to build our record, and
20 we think that these witnesses are relevant and can do that,
21 Judge.

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

23 Is there anything in the 319 series that we can take

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1 up here, or do we need to take all of that up in the closed
2 session?

3 ATC [LCDR SCHREIBER]: Your Honor, I think that most of
4 the material requested in the motion to compel discovery
5 update the 319II is unclassified. I do believe that can be
6 done.

7 The portions of 319HH, some of the witnesses in there
8 are classified, some are not. It may be easier to do that all
9 in closed session.

10 MJ [COL ACOSTA]: That was my intent. I apologize. I had
11 it right here. I have what I wanted to talk about right here,
12 which is 319II.

13 Defense, the portion -- and this is the discovery
14 issues, not the production of the witnesses, so go ahead.

15 DC [MS. CARMON]: Yes, sir. Good morning.

16 The litigation over the discovery relevant to our
17 challenge to the government's proffered hearsay statements has
18 been going on since 2014. And so I have reviewed the litany
19 of pleadings in 319, and in II attempted to distill what is
20 still left in dispute. And there are just several items. I
21 think most of them can be dispensed with rather quickly.

22 The first item that we have been seeking since at
23 least 2015 is an answer to the location or the status of the

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1 photographs that the Yemeni government used in asking for
2 identifications before the FBI was allowed to become involved
3 in the -- in the USS COLE investigation.

4 And I'm sure, as Your Honor is aware, the Yemeni
5 government began their investigation and interrogation of
6 suspects and witnesses in the days after the COLE bombing but
7 it was not until the end of November of that year, after
8 the -- there had been a negotiated memorandum of understanding
9 and guidelines to further the joint investigation between the
10 FBI and the Yemeni officials that the FBI was officially
11 allowed to become involved.

12 And we know from the discovery provided by the
13 government that in the interim, between when the Yemeni
14 government began their investigation -- and when I say Yemeni
15 government, I mean it to include both the Political Security
16 Organization, the PSO, and the Ministry of the Interior and
17 the law enforcement agencies therein. But -- but I will use
18 the word "government" to encompass all of those.

19 We know that they were showing witnesses photographs
20 of potential suspects and potential folks who were involved
21 before the FBI, again, was allowed to become involved and was
22 able to show their own photographs to these same witnesses.
23 We have asked where those photographs are, if the FBI ever

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1 took custody of them.

2 And this is certainly relevant to any sort of
3 reliability of an identification, any reliability of these
4 proffered hearsay identification statements, especially
5 because there's such a robust body of social science research
6 indicating that someone is much more likely to pick out a
7 photograph from a lineup or from a photo array, such as the
8 Adenbom book here that the FBI used, if they were shown a
9 photograph previously. And so in order to best combat those
10 identifications and to file any necessary motions and ask for
11 any necessary relief, we'd like a firm answer as to where
12 those photographs are.

13 I believe the last answer that we received, and I
14 think it was in 2015, indicated -- the government indicated
15 that they had no further information about the photographs.
16 And so if the FBI lost them, we need to know that. If the FBI
17 never had them, we need to know that.

18 And this is particularly important in order to craft
19 an ask for relief, if it be under R.M.C. 703(f)(2) and the
20 Simmermacher line of cases, or where we go in our motion from
21 there. And so we would just like a firm answer as to the
22 status of those photographs.

23 MJ [COL ACOSTA]: All right.

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1 DC [MS. CARMON]: Our second item deals with the, again,
2 Yemeni investigation that took place before the FBI was
3 allowed to get involved.

4 MJ [COL ACOSTA]: And this is the ----

5 DC [MS. CARMON]: They were taken ----

6 MJ [COL ACOSTA]: This is the questions that you say that
7 the Federal Bureau of Investigation gave to the Yemenis to
8 ask?

9 DC [MS. CARMON]: This was -- no, sir. These are the
10 statements that were taken by the Yemenis that were then
11 provided to the FBI agents before they did their own
12 investigation. And so when you read the FBI 302 forms which
13 detail the statements given by witness X, they all start with
14 some version of the witness was read their previous statement
15 and asked to affirm it or asked if those details remain true.

16 We have been provided three -- or, excuse me, four
17 different batches of statements taken in Arabic, and the
18 English translations of those, that were taken by the Yemeni
19 government. And because these batches have come in over a
20 litany of years and in different forms, we have one on SIPR,
21 which we asked in AE 319F be taken down to NIPR since all of
22 the rest of these batches of statements are on NIPR. And it's
23 unmarked, so it's not portion marked SECRET at all. But we

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1 wanted to make sure that we have all of the previous
2 statements.

3 And so in our conference e-mail we noted by Bates
4 number the batches of statements that we have received and
5 have asked the government to compare that to their audit to
6 make sure that we -- we have everything that we need. And so
7 I think that can be dispensed with fairly quickly.

8 MJ [COL ACOSTA]: Okay.

9 DC [MS. CARMON]: Items number 3 and 5 in II are very much
10 related. In 319GG, the government noticed its intent to call
11 15 witnesses in their case in chief for the proffered hearsay
12 evidence. We would like -- three of those we have previously
13 interviewed. We would like the government to facilitate the
14 interviews of the other 12. I don't think that they would
15 have a problem with that.

16 What we have run into in the past -- and again, I
17 believe that this was happening before, at a time when none of
18 the current defense team was on the case -- there were
19 apparently discussions and disagreements about classification
20 guidance when these interviews were taking place.

21 And so when Detective Soufan and Detective McFadden
22 were interviewed and the defense wanted to question them about
23 their involvement with the Yemeni government and certain

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1 folks' names and certain folks' titles within the Yemeni
2 government that there was not clear guidance as to what could
3 be asked.

4 And so what we want to do, if we're going to interview
5 these 12 people, is to have a real meaningful interview. And
6 so what we're asking is, one, for the facilitation of those
7 interviews in a space where we can speak freely and openly in
8 respect with the classification guidance. But I think it
9 would actually be very helpful from our discussion this
10 morning to have a guide for this topic because this topic is
11 going to permeate multiple motion series, AE 166 and 319.
12 This is certainly part of our defense theory of our case, and
13 so this does come up quite often.

14 And what we would like to do is to be able to have a
15 full and robust and meaningful interview of these 12 agents
16 and officials in a place where that conversation can be had
17 securely and with the proper guidance so that we know exactly
18 what we can ask and what we cannot.

19 And I believe it was Commander Jolly mentioned that
20 there is a UFI key. I'm with Captain Mizer; it is completely
21 possible that we have missed it. But in my review, and I know
22 in Captain Mizer's review, we do not have a UFI key when it
23 comes to the identities of these Yemeni officials who are now

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1 going by a unique functional identifier. And so that would
2 be, again, helpful before these interviews take place to have
3 so that everyone's operating on the same sheet of music.

4 And so as far as discovery, there is one more item.

5 And again, this is something the government told us they would
6 give us, I believe, back in 2015. Allegations of abuse when
7 the FBI took interviews, they were told to put them under
8 separate cover. Mr. Bin'Attash, who is a 9/11 defendant, that
9 is one of the noticed hearsay statements that the government
10 intends to offer.

11 There are two such independent covers, Khallad 001 and
12 Khallad 002 which contain allegations of abuse. The
13 government did acknowledge that they would give those to us in
14 2015. We do not have those as of yet. And clearly, those are
15 relevant to any determination that this commission would make
16 as far as the reliability, the -- and the lack of coercion,
17 torture, or inhumane treatment to make these hearsay
18 statements admissible.

19 And so we would just ask that the commission re-order
20 that the government give over those under separate cover.

21 MJ [COL ACOSTA]: Okay. Let's see if we can get some of
22 the answers, if you think that they can be readily done.

23 Let's see.

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1 Government? Good morning.

2 ATC [LCDR SCHREIBER]: Good morning, Your Honor.

3 MJ [COL ACOSTA]: You can take your mask off. Thank you.

4 ATC [LCDR SCHREIBER]: Thank you. It's easiest to go just
5 the same way defense went, straight through.

6 MJ [COL ACOSTA]: Please.

7 ATC [LCDR SCHREIBER]: Starting with number 1, the defense
8 is asking for status of the photos and whether the FBI has
9 had -- whether they have all the photos.

10 The bottom line here is the government has given over
11 and has previously told the defense that we've given over all
12 the documentation we have about the photos that may or may not
13 have been used by Yemeni authorities. If they were turned
14 over to the FBI, they were handed over to the defense. At
15 this point, we have nothing further to offer.

16 This also -- I think it's important to look at this in
17 light of the recent 461 filings, and that is, of course, not
18 concluded yet. Defense still has to file their reply. But
19 the case law in there makes very clear -- the government cited
20 that whether or not the original photos of a photo array can
21 even be provided is not really relevant. It doesn't really
22 impact whether a photo array can be -- excuse me, an
23 identification made from a photo array can be reliable.

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1 So the defense is asking for these, but at the end of
2 the day, the case law doesn't support that they are actually
3 necessary, but ----

4 MJ [COL ACOSTA]: But the question is: Do you have them?

5 ATC [LCDR SCHREIBER]: Bottom line is ----

6 MJ [COL ACOSTA]: Did you have -- did the FBI have them?
7 Did they lose -- their questions were did the FBI ever have
8 those photo arrays that were used by the Yemeni government?
9 Yes or no.

10 ATC [LCDR SCHREIBER]: Your Honor, what I can say is that
11 if anything that the FBI did obtain from the Yemeni
12 government, anything they were provided has been given to the
13 defense counsel. What the Yemenis may or may not have had
14 that they may or -- that they didn't give over is not
15 something the United States government ----

16 MJ [COL ACOSTA]: Oh, I understand. That's not the
17 question that was -- that she presented or that I just asked.
18 I asked: Did the -- did the FBI have the photo arrays used by
19 the Yemeni government? Yes or no.

20 ATC [LCDR SCHREIBER]: There are some document -- there is
21 some documentation that's been provided to the defense of
22 items that the Yemeni government used, photo arrays that they
23 used to -- or photos that they showed persons. There are --

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1 there is documentation in some of the records of the
2 photographic information they showed witnesses in advance.
3 There are places where there is no documentation of that.

4 What the defense counsel, I believe, is asking for is
5 for us to have more information from the Yemenis about what
6 they may or may not have done in their own investigation.

7 MJ [COL ACOSTA]: I don't think they're asking about the
8 information from what the Yemenis had. They're asking about
9 what the FBI had from the Yemenis.

10 So while you can't -- while you may not be able to get
11 that answer from the Yemenis, the question is specifically
12 about what the FBI had and what -- and what -- and whether or
13 not they lost anything and whether or not you turned over
14 everything that the FBI had.

15 So that's -- I'm focusing specific -- I apologize if I
16 asked a confusing question about -- and made it seem like it
17 was about what the Yemenis had. It's about what the FBI was
18 able to get from the Yemenis.

19 ATC [LCDR SCHREIBER]: Yes, sir. And we have stated, and
20 continue to state, that everything the FBI obtained from the
21 Yemenis has been turned over to the defense in discovery. We
22 have nothing further to provide. There is no further
23 information here to give over to the defense that the -- if

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1 the FBI had it, we've turned it over.

2 MJ [COL ACOSTA]: And there has been no loss. There's no
3 record of any loss of any records that had been provided from
4 Yemen to the FBI where the FBI lost anything?

5 ATC [LCDR SCHREIBER]: That's correct, sir.

6 MJ [COL ACOSTA]: Okay.

7 ATC [LCDR SCHREIBER]: Moving on to number 2 then. Again,
8 this is an issue of we've already given the defense everything
9 that we have. They have asked for an accounting.

10 They've asked for an audit. The government's under no
11 obligation to do such a -- such an exercise. The defense has
12 everything that the government has. Admittedly, in the 337
13 series we are providing, you know, better copies of some
14 documents. But at the end of the day, those are all documents
15 that the defense already has, and there is nothing more to
16 present.

17 I think it's also important to note that this issue
18 was largely resolved of the information -- as it relates to
19 potential impeachment of hearsay witnesses. This was also
20 resolved back in 263E, and the judge ruled that the government
21 explained that we had given over everything and that that was
22 to be taken at -- at our word, and there is nothing more to
23 provide. And that continues to be the government's position.

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1 MJ [COL ACOSTA]: Okay. So you provided all of the
2 statements -- all of the statements in the government's
3 possession that were made by witnesses to the Yemen officials
4 that the government had position of, correct?

5 ATC [LCDR SCHREIBER]: That's correct, sir.

6 MJ [COL ACOSTA]: Okay.

7 ATC [LCDR SCHREIBER]: Combining number 3 and 5, so
8 number 3 is asking for facilitation of witness interviews.
9 Certainly, the government will request to see if these
10 witnesses are willing to be interviewed by the defense and
11 facilitate those interviews in a manner that is useful to the
12 defense.

13 MJ [COL ACOSTA]: Specifically, a location where they can
14 talk about classified issues if any come up, correct?

15 ATC [LCDR SCHREIBER]: Absolutely, sir. We'll make that
16 happen.

17 MJ [COL ACOSTA]: All right.

18 ATC [LCDR SCHREIBER]: I would note defense asked for
19 those in their -- in their request they make sure to ask for
20 it to be privately with defense counsel. We can certainly ask
21 the witnesses if they're interested in such an interview. But
22 typically when you're talking about government agents, there
23 would be a government representative present for that

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1 interview. We anticipate that would probably be the situation
2 here.

3 As it relates, then, to number 5, I think this gets
4 pretty much to the issue of the functional identifier issue,
5 again, in the 337 series. And the defense appropriately
6 pointed out that they don't have a key to that, but when they
7 are talking to these witnesses, we will endeavor to provide
8 the witnesses with a key so that they can intelligently speak
9 about, you know, whether it's Officer 1 or 2 or whoever
10 they're identified in various documents.

11 And this is, of course, a procedure we've used in
12 other proceedings recently that I think worked fairly well,
13 and that will give the defense the opportunity to ask the
14 questions and conduct the interviews as they need to. We have
15 every interest in making sure they're able to have robust
16 interviews with those witnesses who agree to be interviewed.

17 MJ [COL ACOSTA]: So you're willing to provide a
18 classification guide and the left and right limits of those
19 interviews?

20 ATC [LCDR SCHREIBER]: I want to make clear that if we're
21 talking about the key that we've been discussing for 337 ----

22 MJ [COL ACOSTA]: I don't think it's just a key of
23 individuals.

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1 ATC [LCDR SCHREIBER]: Right.

2 MJ [COL ACOSTA]: It's more than that.

3 ATC [LCDR SCHREIBER]: Sure.

4 MJ [COL ACOSTA]: It's not just -- it's part -- I think
5 that's an element ----

6 ATC [LCDR SCHREIBER]: Yes, sir.

7 MJ [COL ACOSTA]: ---- of what the guide would be but not
8 the full gamut of things that they're -- part of it is who you
9 can talk about and then it's like, again ----

10 ATC [LCDR SCHREIBER]: Yeah.

11 MJ [COL ACOSTA]: ---- as we keep talking about it,
12 it's -- and also what are they connected to? And just a list
13 of the topics and how they can ask these things, where they're
14 not going to get a witness who is going to say, well, I don't
15 think I can actually talk to you about those things because
16 it's not -- and if they're able to say, hey, here's, here's
17 the left and right limits of what -- you know, here's what we
18 can say or how we can phrase it, even in a classified setting
19 when they're doing it -- which hopefully the classified
20 setting would alleviate the need to, to borrow Ms. Morgan's
21 phrase, soft-shoe around a topic in the middle of an interview
22 in order to have a robust interview, if you're in a classified
23 setting, to talk about those things with -- with those

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1 witnesses.

2 Because these are -- this is talking about wanting to
3 interview F -- largely, you know, U.S. investigators that were
4 conducting this investigation ----

5 ATC [LCDR SCHREIBER]: Yes, sir.

6 MJ [COL ACOSTA]: ---- that conducted the investigation,
7 have the information, were therefore cleared to have the
8 information, and it's the same information that the defense is
9 cleared to have, about the investigation of the crime for
10 which the accused is charged here. They should be able to ask
11 those questions and not have -- run into an issue, right?

12 ATC [LCDR SCHREIBER]: Sir, I don't want to step outside
13 of the issues on this motion, and other -- other members of
14 the team have discussed this issue of classification guidance.
15 Obviously, with whatever ruling you make in relation to what
16 we discussed earlier about classification guidance and
17 providing guidelines, we can certainly provide those as it
18 might relate to these interviews.

19 I do think the one thing that I, standing here right
20 now, can promise you is that as it relates to those witnesses
21 being able to intelligently speak about persons who are
22 identified in the documents by -- in investigatory documents
23 by functional identifiers, we'll ensure that they have a key

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1 that they can do that, much like we've done in previous
2 proceedings.

3 MJ [COL ACOSTA]: Understood.

4 ATC [LCDR SCHREIBER]: As it relates to broader
5 classification guidance, I'd leave that maybe to the
6 litigation of the other motion we talked about earlier.

7 MJ [COL ACOSTA]: Right. Well, I think it would be
8 helpful, and I think that we're going to -- we're going to
9 have to have a discussion about that for these interviews, to
10 the extent that they're going to -- that these individuals
11 can, you know, are -- sit down for these interviews, so that
12 they can have some guidance, just so that you know and that
13 the -- that the -- and that the -- because it's not you, the
14 prosecution, that has a -- well, you have -- we all have a
15 concern with what -- with keeping things in the left and right
16 limits, but it's -- the Federal Bureau of Investigation is
17 the -- is, I believe, the OCA for that, right?

18 And we keep talking about the OCA as if it's the OCA.
19 I mean, I think the number -- the number of OCAs for these
20 issues is myriad. So for this one, for these individuals, it
21 appears to all be FBI agents. So Mr. Miller and his --
22 his grand connection to the -- to the Department of Justice,
23 which may or may not have any influence over the -- over the

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1 Federal Bureau of Investigation, as he discussed earlier,
2 which I notice I don't know how many -- we had a -- we had a
3 large portion of the FBI's OGC here earlier or -- for earlier
4 proceedings and they're not here now, which would be helpful
5 if they were here now to hear this.

6 But I'm sure that Mr. Miller will relay it to them,
7 that they're going to need to get involved with this so that
8 their agents know here's what you can talk about, and yes, you
9 can talk about these things to make it a somewhat meaningful,
10 productive interview for the -- for the defense to occur.

11 So we'll deal with that -- I'll deal with that in a --
12 whatever -- in the ruling that we'll issue on this that needs
13 to occur.

14 ATC [LCDR SCHREIBER]: Understood, sir.

15 MJ [COL ACOSTA]: And I appreciate your willingness. And
16 I'm not beating you up on this. It's just that's what I'm
17 talking about needs to happen, so.

18 ATC [LCDR SCHREIBER]: Yes, sir. I understand the logic.
19 Certainly.

20 And then the last item was item 4. So this was, as
21 the defense has described it, any documented allegations of
22 abuse during confinement directly -- well, the -- and they are
23 directing it toward the hearsay admissibility issue.

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1 These documents that the defense has requested -- and
2 I will point out they pointed out in their filing, it is
3 accurate, in 319L the government indicated that we would
4 provide those documents. We have provided those documents.
5 We've turned over everything responsive as it relates to his
6 experience while in U.S. custody, his interview, and any
7 investigation of allegations of abuse and ----

8 MJ [COL ACOSTA]: They have the thing that she just stood
9 up here and asked me to ----

10 ATC [LCDR SCHREIBER]: Yes.

11 MJ [COL ACOSTA]: ---- ask you about?

12 ATC [LCDR SCHREIBER]: Yes, sir. So we have provided
13 everything that's related to that. I've confirmed that
14 yesterday with our team. I asked that direct question, showed
15 them the defense request. We have given them everything
16 that's in the government's possession that's responsive to
17 their request.

18 I don't want to say beyond that and identify specific
19 items in an unclassified session, but we have provided
20 everything that is responsive to their request.

21 MJ [COL ACOSTA]: Okay.

22 ATC [LCDR SCHREIBER]: I note that we -- we didn't talk
23 about the sixth item, which is really a request to produce a

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1 witness. Defense didn't note that. I don't know if you want
2 to just go ahead and do that now or save that for when we talk
3 about witnesses.

4 MJ [COL ACOSTA]: You can talk about it now if you
5 have ----

6 ATC [LCDR SCHREIBER]: At the end of the day, it's going
7 to be the same -- it's going to be the same argument as it
8 relates to the production of all the other witnesses.

9 This witness that they're requesting, this is Special
10 Agent Steven Bongardt of the FBI. We've previously denied his
11 production. That ultimately wasn't finalized, ruled on. But
12 the only thing that was -- this witness participated in was a
13 single interview, and everything else that they want to
14 question him about is outside the scope of the hearsay
15 litigation.

16 Merely because he expressed concerns or went to
17 meetings or just had sort of general overall involvement in
18 the investigation is not related to the -- it's not relevant
19 to the 803 standard for indicia reliability or corroboration
20 within the statement itself. This is essentially an effort to
21 conduct discovery by asking him to come and testify, and they
22 have not met their burden certainly to produce him.

23 But I -- we can readdress that when we discuss in more

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1 depth the motion to compel witnesses; although, again, I think
2 my argument will mostly rely on the pleadings and be much the
3 same.

4 MJ [COL ACOSTA]: Okay.

5 ATC [LCDR SCHREIBER]: Pending your questions, sir, that's
6 all I have.

7 MJ [COL ACOSTA]: I have no more. Thank you.

8 ATC [LCDR SCHREIBER]: Thank you.

9 MJ [COL ACOSTA]: Defense? Give me one second to catch up
10 with some of my notes here.

11 Okay. You can proceed.

12 DC [MS. CARMON]: Thank you, Your Honor.

13 As it relates to the photographs, the photographs that
14 we have in discovery are those related to the Adenbom book,
15 which is the book that the FBI put together. Many copies of
16 the book are -- many copies of Mr. al Nashiri's photograph
17 appear in the book. There's an actual sketch of
18 Mr. al Nashiri in the book, and multiple other folks appear in
19 the book. But those are the photographs that we have.

20 And not to mix the two here -- and I apologize, I read
21 Your Honor to mean that we would take up witnesses in the
22 closed session. So I can certainly ----

23 MJ [COL ACOSTA]: Yes, we will. If -- unless it -- to the

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1 largest extent possible, of course, we need to speak about the
2 things in our open sessions, and if this one was in the -- in
3 the unclassified ----

4 DC [MS. CARMON]: Right.

5 MJ [COL ACOSTA]: ---- portion of the motion, so if we can
6 take him up here, we'll take him up.

7 DC [MS. CARMON]: And actually, he is relevant to our
8 request for a firm answer on where these photographs are.

9 So former Special Agent Bongardt was in New York. He
10 was the lead on the USS COLE investigation and he was the
11 recipient of most of these documents that are coming from
12 Yemen. And so when we have the statements that are referenced
13 in item number 2, which were the statements taken in Arabic by
14 the Yemeni investigators, those are sent from Yemen via fax to
15 Agent Bongardt who is most times the named recipient.

16 What we do not have are any photographs that were ever
17 sent that were used by the Yemenis. And so our request for
18 these photographs is because we see in the FBI 302s that they
19 were previously used. We see in communications in the
20 discovery that the Yemenis showed photographs, and the
21 photographs that we have are pursuant to the Adenbom book.
22 And so by deduction, it would seem that we do not have any
23 photographs that the Yemeni government showed to these

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1 witnesses.

2 MJ [COL ACOSTA]: Unless they were put into the Adenbom
3 book.

4 DC [MS. CARMON]: And there would be -- I would assume,
5 good practice would dictate that there would be an FBI
6 communication or an FBI report acknowledging that; there is
7 not. And so we don't have any firm indication from the
8 discovery or the reports that we have that that was done.

9 Now, perhaps it was, but I would think that that would
10 be noted somewhere in the reporting. And so that's why we
11 asked for the sort of firm where are these photographs
12 because, by deductive reasoning, we don't have them and it
13 does not appear that anyone documented if they went into the
14 Adenbom book.

15 Obviously, this is relevant to our suggestive lineup
16 arguments in the motions to suppress the identifications,
17 which are a hearsay statement that the government intends to
18 offer. And so these are certainly relevant.

19 If there is no answer forthcoming, I suppose we will
20 discuss that within the team about how to proceed, but I think
21 we have a reasonable request here. And by the discovery and
22 the review that we've done, it seems that these photos
23 certainly did exist and we do not have them. And so that's

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1 the reason that we've been sort of pressing this request over
2 the years.

3 MJ [COL ACOSTA]: You've not been able to determine this
4 from your other interviews from these FBI agents?

5 DC [MS. CARMON]: The interviews that were done were done
6 by ----

7 MJ [COL ACOSTA]: I know -- and I know that these last
8 interviews were done six years ago ----

9 DC [MS. CARMON]: Right.

10 MJ [COL ACOSTA]: ---- to the best of my review of the
11 record; is that correct?

12 DC [MS. CARMON]: That's -- that's right. And I believe
13 that there was no real interview that was able to be done.
14 And that was the genesis of 319Z and 319AA, which was the sort
15 of concerns and complaints about interference with the
16 interview and the wrong classification setting for the
17 interview. And so I'm not sure that those interviews yielded
18 much information at all.

19 But as far as I know, Your Honor, no, no questions
20 were asked about the photographs. And I don't know if that's
21 because they were unable to be asked, given the setting.

22 MJ [COL ACOSTA]: Okay.

23 DC [MS. CARMON]: But -- so we don't have any further

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1 information other than the discovery provided by the
2 government.

3 The reason that we do think that former Special Agent
4 Bongardt would be important is he was the liaison seemingly
5 from the investigation in the United States and the
6 investigation in Yemen. He would have -- he certainly did
7 interview Mr. Owhali, which, again, is a statement that the
8 government intends to offer. And I believe that they noted
9 that hearsay statement in AE 166C. And he is in -- I believe
10 he's in federal detention in the United States. And so they
11 intend to offer his statement against Mr. al Nashiri. Agent
12 Bongardt was the lead investigating agent and interviewing
13 agent for that interview.

14 Agent Bongardt also attended meetings between the U.S.
15 Ambassador of Yemen at the time, Ms. Bodine, and Yemeni
16 investigative agents.

17 He also is the author of communications that have been
18 provided by the government where he expresses concerns about
19 the reliability of these photographs and -- or the
20 photographic lineups that are now being shown by the FBI,
21 because they contain multiple pictures of the same person.
22 They contain a composite sketch made as if it were a real
23 photograph. And so he expresses some concerns about the

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1 reliability of those photographs -- or that photographic book
2 and the photographic identifications that take place. He
3 expresses some concerns about those.

4 He also -- excuse me. Understanding that the
5 government has previously denied his production, that was
6 certainly before we filed our motion to -- our motion to
7 challenge the hearsay identifications that the government
8 intends to offer. The -- he took statements from other
9 authorities. He had -- he was on the receiving end of all
10 communications coming from Yemen, be it from the Yemeni
11 investigators to the FBI agents in Yemen and back, or directly
12 from the U.S. embassy there.

13 There are several communications that are coming to
14 Ambassador Bodine. And most importantly, he is the recipient
15 and the actual go-between and the emissary between the
16 questions that are being written to give to Yemeni
17 investigators to ask of these interviewees, pursuant to the
18 memorandum of understanding that was, I think, ultimately
19 signed 29 November 2000.

20 And so there has been some back-and-forth between the
21 parties as to whether or not this process was actually
22 followed, whether or not questions were written down and then
23 provided to the Yemeni government to ask on behalf of the

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1 United States investigators.

2 MJ [COL ACOSTA]: Is that part of what you want to be able
3 to ask him ----

4 DC [MS. CARMON]: Yes.

5 MJ [COL ACOSTA]: ---- is what you're saying?

6 DC [MS. CARMON]: He's specifically -- or, excuse me, he
7 is sort of uniquely situated in order to talk about the
8 cooperation or, as it were, non-cooperation between the Yemeni
9 government and the Federal Bureau of Investigation in
10 obtaining these statements, the statements that obviously the
11 government wishes to -- wishes to offer into evidence under
12 the hearsay rules in the AE 166 series.

13 And so we think that he would be uniquely situated to
14 answer questions and provide information to the commission
15 about how the process -- how the process worked, right?
16 Because the process is part of the reliability. If the
17 process by obtaining -- obtaining statements was not a
18 reliable process, then the statement is not reliable either.

19 And so were the government agencies working hand in
20 hand as drafted in the memorandum of understanding? Was there
21 a different process? He certainly received and sent over a
22 bunch of questions that were -- and these were attached to the
23 319 series as well. And then we've had the government say

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1 that's not really how it worked.

2 And so to really nail down the procedure by which this
3 investigation was done and the procedure by which these
4 statements were taken, I think he is uniquely -- excuse me,
5 uniquely situated to answer that -- to answer those questions
6 and provide the commission that information.

7 And I believe that that was really the only further
8 information that I wanted to give the commission.

9 And I guess just to briefly address item 2, which is
10 the accounting of the statements that we have. Obviously,
11 this commission has urged the parties to work together to
12 resolve things so as not to have to involve the commission in
13 items that can be easily resolved.

14 And so the reason that I had asked the government, not
15 to create more work for them, but to make sure that we have
16 the same -- we have the same statements and all the statements
17 that we need, is because these have come in batches over the
18 last eight years, and defense counsel has rotated in and out a
19 ton.

20 And so now that we have, I think, the team that is
21 going to take us to the finish line and we're getting ready to
22 gear up to litigate AE 166, we want to make sure that we have
23 everything that we need and there's not a last-minute "we

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1 didn't know that that existed."

2 And so I had asked that in the spirit of cooperation.
3 Certainly I don't want to create more work for them, but I
4 think it prudent to make sure that everyone's playing on the
5 same sheet of music.

6 And the same with the Khallad 001 and Khallad 002. In
7 the review that I have done and I know my teammates have done,
8 I do not see that anywhere in the discovery that we have been
9 provided. And we were specifically told in the FBI letterhead
10 memorandum of interview of Mr. Bin'Attash that those
11 allegations would -- would appear under that cover title,
12 Khallad 001 and Khallad 002. So I will certainly get with my
13 colleague and ask that if we have missed something, perhaps
14 they can point us ----

15 MJ [COL ACOSTA]: Yeah.

16 DC [MS. CARMON]: ---- to where we have missed it.

17 MJ [COL ACOSTA]: How many of the statements that you had
18 from the Yemeni -- you said you had a list of statements that
19 you were provided ----

20 DC [MS. CARMON]: Yes, sir.

21 MJ [COL ACOSTA]: ---- and all of them were -- only one of
22 them was classified, so you clearly have identified all of
23 them that you have, correct?

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1 DC [MS. CARMON]: Yes, sir.

2 MJ [COL ACOSTA]: So I would just make a suggestion of how
3 to provide them a list or a copy of, hey, here's what we have.

4 DC [MS. CARMON]: We did.

5 MJ [COL ACOSTA]: Is there any more? They can look --
6 that way they're not looking through their entire file. They
7 know -- I know that they have a well-organized file, I'm
8 sure ----

9 DC [MS. CARMON]: Right.

10 MJ [COL ACOSTA]: ---- somewhere with each set of things.

11 DC [MS. CARMON]: Yes, sir. And that's how they were
12 provided ----

13 MJ [COL ACOSTA]: And that's ----

14 DC [MS. CARMON]: ---- to the government.

15 MJ [COL ACOSTA]: If you have them, if you can provide it,
16 say, look, is this is? That's all you have? See if we can
17 get that answer.

18 Again, you're right. When you can talk to each other
19 and get an answer, I'd like the parties to be able to just
20 fully answer each other's questions when they get them, which
21 is what I'm asking is is this all of them that you have ----

22 DC [MS. CARMON]: Right.

23 MJ [COL ACOSTA]: ---- that I'm going to get? Yes or no.

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1 DC [MS. CARMON]: And for the court's edification, that's
2 exactly how we approached the government in September of 2021.
3 We listed Batch 1, Bates number here to here, Batch 2, Bates
4 number here to here, to make sure that we had all the batches
5 that were relevant to this, so ----

6 MJ [COL ACOSTA]: It should not be any great burden upon
7 the government to confirm, yes, we provided you these and this
8 is what -- and this is what we provided you because that's
9 what we have.

10 DC [MS. CARMON]: Yes, sir.

11 MJ [COL ACOSTA]: So I'd expect that to go on as well.
12 Okay.

13 And for the issues of the -- the allegations of abuse,
14 those -- those are three things that you were looking for,
15 right?

16 DC [MS. CARMON]: There are two. In his letterhead
17 memorandum, those allegations were provided in the language of
18 the letterhead memorandum under separate cover under Khallad
19 001 and Khallad 002. We do not have in our search, we do not
20 have anything under those two covers.

21 Now, again, was it provided in some sort of different
22 format? I can't imagine so, since the FBI was dictated to do
23 it that way. I assume we would get what the FBI had. But

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1 I -- again, I will -- I will certainly get with our colleagues
2 and try to figure out the miscommunication.

3 MJ [COL ACOSTA]: Government, can you make that happen?
4 To confirm that you were able to provide that? Do you have a
5 microphone back there? You can stand and answer me from
6 there.

7 ATC [LCDR SCHREIBER]: Yes, sir.

8 MJ [COL ACOSTA]: Okay. Thank you. All right.

9 DC [MS. CARMON]: Thank you, sir.

10 MJ [COL ACOSTA]: Thank you.

11 All right. That's all we're going to take up before
12 we go to the closed session at 1300.

13 The commission is in recess until 1300, closed
14 session.

15 [The R.M.C. 803 session recessed at 1154, 09 December 2021.]

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