

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1412,
2 04 May 2022.]

3 MJ [COL ACOSTA]: The commission is called to order.
4 Government, please account for the parties.

5 TC [MR. MILLER]: Good afternoon, Your Honor. These
6 proceedings are being transmitted by CCTV to the public
7 viewing locations in the United States pursuant to your order.

8 Present for the United States here in Guantanamo Bay,
9 Cuba, as identified in the detailing order are myself, Mark
10 Miller; Mr. John Wells; Lieutenant Commander Keven Schreiber;
11 and Major Stephen Romeo. Also assisting the government and
12 here today in the courtroom: Mr. Forrest Parker Smith,
13 Mr. Rocco Marmo, Ms. Paige McLachlan, Mr. Pascual
14 Tavaréz-Patine, Staff Sergeant Carlos Salazar, and I believe
15 our interpreter will be in and out, Interpreter ██████████
16 ██████████.

17 Also present in the back of the courtroom are the
18 following FBI personnel: Specialist Kymberleigh Albites and
19 Specialist Brianna Hearn.

20 Present in the Remote Hearing Room in northern
21 Virginia for the prosecution are Lieutenant Commander Cherie
22 Jolly, Major Michael Ross. Assisting those detailed counsel
23 are Lieutenant Tess Schwartz, Master Sergeant Laura Speranza,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and Special Agent Paul Rude.

2 All persons have the necessary clearances and
3 qualifications, Your Honor. Thank you.

4 MJ [COL ACOSTA]: Thank you. Defense?

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

6 MJ [COL ACOSTA]: Good afternoon.

7 LDC [MR. NATALE]: Here in the RHR is myself, Anthony
8 Natale; Captain Mizer; Mr. Padilla; and LL1 [sic] Bridgewater.

9 We have in the courtroom with you, it should be
10 Lieutenant Commander Piette, Ms. Carmon, Ms. Morgan,
11 Mr. Hoffmann, and Mr. Dolphin. I think those would be the
12 only ones unless -- nope, I think those would be the only
13 ones, Judge.

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

15 LDC [MR. NATALE]: Everyone has the clearances and
16 qualifications to be present.

17 MJ [COL ACOSTA]: Thank you, Mr. Natale.

18 All right. Today we're here at my request to -- oh,
19 sorry. Go ahead, Government. I'm skipping ahead.

20 MATC [MR. WELLS]: Thank you, Your Honor. The government
21 calls a witness from the Staff Judge Advocate's office to
22 testify about the accused's absence from today's proceedings.

23 Good afternoon, Commander. Please raise your hand.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 COMMANDER O-5, U.S. NAVY, was called as a witness for the
2 prosecution, was sworn, and testified as follows:

3 MATC [MR. WELLS]: Please take the stand.

4 DIRECT EXAMINATION

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

6 Q. Ma'am, were you able to meet with the accused this
7 afternoon?

8 A. Yes, sir.

9 Q. Did you use a form or format to advise him about his
10 rights ----

11 A. Yes, sir.

12 Q. ---- to attend?

13 A. Yes, sir. I did.

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

15 MJ [COL ACOSTA]: You may.

16 MATC [MR. WELLS]: Thank you.

17 MJ [COL ACOSTA]: And you may move freely.

18 MATC [MR. WELLS]: Your Honor, I've handed the witness a
19 three-page document marked as Appellate Exhibit 375R.

20 Q. Is that correct?

21 A. Yes, sir.

22 Q. All right. And did you use this form to advise the
23 accused?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. Yes, I did.

2 Q. Could you please tell us how you proceeded.

3 A. Yes, sir. At approximately 1240 today I went to the
4 accused's location, myself, one other person, and a
5 translator. We met with the accused. We informed him he had
6 court today -- speaking in English -- and asked if he wanted
7 to attend and he said no. Oh, and after which -- after he
8 said no, I proceeded to read the English version of his
9 advisement of rights.

10 Q. And the interpreter interpreted in Arabic?

11 A. He was present, sir, but the accused opted to be
12 handed the Arabic translation and read along as I read the
13 English version out loud.

14 Q. All right. And that's the third page of the document
15 you have?

16 A. Yes, sir.

17 Q. And did the accused sign that document?

18 A. Yes, he did.

19 Q. All right. And then did you also sign it as a
20 witness?

21 A. I did.

22 Q. All right. Was there any other communication that you
23 had with the accused about his rights to attend?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. He indicated with the "no" that he understood his
2 right to be present or voluntarily absent himself.

3 Q. All right.

4 A. Yes, sir.

5 Q. Thank you.

6 MATC [MR. WELLS]: Approach the witness, Your Honor?

7 MJ [COL ACOSTA]: You may.

8 MATC [MR. WELLS]: Your Honor, I've handed AE 375R to the
9 court reporters and it's available for the commission. We
10 have no further questions for this witness. We do ask that
11 you make a finding that the accused's absence is voluntary.

12 MJ [COL ACOSTA]: Defense, any questions?

13 LDC [MR. NATALE]: No questions.

14 MJ [COL ACOSTA]: All right. You may step down.

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

16 MJ [COL ACOSTA]: The commission finds that the accused
17 has voluntarily and unequivocally waived his right to be
18 present during today's session.

19 ATC [LCDR SCHREIBER]: Your Honor?

20 MJ [COL ACOSTA]: Yes.

21 ATC [LCDR SCHREIBER]: I've been asked to read a statement
22 to the commission, and request permission to do so.

23 MJ [COL ACOSTA]: I don't know what this is regarding.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [LCDR SCHREIBER]: I've been instructed to read a
2 statement to the commission on behalf of the prosecution to
3 the -- would request permission to do so, sir.

4 MJ [COL ACOSTA]: Oh, go ahead.

5 ATC [LCDR SCHREIBER]: Good afternoon, sir. The
6 prosecution is clarifying statements made on Friday April 29th
7 starting at page 16367 of the transcript that suggested that
8 948r(a) only barred from admission in a military commission a
9 statement obtained from the torture, cruel, inhuman or
10 degrading treatment of the accused in a military commission.

11 To the extent that those statements could be
12 interpreted to support an interpretation that derivative
13 evidence is categorically not subject to 948r, those
14 statements are not reflective of the government's view.

15 Further, as the government has previously stated,
16 Section 948r(a) applies to all stages of a military commission
17 case. Ultimately, the issue of whether and how 948r precludes
18 the admission of derivative evidence was not before the court,
19 but, in fact, is at issue in Appellate Exhibit 471. The
20 government's response to that motion is due on May 26th.

21 Any position the government has on whether and how
22 948r(a)'s prohibition applies to derivative evidence will be
23 articulated in its response to Appellate Exhibit 471. To the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 extent that the court believes the government's position on
2 948r(a)'s relationship to derivative evidence is material to
3 the court's review of Appellate Exhibit 335, the prosecution
4 respectfully requests leave to make a supplemental submission.

5 Thank you, sir.

6 MJ [COL ACOSTA]: Hold on one second. Based upon the --
7 the pages you were referencing, was that the public transcript
8 or the official transcript? I think it was just the public.
9 I'm not sure.

10 ATC [LCDR SCHREIBER]: I believe it's the public -- I
11 believe it's the public transcript, sir, but I actually
12 personally have not been provided that information. I have
13 been asked to read what I was provided.

14 MJ [COL ACOSTA]: So the government's position is that you
15 understand that third-party -- it's regarding a person other
16 than the accused statements of -- derived from torture are
17 also inadmissible. And your question -- and what you seek to
18 clarify eventually, what you say that you're going to clarify,
19 is whether or not derivative evidence from a person other than
20 the accused may be used. That's what you intend to clarify in
21 your later briefing?

22 ATC [LCDR SCHREIBER]: Sir, as stated in what I just said,
23 I was instructed to read this statement to the court.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: So you don't know what you're reading?

2 ATC [LCDR SCHREIBER]: I was instructed to read this
3 statement to the court and I believe that what you're -- what
4 we've said is that if the court believes that the derivative
5 evidence information, that its position on derivative evidence
6 of 948r needs to be made for 335, we'd like to supplement that
7 briefing or that -- that appellate exhibit series.

8 If however -- however, that will be a central issue in
9 471 that the government will address directly in that series
10 because that is the operative question.

11 MJ [COL ACOSTA]: It wasn't -- 335 wasn't about derivative
12 evidence ----

13 ATC [LCDR SCHREIBER]: That's correct.

14 MJ [COL ACOSTA]: ---- from a third -- from a non-accused.

15 ATC [LCDR SCHREIBER]: That is the government's position.
16 But as I said in the statement, if the court believed that it
17 was part of that, the resolution of that, we would like to
18 supplement it. If the court does not believe that, then we
19 would have no need to supplement 335 and we'll address the
20 issue in 471.

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

22 I wasn't trying to call into question your knowledge
23 of it, Counsel. I'm just saying when you get up and you start

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 talking about it, I'm going to ask you questions, okay?

2 ATC [LCDR SCHREIBER]: Understood, sir.

3 MJ [COL ACOSTA]: And I assume they put you up here
4 because you -- because you -- you know it. And every time
5 you've come up, you've been -- you've had a mastery of the
6 topics. I'm not trying to dig on you. Every single attorney
7 for the -- both the government and the defense have been able
8 to -- have demonstrated absolute mastery of their topics for
9 each of their briefs that they've done. It's not -- I'm not
10 digging at anybody. So -- okay.

11 We're here to -- this -- I requested this session to
12 talk about those things that we can be done -- that -- that
13 could be taken up at this time since we had a little bit of
14 extra time that we did not expect, despite my asking
15 repeatedly, and I'll just ask counsel to cast their minds back
16 to an 802 session that they had with me where I repeatedly
17 stated here's all the things that I want to talk about. And
18 counsel for both sides repeatedly reminded me, no, no, no,
19 we're not going to be able to get to there, the testimony is
20 going to take too long. And I was reluctant to -- to not put
21 more on the docket, but you convinced me otherwise. I will
22 not be fooled again. You will not -- I will put more on the
23 docket than -- for next time.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So now we go to -- there's two different motions that
2 I wanted to hear argument on today, and that is 440AA and 473.
3 And I was told that after I -- I communicated to the parties
4 through -- through Mr. Powell last night that that's what I
5 wanted to hear about. The parties indicated that they thought
6 that some of this might require closure. However, as I look
7 at 473, I don't know that 473 requires closure.

8 Does either party believe that argument on 473
9 requires closure?

10 DC [MS. CARMON]: Not from the defense, Your Honor.

11 MJ [COL ACOSTA]: Government?

12 MATC [MR. WELLS]: No, Your Honor.

13 MJ [COL ACOSTA]: Okay. And for 440AA, are there certain
14 portions of that that will require closure or can you -- or do
15 the parties believe that they can argue that sufficiently in
16 open session? Defense?

17 DDC [CAPT MIZER]: Judge, I think we can -- I'm aware of
18 the scalpel, not an axe, guidance from the CAAF and I can do
19 some of it open and some of it closed.

20 MJ [COL ACOSTA]: Okay. Do we need -- government, do you
21 believe that a -- that a 505(h) hearing is required before we
22 get into -- before that argument begins to -- to go into a
23 closed session for the -- what Captain Mizer has said needs to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 be a closed session for 440AA?

2 MATC [MR. WELLS]: Your Honor, I do not believe that we
3 need a hearing to discuss relevance and admissibility. I'm
4 looking at Lieutenant Commander Jolly who may have a concern.
5 However, before she speaks, I would like to say we think that
6 these discussions of productions of these witnesses and all
7 the details will require a closed session in which you're
8 required to make a determination under 806. So I think you
9 can do that. And then in that session we can discuss with
10 liberty what is the basis and the relevance to call these
11 witnesses. It doesn't relate to particular evidence. We've
12 already discussed that in the 505.

13 But I would ask that you also hear from Lieutenant
14 Commander Jolly on this matter because she is handling a
15 number of these motion series.

16 MJ [COL ACOSTA]: Okay. Commander Jolly, do you have
17 something to add as far as the ability to -- our need to
18 close, to have a 505(h) to determine whether or not the -- the
19 defense could make certain arguments regarding its motion to
20 compel in 440AA, which is just a motion to compel witnesses in
21 several different series?

22 ATC [LCDR JOLLY]: Yes, sir. And the government intends
23 to disclose classified information and argument on 440AA as it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 relates to 467, so we also need to discuss classified
2 information. But I believe you have enough information before
3 you to make your written findings that are required before we
4 have that closed session, sir.

5 MJ [COL ACOSTA]: Right. I -- I may tell you that -- I
6 believe I do have it and I believe I will -- when the time
7 comes, I will issue a -- I'll rule from the bench on it before
8 I leave, before we go into closed session, and then I will
9 memorialize my verbal ruling after the session concludes, just
10 in a -- for purposes of judicial economy about leaving the
11 bench going to draft this and come back.

12 Okay. But before we get to the closed session, we can
13 get to the discovery as requested in 473. When we get to 473,
14 and that's what we're going to do right now. So defense, go
15 ahead.

16 ADC [MS. MORGAN]: Judge, before we jump to the motion,
17 just to bring to your attention, we have a tech issue over
18 here. Defense can't see any of our screens, to include the
19 screen that allows us to communicate up north.

20 MJ [COL ACOSTA]: Oh. All right. Let's see if we can --
21 if the technical people can hear me in the back, we're having
22 some communications issues from the defense table to be able
23 to communicate with their partners up north.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [Pause.]

2 MJ [COL ACOSTA]: Defense, are we back up?

3 ADC [MS. MORGAN]: Good to go, Judge.

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

5 DC [MS. CARMON]: Good afternoon, Your Honor.

6 MJ [COL ACOSTA]: Good afternoon, Ms. Carmon.

7 DC [MS. CARMON]: On AE 473, in our reply which was due
8 21 April 2022, that's 473D, I identified items that were still
9 outstanding that the government had agreed to provide or do
10 their due diligence in looking for, and so I want to give the
11 commission an update.

12 MJ [COL ACOSTA]: Right. And those three things -- those
13 are an interview -- two interviews, correct? An interview, a
14 statement of Gaudin, and ----

15 DC [MS. CARMON]: And information from the OIG report.

16 MJ [COL ACOSTA]: And the OIG issue. But you -- is it
17 information that was redacted from the OIG report?

18 DC [MS. CARMON]: In the version that we had, yes, sir.

19 MJ [COL ACOSTA]: Right. Okay.

20 DC [MS. CARMON]: Yes. And so on that same day, and it
21 must have come in in the afternoon when we sent the motion out
22 in the morning, in production 418A we did receive the
23 interviews of Moorehead. Do not need those anymore. We also

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 received a classified version of the OIG report in production
2 418 as well. And so we do not need that anymore.

3 The only item that we had identified, and the
4 government was in agreement to provide, that we are still
5 missing, is Agent Gaudin's signed statement.

6 MJ [COL ACOSTA]: And they've agreed to provide that once
7 they find it?

8 DC [MS. CARMON]: That's correct.

9 MJ [COL ACOSTA]: Okay. So this is more of an update to
10 me than an argument at this point, which ----

11 DC [MS. CARMON]: For those items.

12 MJ [COL ACOSTA]: Okay.

13 DC [MS. CARMON]: There's a couple more.

14 The -- the government is also in agreement that they
15 are searching for the extent of Gaudin's alleged participation
16 in the CIA's RDI program. They do agree that that's relevant,
17 and I know that search is ongoing.

18 MJ [COL ACOSTA]: That's related to another -- is that not
19 related to the other motion regarding ----

20 DC [MS. CARMON]: There is a lot of overlap, but this was
21 particularly ----

22 MJ [COL ACOSTA]: For him?

23 DC [MS. CARMON]: Correct.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: Okay.

2 DC [MS. CARMON]: Yes. The items that we requested were
3 his specific participation in the ----

4 MJ [COL ACOSTA]: Okay.

5 DC [MS. CARMON]: ---- RDI program. And I recognize that
6 the government similarly recognizes that that is -- that is
7 something that they should provide, but I know that search is
8 ongoing. And so we've received a couple of responsive items,
9 but no indication that the two items that we've received
10 encompasses the entire universe.

11 MJ [COL ACOSTA]: Okay.

12 DC [MS. CARMON]: And so I would just ask that in that
13 search, I presume that the commission might want to hear from
14 Agent Gaudin in the July session and so ----

15 MJ [COL ACOSTA]: I do.

16 DC [MS. CARMON]: ---- if there is -- if there are items
17 that relate to him, that we get them in advance of that
18 session.

19 MJ [COL ACOSTA]: Being as his -- he is the witness that
20 is going to testify about the suppression of the accused's
21 statement that you intend to ----

22 DC [MS. CARMON]: That's right.

23 MJ [COL ACOSTA]: ---- that you intend to present, so ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DC [MS. CARMON]: As well as Jamal Badawi's 2007
2 statement.

3 MJ [COL ACOSTA]: Absolutely. But I don't think the
4 government disputes that he's going to be required for the
5 suppression motion hearing. So -- so I'm going to hear from
6 him. We're all going to hear from him so that we can -- I can
7 make that determination.

8 Let me confirm with the government that they're
9 working on producing the two things that you need, which are
10 his sworn statement and information about his participation in
11 the RDI program.

12 DC [MS. CARMON]: And then if Your Honor wants to finish
13 up with me, there is one item that we do not agree on.

14 MJ [COL ACOSTA]: Okay. Please.

15 DC [MS. CARMON]: The one item that we requested that the
16 government declined to provide revolves around Agent Gaudin's
17 administrative inquiry. And so we came to learn of this
18 because it was disclosed to the 9/11 team, where Agent Gaudin
19 also plays a big role in that investigation, that on 17
20 May 2019, Agent Gaudin retired. When he retired, he was under
21 administrative inquiry for failing to report foreign bank
22 accounts, in violation of FBI Offense Code 5.7. That inquiry
23 was subsequently closed 6 June 2019 following his retirement.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And so that's the entirety of the information that we
2 have about that. We have requested responsive documents, any
3 investigative materials, and actually the -- the final
4 adjudication of that inquiry, because we don't know if it was
5 simply ----

6 MJ [COL ACOSTA]: That's what's relevant, isn't it, the
7 final adjudication of it?

8 DC [MS. CARMON]: And I think facts, particularly given
9 the fact that -- and when I say facts, I mean what bank
10 accounts was it alleged -- was he alleged to have had
11 overseas, where were they located. And I think that's
12 particularly relevant because in his role in this
13 investigation, he served as the legat in Sana'a, Yemen. He
14 also served at the legat in the UAE. He is, as you've
15 related, the primary interviewer of Mr. Nashiri in 2007. He's
16 the primary interviewer of Jamal al Badawi in 2007. I imagine
17 he will be relevant for some of the 166 hearsay litigation as
18 he took a lot of those statements.

19 And obviously, none of these things are recorded in
20 any fashion, so his credibility is really at issue.

21 MJ [COL ACOSTA]: When you say recorded you mean not --
22 there's no tapes ----

23 DC [MS. CARMON]: Correct.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: ---- there's no 302.

2 DC [MS. CARMON]: There's no audio.

3 MJ [COL ACOSTA]: No 302s or letterhead memoranda?

4 DC [MS. CARMON]: That's right. There are no audio or
5 video, and so his testimony is really going to be, I think,
6 the best evidence we have of those statements.

7 And so this financial -- or this inquiry into his
8 failure to report these foreign assets, I think, bears
9 directly on his credibility, on his motives, which is always
10 relevant. And we're not asking the commission at this point
11 to make a -- an admissibility determination at a trial, but I
12 think this is certainly discoverable insofar as it might lead
13 to other admissible information, and it bears directly on his
14 credibility, which is going to be a large issue in the
15 upcoming hearings.

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

17 DC [MS. CARMON]: Thank you.

18 MJ [COL ACOSTA]: All right. Government? Mr. Wells, is
19 the defense correct that there's all agreement that you're --
20 that you're going to provide Mr. Gaudin's sworn statement,
21 Mr. Gaudin's -- any discovery that you receive on Mr. Gaudin's
22 participation in the RDI program, that you're working on
23 providing those?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MATC [MR. WELLS]: For the statement, sir, it's a
2 13-page document. We are working on that with security review
3 and the FBI. Certain portions of it require coordination
4 across the government on that matter, so we are working on
5 that.

6 MJ [COL ACOSTA]: When did you get that? When did you get
7 that particular statement?

8 MATC [MR. WELLS]: Sir, I think as the prosecution -- I do
9 not have the exact date.

10 MJ [COL ACOSTA]: Okay.

11 MATC [MR. WELLS]: May I supplement and provide that to
12 the court?

13 MJ [COL ACOSTA]: That's fine. I'm just trying to check
14 and see. This -- we know that Mr. Gaudin's clearly a critical
15 witness, correct?

16 MATC [MR. WELLS]: Yes.

17 MJ [COL ACOSTA]: He's a critical witness for the
18 government. The government intends on call -- I feel very
19 sure that at trial the government wants to call Agent Gaudin
20 to the stand.

21 MATC [MR. WELLS]: Yes, sir.

22 MJ [COL ACOSTA]: He's going to be a critical witness. So
23 that said ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MATC [MR. WELLS]: And he's a ----

2 MJ [COL ACOSTA]: ---- most of the things regarding
3 discovery regarding Agent Gaudin, like any officer of the law
4 who's involved in a case, are important, and you recognize it.
5 So that's what I'm trying to figure out, where are we at in
6 the process ----

7 MATC [MR. WELLS]: Correct.

8 MJ [COL ACOSTA]: ---- of getting all of the information
9 about him, a critical witness, to the defense.

10 MATC [MR. WELLS]: Yes, sir. And he's relevant in another
11 commission, and so we are working with that -- attorneys on
12 that prosecution to make sure that we get the right
13 information and we're consistent.

14 So we have that document. We're processing it. We're
15 in communication with the FBI this week on exactly what the
16 issues were. And I can tell you that the trial counsel has
17 maximized relevance and material discovery to the defense. So
18 that's the issue.

19 So ----

20 MJ [COL ACOSTA]: Right, but my -- you know, my issue
21 would be when they make a request for Brady/Giglio-type
22 information, right, shouldn't it have been a scrub of this
23 witness in probably the first place you look?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MATC [MR. WELLS]: Sir, we have provided the final report
2 and all of those items to the ----

3 MJ [COL ACOSTA]: Are you talking about the final report,
4 the disciplinary issue?

5 MATC [MR. WELLS]: Correct, that were related -- this is
6 just his statement related to that inquiry, that internal
7 review. So the statements of the witnesses who made the
8 allegations, the final review by the internal review, other
9 matters ----

10 MJ [COL ACOSTA]: Is that the OIG one you're talking about
11 or about his internal discipline regarding his bank statement?

12 MATC [MR. WELLS]: No, that's a separate matter. I'm
13 going to get to that.

14 MJ [COL ACOSTA]: Which is the separate matter, the bank
15 statement?

16 MATC [MR. WELLS]: The bank statement.

17 MJ [COL ACOSTA]: Okay. So this is about the OIG part.
18 I've got it. She's got -- they've got the OIG report. You
19 gave them the unclassified version -- or the classified
20 version, so they can all see it now.

21 MATC [MR. WELLS]: They have 440 pages still with some
22 redactions, but I don't think they're contesting those
23 redactions.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: Right.

2 MATC [MR. WELLS]: There were additional documents that
3 related to the initial allegation that led ----

4 MJ [COL ACOSTA]: To the OIG?

5 MATC [MR. WELLS]: ---- to the internal review. Right,
6 yes, sir.

7 MJ [COL ACOSTA]: Yes.

8 MATC [MR. WELLS]: So now we have that component. And
9 then the question is, well, what about Agent Gaudin's
10 statement to that inquiry that ----

11 MJ [COL ACOSTA]: Yes.

12 MATC [MR. WELLS]: ---- in response. So that's what
13 we're ----

14 MJ [COL ACOSTA]: And his is 13 pages on that. So you're
15 going to get that to them. What about the -- you're working
16 on that to ----

17 MATC [MR. WELLS]: Yes.

18 MJ [COL ACOSTA]: Again, this seems -- this seems late to
19 me as something to disclose, if somebody asked for -- this OIG
20 report is how old? What year?

21 MATC [MR. WELLS]: Sir, I want to say it's from the 2003
22 vintage time frame.

23 MJ [COL ACOSTA]: Right. It's old.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MATC [MR. WELLS]: Old.

2 MJ [COL ACOSTA]: And this is the agent that took the
3 statements. This -- this is the type of thing that I would
4 expect to have been turned over already.

5 MATC [MR. WELLS]: Well, sir, we're doing a deeper cut on
6 it. I mean, we're providing the end result. Understand,
7 sir ----

8 MJ [COL ACOSTA]: So, yeah, I understand ----

9 MATC [MR. WELLS]: ---- earlier is better.

10 MJ [COL ACOSTA]: ---- but it's -- so now we're on to his
11 participation ----

12 MATC [MR. WELLS]: Okay, sir.

13 MJ [COL ACOSTA]: ---- if any, in the RDI program.

14 MATC [MR. WELLS]: We ----

15 MJ [COL ACOSTA]: And the defense says that you state that
16 you're working on finding discovery regarding that; is that
17 correct?

18 MATC [MR. WELLS]: We have completed, and I think we've
19 provided a response to the defense to explain, that neither
20 Mr. Ali Soufan nor Agent Gaudin were detailed to the CIA to
21 participate in the RDI program. And you've already heard
22 testimony this week from Dr. Mitchell about the two FBI
23 agents' participation at the sites.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So we have answered the question. Their belief is
2 there was a formal program with the detail. That is not true.
3 We have no documents to support that. We have produced to
4 them the -- or perhaps we have not yet. Those are still
5 perhaps under security review. But to prove the negative,
6 that we have no information, Agent Gaudin will be here to
7 testify and he can explain the extent of his presence at
8 detention sites that while the detainees were under the
9 custody of the CIA.

10 MJ [COL ACOSTA]: All right. So you're saying that
11 portion has been answered in the negative?

12 MATC [MR. WELLS]: Yes, sir.

13 MJ [COL ACOSTA]: Okay. Lastly about his -- the
14 investigation or the -- pardon me. "Investigation" was not
15 the word that was used.

16 MATC [MR. WELLS]: Inquiry.

17 MJ [COL ACOSTA]: His inquiry.

18 MATC [MR. WELLS]: Failure to report ----

19 MJ [COL ACOSTA]: Like a disciplinary -- but still,
20 nonetheless, some form of -- I don't want to -- misconduct or
21 failure to comply with the rules to report certain things.

22 MATC [MR. WELLS]: Yes, sir. We have requested
23 information from the FBI and we'll continue to pursue it. The

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 prosecution does not possess anything at this time that's
2 responsive to this matter. Retired Agent Gaudin was allowed
3 to retire under favorable circumstances and retain his
4 credentials with the FBI. But we haven't run to ground what
5 exactly was this allegation, what did it result to, how far
6 did it go.

7 My understanding, that has been verbally reported to
8 me, is that it related to his spouse's bank account, not his.
9 But I'm not certain until we actually possess the documents
10 that may be responsive. And so if you'll give us additional
11 time to work with the FBI on that, we'll continue to push it,
12 along with the 13-page statement.

13 MJ [COL ACOSTA]: All right. Update me by the end of the
14 month ----

15 MATC [MR. WELLS]: Yes, sir.

16 MJ [COL ACOSTA]: ---- on both sets of discovery that
17 you're working on. That's the 13 pages that you're still
18 waiting on, whether or not you've provided to the defense the
19 amount of the -- the negative report regarding participation
20 in RDI, and update me on the bank account request for
21 information by the end of this month. Okay?

22 MATC [MR. WELLS]: Yes, sir. Let me check with my
23 co-counsel.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Thank you, sir.

2 MJ [COL ACOSTA]: All right. Defense, that's what we'll
3 have, an update by the end of the month on all three of those,
4 and then we'll go from there.

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

6 MJ [COL ACOSTA]: And again, you'll have the chance to --
7 like the government stated, to -- the defense will have ample
8 opportunity to examine Agent Gaudin in our next session.

9 All right. For the portion that's going into --
10 before we get to 440AA, I think I also stated that I wanted an
11 update on 439. Can that be discussed openly as well, or does
12 that need to close?

13 ADC [MS. MORGAN]: I think we can do it open, Judge.

14 MJ [COL ACOSTA]: Government? This is about Echo II. Can
15 we do it open or closed?

16 MATC [MR. WELLS]: Your Honor, I think some portions, but
17 it depends on the defense's argument or basis for the
18 production of particular witnesses.

19 MJ [COL ACOSTA]: Give me one second.

20 Defense?

21 ADC [MS. MORGAN]: Judge, I think we're just talking about
22 the production of one witness at this point. I don't think
23 we're getting into substantive information that would cause a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 closure. It's brief.

2 MJ [COL ACOSTA]: This is the prior -- I know who you're
3 talking about, the witness, but -- okay. If you can argue --
4 if you can -- if you can put that on now, I'd appreciate that.

5 ADC [MS. MORGAN]: And so, Judge, at this point, I think
6 the only thing really to be resolved in 439 is the production
7 of Commander Lockhart. And that's really what we're asking
8 for. We're still trying to get to ground truth on what --
9 when the prosecution knew that Echo II was a black site.

10 MJ [COL ACOSTA]: And this is based upon the -- all
11 started with the -- you -- it's disclosed to you, the next day
12 you're told that's when it was, right?

13 ADC [MS. MORGAN]: The 13 days, yeah.

14 MJ [COL ACOSTA]: ---- of events, yeah.

15 ADC [MS. MORGAN]: And so the disclosure comes from
16 Commander Lockhart. You know, we have asked for, obviously,
17 what, you know, the information that backs up her e-mail so,
18 you know, you get the metadata, kind of anything that went
19 into her producing that e-mail. But really, it's Commander
20 Lockhart is the best source of information about what the
21 prosecution knew and when they knew it back in 2013.

22 MJ [COL ACOSTA]: Okay.

23 ADC [MS. MORGAN]: And as far as its relevance, you know,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this is still an issue that's pending before the commission in
2 398 as far as intrusions. But the intrusion issue -- the
3 intrusion issue is -- is a salient issue to the defense as far
4 as the integrity of the attorney-client meeting spaces.

5 So that is, as far as for us, why this is still a
6 relevant issue.

7 MJ [COL ACOSTA]: Understood. All right.

8 Government? Is there any issue with producing an
9 affidavit or a statement from Commander Lockhart as to how she
10 became aware of -- and I don't know Commander Lockhart. She
11 just referred to her as a "she," so I was never on at the same
12 time, so if -- whoever Commander Lockhart is, if they knew --
13 is there any issue with producing a -- an affidavit or a
14 statement saying this is how I -- you know, I -- you know, I
15 learned of it on X day and this is generally how?

16 MATC [MR. WELLS]: Yes, sir. I believe so. However, in
17 interviewing her and attempting to accomplish a statement
18 which we had discussed with the defense might preclude her
19 testimony, you know, memories are not well known and we were
20 not able to establish through metadata when she was informed
21 exactly or what she knew.

22 There's some ambiguity, I think, about the accused's
23 time at Guantanamo in 2003 and 2004 and when the prosecution

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 was working with the agency to unroll that and understand it,
2 and we're talking now in I think 2012 to 2013.

3 Still today, I think you heard testimony yesterday
4 from learned counsel on the defense that he was unclear if it
5 was Echo I or II or how much time the accused stayed there.
6 If I could make the representation and try to paint a picture
7 of the potential confusion.

8 In 2003 and 2004 the footprint that we call today
9 Echo I was Echo. Starting around January of 2014 -- or 2014,
10 or, excuse me, 2004, Echo II was established and completed,
11 which is our current footprint of Echo I and II. So that's
12 where the generation came of Echo I and II.

13 The accused was moved in February and March to
14 Echo II ----

15 MJ [COL ACOSTA]: What year?

16 MATC [MR. WELLS]: 2004. And then he left in April of
17 2004. And that's all the precision I can give on the dates in
18 this session here, in this open session.

19 However, we have made the representation in our
20 filings that by 2007 the chief prosecutor's office, as an
21 office, understood that Echo II was the former detention site
22 of the detainees, all that were here at that time.

23 MJ [COL ACOSTA]: So you knew in 2007?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MATC [MR. WELLS]: Yes, sir. I think we're prepared to
2 represent that.

3 MJ [COL ACOSTA]: Are you prepared to represent it or are
4 you representing that you ----

5 MATC [MR. WELLS]: To be bound by it ----

6 MJ [COL ACOSTA]: Pardon?

7 MATC [MR. WELLS]: And to be bound by that.

8 MJ [COL ACOSTA]: Okay. So you're saying the government
9 knew in 2007 that Echo II was a -- was a black site?

10 MATC [MR. WELLS]: Yes, sir.

11 MJ [COL ACOSTA]: Okay.

12 MATC [MR. WELLS]: So -- and the prosecution, because
13 we're -- this is framed as some type of prosecution misconduct
14 of knowledge of an intrusion, either into attorney-client
15 confidences or interfering with their attorney-client
16 relationship.

17 Now, the defense counsel who were on the team in 2012
18 to 2013 and were having meetings with the accused in Echo II,
19 in a location which was either the same or similar detention
20 site -- because there were multiple there, but they're all
21 constructed in the same manner -- have this sequence of events
22 that they assert that they were informed. But that was in
23 response to a discovery request that the defense had filed in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 early 2012 about all of the known detention sites where the
2 accused was.

3 So Commander Lockhart ----

4 MJ [COL ACOSTA]: That's what Commander Lockhart's
5 response was for?

6 MATC [MR. WELLS]: That's correct. And so she was working
7 through that with the partner agency to determine all of these
8 sites and was provided various information.

9 MJ [COL ACOSTA]: Right. But she knew -- but you're
10 saying the prosecution knew in 2007. So why did it take so
11 long to answer it?

12 MATC [MR. WELLS]: Well, I think her personal
13 knowledge ----

14 MJ [COL ACOSTA]: 2007 is when they -- is when the -- when
15 the prosecution knew it was a black site and you -- and you --
16 you got asked for it and sometime in 2012, you stated?

17 MATC [MR. WELLS]: A specific discovery request for all of
18 the black sites.

19 MJ [COL ACOSTA]: In 2012?

20 MATC [MR. WELLS]: Yes, sir.

21 MJ [COL ACOSTA]: And then ----

22 MATC [MR. WELLS]: So ----

23 MJ [COL ACOSTA]: ---- and then she answered that in kind

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sometime in 2012?

2 MATC [MR. WELLS]: Yes, sir. December of 2012 she
3 answered specifically a request. And it's not clear to her
4 why she was answering directly to the defense about their
5 client and their concern. I personally theorized that there
6 must have been some discussion with members of the defense
7 team, hey, our client is telling us this. Is this true? But
8 they have not been able to confirm that and they declined to
9 confirm that.

10 Commander Lockhart does not recall why she addressed
11 that particular site at Guantanamo, Echo II, at that time.
12 But there was litigation on moving from that location to
13 another site, which we've had litigation in the 399 and 419
14 series on here in September of last year.

15 So I'm not certain that her testimony is going to move
16 us any further about the point of when did the government
17 first learn that this was a detention site or that the accused
18 was there. Her personal knowledge and what she learned as a
19 trial counsel is somewhat segregated. But as an office, as a
20 prosecution office, the prosecutors at that time had general
21 understanding and knowledge about that detention site.

22 However, the point that they want to make is that
23 someone was listening in on their attorney-client

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 communications.

2 MJ [COL ACOSTA]: No, I understand that that was the --
3 how they were -- how that was framed originally.

4 MATC [MR. WELLS]: And Commander Lockhart doesn't have any
5 information on that point. And there has been no indication
6 that they have ever been listened into.

7 So they -- the defense lays out a sequence of events.
8 We have this conversation, and then all of a sudden we get
9 this missive communication disclosure to us. There's got to
10 be something behind that. They're taking a leap of logic that
11 someone was listening in and providing information to
12 Commander Lockhart or the prosecution ----

13 MJ [COL ACOSTA]: Right.

14 MATC [MR. WELLS]: ---- or categorical ----

15 MJ [COL ACOSTA]: They're saying somebody listened in.
16 You're saying it's coincidental, that there was a discussion
17 and then she was responding to a -- a previously filed
18 discovery request.

19 MATC [MR. WELLS]: Correct. And so that's where -- that's
20 the substance of it. So if that relates to the relevancy of
21 this motion to resolve it, the government and the prosecution
22 would assert there's no evidence to support the supposition in
23 the -- the theory here, the postulate, that there was an

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 intrusion in the first place.

2 If their point is, well, it was inappropriate for you
3 to establish as an attorney-client meeting location in the
4 former detention site, that's a separate matter for another
5 day.

6 MJ [COL ACOSTA]: Well, that's been essentially
7 litigated ----

8 MATC [MR. WELLS]: Correct.

9 MJ [COL ACOSTA]: ---- as we've been going through.

10 MATC [MR. WELLS]: Yes, sir. So there's no need to call
11 Commander Lockhart on these facts and circumstances because
12 she really isn't relevant or needed.

13 MJ [COL ACOSTA]: Has she submitted to interview with the
14 defense?

15 MATC [MR. WELLS]: She declines to do that, Your Honor.

16 MJ [COL ACOSTA]: And has she -- has she declined to sign
17 an affidavit with what she knows?

18 MATC [MR. WELLS]: Sir, she has signed ----

19 MJ [COL ACOSTA]: Or declaration?

20 MATC [MR. WELLS]: She has signed a statement and ----

21 MJ [COL ACOSTA]: And has it been provided to the defense?

22 MATC [MR. WELLS]: It has not, Your Honor.

23 MJ [COL ACOSTA]: And why would that be?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MATC [MR. WELLS]: Your Honor, in discussing with her,
2 unless the commission determines that she is relevant and
3 necessary to an issue, a matter before the commission that
4 needs to be resolved, I do not think it's prudent that that
5 statement be provided in lieu of her testimony. If she's
6 called, since she signed the statement, we will be required to
7 disclose that statement.

8 So I -- I work back on this factual pattern with you
9 and I ask the commission to look at the circumstances and what
10 the defense is trying to obtain through this motion, the end
11 result, to prove an actual intrusion. And I just do not think
12 that this witness is going to be helpful in that regard. And
13 so she's not relevant and necessary on that point.

14 We have no evidence, ever, that anybody has listened
15 in to their meetings in Echo II at any time. And we're going
16 to get back into the road of establishing a negative and
17 calling many witnesses to prove that.

18 MJ [COL ACOSTA]: Understood. All right. I don't have
19 any other questions for you.

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

21 MJ [COL ACOSTA]: Defense?

22 ADC [MS. MORGAN]: Judge, to my colleague's point about it
23 being inappropriate to establish an attorney-client meeting

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 space in a black site, point out that we have the outrageous
2 government misconduct motion pending before you in 459. And
3 the defense would absolutely submit to this commission that
4 the impropriety of establishing an attorney-client meeting
5 space in a black site is something that is relevant to that
6 motion.

7 MJ [COL ACOSTA]: Right. And it's just in a foot -- it's
8 not in the actual building, right? That's what -- we keep
9 talking about it. It's a separate building, but it's in the
10 footprint of the area and you've had to go into a ----

11 ADC [MS. MORGAN]: Judge, he had to reenter the black site
12 to use the bathroom.

13 MJ [COL ACOSTA]: Right.

14 ADC [MS. MORGAN]: And so, I mean, Judge, I ----

15 MJ [COL ACOSTA]: I'm just clarifying.

16 ADC [MS. MORGAN]: Judge, it's a distinction without a
17 difference.

18 MJ [COL ACOSTA]: I know it's -- I know that that's your
19 argument. I'm just trying to make clear that for -- as far as
20 the ----

21 ADC [MS. MORGAN]: And I ----

22 MJ [COL ACOSTA]: ---- potential intrusion issue, that
23 is -- that still lingers in the defense motions, right, as far

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 as the intrusion issue is. That was that separate building
2 that was put there well after, correct?

3 ADC [MS. MORGAN]: No, Judge. I'm going to quibble a
4 little with the characterization to that. The trailer was
5 placed there afterwards.

6 MJ [COL ACOSTA]: Yeah.

7 ADC [MS. MORGAN]: That is fair. However -- the new
8 building that you're referring to is the one that was put
9 there in 2018, not ----

10 MJ [COL ACOSTA]: Not in 2012.

11 ADC [MS. MORGAN]: ---- not in 2012.

12 MJ [COL ACOSTA]: Okay.

13 ADC [MS. MORGAN]: 2018 is the building that Captain Mizer
14 met the client in in 2018 when he came back on the case. In
15 2012, we're talking about ----

16 MJ [COL ACOSTA]: The same buildings?

17 ADC [MS. MORGAN]: The same buildings.

18 MJ [COL ACOSTA]: Gotcha.

19 ADC [MS. MORGAN]: And so I -- and I do apologize.

20 There's a lot of ----

21 MJ [COL ACOSTA]: No.

22 ADC [MS. MORGAN]: ---- there's a lot of shifting around
23 of attorney-client meeting spaces. But in 2012 it's the black

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 site.

2 MJ [COL ACOSTA]: Gotcha.

3 ADC [MS. MORGAN]: So to go to what the timeline shows, I
4 believe my colleague used the phrase "leap of logic." I just
5 want to be clear sort of about the timeline here.

6 The defense sent a discovery request in approximately
7 June of 2012. That discovery request goes unanswered for 15
8 months. There is no prodding by the defense to answer that
9 that suddenly, you know, shakes it loose.

10 On December 3rd of 2013, Mr. al Nashiri confronts his
11 counsel with the fact that he's meeting in the black site.

12 MJ [COL ACOSTA]: What's the month again? Give me that
13 again.

14 ADC [MS. MORGAN]: The date is December 3rd, 2013.

15 MJ [COL ACOSTA]: So wait. We've gone a year and a half?

16 ADC [MS. MORGAN]: Yes, from -- from the discovery
17 request.

18 MJ [COL ACOSTA]: Yeah.

19 ADC [MS. MORGAN]: Thirteen days later is when Commander
20 Lockhart e-mails the disclosure.

21 MJ [COL ACOSTA]: Okay.

22 ADC [MS. MORGAN]: So you have a 15-month break where that
23 discovery request is not answered. And then you have 13 days

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 between Mr. al Nashiri spontaneously telling his counsel
2 "you're meeting me in my former black site," and the
3 government ----

4 MJ [COL ACOSTA]: All right. Yeah.

5 ADC [MS. MORGAN]: ---- seemingly out of nowhere ----

6 MJ [COL ACOSTA]: I'm aware of that set of facts, so.

7 ADC [MS. MORGAN]: Okay. And so there's not a discussion
8 between the defense counsel and I just need -- I don't
9 want ----

10 MJ [COL ACOSTA]: The government seemed to indicate that
11 there was potential discussion between the defense and the
12 government ----

13 ADC [MS. MORGAN]: There was not.

14 MJ [COL ACOSTA]: ---- implied that at least that it was
15 possible, but there was not?

16 ADC [MS. MORGAN]: There was not. And so that is why --
17 and -- and this is why we're looking for Commander Lockhart as
18 a witness. And also, to the extent that Commander Lockhart
19 doesn't remember, Judge, we all have government e-mails and
20 we're all required to keep our e-mails. It doesn't matter
21 when you move on to a new assignment, those e-mails stay.
22 They certainly stay when they -- when they relate to a case of
23 this magnitude.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So to the extent -- and this is what we requested in
2 our -- in our discovery request. To the extent there is
3 e-mail traffic prodding Commander Lockhart to disclose the
4 existence of this black site to the defense, that is what
5 we're requesting.

6 MJ [COL ACOSTA]: Okay.

7 ADC [MS. MORGAN]: Now, if there is an e-mail out there
8 says, hey, we're still waiting on the discovery response, well
9 then great, turn it over. It's on us. The defense's position
10 is that's not going to be found. What did prompt this is what
11 we are looking for.

12 MJ [COL ACOSTA]: All right.

13 ADC [MS. MORGAN]: And, Judge, pending any commission --
14 or pending any questions from the commission, I believe that
15 concludes my presentation on this.

16 MJ [COL ACOSTA]: Thank you. I have nothing else on that.

17 MATC [MR. WELLS]: Your Honor, I would like to be heard,
18 please.

19 MJ [COL ACOSTA]: Okay. Very briefly.

20 MATC [MR. WELLS]: Your Honor, relative to AE 459 and the
21 allegation or motion for ----

22 MJ [COL ACOSTA]: We're talking about 439?

23 MATC [MR. WELLS]: AE 459 -- 459, outrageous government

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 misconduct.

2 MJ [COL ACOSTA]: Okay.

3 MATC [MR. WELLS]: At one time the defense did indicate
4 that they would intend to include a section or paragraph in
5 that and listing this as an additional outrageous government
6 conduct. But my recollection and review of that filing, and I
7 was looking for this, did not include that. So I do not think
8 that that has been formally presented and argued to the
9 commission and presented as a separate and distinct matter.

10 The other aspect about, you know, e-mails, we can go
11 back and do some type of forensics, I can make the
12 representation that we attempted to do that. It indicates
13 that she started working on the response, including all of the
14 black sites, prior to December of 2013, but it was in security
15 review and that she was trying to get clarity on each
16 particular site.

17 I do not ----

18 MJ [COL ACOSTA]: Has that been provided to the defense?

19 MATC [MR. WELLS]: No, sir, because it's not relevant and
20 material to resolve this issue whether or not there's an
21 intrusion. The point is ----

22 MJ [COL ACOSTA]: The question was what the government
23 knew and when it knew it. And if you had the information

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 before and could -- and could stop this issue from becoming
2 something and coming before the commission to decide, could be
3 disclosing and saying we didn't know -- here's when we knew
4 that it was. She was just working on this.

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

6 MJ [COL ACOSTA]: Do you see the issue there ----

7 MATC [MR. WELLS]: Sir ----

8 MJ [COL ACOSTA]: ---- potentially?

9 MATC [MR. WELLS]: ---- cannot the counsel take the
10 representations of the officer of the court on the other side?

11 MJ [COL ACOSTA]: No, they absolutely can.

12 MATC [MR. WELLS]: Right.

13 MJ [COL ACOSTA]: They absolutely can.

14 MATC [MR. WELLS]: Now we're asking to provide proof of
15 that trust but verify.

16 MJ [COL ACOSTA]: Sometimes -- sometimes that's what's
17 required from other people and sometimes people say hey, look,
18 I -- I just found -- it happens all the time as we get into
19 trial practice. A party has to come up to -- and go, listen,
20 I was interviewing the witness last night, I apologize, they
21 just told me this. I have to -- you know, and you know you
22 have to tell the other side. You just found it out late. And
23 you say, look, here's the text message where after I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 interviewed that person, they said, oh, by the way, I
2 remembered this fact, this fact is now relevant and you need
3 to know it.

4 Or, you know, and it -- and it happens in both
5 directions all of the time. So -- where you just prove
6 your -- you know, not your innocence, but prove your -- your
7 statement to them. It happens all the time. But the
8 government doesn't want to do that here?

9 MATC [MR. WELLS]: Sir, it's not within the prosecution's
10 control on those communications and we have to deal with
11 another party. And the aspect of it is those communications
12 are not the complete story because there are meetings and
13 you're reviewing information.

14 So the question of when she was developing and
15 drafting the response, I can represent that the metadata on
16 that indicates that she did it prior to the defense meeting.
17 So she was already working on that response.

18 MJ [COL ACOSTA]: Okay. Now, I know you told me you
19 haven't disclosed the metadata, but have you told the defense
20 anything that you just told me before?

21 MATC [MR. WELLS]: I certainly did, I think, to Captain
22 Mizer and others ----

23 MJ [COL ACOSTA]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MATC [MR. WELLS]: ---- on the team at that time. But the
2 point is, we want to hear from Commander Lockhart, and that's
3 the question. And I represent that I don't think she's going
4 to provide any more help to this commission to resolve whether
5 or not there was an intrusion.

6 MJ [COL ACOSTA]: Okay.

7 MATC [MR. WELLS]: And that's the issue here, which I
8 think we've resolved in 399 and 419. The government is not
9 listening in on their communications. To the extent that this
10 relates to some impropriety of establishing Echo II, a former
11 detention location as an attorney-client meeting area, that's
12 in AE 398.

13 MJ [COL ACOSTA]: All right. I think I have everything I
14 need. Thank you.

15 MATC [MR. WELLS]: And, sir, if we need to go into a
16 closed session, I can talk more about the accused's history at
17 Echo II and lay out for you exactly the locations that we
18 believe was the -- the detention site and the locations that
19 were the meeting location established for the defense in 2012
20 to 2013. All right, sir. Thank you.

21 MJ [COL ACOSTA]: Thank you. No, that's something that I
22 would definitely like to hear the precise -- as precise as
23 possible. Well, and frankly, government, I want it to be --

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 it should -- you should know.

2 MATC [MR. WELLS]: Yes, sir. And I would direct the
3 commission's attention to AE 398D where we lay that out and we
4 include attachments, attachments ----

5 MJ [COL ACOSTA]: Right. No, I'm with it ----

6 MATC [MR. WELLS]: All right.

7 MJ [COL ACOSTA]: ---- but, you know, when I get to ----

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

9 MJ [COL ACOSTA]: ---- there are multiple -- the multiple
10 timelines here are -- on -- on when he -- when he moved. On
11 all of the different movements and who was responsible and
12 what sites were considered as the meeting places and where he
13 was -- which -- where was the detention area versus the
14 meeting area. So that's what I'm trying to just crystallize
15 in my mind for clarity here, to know exactly where we're at.
16 And if you can explain it to me, that would be great.

17 MATC [MR. WELLS]: Yes, sir.

18 MJ [COL ACOSTA]: All right.

19 MATC [MR. WELLS]: We're prepared to do that in a closed
20 session this afternoon.

21 MJ [COL ACOSTA]: All right. I think that leaves us with
22 440AA. Is there any portion that you think you can discuss on
23 the record, parties?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DDC [CAPT MIZER]: Yes, Judge.

2 MJ [COL ACOSTA]: All right. Captain Mizer, you can
3 proceed. And, defense -- or, pardon me, government, who is
4 handling 440AA?

5 MATC [MR. WELLS]: Your Honor, we have different counsel
6 handling different motions.

7 MJ [COL ACOSTA]: Different ----

8 MATC [MR. WELLS]: I think Mr. Miller can handle one of --
9 right away. But this is the defense motion.

10 MJ [COL ACOSTA]: Yeah. Defense, which ones are you going
11 to address so that we can just know which government counsel
12 is going to be responsible, because I'm going to ask that
13 government counsel in case you think that Captain Mizer is
14 getting into a classified area -- and Captain Mizer, I know
15 that you're going to be extremely cautious; you've been at
16 this a little while. You'll know when it is. If you think
17 you're approaching it, please just let me know. Which --
18 which -- 440AA, just for clarity, is a motion to compel
19 witnesses on various different other motions.

20 So which motions are you going to address in the open
21 session, Captain Mizer?

22 DDC [CAPT MIZER]: **[Microphone button not pushed; no**
23 **audio.]**

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: You're now silent. I can't hear you. I
2 cannot hear you.

3 LDC [MR. NATALE]: Your Honor, his microphones here don't
4 seem to be working.

5 MJ [COL ACOSTA]: It was working a second ago, so ----

6 DDC [CAPT MIZER]: Can you hear me now, Judge?

7 MJ [COL ACOSTA]: I can now. I can now. Go ahead. Which
8 ones are you going to address?

9 DDC [CAPT MIZER]: Thank you, Judge. 466 I think
10 potentially I can address, Judge. Part of 467, 468, and I
11 think 471 has largely been covered between Corsetti, Agent
12 Gaudin. There's -- there's one witness that needs to be
13 discussed.

14 MJ [COL ACOSTA]: Can 471's witness be discussed openly or
15 not?

16 DDC [CAPT MIZER]: One moment, Judge. I'm sorry.

17 No, Judge.

18 MJ [COL ACOSTA]: Okay. So we need to close for portions
19 of 467 and 471?

20 DDC [CAPT MIZER]: Yes, Your Honor.

21 MJ [COL ACOSTA]: All right. Let's talk ----

22 DDC [CAPT MIZER]: To the extent that we want to talk
23 facts on 466, we would need to close for that. But, you know,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I think that we can discuss law, Judge.

2 MJ [COL ACOSTA]: Okay. Let's discuss it, then.

3 DDC [CAPT MIZER]: Judge, with respect to 466, which is
4 the Edwards motion, we are requesting the four witnesses
5 listed on page 1 of 440AA. I'm not going to belabor the
6 point. You understand that when -- in American law, including
7 military jurisprudence, when an individual makes a request for
8 an attorney, that interrogations must cease and cannot be
9 reinitiated unless and under certain circumstances.

10 And so it is those witnesses that we are asking to
11 call to establish those facts for the basis of suppressing
12 later statements allegedly made by Mr. al Nashiri.

13 I think one of the points under the law and that the
14 government is contesting, is that these requests were
15 ambiguous. I think we won't know, Judge, if that's, in fact,
16 the case until we get into it. We're not dealing with
17 individuals trained in Edwards, I guess I would say. Trained
18 with that background. And I'm sorry if that's borderline
19 unintelligible. I think that's the best I can do.

20 Edwards arises, Judge, out of the expectation, and
21 it's the progeny of Miranda v. Arizona. And Edwards requires
22 a specific request because an individual has been told his
23 right to counsel. As I stand here in now May of 2022,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. al Nashiri has never been Mirandized, to my knowledge at
2 least, and so the specificity requirement, if you will, Judge,
3 comes out of the expectation that an accused would have been
4 informed of his rights.

5 And so we would submit this is yet another issue of
6 first impression that is going to have to unfortunately be
7 resolved by Your Honor and ultimately potentially by appellate
8 courts, is how much specificity is required, because all of
9 the case law that we are discussing is post 1967. And we're
10 really, again, as with many other issues, rewinding the clock
11 and trying to do a pre-Miranda analysis here, Judge, as to how
12 precise in a pre-Miranda world these invocations need to be.

13 If you have any specific questions about what the
14 witnesses have to say, Judge, I have to do that in a closed
15 session.

16 MJ [COL ACOSTA]: All right. I may, and I may take that
17 up in a closed session, because that will be -- that's
18 important just to know what you -- you know what these
19 witnesses are going to say. Have you had a chance to -- you
20 have identifiers for each of these. Have you had the chance
21 to interview these witnesses and do you know ----

22 DDC [CAPT MIZER]: We haven't, Judge. We haven't. We
23 sent an e-mail requesting interviews. Mr. Wells asked me to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 send a formal letter requesting interviews. We certainly can
2 do that. It hasn't been high on the priority list, Judge.
3 Given that their alphanumeric identifiers -- I feel like I'm
4 spitting in the wind in sending a letter, but I will do that.

5 MJ [COL ACOSTA]: No, I was just -- it was just a request.
6 I know that you've had these -- I believe this is from --
7 these alphanumerics you've had for -- you've had this set of
8 disclosures for quite some time, correct?

9 DDC [CAPT MIZER]: I think that that's -- I think that
10 that's right, Judge. And so, look, I mean, they're
11 alphanumeric identifiers. I can't imagine a universe in which
12 these people are going to sit down and talk with me.

13 As with respect to the proffer, we have the cables or
14 the documents, whatever it is, as to the conversations, and we
15 would expect them to testify consistent with that.

16 MJ [COL ACOSTA]: Right. So if you know that they're
17 going to -- if they're going to testify with that, do I need
18 to produce them? Do I need to order their production if you
19 agree and the -- and say the government agrees that they're
20 going to testify consistent with what their -- what their
21 recorded statements are, I know that they didn't write them
22 themselves, but somebody recorded what their statement is, do
23 I need to hear from them if -- if that is already known?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DDC [CAPT MIZER]: Absolutely, Judge. I think we've
2 gone -- we've heard testimony in the last few days about how
3 cables may not entirely be accurate. These individuals have a
4 different purpose, Judge, and that's not their fault. But I
5 think something would be significant to me as a Navy judge
6 advocate and to Mr. Miller as a United States attorney that
7 would not be relevant to, say, someone employed in a different
8 profession, Judge.

9 And so I would like to call the witnesses and have
10 them discuss exactly what was summarized, if you will, and
11 then summarized again in the product that we finally get. So
12 yes, Judge, is the answer.

13 MJ [COL ACOSTA]: Okay. Thank you.

14 DDC [CAPT MIZER]: Thank you, Your Honor.

15 MJ [COL ACOSTA]: Government?

16 ATC [LCDR SCHREIBER]: So, Your Honor, you asked just a
17 moment ago if the summaries and the proffer of defense counsel
18 are essentially what these witnesses would testify to, whether
19 you should compel the witnesses. And the answer is clearly
20 no, you should not.

21 First of all, defense -- as we made note in our reply
22 motion on the 466 issue, defense has thousands and thousands
23 of pages of documents that they could have offered to suggest

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that somehow these cables were inaccurate or that something
2 different might have been said that might even get them close
3 to an invocation of counsel that their client might have made
4 at some point. They were unable to do so or they declined to
5 do so.

6 And instead of relying on these cables that, again,
7 they have -- they went through the 505 process. They were
8 approved by this commission. And they've offered no -- no
9 reason for this commission to believe that they are inaccurate
10 or inaccurate to the degree that they would fail to include an
11 express invocation of counsel.

12 They do talk about counsel. They mention that
13 Mr. Nashiri may have spoke about the legal process. But that
14 in no way, in no realm, in no case anywhere, gets them
15 anywhere even close to a possible invocation of counsel under
16 Miranda/Edwards.

17 Secondarily, as we've pointed out in our
18 briefings ----

19 MJ [COL ACOSTA]: The defense's proceeding -- statement is
20 we may not be under Miranda/Edwards since he was never
21 Mirandized.

22 ATC [LCDR SCHREIBER]: And I was about to get to that,
23 sir. The second part of this is the government is not going

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to dispute that he was not Mirandized. He was not Mirandized
2 during those interrogations.

3 MJ [COL ACOSTA]: I know you're not disputing it because
4 it's in every -- it's in all of your -- you know, you
5 mentioned it in all of your ----

6 ATC [LCDR SCHREIBER]: Yes, sir.

7 MJ [COL ACOSTA]: ---- pleadings as well.

8 ATC [LCDR SCHREIBER]: In which case, again, these
9 witnesses would not be relevant or necessary to produce here
10 to come up and say what we don't dispute, which is that he was
11 not Mirandized. He was not offered the right to counsel or
12 anything close to Miranda during those interviews.

13 MJ [COL ACOSTA]: But nonetheless, if he requested -- you
14 know, the motion's largely he requested counsel, he was
15 implicated in another place, right, and he requested counsel,
16 that's why it should be suppressed, right?

17 ATC [LCDR SCHREIBER]: I'm not entirely sure I follow. I
18 think I follow what you're saying, sir. But I think what's
19 important to remember, the motion that we're dealing with
20 right now is whether these witnesses should be compelled to
21 speak on the other motion. So I ----

22 MJ [COL ACOSTA]: I understand that.

23 ATC [LCDR SCHREIBER]: Well, right. But -- so on the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 other question, the question is: Do these witnesses need to
2 come in and say what was already summarized and provided in
3 the cables to defense that they have no evidence before this
4 court and have made no effort to dispute, other than to stand
5 up here with Captain Mizer saying they'd like to know more, or
6 they'd like to ask these people more about what might have
7 happened?

8 None of that actually provides this court sufficient
9 evidence to suggest that what was summarized in these cables
10 was incomplete or that would get them to a place where this
11 court should need to consider any further information that
12 these people have, somehow that they got close to an
13 invocation of counsel, that would be relevant for the
14 resolution of 466.

15 Again, if you're looking ahead to 466, that case law
16 that relates to the invocation of counsel in Miranda and
17 Edwards, it's, you know, thousands of cases out there that
18 make it very clear that the invocation of counsel has to be
19 very explicit, extremely so. And nothing that defense offers
20 here or has suggested that these summaries that they rely on
21 are incomplete or inaccurate. They've suggested nothing that
22 would say that these witnesses are going to come in and say
23 that their client got anywhere close to what would be required

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to get an invocation of Miranda or Edwards.

2 Given that, these witnesses are not relevant or
3 necessary to come in and testify to things that would not
4 matter for the resolution of 466.

5 Of course, the government -- if, again, looking ahead,
6 the government also believes that 466 can be resolved as a
7 matter of law, separate and apart from whether he did or did
8 not invoke -- invoke counsel. And I'd refer to our arguments
9 and our filings in 466.

10 MJ [COL ACOSTA]: Got it. Thank you.

11 Captain Mizer, anything additionally?

12 DDC [CAPT MIZER]: No, Your Honor.

13 MJ [COL ACOSTA]: All right. On 468, then, Captain Mizer?

14 DDC [CAPT MIZER]: 468 or 467, Judge? Do you want to hear
15 468?

16 MJ [COL ACOSTA]: You said 467 we needed to be closed for.

17 DDC [CAPT MIZER]: Well, I think that portions of it,
18 Judge, are marked CUI, at least three of the individuals. So
19 I could address those in open session.

20 MJ [COL ACOSTA]: You can address those then. That's
21 fine.

22 DDC [CAPT MIZER]: But with respect to 467, Judge, at the
23 outset I would like to request three additional witnesses with

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 respect to 467. And we certainly can go through the process
2 of papering this, but if you're going to sign an order, those
3 witnesses are going to be RZ3, Z9A, and then also Dr. Jessen.

4 Judge, part of the reason for the request of those
5 witnesses is discovery that was given to us on 4 March 2022,
6 which has been referenced in both the 354 series and in the
7 467 series. And then additionally, Judge, you heard the
8 testimony of Dr. Mitchell that Dr. Jessen was the individual
9 that was present at Location 4 which, as you heard, was the
10 location where I think things that under -- are undeniably
11 torture under the definition of torture itself, not cruel,
12 inhuman or degrading treatment, but the mock executions
13 with -- with a handgun and a power drill that Dr. Mitchell
14 testified about at Location 4. Dr. Jessen now appears that he
15 is the relevant witness to discuss with that.

16 And forgive me, Judge, but I thought that these two
17 individuals, when we were dropping the request for Jessen in
18 the 354 series, traveled as a pair, like, for lack of a better
19 analogy, Bert and Ernie, but that doesn't appear to be the
20 case. Apparently they divided and conquered, if you will, and
21 went and played different roles in different places.

22 And so we're getting an incomplete picture with
23 respect to -- by not having Dr. Jessen. So that would be

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 those three, Judge.

2 And then the other three are on -- referring to page 2
3 of 440 ----

4 MJ [COL ACOSTA]: I'm there.

5 DDC [CAPT MIZER]: ---- page 2, 440AA,
6 subparagraph (b)(i)(ii) and then (iii). And these are
7 individuals who assessed Mr. al Nashiri's intelligence as
8 average, no more, if not. Dr. James Mitchell individual in
9 late 2002 assessed Mr. al Nashiri's intelligence as, quote, an
10 unpolished individual of below-average intelligence. And then
11 number three, an individual who in late 2002 assessed
12 Mr. al Nashiri as, quote, genuinely strange, rather dumb, and
13 not multidimensional.

14 Judge, as you know, for the suppression motion, if you
15 get to the totality of the circumstances test, an accused's
16 intelligence is one of the factors that you look to both in
17 military law and in civilian courts. But it's also relevant
18 ultimately, Judge, for the merits. I mean, you heard Special
19 Agent McFadden's testimony last week that it was Jamal Badawi
20 who was a soldier, and implicit in that was that
21 Mr. al Nashiri is al Qaeda's chief of naval operations.

22 And we're going to expect to hear testimony from these
23 individuals that -- who knew Mr. al Nashiri, who spent years

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 with Mr. al Nashiri, that has -- the defense would -- would
2 have available to it, at least the argument that it is
3 Mr. al Nashiri who is al Qaeda's -- to the extent that he's
4 involved at all, is al Qaeda's lance corporal and that the FBI
5 has got this wrong and that potentially the CIA is in the best
6 position to know both the intelligence and Mr. al Nashiri's
7 culpability.

8 That's what I think that I can do here in open
9 session, Judge.

10 MJ [COL ACOSTA]: Okay.

11 Government?

12 TC [MR. MILLER]: Briefly, Your Honor.

13 ATC [LCDR JOLLY]: If I could just have a moment, sir.

14 MJ [COL ACOSTA]: Somebody else has took the podium here.

15 I'll ask you to consult with Mr. Miller whether or not you're
16 going or he's going. Mr. Miller is very quick and he beat you
17 to the podium.

18 TC [MR. MILLER]: I can scurry back very quickly, Your
19 Honor.

20 DDC [CAPT MIZER]: Judge, I have no objection if they both
21 want to do it.

22 MJ [COL ACOSTA]: I do. I just want them to pick one.

23 TC [MR. MILLER]: Commander Jolly is going to handle it,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Your Honor.

2 MJ [COL ACOSTA]: Perfect. Commander Jolly.

3 TC [MR. MILLER]: Thank you.

4 ATC [LCDR JOLLY]: Good afternoon, sir.

5 MJ [COL ACOSTA]: Good afternoon.

6 ATC [LCDR JOLLY]: So part of this I'm going to be able to
7 do open, the other part of it I'm going to have to do closed
8 even as it relates to the three witnesses that Captain Mizer
9 just identified.

10 MJ [COL ACOSTA]: The three new ones or the three older
11 ones?

12 ATC [LCDR JOLLY]: The ones actually listed in their
13 motion to compel, sir.

14 MJ [COL ACOSTA]: The ones listed in the motion. Do you
15 need to close for those ----

16 ATC [LCDR JOLLY]: I'll do both. I'll just address it as
17 I'm going. I'm just highlighting so that I'm going to need to
18 do both open and closed for this.

19 MJ [COL ACOSTA]: Uh-huh.

20 ATC [LCDR JOLLY]: So the transcript is not ready yet from
21 the first day that Dr. Mitchell started testifying. I was
22 hoping to bring it in to actually get the quote that he had
23 when Mr. Natale was asking him several questions about the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 accused's intelligence. But he wasn't actually asking
2 Dr. Mitchell about his personal knowledge. He was asking
3 about did you know that Mr. Rodriguez said in his book? What
4 about Ali Soufan? What did Ali Soufan say about Nashiri's
5 intelligence in his book?

6 Now, in motion practice of course we can rely on
7 documentary evidence and we haven't objected to that, sir. So
8 here we have summaries that we provided the defense in
9 discovery. At the latest, it would have been November 2017.
10 They've had this for five years and, no, they have not made
11 request for any of these witnesses. None to conduct
12 interviews. And they didn't ask Dr. Mitchell when he was on
13 the stand, hey, are you the one who actually said this quote?

14 And it sounded like Captain Mizer was challenging the
15 adequacy of the substitutes provided to him as though it went
16 through a double summarization process, as though we
17 manipulate the language contained in the cables before we give
18 it to the defense rather than just removing what we have to
19 for classified purposes.

20 But the language that's in the cables is in the
21 cables. And you know how it reads, sir. The cables do not
22 identify a speaker. We're not removing, Dr. Mitchell said on
23 the following day this. It's -- it's not there. So we would

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 not oppose the defense attaching this or supplementing their
2 pleading, which -- it's not in their pleading, but they're not
3 necessary, and to the extent that they can even be identified,
4 sir.

5 Additionally, we would submit that in 467, I think
6 we're all in agreement that whether it's Oregon v. Elstad or
7 Karake might be the proper pronunciation of that case, it's
8 the same analysis, the age, intelligence can -- all of that.
9 You don't need these three witnesses to testify to the
10 accused's intelligence in their observation from late 2002 to
11 early 2003. You already had Dr. Mitchell. And he did testify
12 to the accused's concrete thinking, that if you presented him
13 with a piece of paper he would just -- I'll leave it there.
14 Excuse me.

15 But he already testified to that, so you don't need
16 more witnesses on that. Additionally, you're going to have
17 all of the other witnesses, and not necessarily psychologists.
18 You're going to have the law enforcement personnel who
19 interviewed the accused in January of 2007 resulting in the
20 letterhead memorandum who will testify to the accused's
21 intelligence.

22 And then you also have the competency examination
23 conducted by a panel of three. But we intend to call the lead

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 psychiatrist who participated in the accused's 706 evaluation
2 to determine whether he's competent to participate in these
3 proceedings. And he too evaluated the accused's intelligence.

4 So we would submit, sir, that those three witnesses on
5 page 2 of 440AA, the top, they're talking about the accused's
6 intelligence, are not material. To the extent that they are
7 not Dr. Mitchell who, when we asked him if the accused -- if
8 he described the accused as dumb as -- as a bag of rocks, he
9 couldn't remember.

10 As it relates to these three new witnesses, it's a
11 little late, sir. You gave us guidance about when we needed
12 to file these motions and these requests. Z9A, it seems that
13 the defense wants to call this person because she happened to
14 be present at the location. But again, that relates to 354
15 and the videotapes, not the suppression of the accused's
16 statements that were in 2007.

17 As the testimony came out from Dr. Mitchell, Z9A is
18 interacting with the accused at Location Number 3. So we're
19 talking late 2002. The statements that the defense seeks to
20 suppress in 467 were made in January 2007 and then first
21 couple of days in February 2007.

22 As it relates to Dr. Jessen, we -- I disagree with
23 Captain Mizer's assessment. I don't have the transcript right

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 here in front of me, but my recollection is that Dr. Mitchell
2 said that both he and Dr. Jessen were called to clean up the
3 mess that those other individuals made at Location Number 4.
4 His language. The mess they made. That they were not there
5 at the time. Dr. Jessen just happened to beat Dr. Mitchell to
6 that location, but he was not present when the treatment
7 occurred. I don't have that transcript, sir.

8 As far as the defense cast aspersions on the discovery
9 provided, again, we provided that back in 2017 and it actually
10 states which interrogators were present at any given time. If
11 the person was a direct and substantial -- they had direct and
12 substantial contact with the accused, it says interrogator
13 number whatever was present at the time. And that was
14 provided back in 2017 and reproduced as it relates to
15 statements of the accused, yes, in March of this year, sir, as
16 we included additional information and reformatted those
17 reports in accordance with your guidance.

18 The rest I believe I'm going to have to do in a closed
19 session, sir.

20 MJ [COL ACOSTA]: Including ----

21 ATC [LCDR JOLLY]: Subject to your questions.

22 MJ [COL ACOSTA]: Including RZ3?

23 ATC [LCDR JOLLY]: I need to pull the thread on that, sir.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I don't have it right in front of me. I think RZ3, the
2 defense wanted to say they were relevant because of a
3 conversation they had, again, relating to the accused's
4 intelligence.

5 To the extent that that was the proffer, I would
6 submit that it's the same as the first three individuals on
7 page 2 of 440AA that if it's not -- RZ3 is not Dr. Mitchell.
8 But we don't need additional testimony about the accused's
9 intelligence back in the day when, again, that's one factor in
10 the Oregon v. Elstad analysis. And the relevant time period
11 is 2007 when the accused made the statements. Did he
12 understand, did he have the capacity to understand that he was
13 meeting with law enforcement personnel and that he did not
14 have to talk to them? That's the question, sir. Not 2002.

15 Subject to your questions.

16 MJ [COL ACOSTA]: I have none at this time.

17 ATC [LCDR JOLLY]: Thank you, sir.

18 MJ [COL ACOSTA]: Defense.

19 DDC [CAPT MIZER]: Judge, 2002 is obviously relevant to
20 this case and what took place at Location 3. I would hope
21 that -- that that would not be in dispute, particularly with
22 respect to the admissibility of statements, even if they're
23 taken in 2007.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I mean, you've read the pleadings, and so exactly what
2 happened at Location 3, who saw what and what happened to
3 Mr. al Nashiri is relevant to the attenuation analysis which
4 precedes the voluntary analysis.

5 So the government wants to skip to the end of the
6 book, but we've got to get to the -- the three factors that
7 Karake, that my friend from the government references, before
8 you get to the voluntary analysis. And that's pretty clear
9 from -- from that case.

10 Judge, I mean this is another example, and with
11 respect to my friends from the prosecution, where they wish to
12 contest the facts and then deny the witnesses at the same
13 time. I mean, you heard McFadden -- Special Agent McFadden,
14 pardon me -- talk about, you know, or characterize
15 Mr. al Nashiri as a mastermind. And we are entitled both on
16 the suppression motion and at trial to -- to elicit testimony
17 from psychologists and witnesses who would be qualified to
18 know better, who spent more time with Mr. al Nashiri, who
19 would, in essence, tell you that Mr. al Nashiri couldn't run a
20 yard sale, much less a mastermind of some terrorist
21 organization. And we believe that that evidence is there. We
22 believe that these witnesses would -- would establish that.

23 Judge, with respect to the lateness of the request, it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 is true that some of this discovery did come in in November of
2 2017. I wasn't here, Judge. I was blissfully doing other
3 things, and so I don't know that I can be held responsible,
4 particularly with the -- with the rest of this trial team, for
5 discovery that was provided when a Navy Lieutenant was manning
6 the desk by himself.

7 You know how complex this case is, Judge. I know that
8 that's not lost on you. And to have the expectation that we
9 are supposed to be -- or he was alone, supposed to be, you
10 know, running in all of the various directions, is -- is a bit
11 much, Judge.

12 And again, I stand by with respect to these -- the
13 three additional witnesses, that we got those documents on 4
14 March 2022. And I'm going to talk about that document in the
15 closed session and why -- I mean, it probably even makes a
16 defense exhibit list on the merits at trial. And so that's
17 the importance of these witnesses.

18 Judge, my friend is right that we don't have the
19 transcript. But one of the things that I'm going to want to
20 do when I get the transcript -- and actually, I -- let me be
21 correct. I think that we got a Top Secret version of the
22 transcript late last night. One of the things that I'm going
23 to want to do is run through how many times Dr. Mitchell said

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the phrase "I don't know" or "I don't remember."

2 And, look, it's 20 years later, but I think that the
3 court is going to have to be more indulgent than it would be
4 in, say, the Article 120 case that happened six months or a
5 year ago. I think that people are going to remember pieces of
6 it. You saw it with -- with Damien Corsetti. You saw it with
7 Dr. Mitchell. And -- and our theory would be that with --
8 with witnesses you're going to get a little piece of -- of
9 events that happened, and some of these things are very, very
10 important. What took place at Location 4 and Location 3 is
11 critical to both the suppression motion, and then ultimately
12 in the unlikely event that the defense motion for suppression
13 is not granted, this becomes a weight issue, as you know,
14 Judge, and ---

15 MJ [COL ACOSTA]: Yeah.

16 DDC [CAPT MIZER]: ---- I don't mean to tell you the law.
17 You know it well.

18 MJ [COL ACOSTA]: For the things that occurred at
19 Location 4, I don't see -- I don't see the requests that are
20 granted, right? I don't see the -- what never comes across my
21 desk is a request for a witness that's granted for a motion
22 hearing. I only see the ones that are denied, unless you
23 attach it.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Did you request other people from Location 4 who saw
2 the things that occurred there ----

3 DDC [CAPT MIZER]: Well ----

4 MJ [COL ACOSTA]: ---- before Doctor -- well, according to
5 the government, before Dr. Jessen got there, but ----

6 DDC [CAPT MIZER]: We're ----

7 MJ [COL ACOSTA]: ---- that we heard testimony of occurred
8 at Location 4?

9 DDC [CAPT MIZER]: I think that there are some of these
10 individuals in the motion, Judge, but I don't know that I can
11 fully answer that here. I think we'd have to go into a closed
12 session to discuss the substance.

13 MJ [COL ACOSTA]: Yeah, it's -- I don't want the
14 substance. I just want to know: Did you request witnesses
15 that saw or did the acts at Site 4 for purposes of the -- of
16 litigating the motion to suppress?

17 DDC [CAPT MIZER]: Judge, I want to say that we did, but
18 I'm going to have to take a look at this, because we're
19 dealing with across four motions, and I apologize.

20 MJ [COL ACOSTA]: I can't imagine that you wouldn't,
21 right?

22 DDC [CAPT MIZER]: Yes, Judge. So I believe that we did.
23 And I think one of the other problems is, as Dr. Mitchell

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 testified to, NX2 is dead. So the individual that perpetrated
2 the acts themselves is gone. And so we're looking at a
3 handful of other alphanumeric identifiers. Dr. Jessen is --
4 is the obvious one, Judge.

5 MJ [COL ACOSTA]: All right.

6 Government, can you confirm that they've requested
7 other -- whether or not ----

8 ATC [LCDR JOLLY]: Sir, I can confirm that they did not.

9 MJ [COL ACOSTA]: They did not request any other
10 eyewitnesses of the events at Site 4?

11 ATC [LCDR JOLLY]: In fact, the thrust of 467 has to do
12 with the intelligence of the accused and his perception of
13 Camp VII. So the witnesses, their medical providers,
14 they're -- we did -- the defense did request several law
15 enforcement personnel who actually participated in the FBI
16 interviews and we granted those.

17 They requested people -- actually, in 440AA, after we
18 denied them discussing the accused's intelligence and medical
19 providers at Camp VII at the time that the accused made the
20 statements to the FBI, but that's it, sir.

21 They don't have witnesses on 467 relating to the
22 treatment of the accused at the black sites.

23 MJ [COL ACOSTA]: Okay. Thank you.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [LCDR JOLLY]: Thank you, sir.

2 DDC [CAPT MIZER]: Judge, I have one saved round.

3 MJ [COL ACOSTA]: Yes.

4 DDC [CAPT MIZER]: I would invite the commission's
5 attention to page 6 of our pleading.

6 MJ [COL ACOSTA]: Which -- I -- are we on 440 ----

7 DDC [CAPT MIZER]: 440A, Judge.

8 MJ [COL ACOSTA]: 440AA or ----

9 DDC [CAPT MIZER]: 440AA. I'm sorry.

10 MJ [COL ACOSTA]: Okay. No, that's okay.

11 DDC [CAPT MIZER]: I need to be more precise.

12 Page 6. So we have one, two, three, four witnesses
13 from Location 4 that were requested.

14 And then the last point that I would make is Z9A --
15 well, that's going to have to wait, Judge.

16 MJ [COL ACOSTA]: Okay.

17 ATC [LCDR JOLLY]: Sir, if I could be heard.

18 MJ [COL ACOSTA]: You may.

19 ATC [LCDR JOLLY]: Tracking that this is a classified
20 filing, so it might be harder to handle here. But on page 6
21 of 440AA ----

22 MJ [COL ACOSTA]: That's where I'm at.

23 ATC [LCDR JOLLY]: ---- those individuals relate to 466.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL ACOSTA]: Yes, I'm aware. I was just -- I hadn't
2 had the chance to catch up with -- to ask that question, but
3 I'm tracking the same.

4 ATC [LCDR JOLLY]: Copy. So there were no witnesses the
5 defense requested related to the accused ----

6 MJ [COL ACOSTA]: For 467.

7 ATC [LCDR JOLLY]: For 467, yes, sir.

8 MJ [COL ACOSTA]: All right.

9 Captain Mizer, for 468?

10 DDC [CAPT MIZER]: Two witnesses, Judge: James Comey and
11 Dave Kelley, the -- I don't know if he's a senior AUSA or AUSA
12 up in New York at the time that's dealing with the -- the New
13 York Terrorist Bombings case. I think Your Honor's well aware
14 that there was an indictment. I think you heard testimony
15 last week from Special Agent McFadden that -- that he was
16 involved to some extent with that investigation. I think that
17 he was there, I think he said, but didn't testify in front of
18 the grand jury.

19 This is one that probably could be resolved if the
20 government would agree to a certain number of facts, Judge.
21 One, that -- first, I think there's been some gauzy language,
22 if you will, as to whether or not Mr. al Nashiri was indicted
23 in the district of New York at this point. But if the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 government will confirm that he was not, and even if it's
2 under seal, that he was not, and that both Mr. Comey and
3 Mr. Kelley were aware of where Mr. al Nashiri and, to some
4 extent, Walid Bin'Attash, because those are the two unindicted
5 co-conspirators, they were aware of where they were and that
6 the United States government intentionally did not indict
7 those gentlemen to evade the Sixth Amendment.

8 MJ [COL ACOSTA]: That's your argument, right?

9 DDC [CAPT MIZER]: Yes, Judge.

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

11 DDC [CAPT MIZER]: But we need those facts to make that
12 legal argument. And we'll call the witnesses. I suspect that
13 that is -- and I do expect that that is what they will
14 testify. They are obvious people of relevance, according to
15 the government's theory. There is a reason why they weren't
16 indicted. We think we know what that is, and we would expect
17 them to testify consistent with that, Judge.

18 MJ [COL ACOSTA]: Right. You're saying that you know
19 that -- you believe that you know that it is simply to avoid
20 attachment of any Sixth Amendment rights?

21 DDC [CAPT MIZER]: Yes, Judge.

22 MJ [COL ACOSTA]: Okay.

23 DDC [CAPT MIZER]: And ultimately the question here is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 going to be: Can you do that too? I mean, so many of these
2 issues have never been done before in either civilian or
3 military courts, and they're going to have to be resolved,
4 Judge.

5 MJ [COL ACOSTA]: All right.

6 DDC [CAPT MIZER]: That's it.

7 MJ [COL ACOSTA]: All right.

8 Government? Now we get to hear from Mr. Miller. Good
9 afternoon.

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

11 MJ [COL ACOSTA]: Can you -- let's just open the door
12 with -- with the two facts that Captain Mizer asked you to
13 agree to, if you can, and that is that Mr. al Nashiri was
14 unindicted.

15 TC [MR. MILLER]: He was an unindicted co-conspirator.

16 MJ [COL ACOSTA]: So he was not indicted.

17 TC [MR. MILLER]: Never indicted.

18 MJ [COL ACOSTA]: So the government agrees.

19 TC [MR. MILLER]: Never indicted.

20 MJ [COL ACOSTA]: Now, the next question is: Did
21 Mr. Kelley and Mr. Comey of the Department of Justice know the
22 location of Mr. al Nashiri at the time of the decision to not
23 indict him?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [MR. MILLER]: Well, Mr. Comey wouldn't make that
2 decision. He was the director ----

3 MJ [COL ACOSTA]: No, it's not the decision. It's --
4 right. Did they know where he was at the time that the
5 indictment came down in which Mr. al Nashiri was not included?

6 TC [MR. MILLER]: I wouldn't know, but that would be
7 irrelevant.

8 MJ [COL ACOSTA]: Okay.

9 TC [MR. MILLER]: And, of course, this gets into sort of
10 the argument. The rule that had been set forth in all the
11 Supreme Court cases is that the right doesn't attach until
12 he's indicted, all right, or some sort of formal charges are
13 brought. Here it would be referral charges, referral charges.
14 That's when the right attaches.

15 There's a million reasons why you might not indict
16 somebody. But the fact is is you didn't indict them. You
17 know, you may have a wire up on -- now, I'm not saying in this
18 case it was. I'm just talking about in a traditional
19 organized crime case or a dope case, you wait until you have
20 enough evidence. You know, the timing of your indictment a
21 lot of times has to do with evidence gathering, even though
22 you may know ----

23 MJ [COL ACOSTA]: What is that noise? Sorry. It was --

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 there was a distracting beeping going on that I was trying to
2 make sure wasn't somebody setting off an alarm.

3 Go ahead. I apologize for interrupting you.

4 TC [MR. MILLER]: Oh, no, Judge. Or you know where the
5 defendant is and what he's doing and who he's doing it
6 with ----

7 MJ [COL ACOSTA]: Yes.

8 TC [MR. MILLER]: ---- but you simply choose to indict him
9 at a later time. The rules as set forth in the Supreme Court
10 set forth a bright-line rule. I think we cite a case in our
11 ----

12 MJ [COL ACOSTA]: Right. So your argument is that it's a
13 matter of law and it doesn't matter ----

14 TC [MR. MILLER]: Right.

15 MJ [COL ACOSTA]: ---- and even if there is bad intent --
16 even if -- your argument is even if the Department of Justice
17 said we don't want to indict him so that he's not implicated,
18 right, by the Sixth Amendment, that that's acceptable.

19 TC [MR. MILLER]: Yes, it is.

20 MJ [COL ACOSTA]: Okay.

21 TC [MR. MILLER]: So for those reasons I think that these
22 people are irrelevant.

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

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [MR. MILLER]: Thank you.

2 MJ [COL ACOSTA]: Captain Mizer?

3 DDC [CAPT MIZER]: Judge, the only point I want to make
4 is, I mean, Attorney General Ashcroft gave a press conference
5 where he accused Mr. al Nashiri of the role that the
6 government now accuses him of. And the government's argument
7 is, well, that's not actually being accused of a crime to
8 where the Sixth Amendment attaches.

9 And under these exotic facts, Judge, I wouldn't even
10 mention this if I were giving an appellate argument as a
11 hypothetical. They are that extreme. I'm making the Attorney
12 General of the United States come and accuse you of a crime
13 while you're held in incommunicado detention during a
14 four-year period ----

15 MJ [COL ACOSTA]: By the United States.

16 DDC [CAPT MIZER]: ---- and the purpose, and that's what I
17 expect the testimony would be, the purpose and intent was to
18 evade the Sixth Amendment. And does the Sixth Amendment allow
19 the government to go that far? Judge, I think that it
20 doesn't, but we're entitled to at least have limited testimony
21 on that -- on that -- on that basis, Judge, to make that
22 argument. That's it.

23 MJ [COL ACOSTA]: All right.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

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

2 MJ [COL ACOSTA]: I believe that covers all the portions
3 that we can cover in open because 471, I think, has to be
4 entirely in closed, correct?

5 DDC [CAPT MIZER]: Yes, Judge.

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

7 MJ [COL ACOSTA]: All right. One second. While there has
8 been no notice provided other than what I've been told, I will
9 take -- the commission takes the representations of the
10 parties of the issues in which they need to inquire into this
11 as the notice of what needs to be heard and the government's
12 concession and indeed agreeance that they will also seek to
13 introduce evidence on these issues which is classified.

14 This classified information that they've discussed may
15 only appropriately be discussed in a closed hearing conducted
16 in accordance with R.M.C. 806(b)(2).

17 The commission concurs and finds that the
18 United States has an overriding interest in preventing public
19 disclosure to the -- or disclosure to the accused of the
20 classified information that the parties expect will be
21 presented as they've stated here today during argument on the
22 motions that we discussed.

23 Since that information could be reasonably expected to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 cause serious damage to national security, the commission
2 finds that the closure of the proceedings in accordance with
3 R.M.C. 806(b)(2) is necessary and has been narrowly tailored,
4 as is demonstrated by our discussion of everything we possibly
5 could in the open session, and that we will close the session.

6 The commission finds the classified information is
7 necessary -- it is necessary to protect the classified
8 information that I previously discussed. And I'm going to
9 hear evidence and argument on the defense motions we
10 previously discussed in a closed session beginning in
11 approximately 30 to 45 minutes, depending on how long it takes
12 for the court reporters to get down here.

13 I do not expect, unless time permits, to reconvene
14 publicly if the -- and again, I'm basing this on the
15 dangerous -- not the dangerous -- on the assertions of the
16 parties that they believe that the -- that the deposition will
17 take two days. If it doesn't take two days and we have time,
18 I reserve the right to reopen and take up whatever issues that
19 I -- that we can take up in the last day.

20 But tomorrow, I will -- I will assure the public and
21 the parties that we will not reconvene tomorrow. So at the
22 earliest, it would be Friday. And if I know by midday
23 tomorrow -- any open session on Friday I will provide notice

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of by 1600 tomorrow.

2 So the closed sessions -- the open sessions are going
3 to be closed now for the purpose -- just for public notice,
4 and we will begin a closed session in 30 to 45 minutes.

5 The commission is in recess.

6 [The R.M.C. 803 session recessed at 1545, 04 May 2022.]

7 [END OF PAGE]

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23