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1 [The R.M.C. 803 session was called to order at 0902,
2 15 December 2021.]

3 MJ [COL ACOSTA]: The commission is called to order. Good
4 morning, Government. Mr. Miller.

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

8 Present for the United States today, consistent with
9 our detailing memorandum: Myself, Mark Miller; Mr. John
10 Wells; Lieutenant Commander Cherie Jolly; Lieutenant Commander
11 Keven Schreiber. Absent today is Major Michael Ross who is
12 tending to other duties, Your Honor, but he is observing the
13 proceedings from the -- our trailer here.

14 MJ [COL ACOSTA]: Okay.

15 TC [MR. MILLER]: Also present for the prosecution are
16 Mr. Pascual Tavaréz-Patino and Staff Sergeant Carlos Salazar.
17 Also present for the government is Mr. Forrest Parker Smith,
18 Ms. Joleen Sanders, and our interpreter, [REDACTED].

19 Present in the back of the courtroom are our case
20 agent, Supervisory Special Agent Luke Hardison of the FBI, and
21 he's being provided assistance by FBI employee Kimberleigh
22 Albites.

23 All persons have the necessary clearances, Your Honor.

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1 Thank you.

2 MJ [COL ACOSTA]: Thank you.

3 Good morning, Mr. Natale.

4 LDC [MR. NATALE]: Good morning, Your Honor. Anthony
5 Natale on behalf of Mr. Nashiri. Present in the courtroom
6 today is Captain Mizer, Ms. Carmon, Ms. Morgan, Ms. Janes.

7 The following individuals will probably be coming in
8 and out as we need them: Mr. Hoffmann, Mr. Dolphin, Mr. Roy,
9 and our interpreter. Mr. Nashiri is present here in court.

10 In the RHR, Commander Piette, Ms. Hon, and I also
11 believe Ms. Pinate will also be present.

12 All of these individuals have the proper clearance to
13 attend these proceedings.

14 MJ [COL ACOSTA]: Thank you.

15 Ms. Morgan, I have a couple of questions for you that
16 I want to follow up with from yesterday on the 371 issue. Can
17 you tell me roughly -- I mean, the issue is generally -- it's
18 difficult for me to understand the scope of the issue that
19 you're presenting.

20 Can you tell me about how many pages of behavioral
21 health records are we talking about, the 2006 to the present,
22 how many pages you have?

23 DDC [MS. MORGAN]: Judge, I can give you a definitive

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1 answer from one of our analysts. I believe the answer is
2 approximately 1600 pages, but please don't hold me to that
3 and ----

4 MJ [COL ACOSTA]: Okay. So it's not -- I'm trying to
5 figure out if I'm dealing with a -- one volume of the
6 Encyclopedia Britannica or the series.

7 DDC [MS. MORGAN]: Right. I don't want to mislead the
8 commission. It will not take much to get that definitive
9 answer from my analyst, but if I could do that at a break ----

10 MJ [COL ACOSTA]: I will -----

11 DDC [MS. MORGAN]: ---- and then come back with a
12 definitive answer.

13 MJ [COL ACOSTA]: Another question: What's the nature of
14 the redactions that you're -- that you say -- you know, I
15 understand you're saying, hey, we're getting these, they're
16 redacted.

17 Is the nature significant portions where things that
18 are said to the patient, from the patient, or are there names
19 that are redacted?

20 DDC [MS. MORGAN]: Sure, Judge. Good question. So
21 substantive -- and let me make a point here.

22 The providers' names don't appear on these records.
23 They're signed "psych." And we get really weird reactions. I

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1 can point to a record where the "Y" in psych is redacted. I
2 can't figure out -- yeah. Can't figure out why that's
3 happening, but it is. So you just don't really know who's
4 using this redaction pen. But the provider's name never
5 appears on the record. So that's not what we're fighting
6 here, not what we're contesting here.

7 What is being redacted is substantive -- substantive
8 portions of the record where it is describing what my client
9 is relating to the provider. And the defense's position is
10 that nothing that my client says can be classified. One, it's
11 incredibly valuable for mitigation purposes, but I think we
12 saw that just recently in the Khan case. My client's memories
13 themselves are not subject to classification. And so that is
14 what we're contesting being classified.

15 MJ [COL ACOSTA]: All right. And the government's stating
16 that they've never seen these, they're not doing it, and you
17 don't know who's making these redactions. It's allegedly --
18 well, there was a -- there was a captain that appeared, and I
19 think that was a '17 hearing. Was that '17?

20 DDC [MS. MORGAN]: That sounds right, Judge. And I -- in
21 the past, the prosecution has actually used their own people
22 to do this. They've used -- it was a -- it was a Major Ford
23 who was assigned to the prosecution. I understand she wasn't

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1 assigned to the Nashiri team. I think we're getting these
2 from some sort of walled-off prosecution team, but they're
3 still assigned to the Office of the Chief Prosecutor. I don't
4 know who's actually making these redactions.

5 We're trying to go direct to the records custodian.
6 We're trying to cut out the middleman which reduces the
7 opportunity for error. It reduces the opportunity for, you
8 know, a record just getting missed on a copier somewhere.

9 And look, Judge ----

10 MJ [COL ACOSTA]: Right. Here's my next question. Are
11 they dated? Are they all dated? The 1600 pages, are they
12 dated?

13 DDC [MS. MORGAN]: I believe so.

14 MJ [COL ACOSTA]: Okay. This is my question: You're
15 saying you don't know what order they're in. I'm assuming
16 they have dates on them. Ordering 1600 pages -- and I know
17 that you're talking about you have a substantially smaller
18 team. That can't be done, to order 1600 pages?

19 DDC [MS. MORGAN]: Well, Judge, so ----

20 MJ [COL ACOSTA]: And then to say this is what we have.
21 Are there more? Can you recheck?

22 DDC [MS. MORGAN]: Well, and so here's the thing, Judge.
23 I don't know how many visits my client has had.

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1 And so I get a custodian's record that says here's the
2 months he didn't have appointments. I already know that's not
3 right because I can point to months where he did. But then
4 the other thing is I don't know how many visits happen in a
5 month.

6 And so, Judge, I'm telling you, if the answer is I fly
7 down to the island and I sit in an office with the records
8 custodian similar to, you know, what a uniform personnel would
9 do with AFOSI, and I go cover to cover with that record and
10 make sure they're copied, I'm happy to do that.

11 Just trying to get to the point where we go direct
12 with the records custodian, we're not getting substantive
13 information redacted out of it, and we know we have it cover
14 to cover.

15 MJ [COL ACOSTA]: Okay. I'm just trying to frame the
16 issue. Because, again, they're not provided to the commission
17 for an -- to say -- there's no exemplars presented to me to
18 go, look, look at what it is. So that's why I have to ask the
19 question of ----

20 DDC [MS. MORGAN]: Understood, Judge.

21 MJ [COL ACOSTA]: ---- what am I talking -- what are you
22 talking about? How are you meeting your burden to me to get
23 the relief that you're asking for?

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1 DDC [MS. MORGAN]: Understood.

2 MJ [COL ACOSTA]: As far as medical records, what's the
3 volume there?

4 DDC [MS. MORGAN]: Much larger. And I can provide you a
5 NIPR and SIPR total, again, if I can have an opportunity after
6 the break to get with my analyst to get those numbers. I
7 believe we give a WAG in our pleading. I just didn't bring it
8 into the commission today, but I'll go ahead after the break
9 and give you -- give you NIPR and SIPR numbers.

10 MJ [COL ACOSTA]: Is there a -- you stated -- you've
11 referenced an analogous 513 method, which ----

12 DDC [MS. MORGAN]: It's imperfect.

13 MJ [COL ACOSTA]: I don't know that -- that's not a
14 perfect analogy, I understand.

15 Is it your position that the commission should review
16 the redactions? Or do you want -- is that something you're
17 consenting to or not consenting to or as potential -- as a
18 potential method of -- of going through these to review them
19 on behalf of -- on behalf of the defense, like I do other
20 things, whether or not the redactions are made, and send them
21 back to the person making the redactions?

22 DDC [MS. MORGAN]: Sir, our position is that there is no
23 basis for redacting anything from mental health records for

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1 our client. 513, you're typically looking at, like, you know,
2 victim records.

3 MJ [COL ACOSTA]: Right.

4 DDC [MS. MORGAN]: That's why it's coming to the judge.
5 Got it. So defense's prior position is we go direct to the
6 records custodian, we get the records ----

7 MJ [COL ACOSTA]: Nothing is ever redacted.

8 DDC [MS. MORGAN]: If there's a fallback position, why in
9 some -- for some inexplicable reason someone else has to look
10 at these things, then we would entrust that to the military
11 judge in an ex parte in camera review. We do not waive the
12 privilege in any manner to the prosecution ----

13 MJ [COL ACOSTA]: No, I understand. I'm not -- I'm not
14 suggesting that it go through them. It's just now it's
15 another party -- you understand that that would be another
16 party, not the prosecution, essentially making a 505 type of
17 a pleading to me to review it. You understand that?

18 And I don't know -- I'm trying to find a
19 mechanism ----

20 DDC [MS. MORGAN]: Judge, we ----

21 MJ [COL ACOSTA]: ---- in the rules that exists to make
22 that happen other than me saying make this happen.

23 DDC [MS. MORGAN]: Well, and, Judge, we would ----

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1 MJ [COL ACOSTA]: You know, like one of the things I ask
2 is, like, what do you want me to do? Now, tell me how I have
3 the authority to do that ----

4 DDC [MS. MORGAN]: Right.

5 MJ [COL ACOSTA]: ---- and that's what I'm trying to
6 figure out.

7 DDC [MS. MORGAN]: We would contest that that's not an
8 appropriate use of 505. So, Judge, this may spur a different
9 legal issue, right? We may get there and we may -- you know,
10 it may become a different legal issue.

11 Cleanest answer is we go to the records custodian.
12 The analogy would be how does the defense get the file from,
13 you know, AFOSI. We go, we sit down with the agent, we copy
14 it cover to cover, and we then know that we're in possession
15 of all the records.

16 MJ [COL ACOSTA]: Are there similar redactions in the --
17 in the -- in the basic medical, in the physical medical
18 records of the non-behavioral health records?

19 DDC [MS. MORGAN]: Sure, Judge, and they're all over the
20 map. I mean there are records that I can point to where my
21 client's blood pressure is redacted out. Can't possibly
22 understand how that could be a matter of national security.

23 And here's the problem, Judge. And we don't have

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1 visibility on whether my client's medical records are going
2 through the 505 process. If something is being redacted, the
3 government is under an obligation to delineate the reason for
4 redaction, and we don't get that.

5 There is not ----

6 MJ [COL ACOSTA]: Not on the medical records you're not.
7 On the 505s you are.

8 DDC [MS. MORGAN]: Sure. Sorry. Let me be more precise
9 in my language. On the medical records. And -- and
10 privileges -- the redactions are a scalpel, not an ax, right?
11 That's the famous quote. If it is one word -- whoever is
12 using that redaction pen gets to redact out one word and gets
13 to draw that line and put a little notation that that's 505.
14 And if it's some other basis, they have to demarcate that.

15 That's not happening, so we don't know. I don't know
16 who is seeing this. I don't know who is making decisions. I
17 don't know what training they're receiving.

18 MJ [COL ACOSTA]: All right.

19 DDC [MS. MORGAN]: You ----

20 MJ [COL ACOSTA]: On the -- let me get back to the
21 question about your -- the issue about your indexes that
22 you've received.

23 DDC [MS. MORGAN]: Sure.

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1 MJ [COL ACOSTA]: Your issue is that the records
2 themselves are not OCR'd?

3 DDC [MS. MORGAN]: The indexes are also not OCR'd.
4 Nothing is OCR'd, Judge.

5 MJ [COL ACOSTA]: So an index that they're creating,
6 essentially a spreadsheet with what's what ----

7 DDC [MS. MORGAN]: Right.

8 MJ [COL ACOSTA]: ---- you can't search the index?

9 DDC [MS. MORGAN]: No.

10 MJ [COL ACOSTA]: It's not an Excel document ----

11 DDC [MS. MORGAN]: No.

12 MJ [COL ACOSTA]: ---- of some type?

13 DDC [MS. MORGAN]: No. I'm sorry. Ms. Janes is telling
14 me that some of the -- okay, they are. They're just not
15 searchable.

16 MJ [COL ACOSTA]: I don't know how an Excel document is
17 not searchable, but I don't know -- you know ----

18 DDC [MS. MORGAN]: We get things often scanned.

19 MJ [COL ACOSTA]: I'll just say, I have a complicated
20 relationship with Excel. It's not good. I'm not as good at
21 it as any -- as -- I'm not good at that. But I know that it's
22 searchable in some ways, so ----

23 DDC [MS. MORGAN]: Right. And, Judge, what I'm laying out

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1 is what my analysts are telling me.

2 MJ [COL ACOSTA]: For the record, OCR is optical character
3 recognition, is what I believe it stands for. But it's
4 able -- it's so that -- it's the thing that allows you to use
5 the -- the much-used Control-Find function to look for things
6 in a document so that you don't have -- so that you're not
7 click -- going through it, right?

8 DDC [MS. MORGAN]: Yeah. And, Judge, what we often get --
9 and we even see this in the pleadings that we receive, is we
10 get -- you know, Adobe should be OCR'd, right, that's the
11 default setting. But what we often get is something that
12 has -- that should be OCR ----

13 MJ [COL ACOSTA]: It's photographs that are put into PDFs
14 as opposed to -- which are less searchable than ----

15 DDC [MS. MORGAN]: Right.

16 MJ [COL ACOSTA]: Yeah.

17 DDC [MS. MORGAN]: And so we often run into that
18 situation. What I can say is that over the course of ten
19 years, things have come in different formats and we -- what we
20 have is not helpful to my analysts, right?

21 MJ [COL ACOSTA]: So at a minimum, you're looking for a
22 searchable -- searchable index -- indices, correct?

23 DDC [MS. MORGAN]: Searchable indices that can cover the

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1 productions.

2 MJ [COL ACOSTA]: That have happened since 2006?

3 DDC [MS. MORGAN]: Yes.

4 MJ [COL ACOSTA]: Okay. All right. I think I'm done with
5 my questions for you.

6 DDC [MS. MORGAN]: And I will ----

7 MJ [COL ACOSTA]: If at some point later today, if someone
8 can bring that in for you, just the number. I just want to --
9 I'm trying to get my -- my -- my mind wrapped around the scope
10 of that issue. The 1600 pages of behavioral health is ----

11 DDC [MS. MORGAN]: The behavioral health is much more
12 manageable, but I do not want to give you the wrong numbers,
13 and so I will be able to provide you numbers.

14 MJ [COL ACOSTA]: Right. And then the number of pages for
15 the -- for the other records too. It's, again, they're dated,
16 correct? The medical -- the regular medical records have
17 dates on them?

18 DDC [MS. MORGAN]: If you can read the dates. I mean, I
19 think we saw an example of that yesterday. There was a --
20 there was a document that Commander Jolly put up that did
21 ostensibly have a date on it, but I'm not sure that anyone
22 could actually read that date.

23 So yes ----

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1 MJ [COL ACOSTA]: Because this is not a -- I don't mean to
2 be -- I'm not trying to -- you can look at the dates and put
3 things in order that they exist, right?

4 DDC [MS. MORGAN]: Sure, Judge. It's just ----

5 MJ [COL ACOSTA]: It's not beyond the capability of the
6 team to take 1600 pages with, you know, let's say there's
7 100 -- 100 reports in that and put them in some form of a
8 chronological order?

9 DDC [MS. MORGAN]: Sure. I just don't know if something
10 is missing in between.

11 MJ [COL ACOSTA]: Right. I understand that, but ----

12 DDC [MS. MORGAN]: And that's what I'm looking for. I
13 need to know that what we have is the complete picture.

14 I mean, you know, and I think the -- the pleadings
15 deal with this. You know, back in -- please don't hold me to
16 the year -- 2016 or 2017, we ran into a missing -- maybe I'm
17 getting the number 1600 from this, but pages that were just
18 not turned over because of human error. We just didn't run
19 the backside of copy sheets. We didn't -- and that is
20 understandable, Judge. People make mistakes, but that's
21 pretty huge when you talk about ----

22 MJ [COL ACOSTA]: Right, but that's based upon your --
23 once you gather to review it, to go back to the party that

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1 produced it and say, hey, there's pages missing here. What do
2 you have?

3 DDC [MS. MORGAN]: I don't -- based on my review of the
4 pleadings, I don't think that's exactly what happened in that
5 case. I think the government sent someone down to the island,
6 but I -- I don't know that it was as apparent as, hey, I'm not
7 seeing page 2 here. I wasn't on the team, I can't speak to
8 exactly how that came out, but my review of the pleadings does
9 not indicate that it was that apparent.

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

11 DDC [MS. MORGAN]: Thanks, Judge.

12 MJ [COL ACOSTA]: Mr. Wells, you stated that you would
13 be -- good morning, Mr. Wells. Sorry.

14 MATC [MR. WELLS]: Good morning.

15 MJ [COL ACOSTA]: You stated that you would be -- that the
16 government is amenable to recreating the index -- the indices;
17 is that correct? That's what you said yesterday?

18 MATC [MR. WELLS]: Your Honor, yes. I think we would go
19 through all of our indexes.

20 MJ [COL ACOSTA]: Uh-huh.

21 MATC [MR. WELLS]: If we had the criteria or the columns
22 of the information that the defense wanted, there may be
23 some ----

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

2 MATC [MR. WELLS]: ---- talk with them about what they
3 want. We have a Bates number, we have a description of the
4 record.

5 MJ [COL ACOSTA]: I understand, but ----

6 MATC [MR. WELLS]: We have a page number ----

7 MJ [COL ACOSTA]: Is there ----

8 MATC [MR. WELLS]: ---- Bates ----

9 MJ [COL ACOSTA]: The columns that they want -- I don't
10 know -- I don't have your index -- again, this is your -- I
11 don't have your indexes. I don't know what they say. If you
12 have the ones that say here's the -- here's medical records
13 and here's behavioral health records, is -- do you not -- are
14 they organized in such a way that you can create indexes of
15 every medical and behavioral health record that you've turned
16 over? Is that a possibility?

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

18 MJ [COL ACOSTA]: Okay. And you can make them searchable
19 and give them to them in a raw -- you know, a raw ----

20 MATC [MR. WELLS]: Sure.

21 MJ [COL ACOSTA]: ---- in a non-printed Excel format or in
22 an -- in an -- in a searchable format for the index? Is that
23 possible?

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

2 MJ [COL ACOSTA]: Okay. And I know you're answering for
3 people that are behind you, but I'm hoping that somebody
4 behind -- I'm not suggesting that -- that you, John Wells, is
5 going to go back and create these indexes, but I'm trying to
6 make sure that that's a possibility that's going to happen,
7 right? And it can happen?

8 MATC [MR. WELLS]: Right. Yes, Your Honor.

9 MJ [COL ACOSTA]: Okay. That's what I'm trying -- and
10 that's something that you said you would do. Is that what you
11 were planning on doing or are you waiting for me to tell you
12 to do it? I'm just trying to figure it out.

13 MATC [MR. WELLS]: Your Honor, as a matter of course we
14 produce an index to the defense on every production. It has
15 data. It has a Bates number, description of the record, has
16 the date of the record, has the number of pages. You can use
17 Adobe to convert those to OCR. I believe during our time with
18 our chief paralegal, at least since 2017, we've also been
19 providing an Excel spreadsheet. We haven't heard from the
20 defense paralegal here, but that's what we provide them.

21 Now, we can take all of those indexes and compile them
22 from 2006 to current and provide those again to the defense,
23 and we will have personnel who can go through each one to

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1 confirm that the documents that we have produced are actually
2 in our possession and have gone to the defense.

3 MJ [COL ACOSTA]: And that's the ones you've produced.
4 But you don't produce -- you don't produce indexes on the
5 behavioral health, correct ----

6 MATC [MR. WELLS]: Well ----

7 MJ [COL ACOSTA]: ---- because you don't see those?

8 MATC [MR. WELLS]: No, sir. I think we have seen the
9 indexes on the behavioral health because we have an
10 accountability log that we receive from that walled-off team
11 that has the Bates number and the date and the page number
12 and, I think, a general description of the type of record.
13 It's usually SF 600 medical record.

14 So in both categories, behavioral health and regular
15 medical records, we can do that with the defense. What I
16 would like from the defense is to tell us what is the helpful
17 information that you want in this index and the columns and
18 the information, and we can talk through that, if they want
19 more than what we've already provided in an index for
20 uniformity.

21 MJ [COL ACOSTA]: Who on the walled-off team has the
22 authority to make a redaction under 505 without passing it
23 through the commission?

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1 MATC [MR. WELLS]: Yes, sir. Both medical records and
2 behavioral health records go through an equity review
3 process ----

4 MJ [COL ACOSTA]: Yes. One of ----

5 MATC [MR. WELLS]: ---- through an equity partner.

6 MJ [COL ACOSTA]: We're getting the slow down.

7 Who has ever submitted a medical record or a
8 behavioral health record to the commission under 505?

9 MATC [MR. WELLS]: I'm not aware of anybody. And so it
10 was only brought to my attention yesterday, maybe the day
11 before, that behavioral health records were having redactions
12 applied to them. The defense has never raised this
13 previously.

14 I think you asked Mr. Natale, what did you do with the
15 information, and he said he provided it to the prosecution.
16 But the only thing that I've received here is December 10th
17 with a list of dates and Bates numbers on behavioral health
18 records asking can we confirm that there are no behavioral
19 health records on there.

20 So this is a new issue about the redactions. And I
21 ask the commission's indulgence to give us at least a month,
22 until February, to see where we are on those redactions. And
23 my intent is going to be walled-off attorney, paralegal, and

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1 supervisors, what redactions are being made by the OCAs, the
2 original classification authorities, and what type of
3 redactions and why? Are they names of places and locations
4 where the detainee was held during CIA custody? Are they
5 names and identities of certain guard force members who have
6 regular contact with them?

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

8 MATC [MR. WELLS]: Those are the type of items that I
9 would need to know and say that's not appropriate to redact
10 without going through the commission and getting 505 approval.

11 There may be some that are relevancy, redaction 701,
12 and we need to apply the appropriate identifier there,
13 R.C.M. 701. But until I have opportunity to do that, I'm not
14 prepared to give you all the answers.

15 MJ [COL ACOSTA]: Okay. I don't have any other questions
16 for you.

17 MATC [MR. WELLS]: All right, sir. It would help, also,
18 if there were some type of exemplar from the defense, perhaps
19 to submit to the commission ex parte, to give you an
20 understanding of both medical record and the behavioral health
21 record, if it's possible that they can give it to us in some
22 other redacted format to show me the type of redactions, where
23 I can talk specifically with the walled-off folks and say

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1 what's going on here.

2 MJ [COL ACOSTA]: It may be me that's speaking
3 specifically with the walled-off folks and not you.

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

5 MJ [COL ACOSTA]: Okay.

6 MATC [MR. WELLS]: All right. Thank you.

7 MJ [COL ACOSTA]: And that's just to protect
8 the confidentiality. It's not a -- I don't -- it's not a lack
9 of -- I -- if I -- I'm not trying to indicate that I don't --
10 that you can't -- you make those decisions regularly. It's
11 just that's not -- wouldn't be your lane to do. That's all
12 I'm saying, so ----

13 MATC [MR. WELLS]: Yes, sir. I understand that. And
14 we're interested in maintaining standards for the prosecution
15 team and the government across the board, and it may be a lack
16 of information and training and understanding how to submit an
17 ex parte filing to get those redactions recognized by the
18 commission and approved.

19 Thank you, sir.

20 MJ [COL ACOSTA]: All right. Let's take up 445.

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

22 MJ [COL ACOSTA]: Good morning, Captain Mizer.

23 DDC [CAPT MIZER]: I think we've had, even this week, a

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1 variation of discussion about Boumediene, and so I won't
2 belabor that aspect of the argument.

3 But since 1965, in Pointer v. Texas, the Supreme Court
4 has held that there are certain fundamental due process rights
5 applicable to criminal trials. Those include the right to
6 counsel, the right to present and assist in a defense, and the
7 right to confront one's accusers.

8 We submit that in this case, as with any court-martial
9 or federal or state prosecution, that at the very least, those
10 core fundamental rights are applicable in a criminal case.
11 It's not to -- and I know that we've talked about the al Hilah
12 decision also this week. Fundamentally different concepts, I
13 know that that's not lost on Your Honor. And what is at
14 dispute in the D.C. Circuit in the al Hilah case is the extent
15 of due process rights in a civil proceeding. This obviously
16 isn't a civil proceeding.

17 Your Honor, this isn't some relic of the Warren court,
18 and I would be the first to concede that there may be some of
19 those. The right against confrontation is -- a right to
20 confrontation, excuse me, is -- has been a darling, if you
21 will, of the modern conservative court. And if you watch that
22 develop with Justice Scalia and Justice Thomas in cases like
23 Coy v. Iowa, Maryland v. Craig, you can go back and look at

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1 their dissents in those cases that ultimately become
2 Crawford v. Washington in -- in 2006.

3 Judge, I don't think it's too speculative to say that
4 you might have a 9-0 majority on the right to confrontation in
5 a criminal case, should this case make it to -- to the Supreme
6 Court, or any challenge, for that matter, in which a criminal
7 defendant was convicted without, in the words of Justice
8 Scalia quoting Sir Walter Raleigh in the Tower of London,
9 "Call my accuser before my face."

10 And, you know, this is one of the foundational tenets
11 of our republic. I mean, I'm not going to go through Justice
12 Scalia's recitation of history in Crawford v. Washington,
13 dealing with the abuses of George III and the admiralty
14 courts, prison ships. I mean, these are well known to Your
15 Honor, I'm confident. Nor am I going to recite all of the
16 quotes, like Justice Scalia's dispensing with the right to
17 confrontation because evidence is obviously reliable, is akin
18 to dispensing with a trial because an accused is obviously
19 guilty. Core rights, Judge, not something on the periphery.

20 I think one of the problems that we've had with the
21 commissions -- and we talked about this the other day, and I
22 don't think the parties are going to dispute that what
23 Congress did, in essence, two -- two years -- they did it in

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1 2006 but then again in 2009, is they codified the Ohio v.
2 Roberts rule that Crawford v. Washington overruled. That's
3 the reliability standard that you find now in the Military
4 Rules of Evidence -- or the Military Commission Rules of
5 Evidence.

6 And the appellate history of the only two contested
7 commissions, those being Hamdan and Bahlu1, should give the
8 commission pause and, indeed, I would suggest it's pretty
9 strong evidence that in many respects Congress has been over
10 its skis when it has been legislating in the Military
11 Commissions Act.

12 The example from Hamdan is Congress codified material
13 support for terrorism as a war crime. We later find out from
14 the D.C. Circuit that that is not, in fact, a war crime. They
15 do the same thing in the Bahlu1 decision and also hold that
16 Congress's codification of solicitation is also not a war
17 crime.

18 The open question of conspiracy is resolved under
19 plain error, so we'll have to wait and see what ultimately
20 the -- the Congress's authority with respect to that offense
21 which is charged in this case is.

22 But, Judge, I don't think that there should be really
23 any serious doubt that if you were trying a court-martial at

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1 Fort Ord, for instance, that the soldier there would have
2 confrontation rights. And so it really is a question of what
3 rights, again, extend to this territory that was captured in
4 1898, the oldest standing Navy base overseas.

5 The insular cases which are at issue in Boumediene,
6 Judge, come out of that emerging empire, if you will, out of
7 the Spanish American War and those possessions that we got,
8 the Philippines, Guam, Puerto Rico, Guantanamo, and the
9 interpretation of the rights in those various U.S.
10 territories.

11 And, Judge, I don't think that there would be any
12 doubt if the United States government had decided to move this
13 commission to Guam that there would be a question as to
14 whether or not due process rights, at least those core rights
15 that we're talking about in Pointer v. Texas apply. I don't
16 think that there would be any doubt if they had moved this
17 military commission to Puerto Rico that there would be a
18 question.

19 And I would submit to Your Honor that both Guam and
20 Puerto Rico are far more foreign territory than what you see
21 on this American Navy base. It has no local culture. And
22 again, that's what the Supreme Court is looking to in the --
23 in the insular cases.

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1 I think the last point that I would make, Judge, is
2 we've talked a lot about, with respect to Boumediene, that it
3 only deals with the habeas clause. I would point out that
4 again in Bahlu the D.C. Circuit expands the constitutional
5 rights that apply here to the ex post facto clause. And so
6 Congress is -- we know that Congress doesn't have the power,
7 and it's been litigated in a number of the legal motions that
8 have been decided by Your Honor and your predecessors on the
9 bench, that Congress can't violate the ex post facto laws.

10 And so our view, Judge, and now with al Hilah, is that
11 you have a steady march in one direction, that we're finally
12 getting some guidance that there is going to be the
13 application of constitutional rights here.

14 And we would submit that Your Honor should take the
15 step of acknowledging the elephant in the room, which is those
16 core rights, the right to counsel, which has been provided by
17 statute, the right to participate in one's defense, and the
18 right to confront one's accusers. Congress doesn't have the
19 power to take what our founding fathers afforded all men and
20 women in 1789 with the Bill of Rights.

21 Unless there are any other questions, Judge, that's
22 everything on 450 -- 445. Excuse me.

23 MJ [COL ACOSTA]: Thank you.

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1 Government?

2 TC [MR. MILLER]: Thank you, Your Honor. The defense here
3 asserts that the due process clause bars the use of
4 M.C.R.E. 803(b), which I'll just refer to as 803, to introduce
5 at trial the hearsay evidence the government has identified in
6 AE 166 and 166A.

7 The defense argues that some variant of the
8 Sixth Amendment rights afforded to criminal defendants in
9 Article III courts must be provided to the accused in order to
10 satisfy the due process clause ----

11 MJ [COL ACOSTA]: Slow down, sir.

12 TC [MR. MILLER]: ---- even if the provisions of that
13 right do not apply by their own force, and no court has held
14 that they do.

15 Captain talked about Hamdan. But Hamdan held that
16 Congress can establish both military commissions to prosecute
17 war crimes and provide procedural rules that may depart from
18 those specific ones used in civilian criminal proceedings and
19 courts-martial.

20 Hamdan also acknowledged the wartime context of
21 military commissions and the potential need for tailored
22 evidentiary rules where peacetime rules are impractical. 803
23 is an exercise in the turn -- in the need for evidentiary

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1 flexibility. And, in fact, Justice Kennedy in his concurring
2 opinion in Hamdan specifically used the term "flexibility" in
3 the need for evidentiary rules in pursuing cases against alien
4 unprivileged belligerents.

5 Weiss and other cases teach us that Congress is not
6 required to provide an accused tried by military commission
7 rights identical to those guaranteed persons, criminal
8 defendants being charged and tried in criminal civilian
9 courts.

10 The Supreme Court has repeatedly confirmed that the
11 constitutional issue is whether an accused receives an
12 objectively fair trial, not whether the trial exactly matches
13 how a civilian criminal proceeding would -- would move
14 forward.

15 Even in criminal trials in Article III courts, the
16 introduction of evidence violates the due process clause only
17 when it is so unextremely -- excuse me, it is so extremely
18 unfair that its admission violates fundamental conceptions of
19 justice. And the Supreme Court has defined that category of
20 infractions that violate fundamental fairness rather narrowly.

21 For the reasons set forth in our response, Your Honor,
22 we believe that the relevant evidentiary provisions of the
23 803(b) and the MCA clearly afford a fair trial that meets and,

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1 in fact, exceeds any reasonable construction of the
2 constitutional requirements of the due process clause.

3 Thus, given that the due process requirement has
4 satisfied the MCA, there is no need for this commission to
5 reach the question whether the due process clause applies
6 directly to an alien unprivileged enemy belligerent tried in a
7 military commission.

8 And this is exactly the position taken by Judge Pohl
9 in AE 109C and I believe 109F. This is a constitutional
10 avoidance position, and I believe is the law of the case is
11 that was not overturned by the Court of Appeals
12 in In re Nashiri. I would also note that no court has to date
13 done what this defense motion is asking you to do, and that is
14 to make an immense jump and apply the due process clause.

15 Boumediene is a habeas course -- case, excuse me, and
16 took great pains to point out that it was limiting its reach
17 to that habeas-specific issue before it. I would point out
18 that the evidentiary rule challenged here, if we look at the
19 specifics too, further, I think, bolster the government's
20 argument that constitutional avoidance is proper here.

21 As the court is aware, to apply 803(b), you're going
22 to have to make -- we're going to ask the court to make
23 certain findings that the witness is unavailable, that the

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1 general purpose of the rule serves the interest of justice,
2 and that the admission should be allowed.

3 There are notice requirements. We have to meet 401
4 and 403. The defense gets to attack that evidence. They get
5 to put on their own credibility evidence to challenge the
6 credibility of the evidence. And this is what is consistent
7 also with war crimes that have happened in the ICTY former
8 Yugoslavian war crimes.

9 Your Honor, the issue here is that the due process
10 clause does not require specific procedures. It allows
11 choices to be made so long as they do not offend fundamental
12 principles of justice and they allow for a fair trial. The
13 due process clause does not require you to apply the
14 protections of the Sixth Amendment, rather to -- or to decide
15 between two choices, but simply to decide whether the one that
16 has been enacted is fundamentally fair.

17 Even if the court thinks another practice might be
18 better, that's not the inquiry that is to be made or the
19 decision that is to be made. It's simply is whether what is
20 in place is enough. In this particular case, because we
21 believe it is enough, we don't even reach the question of
22 whether or not the due process clause is applicable.

23 Counsel also mentioned that the whole notion of the

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1 Sixth Amendment right to confrontation has changed under the
2 recent decisions by Justice Scalia. And while that may be
3 true, much of that is because of the historical context in
4 which he saw how the provision came into being. I would point
5 out, having practiced in federal court, there is a significant
6 amount of hearsay that comes in, particularly in conspiracy
7 trials.

8 Without -- Your Honor, unless there are any other
9 questions, that is the government's presentation. And I would
10 also point out that I believe the full position of the
11 government was set forth in our attached brief -- in our brief
12 where we attached the filing of the Department of Justice in
13 the al Hilah case ----

14 MJ [COL ACOSTA]: All right.

15 TC [MR. MILLER]: ---- the en banc case.

16 MJ [COL ACOSTA]: Thank you, Mr. Miller.

17 DDC [CAPT MIZER]: Judge, just two very brief points.

18 Pointer v. Texas lays out the minimum requirements for a fair
19 trial. That's set forth in the pleadings. If those
20 requirements are not met, it is not a fair trial. It's a fair
21 trial light or something else, Judge, but it is not a fair
22 trial. The elements of a fair trial haven't been in debate
23 since the 1960s, Judge.

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1 Now, what -- I think, as I said before, we don't
2 dispute that Congress has made this attempt to do this,
3 but ----

4 MJ [COL ACOSTA]: Right. They gave the rule, and they
5 said, okay, you can use it, and here's the -- here are the
6 wickets that you have -- that the government has to get
7 through to prove that.

8 DDC [CAPT MIZER]: Right, Judge.

9 MJ [COL ACOSTA]: And they are similar in other ways in
10 other rules where we -- where hearsay can be allowed in,
11 right? I mean, you get to ----

12 DDC [CAPT MIZER]: No, Judge. I don't think that they're
13 similar to rules that would allow hearsay in, Judge. I think
14 that the 116 hearsay statements that ----

15 MJ [COL ACOSTA]: Well, that's -- that's the volume.
16 That's not the nature ----

17 DDC [CAPT MIZER]: Yes, Judge.

18 MJ [COL ACOSTA]: ---- of things, right?

19 DDC [CAPT MIZER]: But the nature is every single one of
20 those, and there may be one or two exceptions that we could
21 argue would violate the -- that would constitute testimonial
22 hearsay under the Crawford v. Washington test.

23 And you have been in the military as we have seen that

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1 evolution. I mean, you know what that did to our urinalysis
2 practice. You know what that did to our AWOL practice with
3 unit musters, at least in the Navy, how we were prosecuting
4 those cases. You know what testimonial hearsay is. And an
5 FBI 302 that's taken with law enforcement that says I was at X
6 and saw X happen is going to be testimonial hearsay, Judge,
7 and that's what you're going to see here.

8 And with respect to my colleague, we can't keep
9 kicking these cans down the road. And that is what I told
10 Your Honor with respect to Hilah. And I think that there's
11 actually -- whether it's a majority or not, I think that you
12 have justices -- judges, excuse me, if you listen to that oral
13 argument, who are finally wanting to give us some guidance
14 after two decades of this.

15 But you can't avoid the constitutional application
16 when you look at a statement and say that clearly violates the
17 Constitution, but I've been given rules that allow me to use
18 it anyway. It either violates the Constitution or the
19 Constitution doesn't apply.

20 Constitutional avoidance, with respect to Judge Pohl,
21 just -- it can't be the right answer when confronted with
22 testimony -- testimonial hearsay and blackletter precedent
23 from the Supreme Court. Either that precedent doesn't apply

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1 or it needs to be excluded, and that's -- those are your two
2 options, Judge. They're mutually exclusive and we would ask
3 you to -- to enforce the basic requirements of a fair trial,
4 Judge.

5 MJ [COL ACOSTA]: The next issue was 353. Sorry. I
6 should have kept you up here, Counsel.

7 DDC [CAPT MIZER]: Judge, I don't think that I have
8 anything to add on 353. I think it's a motion that's been
9 developing over -- is it six years, five years?

10 MJ [COL ACOSTA]: Right. And that's what I'm trying to
11 figure out. Are we complete and am I left with what you've
12 had -- with your pleadings on that issue ----

13 DDC [CAPT MIZER]: I think so ----

14 MJ [COL ACOSTA]: ---- as far as ----

15 DDC [CAPT MIZER]: I'm sorry, Judge.

16 MJ [COL ACOSTA]: No, it's okay.

17 If what we have in the discovery is complete and I
18 have your -- your motion, am I -- and there's nothing to add,
19 am I ready to -- is there anything else you need to present to
20 me on that issue?

21 DDC [CAPT MIZER]: I do not think so, Judge, again with
22 the caveat that the 505 process is opaque to us, comes out the
23 other side of that process. So if the 505 process is done, I

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1 don't believe that we have anything in addition to the
2 pleadings.

3 I think the only thing that I would say is to address
4 the relevance aspect of some of the other acts related to the
5 individual identified there. We do think that it is relevant
6 that they engaged in other terrorist activities when you have
7 these individuals who are targeted and discovery is -- is
8 turned over to us.

9 We don't think it should be so narrow as to the
10 charged offenses. Because what the government does in its
11 pleadings is say, you know, he was just a 19-year-old, this
12 can't possibly be true, this allegation. And we think it
13 would be valid rebuttal to say, well, look at all of the other
14 things that this supposed 19-year-old has gotten into.

15 I think if -- to the extent that there is any quarrel
16 about the issue remaining, it would be over the scope of
17 discovery, but that would be it, Judge.

18 MJ [COL ACOSTA]: All right. Government?

19 MATC [MR. WELLS]: Your Honor, I do believe in AE 353 we
20 have completed disclosure and discovery in this matter and the
21 505 process, including the strike package information and also
22 the basic information and intelligence channels, and also from
23 the -- what we knew of the Kuwaiti government on the

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1 prosecution and the subsequent appeal that was overturned
2 against Mr. al Fadhli. So I think we're done on that issue,
3 sir.

4 MJ [COL ACOSTA]: All right. So nothing else to add to
5 the argument?

6 MATC [MR. WELLS]: Nothing else to add. And just to
7 respond to counsel's point about relevance and opening the
8 aperture to every potential bad act that the individual may
9 have done, I think our discovery did cover that, to a certain
10 extent, that was known and in the possession of the United
11 States government. We did not make any relevance calls or
12 determinations to exclude information that related -- that we
13 did not possess, or that we did possess. So both to the COLE
14 and to the Limburg, I think we've turned over all available
15 information in the charges.

16 And to the extent his conduct afterwards that led to
17 his death, we've turned over that information that related to
18 his subsequent terrorist activities.

19 MJ [COL ACOSTA]: All right.

20 MATC [MR. WELLS]: So I think we're ready for a ruling
21 from the commission, Your Honor.

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

23 MATC [MR. WELLS]: Thank you.

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1 DDC [CAPT MIZER]: Nothing further, Judge.

2 MJ [COL ACOSTA]: Okay. All right. Defense, I asked you
3 to look -- take a look at your pleading in 463 and list for me
4 where you think you haven't gotten -- where there hasn't been
5 a ruling on an issue. And I know that several of the issues
6 that we've ruled -- that we've heard in this session that are
7 obviously pending a ruling, which ones ----

8 DDC [CAPT MIZER]: And, Judge ----

9 MJ [COL ACOSTA]: ---- do you not have a ruling on that
10 you need to somehow reassert?

11 DDC [CAPT MIZER]: I think that I grabbed the -- the wrong
12 sheet here, Judge ----

13 MJ [COL ACOSTA]: You can take your time.

14 DDC [CAPT MIZER]: ---- so if you can give me just one
15 second.

16 And, Judge, we filed that out of an abundance of
17 caution to make sure that we were preserving the record. I
18 think, as Your Honor knows, we have been working through many
19 of those issues. I just wanted to avoid the potential of a
20 forfeiture argument later on.

21 MJ [COL ACOSTA]: I believe I understood that that's what
22 you were doing, but I wanted to make sure that there was not
23 something that you were ----

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1 DDC [CAPT MIZER]: Right.

2 MJ [COL ACOSTA]: ---- actually concerned hadn't been
3 ruled on.

4 DDC [CAPT MIZER]: I understand, Judge, and I think the
5 two potential outstanding we have discussed, 353 moments ago.

6 MJ [COL ACOSTA]: Uh-huh.

7 DDC [CAPT MIZER]: And then 333.

8 MJ [COL ACOSTA]: Yes. We're going to talk -- we're
9 probably going to take a recess before we come back out and
10 talk about 333.

11 DDC [CAPT MIZER]: But our audit, which was done with
12 Ms. Janes last night, reflects that we have at least summary
13 rulings for everything else on that list, Judge.

14 MJ [COL ACOSTA]: Okay. So there's nothing -- and this is
15 just essentially to -- the commission -- when the commission
16 originally -- when the -- when I originally came to the
17 commission and the multitude of -- in the 400 series of me
18 trying to go back and say -- and asked -- and I asked the
19 parties in the 400 series, tell me which ones are -- here's
20 the ones that are vacated. And there was a series of
21 exchanges on that issue, and I eventually asked, hey, which
22 ones are there?

23 And I went back through over a long period of time and

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1 reexamined and where -- where there was not a -- for those
2 that were vacated by the D.C. Circuit where this -- where I
3 found that they were -- the original ruling was correct in law
4 and fact, I reasserted them. In other areas, as you know,
5 I -- I reopened and made different decisions that have led to,
6 you know, subsequent months of litigation on other issues.

7 DDC [CAPT MIZER]: Yes, Judge.

8 MJ [COL ACOSTA]: So that's what we're talking about, is
9 getting back to where we were essentially when that -- when
10 the Nashiri opinion came out from the -- from the D.C. Circuit
11 setting aside those -- and I think that's -- that -- where I'm
12 trying to figure out is are we done with all of those older
13 ones? And I think the answer is yes after this session.

14 DDC [CAPT MIZER]: And I would agree with that, Judge. I
15 think the answer to that is yes ----

16 MJ [COL ACOSTA]: Okay.

17 DDC [CAPT MIZER]: ---- with those two ----

18 MJ [COL ACOSTA]: With those two ----

19 DDC [CAPT MIZER]: Yes.

20 MJ [COL ACOSTA]: ---- absolutely. Thank you.

21 Government, concur or nonconcur?

22 TC [MR. MILLER]: Concur for the most part, Your Honor.

23 MJ [COL ACOSTA]: Okay.

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1 TC [MR. MILLER]: The only one remaining is one we
2 discussed yesterday, was 342, the testimony immunity for
3 al Hilah. But other than that, I agree with Captain Mizer.

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

5 DDC [CAPT MIZER]: And, Judge, we would agree with that.
6 I think the issue is the ripeness.

7 MJ [COL ACOSTA]: Right. And that was the issue --
8 understood. And that had been discussed on multiple
9 occasions, and we'll talk about that in just a few minutes.
10 But before then we're going to take a 15-minute recess.

11 The commission is in recess.

12 [The R.M.C. 803 session recessed at 0952, 15 December 2021.]

13 [The R.M.C. 803 session was called to order at 1012,
14 15 December 2021.]

15 MJ [COL ACOSTA]: Government, all parties present as
16 before?

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

18 MJ [COL ACOSTA]: Defense?

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

20 MJ [COL ACOSTA]: All right. Can we take up 333 in
21 this -- oh, Ms. Morgan has an update on numbers, I believe.

22 DDC [MS. MORGAN]: Thank you, Judge. Over the break, I
23 was able to get you -- these are estimations, but we think we

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1 get pretty close. For the records. For behavioral health, we
2 have a total, so this is NIPR plus SIPR, a total of 1,176
3 pages. That's 1-1-7-6. And then on the medical records side,
4 that's NIPR plus SIPR, a total of 6,089, so 6-0-8-9.

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

6 All right. 333, can we take that up in open session
7 to the extent that, let's keep it open-session clean?

8 DDC [MS. MORGAN]: And, Judge, I was able to talk to
9 Commander Jolly during the break. May -- I don't want to
10 speak out of turn, but I think they may consent to this.

11 The defense position is that this is going to involve
12 a 505(h) hearing, and so we would prefer to take this up in
13 February.

14 MJ [COL ACOSTA]: Okay. Government, is that your
15 position? You can remain at table.

16 ATC [LCDR JOLLY]: We're comfortable with that, sir.

17 MJ [COL ACOSTA]: Okay. All right. We'll leave 333
18 for -- for that then.

19 I just want to point out -- that's fine. When we were
20 talking about 363, there's two others that I have that still
21 need to be addressed. I don't think that they're necessarily
22 open, but need to be addressed, and that's 327 and 335, still
23 need to be talked about.

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1 And what I want to do is talk about those. And the
2 other -- and what I'm going to do right -- in a couple
3 minutes, I want to set up and see if you're -- if you're
4 capable. I talked to you all about conducting an 802, a
5 planning session for the 802, and I talked about doing it
6 tomorrow. If it's possible, can we do it at 1300 today?

7 And the topics that I want you to be prepared to talk
8 about are going forward with our 2022 sessions, at least
9 covering the first two, which constitute four weeks that we
10 have in preparation for our -- the third session which is
11 our -- our three-week session.

12 And what I want to talk about are the need and the
13 logistics that will be involved in conducting either a
14 354-related hearing, the outrageous government conduct
15 hearing, and suppression hearing, and the judicial economy of
16 witnesses that could be -- my thought is that some of those
17 witnesses are going to cross over and to give their testimony
18 one time as opposed to multiple different occasions and having
19 those done to the greatest extent in the first two sessions,
20 if possible.

21 So that's where I'm having you look at and look at
22 those motions and who you intend on calling for your motions
23 and in rebuttal, Government, and how long you think those are

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1 going to take. And that's what I want to be able to discuss
2 starting at 1300 today. And it's -- I'd ask you to make sure
3 that you eat before you come in, because I think it can take a
4 while for us to get through this. It potentially could, I
5 don't know that it will, depending on how well you've had it
6 planned out.

7 So -- but I want to have a discussion. We'll do it in
8 here. We'll just do it in an 802 in here, just because I can
9 accommodate everybody and keep the distances. Okay.

10 Is there anything else? I don't have anything else
11 for this session. All I had was 333. And if we're going to
12 push that off until February, we'll have to work that in as
13 well.

14 Government, was there anything else?

15 TC [MR. MILLER]: Nothing, Your Honor. Thank you.

16 MJ [COL ACOSTA]: Defense?

17 LDC [MR. NATALE]: Nothing, Your Honor. We'll see you at
18 1300.

19 MJ [COL ACOSTA]: All right. This commission is in
20 recess.

21 [The R.M.C. 803 session recessed at 1017, 15 December 2021.]

22 [END OF PAGE]

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