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1 [The R.M.C. 803 session was called to order at 1029, 22 July
2 2019.]

3 MJ [Col COHEN]: The commission is called to order.

4 Brigadier General Martins, will you please identify
5 who is here on behalf of the United States. If any counsel
6 are making their first appearance, please indicate that as
7 well.

8 CP [BG MARTINS]: Good morning, Your Honor.

9 MJ [Col COHEN]: Good morning.

10 CP [BG MARTINS]: Representing the United States are
11 Brigadier General Mark Martins, Mr. Robert Swann, Mr. Edward
12 Ryan, Mr. Clay Trivett, Ms. Nicole Tate, and Major Christopher
13 Dykstra. We have no new trial counsel, Your Honor.

14 Also at counsel table are paralegals Mr. Dale Cox,
15 Mr. Rudolph Gibbs, and Staff Sergeant Antony Kiser. Also
16 present in the courtroom is Donald Fuhr of the Federal Bureau
17 of Investigation.

18 These proceedings are being transmitted, Your Honor,
19 by closed-circuit television to locations in the continental
20 United States pursuant to the commission's order.

21 MJ [Col COHEN]: All right. Thank you, sir. I appreciate
22 it.

23 Mr. Nevin, I'll start with your team. Would you

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1 please indicate for the record who is here on behalf of
2 Mr. Mohammad.

3 LDC [MR. NEVIN]: Yes, Your Honor. Good morning.

4 MJ [Col COHEN]: Good morning.

5 LDC [MR. NEVIN]: David Nevin for Mr. Mohammad as well as
6 Lieutenant Colonel Derek Poteet, U.S. Marine Corps;
7 Ms. Radostitz; and Ms. Leboeuf. And Mr. Sowards is not
8 present, and I can put a matter related to that on the record
9 whenever the military commission directs me.

10 MJ [Col COHEN]: We'll take that up when I summarize the
11 802, sir.

12 LDC [MR. NEVIN]: Thank you.

13 MJ [Col COHEN]: Thank you very much.

14 Ms. Bormann, your team.

15 LDC [MS. BORMANN]: Good morning, Judge.

16 MJ [Col COHEN]: Good morning, ma'am.

17 LDC [MS. BORMANN]: Mr. Bin'Attash is present. On behalf
18 of Mr. Bin'Attash, myself, Cheryl Bormann; and Captain Caine,
19 United States Air Force; Mr. Edwin Perry; Mr. William
20 Montross.

21 MJ [Col COHEN]: Thank you, ma'am.

22 Mr. Harrington, your team.

23 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,

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1 James Harrington and Wyatt Feeler, and also appearing is Major
2 Virginia Bare, United States Air Force, who will put her
3 credentials on the record in a few minutes.

4 MJ [Col COHEN]: I'll take that up as well in a few
5 minutes. Thank you, Mr. Harrington.

6 Mr. Connell.

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

8 MJ [Col COHEN]: Good morning.

9 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi, myself,
10 James Connell; Alka Pradhan; Benjamin Farley; and Captain Mark
11 Andreu of the United States Air Force.

12 MJ [Col COHEN]: Thank you, sir.

13 Mr. Ruiz, your team.

14 LDC [MR. RUIZ]: Good morning, Judge.

15 MJ [Col COHEN]: Good morning.

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

19 MJ [Col COHEN]: Thank you, Mr. Ruiz. I appreciate it.

20 I will take this opportunity to advise the gentlemen
21 who are accused of the crimes in this case of their right to
22 be present and their right to waive said presence.

23 Gentlemen, you have -- each have the right to be

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1 present during all sessions of the commission. If you request
2 to absent yourself from any session, such absence must be
3 voluntary and of your own free will. Your voluntary absence
4 from any session of the commission is an unequivocal waiver of
5 the right to be present during that session.

6 Your absence from any session may negatively affect
7 the presentation of the defense in your case. Your failure to
8 meet with and cooperate with your defense counsel may also
9 negatively affect the presentation of your individual cases.

10 Under certain circumstances your attendance at a
11 session can be compelled regardless of your personal desire
12 not to be present. Regardless of your voluntary waiver to
13 attend a particular session of the commission, you have the
14 right at any time to decide to attend any subsequent session.

15 If you decide not to attend the morning session but
16 wish to attend the afternoon session, you must notify the
17 guard force of your desires to do so. Assuming there is
18 enough time to arrange transportation, you will then be
19 allowed to attend the afternoon sessions.

20 You will be informed of the time and date of each
21 commission session prior to the session to afford you the
22 opportunity to decide whether you wish to attend that session.

23 Mr. Mohammad, I will start with you. Do you

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1 understand what I just explained to you?

2 ACC [MR. MOHAMMAD]: Yes.

3 MJ [Col COHEN]: Thank you, sir.

4 Mr. Bin'Attash, I'll now turn to you. Do you
5 understand what I just explained to you?

6 ACC [MR. BIN'ATTASH]: Yes.

7 MJ [Col COHEN]: Thank you, sir.

8 Mr. Binalshibh, do you understand what I just
9 explained to you?

10 ACC [MR. BINALSHIBH]: **[Speaking in English]** Yes.

11 MJ [Col COHEN]: Thank you, sir.

12 Mr. Ali, do you understand what I just explained to
13 you?

14 ACC [MR. AZIZ ALI]: Yes.

15 MJ [Col COHEN]: Thank you, sir.

16 Mr. al Hawsawi, do you understand what I just
17 explained to you?

18 ACC [MR. AL HAWSAWI]: Yes.

19 MJ [Col COHEN]: Thank you, sir.

20 On 21 July 2019, I conducted a conference with trial
21 and defense counsel in according -- accordance with Rule for
22 Military Commission 802. The accused were absent during this
23 session. At this conference we discussed the following:

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1 First, I disclosed to the parties that I know
2 Lieutenant Colonel Christina Jimenez, currently the Deputy
3 Chief Trial Judge of the United States Air Force, and that on
4 the 9th of July 2019 I became aware that she was formally a
5 defense counsel representing Mr. Bin'Attash at some point in
6 these proceedings, dating back to when they originally
7 started.

8 That may have been during the initial iteration when
9 these gentlemen were representing themselves pro se, but to be
10 honest with you, I did not clarify that with her. I just --
11 once I knew that she'd represented Mr. Bin'Attash and that I
12 had been questioned for the last month about who I knew, I
13 told her that I would inform the parties that I did know her.
14 She no longer represents any party in this case, but I
15 indicated to the parties that I would provide transparency,
16 and I continue to do so.

17 I indicated that in her current role as Deputy Chief
18 Trial Judge that we interact periodically on official
19 government business; in addition, periodic acquaintance
20 conversations and friendly conversations, given the fact that
21 I've also known her when I was -- when I supervised her when
22 she was a defense counsel, a brand-new defense -- area defense
23 counsel in Korea, and I was the Deputy Chief Circuit Defense

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1 Counsel for the Pacific Circuit.

2 If there are any questions or desire to voir dire me,
3 I will allow some time, once I've concluded this summary, for
4 the parties to ask me additional questions they may have.

5 In addition, Mr. Nevin informed me that Mr. Sowards
6 had suddenly become ill and could not travel for the hearings
7 and that Mr. Nevin would be orally moving on the record for
8 his excusal.

9 Sir, is that the case?

10 LDC [MR. NEVIN]: You want me to make the motion now?

11 MJ [Col COHEN]: If you would, sir.

12 LDC [MR. NEVIN]: Yes, Your Honor. I respectfully move
13 that you permit -- that you excuse Mr. Sowards from this round
14 of hearings ----

15 MJ [Col COHEN]: That is granted.

16 LDC [MR. NEVIN]: ---- because he fell ill. Thank you.

17 MJ [Col COHEN]: Appreciate it, sir.

18 I also advised Mr. Harrington that I would be talking
19 with Mr. Binalshibh on the record this morning regarding his
20 consent to permanent excusal of Major Danielson -- excuse me,
21 is it Lieutenant Danielson, Mr. Harrington?

22 LDC [MR. HARRINGTON]: Yes, Judge.

23 MJ [Col COHEN]: Okay. ---- that Lieutenant Danielson for

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1 Mr. Binalshibh's defense team to represent Abd al Hadi
2 al-Iraqi, and I will take that up momentarily.

3 In addition, we also discussed the fact that Major
4 Bare would be making her first official appearance here at the
5 commissions.

6 Major Bare, at this time I would like you to state
7 your qualifications for the record, please.

8 DC [Maj BARE]: Yes, Your Honor. I'm Major Virginia Bare.
9 I have been detailed to this military commission by the chief
10 defense counsel in accordance with R.M.C. 503. I'm qualified
11 under R.M.C. 502 and I have been previously sworn. I have not
12 acted in any manner that might tend to disqualify me in this
13 proceeding, and the document detailing me as defense counsel
14 is included as Appellate Exhibit 004JJ.

15 MJ [Col COHEN]: Okay. Major Bare, I understand you said
16 that you've been previously sworn as a defense counsel for the
17 military commissions, or just under ----

18 DC [Maj BARE]: As a defense counsel.

19 MJ [Col COHEN]: As a defense counsel? Okay. Great.
20 Then I see no reason to -- to re-swear you. That would be
21 applicable since you were sworn under 10 U.S.C. as well.
22 Thank you very much.

23 DC [Maj BARE]: Thank you, Your Honor.

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1 MJ [Col COHEN]: In addition, Mr. Connell advised me that
2 Mr. Ali was not yet 100 percent better, but that he was making
3 improvements and that they might be asking for some reasonable
4 accommodations during the hearing such as standing
5 occasionally, et cetera. I advised Mr. Connell to raise any
6 reasonable accommodations he believed were necessary and that
7 the commission was inclined to grant those to -- to alleviate
8 any pain that Mr. Ali may be having during the proceedings.

9 The government advised that the -- would be -- the
10 accused would be brought into the courtroom this morning and
11 that the defense counsel would be provided an opportunity to
12 consult with their clients prior to the start of today's
13 hearing.

14 We addressed some administrative issues from my staff
15 regarding the AE number requested by Mr. Ali's team and
16 another by Mr. Nevin's team. I believe both of those issues
17 have been resolved. If they have not, I'll allow the parties
18 to be heard momentarily on those matters.

19 I then discussed our anticipated schedule for the
20 week and the sequencing of oral argument. For today's
21 session, we began at 1030 hours to allow defense counsel to
22 see their clients. In addition, we will stop approximately at
23 1230 today for a lunch and prayer time.

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1 In addition, we will reconvene at 1400, which the
2 parties are then free to use that time to eat, for prayer
3 time, and to -- for additional time to meet with their
4 clients, if they choose to do so. And then we will continue
5 from 1400 until a reasonable concluding time this afternoon
6 based on the arguments of counsel and the motions we intend to
7 take up.

8 We will begin today's session with AE 118N, followed
9 by an update on AE 628B. We will then take up AE 635, AE 637,
10 and I suspect that that may get us to the entirety of today.

11 For tomorrow's session, with the concurrence of the
12 parties, we anticipate a Military Commission Rule of Evidence
13 505(h) session to determine use, relevance, or admissibility
14 of classified information, which will then facilitate the open
15 sessions for the remainder of the week. Or to the extent that
16 we need to close something under R.M.C. 806, we can do so, and
17 I can issue the appropriate order at that time based on that
18 505(h) session.

19 In addition, upon my request, the government was to
20 notify me if everyone had appropriate clearances and read-ons
21 to discuss AE 642 as well as during the 505(h) session. We're
22 still working some of those issues.

23 I then advised the parties that following the 505(h)

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1 hearing and how those play out, then I would then give a
2 marching order for the remainder of the open sessions for the
3 week as well as any closed hearings that would be necessary.

4 Obviously, for the benefit of the parties and
5 everyone else who's interested, we will try to consolidate
6 closed sessions and have open sessions so that we don't have
7 the necessity for the accused coming to and fro. We'll try to
8 consolidate everything into a morning session or two after --
9 or an entire day, however we need to do so based on what comes
10 up tomorrow during the 505(h) sessions.

11 All right, then. That's a generalized recollection
12 of -- and summary of what I believe was covered during the 802
13 session yesterday afternoon.

14 Does the government wish to add anything to the
15 commission's summary?

16 CP [BG MARTINS]: No, Your Honor.

17 MJ [Col COHEN]: Thank you, sir.

18 Mr. Nevin, how about from your team?

19 LDC [MR. NEVIN]: No thank you, Your Honor.

20 MJ [Col COHEN]: Okay.

21 Ms. Bormann?

22 LDC [MS. BORMANN]: Nothing, Judge.

23 MJ [Col COHEN]: Mr. Harrington?

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1 LDC [MR. HARRINGTON]: Nothing, Judge.

2 MJ [Col COHEN]: Okay. Mr. Connell?

3 LDC [MR. CONNELL]: Sir, you mentioned the AE number with
4 respect to our issue. We were issued an AE number, 647, but a
5 question arose as to whether you had granted leave to file
6 ex parte and 647 was for the underlying filing or 647 was for
7 the motion for leave to file ex parte.

8 MJ [Col COHEN]: I will need to verify that for you.

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

10 MJ [Col COHEN]: I typically -- I'm usually aware of what
11 numbers are assigned, but not necessarily to that detail at
12 this point. So let me find out exactly what -- what that
13 number was intended to be, and I will get back with you.

14 LDC [MR. CONNELL]: Sir, we're ready to proceed either --
15 whatever you decide.

16 MJ [Col COHEN]: Okay. All right.

17 Mr. Ruiz, anything else you'd like to add?

18 LDC [MR. RUIZ]: Not with respect to the 802, Judge, but
19 Mr. al Hawsawi has asked me to ask the court for permission to
20 leave the proceedings.

21 MJ [Col COHEN]: Okay. At -- I will allow him to leave at
22 the lunch break, given the fact that it will only be about
23 another hour and 30 minutes.

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1 LDC [MR. RUIZ]: Thank you.

2 MJ [Col COHEN]: But he may leave at that time. All
3 right.

4 Before we proceed with the argument on AE 118N,
5 Mr. Binalshibh, I did -- with the permission of your
6 counsel -- I indicated this in the summary -- I do have a
7 couple of questions for you with respect to the release of
8 Lieutenant Danielson.

9 Sir, I don't want to -- I will never ask you to
10 divulge any attorney-client discussions, et cetera, but I --
11 in this particular case, it was indicated to the commission
12 that you are okay with releasing Lieutenant Danielson, even
13 though he will be moving on to represent a different accused
14 in a separate commission. Is that, in fact, the case, and
15 have you had the opportunity to discuss that with your defense
16 counsel?

17 ACC [MR. BINALSHIBH]: **[Speaking in English]** Yeah.

18 MJ [Col COHEN]: And do you have any objection to me
19 granting that request?

20 ACC [MR. BINALSHIBH]: **[Speaking in English]** No
21 objections.

22 MJ [Col COHEN]: Okay. Then it is granted.

23 Trial Counsel, I believe 118N was a government

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1 motion. Who would like to argue that? Mr. Trivett.

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

3 MJ [Col COHEN]: Good morning.

4 MTC [MR. TRIVETT]: AE 118N is the prosecution's motion to
5 reconsider Judge Parrella's ruling in AE 118M. And I want to
6 make clear for the commission that our argument for
7 reconsideration is really about the means and not the ends by
8 which the government is able to satisfy the commission's
9 concerns set forth in 118M.

10 Regardless of our motion to reconsider, the
11 government is committed to a 60-day time frame. We believe
12 that that was one of the two concerns that Judge Parrella had
13 in issuing 118M. And the second concern being that the
14 defense have an ability to communicate directly with someone
15 for what they deem to be informal requests from a
16 classification perspective.

17 Now, for the second concern, the DoD Security
18 Classification/Declassification Review Team, which is
19 colloquially known as SC/DRT, has set up a SIPR e-mail box for
20 any such informal inquiries that are at the Secret level or
21 below. And that has been operational and by all accounts has
22 been meeting the 60-day deadline. We're walled off from it.
23 We don't know specifically what the requests were, but it has

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1 been communicated back to us that it is being utilized and it
2 is working.

3 The primary reason we moved to reconsider wasn't the
4 60-day time frame and it wasn't having some way for the
5 defense to have those questions. It was primarily a question
6 of appropriations and logistics.

7 The SC/DRT is simply not equipped to be able to
8 handle all of the myriad tasks that would be required from
9 Judge Parrella's order in AE 118M, but Washington Headquarters
10 Services Office of Special Security is. They're designed for
11 that. This would not change the current existing process
12 much, and I suspect the defense may argue that. But we have
13 never had a 60-day deadline before, and we are complying with
14 it and they are committed to complying with it and making any
15 adjustments to their processes as necessary in order to do
16 that. There's also never been an informal route to the
17 SC/DRT, and there is now with the SIPR e-mail box.

18 This case involves a lot of classified information,
19 not all of which is owned by the Department of Defense. And
20 SC/DRT simply can't make calls and make determinations for
21 certain information that's not the Department of Defense's
22 information, nor are they equipped, from a personnel
23 standpoint, to be able to ferry such information or transmit

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1 such information to the requisite parties that -- that need to
2 be able to make these determinations, but WHS OSS is, and
3 they're capable of doing it. They have people. There is a
4 point of contact that the defense is aware of that helps
5 facilitate and ferry these walled-off reviews.

6 Part of what Mr. Connell -- part of the reason
7 Mr. Connell decided to push this issue off until this session
8 was to see if it was working. And by all accounts from the
9 government's perspective, it is. I'm sure you'll hear from
10 the defense's perspective shortly.

11 Part of what he wanted in his reply, Mr. Connell, was
12 to meet and ultimately to have a POC from each -- both WHS OSS
13 and from SC/DRT. And the prosecution -- namely, myself or
14 Major Dykstra -- are happy to meet with Mr. Connell. We
15 represent the United States on this issue. We would certainly
16 represent the interests of WHS OSS and SC/DRT. We would
17 communicate anything back to them that was necessary to get
18 any answers if we were unsure.

19 But understandably, the classification professionals
20 that are involved in this process want to have this remain an
21 arm's-length transaction for a lot of reasons and good
22 reasons. Security professionals do more than work just for
23 the military commission. They want to continue to be able to

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1 work with anonymity so they can continue to do their jobs, not
2 just for commissions purposes, but for any purpose that they
3 serve. The DoD SC/DRT is not solely responsible just for
4 military commissions work.

5 Because we believed that the current appropriations
6 and current logistical and organizational structure that the
7 Department of Defense has made the calls on regarding the
8 security matters in military commissions could not be
9 accomplished by AE 118M, at least not the way that
10 Judge Parrella envisioned it, we move to reconsider. We
11 believe the new facts are the facts set forth in the
12 declaration from the director of SC/DRT or the officer in
13 charge of SC/DRT.

14 We never briefed this issue. This wasn't something
15 that was raised by the defense or the prosecution in regard to
16 whether or not we can switch the actual process that was
17 involved. We believe those are the new facts that would
18 satisfy our burden to establish why a motion to reconsider is
19 appropriate in this case. And if you adopt the protective
20 order set forth at -- I believe it's Attachment C to 118N, the
21 prosecution is committed to the 60-day time frame and the SIPR
22 e-mail box.

23 Part of the concern with the way it was described, at

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1 least in Judge Parrella's ruling, was the informal advice
2 concern. And it's just like attorneys who practice. Any
3 classification authority will need to understand exactly what
4 is being asked, will need to understand the context in which
5 it's being asked, the facts surrounding it. It's very
6 quick -- very quickly unclassified information can slip into a
7 mosaic theory and reveal classified information that they're
8 duty bound to protect. But the SIPR e-mail box allows them to
9 see a written request and provide written guidance, and that's
10 why it was determined after the AE 118M was issued that this
11 would be the best way to do it.

12 And I've got to tell you, just from the government's
13 perspective, when we get orders from the commission that
14 impact other equities, we always coordinate with those
15 equities. They often are the subject matter experts on the
16 issue, especially in this regard, because it's a walled-off
17 issue that we don't participate in and only know of
18 structurally but not how it works in actuality. And so we
19 rely on the -- those entities to explain to us whether or not
20 they can satisfy the order and, if not, how they would be able
21 to restructure so they could.

22 So I don't want anyone to leave this argument with
23 the understanding that the government simply indicated things

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1 that were incorrect or not done as a matter of course because
2 WHS and the SC/DRT were heavily involved in the response. We
3 had many meetings on this. This was sent to them immediately.
4 This is their best professional judgment on how they can
5 satisfy the means of the 60-day review as well as the ability
6 to answer quick questions that may not require a full
7 classification review of a document. But this is the
8 United States' consolidated position on it. It's not just
9 OCP's prosecution team position. So I wanted to make that
10 clear.

11 And subject to your questions, that's all I had, sir.

12 MJ [Col COHEN]: Just a few pragmatic questions here.

13 So I understand the government is committed to the 60
14 days, but what is the -- the check and balance on that? In
15 other words, anecdotal evidence is great for theorizing, but
16 when the rubber meets the road, how are we going to make sure
17 that the -- that those who are responsible for this process
18 are actually meeting the expectations and complying with even
19 a modified order?

20 MTC [MR. TRIVETT]: Sure. So SC/DRT is committed to --
21 even though they're only responsible for the DoD component of
22 it, SC/DRT is committed to communicating with the commission
23 when the 60 -- when and if the 60-day deadline won't be met

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1 and the reasons why, even if that's for a non-DoD request.

2 So I believe that that's the accountability that the
3 commission may have sought in the issuance of AE 118M because,
4 at least from our outside perspective, this has primarily been
5 a defense-driven process, where the commission may not have a
6 lot of insight into where they are in that process.

7 So the accountability of SC/DRT communicating back to
8 the commission in the event the 60-day is not met I believe
9 would satisfy the commission's concerns in that regard.

10 MJ [Col COHEN]: And I understand the -- the general
11 framework based on the filing and then obviously your argument
12 right now with respect to their equities beyond what SC/DRT
13 has within their A0 -- I guess within their area of
14 responsibility.

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

16 MJ [Col COHEN]: In fact, in this particular case, I
17 suspect that there is significantly more outside of what
18 SC/DRT has technically under its -- within its portfolio than
19 may be in some other ----

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

21 MJ [Col COHEN]: ---- DoD-related cases.

22 That being the case, then, how can we meet the intent
23 of Judge Parrella -- which I share in his -- I think everyone

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1 has an interest to make sure we get this stuff done as
2 expeditiously as possible -- with respect to outside entities
3 that still need to review this information and holding as true
4 as we can to that 60-day framework?

5 MTC [MR. TRIVETT]: In filing its motion, the government
6 has committed the United States to doing this.

7 MJ [Col COHEN]: Okay.

8 MTC [MR. TRIVETT]: SC/DRT will be the -- will be the
9 button, so to speak, so they'll be the ones communicating with
10 the commission with the help and coordination of WHS OSS. But
11 we are -- we are committed to meeting the 60-day for whatever
12 type of information it is or communicating back to the
13 commission why it might not be possible.

14 And there have been instances that we are aware of
15 just because they were -- they arose in litigation where there
16 may have been 18,000 pages of something that was sent through
17 the classification review and 60 days is not possible or
18 feasible. But in that instance it would be communicated back
19 to the commission so the commission had oversight over how
20 long it would take and the reasons therefor.

21 MJ [Col COHEN]: Okay. And when you say the
22 United States' position then, so I understand that you met
23 with WHS and SC/DRT, but that also would include these other

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1 agencies and their reviewing authorities?

2 MTC [MR. TRIVETT]: We have adequately -- we have
3 adequately advised and have gained the consent of any original
4 classification authority that may have significant information
5 at issue.

6 MJ [Col COHEN]: Okay.

7 MTC [MR. TRIVETT]: There's always the possibility,
8 especially when we deal later with the State Department-type
9 information that we are arguing isn't relevant, if for some
10 reason that needs to be disclosed or there's something outside
11 of the ordinary realm of who we've defined as the prosecution
12 team, we would have to communicate with them. But SC/DRT is
13 still committed to at least communicating with them and the
14 commission on those issues.

15 MJ [Col COHEN]: But your assertion to me as an officer of
16 the court, then, is that as we stand here today, that with
17 respect to those agencies that we are all aware of have had
18 significant relationship to this case, that that coordination
19 has already occurred and everyone is generally committed to
20 the 60-day timeline?

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

22 MJ [Col COHEN]: Okay.

23 MTC [MR. TRIVETT]: This was a properly coordinated

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1 response.

2 MJ [Col COHEN]: Thank you, sir. I appreciate it.

3 Oh, Mr. Trivett, one last question. With respect to
4 the disclosure about Lieutenant Colonel Jimenez, does the
5 government have any questions?

6 MTC [MR. TRIVETT]: No voir dire at this time, sir.

7 MJ [Col COHEN]: Okay.

8 MTC [MR. TRIVETT]: Thanks.

9 MJ [Col COHEN]: Thank you. I'll just take that up. I'll
10 ask that question of each of the defense counsel as well. If
11 you have any generalized questions, I'll allow you to do that
12 in conjunction with any argument you may have on the matter.

13 All right. Mr. Nevin, do you have any arguments
14 you'd like to be heard on in this matter?

15 LDC [MR. NEVIN]: No questions.

16 MJ [Col COHEN]: Okay. And no voir dire as well?

17 LDC [MR. NEVIN]: Right.

18 MJ [Col COHEN]: Okay. I understand.

19 LDC [MR. NEVIN]: No to both. Thank you.

20 MJ [Col COHEN]: All right.

21 Ms. Bormann, anything with respect to Lieutenant
22 Colonel Jimenez?

23 LDC [MS. BORMANN]: Nothing with respect to Lieutenant

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1 Colonel Jimenez, no.

2 MJ [Col COHEN]: Okay. Would you like to make some
3 argument?

4 LDC [MS. BORMANN]: I believe Mr. Connell is probably
5 going to address the issue.

6 MJ [Col COHEN]: Okay.

7 LDC [MS. BORMANN]: If there's anything to follow up, I
8 would ask to do that after he argues.

9 MJ [Col COHEN]: You may do so. Since I was kind of
10 combining the two issues, I wanted to just kind of go down the
11 line, but I under that this is Mr. Connell's motion.

12 So Mr. Harrington, same questions to you. First of
13 all, any voir dire with respect to Lieutenant Colonel Jimenez?

14 LDC [MR. HARRINGTON]: No voir dire, Judge.

15 MJ [Col COHEN]: Okay. Thank you.

16 Mr. Connell, argument and then any questions you may
17 have. Good morning, sir.

18 LDC [MR. CONNELL]: Good morning.

19 Your Honor, as we are gathered today, AE 639C is not
20 accepted for filing because of an investigation as to the
21 possibility of whether there has been a spill. When I go back
22 in and review that document, I don't see -- I don't see what
23 the concern is. But that's the point. It doesn't matter

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1 whether I see what the concern is. What matters is what OCA
2 sees. They have information that I don't have. They have
3 experience and skills that I don't have.

4 The transfer of information from OCAs to the parties
5 who need it, who in the heat of the moment make arguments, who
6 respond to questions from the military commission, who write
7 under deadlines, has been a critical problem throughout this
8 case. And everyone agrees that there are challenges. But
9 there are different views as to the solutions. I have a view,
10 the government has a view, Judge Pohl had a view,
11 Judge Parrella had a view, and now you are called upon.

12 What I'm about to do in this argument is to give you
13 a lot of history for what is really a banal request for
14 relief. And the bottom line up front is that I will be asking
15 for an order to meet and confer with some representative of
16 the prosecution and the interested defense team, the --
17 someone from SC/DRT, and someone from OSS.

18 That sounds like almost nothing, right? I mean --
19 and I will tell you that -- I'll just represent to you that
20 five years ago it probably would have been nothing; that we
21 had meetings with OSS routinely trying to work out procedures,
22 trying to work out training regimens, various things. But,
23 you know, positions change over time, and I'm not blaming

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1 anybody for that. It's just the way that it is.

2 I will at the very beginning note, as required by
3 AE 609 trial conduct order, that this is the 16th argument
4 related to this topic. The -- we have listed at AE 609C
5 Note 2 all the prior dates and transcript page numbers for the
6 prior arguments on this issue.

7 So let's begin with a little history because
8 otherwise this seems like an issue that kind of comes out of
9 nowhere. Why would Judge Parrella issue an order requiring
10 the government to change its security infrastructure when
11 really that's ordinarily not something that's under the
12 purview of the military commission. They want -- they want
13 the end to be established, as the government just mentioned,
14 but really normally the military commission doesn't get
15 involved in the exactly what agency does what. And it might
16 seem a little strange coming in at this point to, you know,
17 what is the history of all that?

18 And so there's -- there's really a long history of
19 both the sort of ontological question of what is classified
20 and the epistemological question of how do we know what is
21 classified? And those -- just to give you an example of how
22 foundational that has been to the litigation here, that those
23 were really the first motions and the first discovery requests

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1 that were made back in 2012.

2 In 2012 there was a belief that anything the
3 defendants said was presumed to be classified. It was a
4 regime called presumptive classification, and if there -- if
5 Mr. al Baluchi asked for a tuna fish sandwich, that was
6 considered to be classified.

7 And really, the first major motion that
8 Mr. al Baluchi filed, on 19 April 2012, even before the
9 arraignment, was -- raising this question, was AE 009. And on
10 17 May 2012, in the reply in that series, we asked for defense
11 information security officers as a remedy. Around that same
12 time, on 26 April of 2012, the government asked for the
13 protective order which eventually became 013P and then has had
14 multiple iterations since.

15 In our very -- so in our very first discovery
16 request, DR-001-AAA, on 26 June of 2012, the request was for
17 security classification guides. The reason why I mention that
18 is that that forms part of the basis of 118 that this whole
19 thing flows out of. And that was in -- that request was at
20 AE 054 Attachment B in the record.

21 And over time, it emerged that the defense really has
22 three needs with respect to security infrastructure. First,
23 it has the need for broad guidance, classes of things which

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1 are like rules going forward for the future. And I want to
2 pause there and talk about the distinction in the executive
3 order between classification guides and classification
4 guidance.

5 Guidance is ad hoc and informal. When the
6 prosecution hands over a piece of paper, you know, a
7 one-paragraph explanation, or sends a letter saying that this
8 is classified when combined with this other information or
9 this is classified at such-and-such level, that's guidance,
10 I'm sure passed down from an OCA.

11 Guides are different. Guides are what are used more
12 normally throughout the Department of Defense, often arranged
13 as a sort of a spreadsheet or a table, they give broad topics,
14 and, in addition to saying what level information is
15 classified at, how a mosaic combining with another piece of
16 information could elevate its classification, and on what date
17 it is due to be declassified which is important for placing
18 the classification blocks that the military commission and the
19 executive order and the DoD reg all require.

20 The second basic requirement of the defense is
21 day-to-day assistance. Judge Pohl chose, properly in my view,
22 to address this largely through the defense information
23 security officer, who have been invaluable to the defense

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1 teams. But from time to time, they need more. There's a gray
2 area. There's a question. And that's where what we see as a
3 very valuable piece of Judge Parrella's order in 18 -- 118M
4 comes into play.

5 And, third, we need a privileged classification
6 review mechanism. And I'm going to go over that, but one of
7 the things we did not hear and is not addressed in the
8 government's brief that is of great concern is how the
9 privilege structure changes under the government's proposal,
10 which is not covered by 013BBBB, and I'm going to talk about
11 that in some detail. So they've -- their proposal shifts
12 what's going to happen, and, to be honest, Judge Parrella's
13 proposal shifts what's going to happen too, so we need to
14 privilege to catch up with the review mechanism.

15 So on 6 December 2012, the military commission,
16 Judge Pohl, gave its initial approach to the problem in 013 --
17 AE 013P, Protective Order #1, provided guidelines around CIA
18 treatment of the defense, ordered DISOs to assist in applying
19 security classification guides and ordered a privileged
20 classification review -- or ordered a classification review
21 process.

22 Shortly thereafter, on 31 May 2013, Judge Pohl denied
23 access to MET S-06, which was a particular classification

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1 guide that we had been able to identify. But at the same
2 time, the other structures that the military commission had
3 ordered put into place had not come into actual existence yet.

4 We needed the convening authority to act. That's why
5 we filed 118 with four different elements, three of which have
6 been resolved. The convening authority hired defense
7 information security officers, set up a classification review
8 process, we later came back to the court and had privilege --
9 clarified the privilege around that.

10 And for Mr. al Baluchi, I can say that we have used
11 that process about 200 times. We have over the time -- over
12 time come to trust OSS. We have come to understand their
13 procedures. We've come to trust those procedures. And it's
14 a -- it's a mechanism that has problems and -- it has
15 disadvantages and advantages, like everything else.

16 And one of those disadvantages that the military
17 commission saw is the length of time that classification
18 review requires. And in AE 396G, the military commission
19 wrote that it was evident to the commission that the
20 classification review process envisioned by the Third Amended
21 Protective Order #1 is not functioning in a timely manner.
22 That was Judge Pohl.

23 Judge Parrella identified another problem that has --

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1 is not fully resolved by any of these solutions, which is the
2 problem of ORCON. Many of the documents that we received are
3 marked ORCON, originator control, and typically one would have
4 an ability to reach out to the originator and say can I use
5 this document or can distribute it to somebody else, which is
6 simply not present in this case.

7 Many of the documents, of course, are CIA documents.
8 We don't have any way to reach out to them and say, "Hey, can
9 we use this document in a motion," or something. So I told
10 Judge Parrella that essentially, the ORCON markings, we can't
11 do anything with them other than pass them through because we
12 have no way to reach the originator.

13 Now, skipping forward to 25 February 2019,
14 Judge Parrella issued AE 118M, and he found as a fact that
15 there had been excessive delay in the classification review
16 process, and he found that the problem was either, as
17 Mr. al Baluchi had identified, the lack of security
18 classification guides -- that's where all this flows from --
19 or the lack of an accessible POC, and he deferred ruling.

20 And just as an advantage for the government, I don't
21 see that they have to -- I'll just pause here and say I don't
22 see the government has to meet the standard for
23 reconsideration because there is no finer ruling on this.

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1 This is really -- this was sort of an experiment by
2 Judge Parrella. Let's try this other framework and see if
3 this works, and there's a deferred ruling of the availability
4 of security classification guides or some other solution.

5 And he ordered a switch, for reasons that I don't
6 fully understand, from the Office of Special Security to the
7 SC/DRT for classification review. He ordered the defense to
8 informally query the POC before submitting items for formal
9 classification review. He ordered the government to provide
10 POCs, and he ordered a 60-day suspense.

11 The government's response does not oppose a 60-day
12 suspense, as they made clear today, but problematically, I
13 believe, pursued the exact strategy that Judge Parrella
14 identified as part of the problem, which is Judge Parrella was
15 trying to get things out of organizational inboxes -- he
16 actually kind of used that phrase in the brief -- in his -- in
17 his order or something very similar to it -- and into personal
18 communication.

19 Judge Parrella once referred to himself as "The
20 Kumbaya Judge" because he had a real commitment to trying to
21 force people to talk to each other. I will tell you as a
22 result of that, I talked to the prosecution much more than I
23 did during some period of the case. But he wanted the same

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1 sort of consultation that he described in the order between,
2 for example, the Court Information Security Officer and POCs.
3 He wanted that sort of context discussion question asking and
4 answering to be able to take place.

5 Now, with respect to our position today,
6 Mr. al Baluchi does not oppose reconsideration. As I said, I
7 think it was only a deferral. And our original position
8 articulated in the briefs, which continues, is that security
9 classification guides look like a good solution to me. But I
10 also understand that given this sort of three different
11 problems that I identified: Broad guidance, which security
12 classification guides address; day-to-day guidance which DISOs
13 mostly address but there should be POCs for, I like that idea;
14 and then third, privilege classification review.

15 MJ [Col COHEN]: Let me ask you the first one.

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

17 MJ [Col COHEN]: The security classification guides, will
18 that -- will that primarily just assist your DISO? Is that
19 who that -- who you anticipate as the -- as the end user on
20 that? I mean, obviously I doubt that -- I -- for example, I
21 have my CISO.

22 LDC [MR. CONNELL]: Sure.

23 MJ [Col COHEN]: Most of my stuff then goes to my CISO to

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1 say, okay, give me, you know, a heads-up on whether this looks
2 like we're good to go or we're not. So, in fact, in many ways
3 the commission finds itself in the same position that the
4 parties do, which is, hey, I think we're -- we've got a
5 nonclassified version of this that we can send out to the
6 public, but you have to have someone take a look at it.

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

8 MJ [Col COHEN]: So the security classification guide, is
9 that who you would anticipate the defense counsel would be
10 using to -- the DISO would have that as some kind of guidance
11 for providing you all assistance in reviewing this stuff, or
12 how do you anticipate that would assist you in solving this
13 problem?

14 LDC [MR. CONNELL]: Yes, sir. Two answers to that.

15 The first one is, yes, in that the Protective
16 Order #1 in its third amended version assigns primary
17 responsibility to the DISO. One of the three responsibilities
18 of the DISO listed in the document is to assist counsel in
19 applying security classification guides.

20 So, yes, the DISOs are security professionals with
21 the experience and the knowledge and the context to let them
22 apply guides in a way that -- you know, in the rest of my
23 career, I've never worked with security classification guides.

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1 I have -- I have seen what they look like, but that's about
2 it.

3 But the second part of my answer that I want to give
4 is that the buck stops with learned counsel on this question
5 in that I am responsible for proper handling of classified
6 information throughout my team, and if there is a problem, I
7 can't just point to the DISO and say, "Well, you know, they
8 gave me a bum steer." I mean, I -- I take independent
9 responsibility for doing my best to apply the classification
10 guidance that I know and to be a good custodian of government
11 information.

12 So the answer is yes, they are the primary and
13 first-line person to apply those guides, but I also see it as
14 my responsibility to understand -- perhaps not to the level
15 that they do, but to understand that process and be able to
16 assist in the overall goal of protecting classified
17 information.

18 MJ [Col COHEN]: Thank you, sir. I appreciate it.

19 LDC [MR. CONNELL]: The -- and so that brings us to this
20 sort of day-to-day assistance question. We've submitted, you
21 know, two examples, one of which has been -- has been in
22 declassified format. Thank you to the government for -- at
23 the last hearing.

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1 And -- but at AE 118Q Attachment B I think is a good
2 example of the type of question that -- where human
3 communication is a good -- is much better than an
4 organizational inbox. And it was for our brief that we were
5 actually writing in 1180, and I was pretty sure -- I was, you
6 know, 99 percent sure I knew the answer to this question
7 anyway, but I thought, well, let me just pilot this -- this
8 process just to see.

9 Because if I hear -- to be honest, I hear my DISO,
10 who sits near where I sit, speak to the CISOs, you know,
11 informally quite a lot, speak to the government paralegals
12 quite a lot about, Hey, I have this concern, or, Hey, I have
13 this question, and lots of times they just work out the
14 solution and it never goes any higher than there.

15 On this occasion, I said, "Well, can I say that there
16 are approximately five OCAs who are involved in review?" And
17 as I said, I knew this was unclassified, but I just wanted to
18 say it's good phrasing. And that's the sort of thing we do
19 with the DISOs, is I know that if I say it this way, I'm fine.
20 You know, what's the proper phrasing of this question?

21 And if there had been a phone call, I think that our
22 DISO could have picked up the phone, called the POC, said,
23 "Hey, my lawyer wants to say approximately five OCAs. Is that

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1 good with you?" "Yep, sounds right," and moved on from there.

2 As it was, you know, fairly short suspense. Three,
3 four hours later we got to file the brief. We didn't get an
4 answer. I'm not blaming anybody for that, but it's not
5 really -- you know, an organizational inbox is not really the
6 same as human-to-human communication.

7 And I heard the government say that OCAs want
8 context, explanation, and that makes perfect sense to me. And
9 that's -- that's the reason why human-to-human communication
10 is often superior to submitting a query to an organizational
11 inbox. Because they can say, Well, you know, I don't
12 understand what you mean about that or does it affect this
13 equity or -- you know, What if you said it this way, right?
14 There can be a sort of often very quick discussion of finding
15 a solution with government professionals working together. I
16 mean, we're talking about a bunch of GS employees all
17 committed to the same goal of protecting classified
18 information working together. So that's why I liked what
19 Judge Parrella proposed on the point of contact, and it seemed
20 like a good idea.

21 So that brings us to the privileged classification
22 review question. And I want to direct the military
23 commission's attention to AE 013BBBB, the current version of

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1 the protective order, paragraph 4.d., which provides a
2 privilege classification mechanism. It says that essentially
3 by submitting information for classification review we're not
4 surrendering privilege, which would otherwise be a very big
5 deal in the D.C. Circuit.

6 The D.C. Circuit is the strictest of the circuits
7 when it comes to accidental surrender of attorney-client
8 privilege. Even what seems like a reasonable application of
9 attorney-client privilege can waive privilege under some
10 circumstances and for some scope.

11 But the language of it only addresses the Office of
12 Special Security. It does not address SC/DRT and -- which
13 gives me some concern.

14 Now, you know, when we started this -- using this
15 process with OSS, the whole idea of sending our work
16 products -- much of which is not intended for -- ever to be
17 filed in a military commission -- sending that work product
18 off to the CIA and whoever else was involved seemed like a
19 very iffy proposition, you know, on many -- you can understand
20 why we would be hesitant about that.

21 And it was really through repeated conversations and
22 meetings with OSS early in the process that we came to
23 understand exactly that there's a small walled-off section

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1 within these other OCAs -- it's a very small number of people
2 who deal only with our information, who don't communicate that
3 information to other elements of the United States
4 Government -- that we came to understand that process and
5 trust it and haven't had any -- any problems with leakage or
6 spillage of privileged information. What we've had problems
7 with is time, which I think has been a focus of the military
8 commission.

9 So it appears to me, Your Honor -- and I told you
10 there was going to be a lot of history to get to a banal
11 result, but, you know, the -- there was an idea that we were
12 going to give this six months and see how it works, and that
13 makes sense to me. On 14 June 2019 we submitted two documents
14 for classification review. We're going to see if they make
15 the 60-day mark or not, right? That will be an empirical
16 question that we have.

17 But it seems to me that we could all improve this
18 process significantly if we understood each other's
19 constraints and requirements. I read the government's brief
20 with attention and could not extract from it like what the
21 actual problem was. I mean, there was sort of some -- some
22 language that in my mind is associated with the bureaucracy
23 about requirements and funding and -- but I didn't understand

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1 what they actually meant. Like we need two people to do this
2 and we don't have two people to do that, or something like
3 that. I mean, it seems like this is a conversation that
4 could -- could be valuable.

5 And with all due respect to my colleagues on the
6 other side of the aisle, the brief -- their brief reveals that
7 the government doesn't really understand a lot of this -- part
8 of this process either. For example, they talk about OSS
9 providing classification guidance to us as a reason to keep
10 them in the loop. OSS doesn't provide us classification
11 guidance. What they do is that they carry classification
12 review to the five OCAs who are involved.

13 There's a reference in the government brief to
14 communication infrastructure that would have to be duplicated
15 between OSS and our office, and I assume they mean, like, STI
16 phones or something but we won't do have communication
17 structures with OSS. We physically take double-wrapped
18 documents over to their office and then they take them
19 wherever they take them.

20 But I'm not just saying that the government doesn't
21 fully understand. Because they in the brief write that I
22 don't understand their administrative requirements. And let
23 me tell you, sir, truer words were never spoken. I do not

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1 understand the government's administrative requirements. I
2 couldn't extract them from the brief. And it would be nice
3 for, you know, somebody at OSS, somebody at SC/DRT, to
4 explain, and I'd say, "Oh, okay."

5 When we conferenced this again just shortly before
6 coming down here again, you know, one of the observations I
7 made in my response to the government was I'm entirely likely
8 to agree with you if I can just get some understanding from --
9 from people who actually work on the process.

10 The government in its argument today made the
11 observation that they only know the structure because they're
12 walled off from it. They don't know how it actually works.
13 And with the OSS classification review over the years, I've
14 come to understand how it actually worked.

15 And whether this is a good system or whether I would
16 join the government in -- in asking to roll back parts of
17 118M, isn't -- is very much a realistic scenario, because
18 although the government's brief talks a lot about counsel
19 wants this and counsel has preferences for that, if I were
20 picking, I would pick OSS, who I know the personnel, I've
21 talked the them many times about the process and I trust, over
22 SC/DRT, who I've never met anyone from SC/DRT. I don't know
23 anything about them other than their role in the process of

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1 posting things on the website, right? And I don't know who
2 they are or what they do, really, other than what appears in
3 the regulation.

4 So at the same time, we can explain our requirements.
5 I mean, to a nonlawyer, it is probably pretty obscure that the
6 protective order provides for privileged communications, which
7 is not something the security community normally has to deal
8 with, right? They deal with classified information, not
9 privileged information -- only affects certain channels when
10 it goes from for DISO to the OSS is the narrow channel
11 established in the protective order. I can explain our
12 concerns. I can explain my understanding of the history of
13 how things work.

14 And it -- you know, and I know that Mr. Trivett is
15 willing to meet with me. Mr. Trivett and I speak fairly
16 frequently. But we need stakeholders. And if the concern is
17 that people want to remain anonymous, I mean, the head of OSS
18 and the head of SC/DRT are both well-known individuals, right?
19 They're a -- I don't know anyone else who's in SC/DRT, but
20 I -- but I know who the head of it is. I know who the head of
21 OSS is and our -- and our individuals.

22 But they also have lawyers. I've spoken to the
23 lawyer for OSS before. I know the DIA has tons of lawyers.

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1 I've never met with any of them, but I know they're out there.
2 I don't know if SC/DRT has their own personal lawyer, but I'm
3 sure there's somebody in the umbrella that has them in their
4 portfolio.

5 And if the concern is individual security
6 professionals, let's have a meeting of the lawyers from those
7 organizations, and they can explain with knowledge of how the
8 process works, what their constraints and what their
9 capabilities are, and then I bet we could build a system that
10 would protect classified information and help us all move
11 forward a little bit better.

12 So that's my proposal.

13 MJ [Col COHEN]: All right. Thank you, sir. I appreciate
14 it.

15 LDC [MR. CONNELL]: Sir, I do -- I did have two questions
16 on voir dire.

17 MJ [Col COHEN]: You may do so.

18 LDC [MR. CONNELL]: Sir, I'm sure that your commitment to
19 impartiality extends to giving a fair trial to the government
20 as well as the defense?

21 MJ [Col COHEN]: Absolutely.

22 LDC [MR. CONNELL]: And would anything about your
23 association prior or current with Lieutenant Colonel Jimenez

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1 affect your ability to give the government a fair trial?

2 MJ [Col COHEN]: Absolutely not.

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

4 MJ [Col COHEN]: Yeah, there's nothing about that
5 relationship that I believe would impact this case in any way,
6 shape, or form.

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

8 MJ [Col COHEN]: Thank you.

9 Mr. Ruiz, first of all, if you have any voir dire
10 questions, you may ask them. If you do not, if you have any
11 additional argument, you may also do that.

12 LDC [MR. RUIZ]: No on both counts.

13 MJ [Col COHEN]: All right. Thank you, sir.

14 LDC [MR. RUIZ]: Thank you.

15 MJ [Col COHEN]: There's enough built-in time in just the
16 regular briefing cycle, so I'm going to say I'm inclined to --
17 based on the arguments of both sides to take a look, a new
18 look at 118M.

19 What I'd like to do, and I'll hear any arguments as
20 to why this is not feasible. I would like a government
21 representative and a representative of each of the defense
22 counsel to get together in the next 45 days with a
23 representative from the entities that the government would

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1 like to propose, to be the liaisons in this process, and a
2 report back 45 days from now as to what a -- what you can
3 agree on as a proposal and what becomes incapable. But I
4 think that both sides make very good points.

5 At the end of the day, what both Mr. Trivett and
6 Mr. Connell have said is true. I'm concerned about the end
7 result, and that is the expeditious processing of this
8 information so that this case can move forward in a timely
9 manner.

10 How that's done, to the extent that requires a
11 court -- a commission order, I'm willing to do so. But at the
12 same time, I'm also -- it's not routine, necessarily, for a
13 court or a commission to get into how a cake is baked. We
14 just want to see the cake.

15 And so I'm going to give you 45 days to come together
16 and see if you can come to some kind of agreement with
17 stakeholders as to -- so that everyone is talking on the same
18 language. And if we can do that, then perhaps that may
19 resolve this issue, and then my -- well, either way, there
20 will be some modifications to 118M because I think both sides
21 want some modifications to 118M, and I don't think that's
22 unreasonable.

23 If it's not meeting its intended purpose, then --

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1 then we need to adjust it to meet its intended purpose to
2 assist both the government and the defense. And so 45 days
3 from now, so approximately the end of August, I'd like a
4 report back that that meeting has been held. That should give
5 sufficient time; that's six weeks. And like I said, the
6 defense can pick who you want to go, and the government can
7 pick who they want to go.

8 And in the meantime, I encourage you to do exactly
9 what you've both discussed, which is the government is willing
10 to talk with the defense, defense talk with the government,
11 let's figure out what your going-in positions are and then see
12 what's feasible and what isn't. And then come back to the
13 commission and say, okay, here is what -- we can either agree
14 on or here is what you need to issue an order because the
15 stakeholders are saying that they're unwilling to assist us
16 beyond this, and then I'll see what's within my lane in my
17 legal authority to do.

18 Like I said, I don't want to make you wait two weeks
19 for me to tell you that's what I want done, so I'll just tell
20 you now. Please do that. And then once I get that report
21 back from the parties, to the extent that you -- to the extent
22 that you can provide a joint filing, that would be great,
23 just -- as opposed to each -- everyone briefing it. Just tell

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1 me where -- what the status is on this issue and then what
2 needs to be resolved. Because you're not in disagreement as
3 to what the end result is. The question is how you get there,
4 and so I want you to look at that. All right.

5 LDC [MR. HARRINGTON]: Excuse me, Judge.

6 MJ [Col COHEN]: Yes, Mr. Harrington.

7 LDC [MR. HARRINGTON]: Without trying to get into the
8 weeds on this meeting, would it be possible we could have a
9 DISO and another representative from each team?

10 MJ [Col COHEN]: Absolutely. That would be fine. In
11 fact, DISOs makes -- actually makes very good sense, for
12 security officers to be there to talk about what their
13 concerns are. The details of when it is, how long you guys
14 set aside to discuss that, I'm going to leave up to you as the
15 parties. That is a little bit too far in the weeds for me.

16 But just the general concept again of getting
17 together and discussing it -- because I could sit here and
18 issue a ruling every day and it could be another test and
19 we're going to keep coming back and addressing it, so I think
20 now is the time especially since we're talking, the government
21 has asked for a trial schedule. The defense in your response
22 is asking for certain dates based on things. This is going to
23 continue to be relevant. To the extent that we can -- we can

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1 knock out this issue, it will expedite other issues that
2 are -- that are guaranteed to come in the future. All right.

3 As I indicated during voir dire, before we move on to
4 the next, which will be the update of AE 628B and kind of
5 where we are on that issue, the motion to compel the
6 witnesses -- as I indicated, if names pop up, people rotate in
7 and out of the commissions, so if any party believes that
8 there may be a -- that I may know someone who ultimately later
9 gets added to the case, obviously, please at that point, ask
10 me about any relationships, et cetera, as we move forward in
11 voir dire. All right.

12 Mr. Connell, 628B, please.

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

14 The -- obviously the overall structure of how -- when
15 the motion to suppress is going to be dealt with and how
16 exactly it's going to relate to discovery deadlines and other
17 things is before the military commission in AE 639.

18 Without any change to our position there, which we've
19 articulated, we -- our position from the last hearing has not
20 changed. As a general matter, the government wants to call
21 the six witnesses that they've identified, the 12 witnesses
22 that the defense has identified, and then conduct the argument
23 on compelling further witnesses after that. That's fine with

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1 us.

2 If you choose to do it the other way, like in a -- I
3 don't know to what extent their position is based on the,
4 "Hey, we really hope to do this in September" position, and
5 your ruling on 639, how you're going to structure things may
6 change, you know, positions of parties. I don't know.

7 But as a general matter, we haven't changed our mind.
8 That's their proposal. Seeing -- the way things are
9 structured now, it seems reasonable, and if -- if the
10 structure changes, positions may change.

11 MJ [Col COHEN]: I understand. Where are the -- you and
12 the government with respect to the stipulation of fact that
13 was discussed last time?

14 LDC [MR. CONNELL]: So we are working hard on it. We
15 haven't gone back to the government with a stipulation yet,
16 but lots of people have spent lots of hours on it. We're
17 working hard on it.

18 MJ [Col COHEN]: All right. Thank you, sir.

19 LDC [MR. CONNELL]: Thank you.

20 MJ [Col COHEN]: Mr. Trivett, from the government's
21 perspective, anything that you'd like to add?

22 MTC [MR. TRIVETT]: Yes, sir. Thank you.

23 MJ [Col COHEN]: You're welcome.

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1 MTC [MR. TRIVETT]: I just want to impress upon the
2 commission again how important it is to have dates certain.
3 It's our belief that we're going to be calling all of our
4 witnesses in September, if that's the commission's belief.
5 And if the commission defers to our order, meaning the
6 prosecution's order, we just need to know because we need to
7 subpoena people, we need to make sure that they can travel
8 down.

9 MJ [Col COHEN]: Understand.

10 MTC [MR. TRIVETT]: If you have your own idea as to how
11 that order needs to go, that's fine too. We just need the --
12 the more lead time we have, the better to make sure that we
13 can subpoena everybody and make sure that they're available,
14 and if they're not available on a certain date, be able to
15 communicate that back to the commission.

16 MJ [Col COHEN]: Have you had the opportunity to see 639C
17 yet?

18 MTC [MR. TRIVETT]: I'm sorry, sir?

19 MJ [Col COHEN]: Has the government been able to see
20 AE 639C yet?

21 MTC [MR. TRIVETT]: One second. Let me confirm.

22 MJ [Col COHEN]: I know there was an issue with the
23 filing, but I wasn't sure if that had been shared at all yet.

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1 MTC [MR. TRIVETT]: I think we're still waiting for it to
2 be properly filed and accepted.

3 MJ [Col COHEN]: Okay.

4 MTC [MR. TRIVETT]: I don't want to make any other
5 reference to it at this point.

6 MJ [Col COHEN]: Okay. All right. Thank you.

7 LDC [MR. CONNELL]: Sir, I just want to be clear, the
8 government received timely service, so the government has
9 their copy. The question is whether it's been -- I think what
10 counsel is saying he doesn't want it argued because it
11 hasn't ----

12 MJ [Col COHEN]: No, absolutely.

13 LDC [MR. CONNELL]: ---- been accepted for filing. But
14 the government received theirs on Friday.

15 MJ [Col COHEN]: I wasn't asking for argument. I just
16 wanted to see if you guys even had kind of an advanced --
17 let's call it an advanced copy. Have you at least seen some
18 notion of what the defense may be asking for in that motion?

19 MTC [MR. TRIVETT]: Shortly after we received it, we were
20 notified to not open it.

21 MJ [Col COHEN]: Copy. All right. Thank you.

22 LDC [MR. CONNELL]: I understand. I'm caught up now, sir.

23 MJ [Col COHEN]: Got it.

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1 LDC [MR. CONNELL]: I didn't know that.

2 MJ [Col COHEN]: That's all right. Thank you.

3 LDC [MR. CONNELL]: I will bring them -- I will get them a
4 paper copy today.

5 MJ [Col COHEN]: Perfect. Thank you. Yeah, that's
6 something, obviously, by the end of the week, I want to take
7 up. One of the issues with that particular one is if there's
8 just a particular attachment that is at issue, perhaps we can
9 just offer it without a particular attachment, and then we can
10 see whether or not that particular attachment can just be
11 added as some kind of other classified document, et cetera.
12 All right.

13 Mr. Trivett.

14 LDC [MR. CONNELL]: Your Honor, I'm giving the government
15 a paper copy right now.

16 MJ [Col COHEN]: Perfect. Thank you. Obviously we won't
17 argue it today. I just wanted to see if you guys had even had
18 a chance to see what it was.

19 Mr. Trivett.

20 MTC [MR. TRIVETT]: Yes, sir. I wanted to also point the
21 commission's attention to AE 586 and AE 641. Those are
22 ex parte motions from the prosecution that I believe should
23 be -- in order to efficiently litigate the suppression

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1 motions, both of those should be decided on prior to the
2 suppression motion.

3 MJ [Col COHEN]: I would agree with you.

4 MTC [MR. TRIVETT]: So I would call your attention to
5 that.

6 Also in our consolidated request for witnesses we
7 have listed more witnesses than we had at least given initial
8 notice of in our suppression responses to the various teams.
9 I wanted to call the commission's attention to that as well.

10 MJ [Col COHEN]: I saw that this morning.

11 MTC [MR. TRIVETT]: There's a total of 16. Many of those
12 are chain of custody witnesses. And quite frankly, sir, this
13 is the first time we've practiced in front of you and we're
14 not sure exactly how it's going to go, understanding that it's
15 a pretrial hearing but it's also a suppression motion. So it
16 may be that that number dwindles significantly once we start
17 litigating. But I wanted to give you and the parties the
18 reason why we added some additional people.

19 We've also added Captain Delury as a witness to
20 discuss the taking of the CSRTs for certain accused and also
21 to help rebut a claim of learned helplessness. I just wanted
22 to explain in -- it is not necessarily clear.

23 Mr. Connell's motion to suppress is very broad. But

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1 he doesn't delineate the exact statements in which he wanted
2 suppressed. Although we don't intend to use the CSRT for
3 purposes of the case in chief for Mr. Ali, there is a reason
4 to use it for purposes of suppression, and so we intend to
5 use it. And that's why we're calling him as opposed to just
6 moving in the Combatant Status Review Tribunal transcript.

7 MJ [Col COHEN]: Understood.

8 MTC [MR. TRIVETT]: I just wanted to give all parties and
9 the commission notice as to why there were additional people,
10 although timely, based on your order, on our witness list.

11 And we also indicated too that we're trying to be as
12 efficient as possible. A lot of our theory of suppression for
13 our statements is that, in part, that they're voluntary but
14 also reliable, and that they're reliable because we can
15 corroborate them in many different ways. In a lot of ways the
16 corroborative evidence is also going to be any evidence that
17 we wind up relying on if the other accused challenge their
18 AUEB status in a jurisdictional challenge.

19 As of now, we've resolved Mr. Hawsawi's
20 jurisdictional challenge. We're now on to Mr. Ali's
21 jurisdictional challenge, which is the main reason why the
22 suppression motions were triggered to begin with, but we still
23 await other jurisdictional challenges.

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1 It's the government's intention to use this hearing
2 and that corroboration of those LHM statements to also lay our
3 foundation for the AUEB status of the other accused.

4 MJ [Col COHEN]: Thank you, sir. I appreciate the updates
5 from both parties.

6 MTC [MR. TRIVETT]: Thank you, sir.

7 LDC [MR. RUIZ]: Judge, may I make one reference?

8 MJ [Col COHEN]: You may, Mr. Ruiz.

9 LDC [MR. RUIZ]: So Judge, with respect to 639C,
10 Mr. al Hawsawi has a supplement that we intended to file and
11 were, in fact, ready to file at that time; it's 639C (MAH
12 Sup). However, because the pleading couldn't be accepted, our
13 supplement never -- it's never been sent. It's an ex parte
14 supplement that outlines some of the challenges that we face,
15 so you've never seen that.

16 MJ [Col COHEN]: Okay.

17 LDC [MR. RUIZ]: We would like for the court to have an
18 opportunity to consider that as well, but we're waiting for
19 the actual acceptance of the -- of the pleadings.

20 So I guess what I'm asking is: How would you like us
21 to handle that? Do you want us to hold onto that or --
22 because we've been ready to file that. And because the other
23 pleading ----

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1 MJ [Col COHEN]: Right.

2 LDC [MR. RUIZ]: ---- didn't come in, there was nothing to
3 supplement.

4 MJ [Col COHEN]: I know what I'm inclined to do. Let me
5 find out what -- what makes the most sense, all right? Give
6 me -- just give me -- actually, we're going to take a brief
7 recess here momentarily anyway. Let me ask -- let me talk
8 with the court reporters, et cetera, and just my staff and
9 make sure that that -- what I'm inclined to do is say we'll go
10 ahead and file it and we'll catch everything up. As long as
11 we've got the right numbers for everything, the record -- the
12 record reflects it.

13 So like I said, and then Mr. -- so let me get back --
14 I'll give you an answer right away after we get back from
15 recess.

16 LDC [MR. RUIZ]: Thank you.

17 MJ [Col COHEN]: All right. And Mr. Connell, I'd
18 mentioned that previously, has anyone talked to you about
19 possibly just removing whatever the issue was and then just
20 pushing with that filing, and then if we need to supplement it
21 with that document in a different format we could?

22 LDC [MR. CONNELL]: Sir, I haven't been advised what the
23 issue is.

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1 MJ [Col COHEN]: Okay.

2 LDC [MR. CONNELL]: I have a guess, but it's just a guess.

3 MJ [Col COHEN]: Okay. All right. We need to get someone
4 to let you know what that issue is. All right. Thank you.
5 All right.

6 Are there any other comments that need to be made
7 with respect to 628B? Okay.

8 All right. Then let's go ahead and take a 15-minute
9 recess and we'll reconvene.

10 [The R.M.C. 803 session recessed at 1139, 22 July 2019.]

11 [The R.M.C. 803 session was called to order at 1200, 22 July
12 2019.]

13 MJ [Col COHEN]: The commission is called to order.

14 One other administrative matter that I need to take
15 up. The court reporters had brought this to my attention last
16 night. During a closed session last time -- I won't go into
17 the contents of what it was, but just we'd marked something as
18 530YYY (MAH). It actually -- there was already a
19 530YYY (MAH), and so for -- to catch up the record, that is
20 going to be now 530ZZZ (MAH).

21 LDC [MR. RUIZ]: I'm sorry, judge. I missed the first
22 part of it.

23 MJ [Col COHEN]: Yeah. Last time we'd marked an exhibit

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1 as 530YYY (MAH). That actually should have been a ZZZ (MAH)
2 because there was already a YYY, I believe. It was a ruling
3 by the court.

4 LDC [MR. RUIZ]: Got it. Thank you.

5 MJ [Col COHEN]: Thank you.

6 Mr. Trivett, with respect to AE 586 and AE 641, if
7 the government would please provide the commission as to
8 whether or not every matter addressed in those needs to be
9 decided or whether there's just certain portions that need to
10 be decided.

11 MTC [MR. TRIVETT]: Will do. To the extent -- I know the
12 answer to the latter AE is that all of that needs to be
13 decided.

14 MJ [Col COHEN]: Okay.

15 MTC [MR. TRIVETT]: I can certainly go through 586 and
16 make a determination as to what aspects of 586 need to
17 be addressed.

18 MJ [Col COHEN]: Okay. I'll take that. Then AE 641 needs
19 to be in its entirety, and then if you could just follow up
20 with AE 586, I would appreciate it.

21 MTC [MR. TRIVETT]: Will do, sir.

22 MJ [Col COHEN]: All right. Thank you.

23 Mr. Connell, with respect to AE 639C, my

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1 understanding at this point is that there is a -- there's a
2 particular type of information that is problematic that's in
3 that. Once we take the lunch break, if you could get together
4 with my CISO and then the government, we're going to figure
5 out a way to get that -- whether it's a corrected copy or
6 whatever we need to do, redactions, et cetera, to -- to make
7 sure we can get that filed as quickly as possible.

8 And then, Mr. Ruiz, we'll get your -- we'll get yours
9 filed in very short order as well once we can get that
10 resolved.

11 LDC [MR. CONNELL]: Standing by, sir.

12 MJ [Col COHEN]: All right. Thank you.

13 Okay. We have about 25 minutes. I'd like to start
14 off with AE 637. Given this time, Mr. Harrington, is that
15 enough time for you to provide your initial argument, or for
16 your team?

17 LDC [MR. HARRINGTON]: Yes, Judge. Major Bare is going to
18 argue that.

19 MJ [Col COHEN]: Okay. We'll take that one. I think
20 that that seems to be the right order based on the time that
21 we have. I'll hear Major Bare's argument, and then we will --
22 if that takes us to around a lunch break, then we will pick it
23 up with any additional defense argument, and then I'll have

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1 government argument and response after lunch. All right.

2 Major Bare.

3 DC [Maj BARE]: Your Honor, this motion is about
4 prosecution access to defense information; specifically,
5 prosecution access to defense information held by the
6 convening authority and contracting agencies. Now, the issue
7 arose in the 350 series and some of the filings and history in
8 that series, and the 616 series are relevant. But the legal
9 issue for this motion is independent of that.

10 By way of background for how the parties viewed
11 information held by the convening authority, one of the
12 earliest pleadings in the AE 350 series was AE 350B. And in
13 that pleading the government asked the commission to compel
14 and review in camera all documents in the convening
15 authority's possession regarding the Office of the Chief
16 Defense Counsel's and/or Mr. Binalshibh's defense team's
17 request for the services of a former CIA interpreter. And
18 then after that review the government asked that nonprivileged
19 information be released. This was filed on the 11th of
20 February 2015.

21 The next day, the 12th of February, the convening
22 authority provided a spreadsheet to the prosecution. We don't
23 know exactly what that spreadsheet was. Perhaps it's the

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1 spreadsheet that became now evidence, Attachment B of AE 616S.

2 When the prosecution received that evidence -- that
3 spreadsheet, they responded and said they would delete it.
4 This is on the 13th of February. It's an e-mail found in AE
5 616X Attachment D. They said they would delete it out of an
6 abundance of caution -- not their words -- but saying even
7 though they didn't think there would be privilege, they would
8 delete it.

9 At that point the prosecution rightfully recognized
10 the importance of respecting defense information, even defense
11 information held by the convening authority. You see, the
12 convening authority holds details of the defense work, and
13 some of that information is protected by commission order, but
14 a lot of it is not. A good example is every defense team
15 travel request goes through the convening authority. That
16 includes the travel requests that bring us here to Guantanamo
17 Bay today, to training, or to international and domestic
18 investigation.

19 For years it seemed that all the parties appreciated
20 the sanctity of that, and then this year, in 2019, defense
21 counsel received notices of exhibits that originated from the
22 convening authority. This is AE 616F, e-mails within the
23 convening authority's office about the former interpreter's

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1 travel; and AE 616S, a spreadsheet of the interpreter's hours,
2 travel locations, and dates.

3 A former defense team member's hours, travel
4 locations, and dates, however brief those dates were, were
5 given from the convening authority to the prosecution. And
6 this turnover occurred with no notice to the defense from the
7 convening authority, no notice from the prosecution, and
8 nothing like 350B where the commission was asked to intervene,
9 just a notice that the exhibits were being submitted to the
10 commission.

11 So the defense submitted a discovery request asking
12 for exactly how this occurred and, essentially, if it had
13 happened before, whether there were any communications between
14 the convening authority and the prosecution and contracting
15 agencies and prosecution about the interpreter or any other
16 past or present defense team member.

17 And this related to the kinds of things that were
18 given over in the spreadsheet: Any communications about the
19 numbers of hours worked, location of work completed, vouchers
20 submitted by the employee, numbers or length of client visits,
21 training completed, communications between the employee within
22 the team, statement of services provided, and work product.
23 And that discovery request was denied.

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1 In sum, it seems that the government's position, by
2 denying this discovery but accepting the documents from the
3 convening authority, is that they can receive the information
4 from the convening authority but the defense doesn't have a
5 right to an accounting of that.

6 So this motion to compel focuses on a couple of legal
7 issues. First is to evaluate the convening authority's
8 neutrality, and second is to protect defense information.

9 Regarding convening authority neutrality, the
10 government asserts in their response in 637A that this motion
11 to compel -- in the response, that the reason to deny the
12 discovery is because the convening authority is neutral. It's
13 a requirement of the law. It's a requirement of the position.

14 Unfortunately, the defense has a duty to investigate
15 whether the convening authority is indeed impartial. The
16 convening authority's role has to be evaluated. That's
17 because historically not all convening authorities are
18 impartial.

19 And reflecting the Rules for Courts-Martial -- R.M.C.
20 504(c)(1) says that the convening authority can't be an
21 accuser in the case.

22 A type three accuser is one who has a personal
23 interest -- is personally disqualified, one who has an

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1 other-than-official interest in the case. And the test for
2 that is whether a reasonable person could impute to the
3 convening authority a personal interest or feeling in the
4 outcome of the case.

5 Providing evidence to the prosecution could be
6 disqualifying. The circumstances surrounding providing
7 evidence to the prosecution about the defense team could be
8 disqualifying, and a reasonable person might find that.

9 It's also helpful to note that there is a pending
10 motion to disqualify the convening authority -- it's AE 643 --
11 based on the convening authority's recusal of himself in two
12 other cases. It highlights the importance of the -- the
13 importance of investigating the neutrality of the convening
14 authority and the defense team's responsibility.

15 Now, regarding the defense communications with the
16 convening authority, historically some defense communications
17 with the convening authority have been protected by commission
18 order and some have just been respected because it makes good
19 sense.

20 In AE 160, the defense made a filing about
21 prosecution access to learned counsel and expert billing
22 information. They did this because they've learned that the
23 prosecution had access to that information. And without

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1 prosecution objection, the commission entered into Protective
2 Order #3, which protects learned counsel and expert payments,
3 hours, and documents submitted for pay. As the defense
4 explained in asking for that information, it's because this
5 kind of information reveals defense strategy.

6 The convening authority similarly maintains all the
7 records of travel of every defense team member, all the travel
8 defense team members have ever made. What could be more
9 revealing of a defense team strategy than their travel
10 records?

11 So after years of respecting the sanctity of defense
12 information, the government perspective has changed, and we
13 know this because they assert it in AE 637A. There's no
14 longer an assumption that defense documents held by the
15 convening authority are protected, but the prosecution -- they
16 assert the prosecution or the convening authority can release
17 these documents under certain circumstances. And the
18 justification for this is because of the neutrality of the
19 convening authority. In fact, if the defense relies on the
20 convening authority to protect these documents, on page 12 of
21 AE 637A, the prosecution asserts that that is unreasonable.

22 So now we know the prosecution has changed their
23 perspective on whether defense information filed with the

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1 convening authority is protected. We know the convening
2 authority provided evidence to the prosecution. We know that
3 it is evidence about a former member of the defense team. We
4 know it includes evidence about defense e-mails regarding
5 travel and evidence that the prosecution has noted they'll put
6 before the commission.

7 Here's what we don't know. We don't know if this is
8 an isolated occurrence. We don't know if this is the only
9 time it has happened. We don't know if it's a recurring
10 occurrence or a habit. We don't know the substance of the
11 communications in which this occurred. So the motion to
12 compel must be granted to clear up these unknowns so the
13 defense can evaluate what information of ours was provided to
14 the prosecution, how it was provided, and what remedy to
15 pursue.

16 MJ [Col COHEN]: Major Bare, have you contacted the
17 convening authority to ask for the information that was
18 provided to the prosecution?

19 DC [Maj BARE]: May I consult with learned counsel?

20 MJ [Col COHEN]: You may.

21 [Pause.]

22 DC [Maj BARE]: No, and there are reasons for not doing
23 that.

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1 MJ [Col COHEN]: Okay. What are -- what are those reasons
2 why you wouldn't just ask them for the information? In other
3 words, if -- there's two ways this can go. Either they're
4 impartial, in which case they should just be willing to
5 provide you whatever they provided to the prosecution because
6 that's what an impartial person would typically do is say,
7 well, we're not playing sides. So they ask for it. They can
8 have it. You ask for what they got. We're going to give you
9 what they have and all those kinds of things. We gave them
10 the -- the e-mails from defense counsel, so we'd like to see
11 what the prosecution asked for in that. I mean, if that's --
12 if it's just an impartial arbiter of procedure, then that's
13 theoretically what you would get.

14 It seems to me that you have a better case for
15 arguing that they are -- they are partial towards the
16 prosecution as opposed to the defense. If you ask the
17 question and they said, "No, we're going to help the
18 prosecution out in this matter, but we're going not to assist
19 the defense in having equal access to the information."

20 So if you never ask the question, how do we -- how do
21 I as the commission know whether or not the first -- the
22 primary purpose you said was is to test the partiality of the
23 convening authority.

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1 DC [Maj BARE]: As a starting point, if it's relevant to
2 making that determination, the prosecution's discovery
3 obligations would still encompass turning over that sort of
4 information or making a similar request to the convening
5 authority.

6 MJ [Col COHEN]: Okay.

7 DC [Maj BARE]: Regarding specific reasons to not go to
8 the convening authority, I'd have to come back to the
9 commission.

10 MJ [Col COHEN]: Okay. After lunch, I'd like to know why
11 you never asked for the information from the convening
12 authority.

13 DC [Maj BARE]: Yes, sir.

14 MJ [Col COHEN]: All right. To the extent that it doesn't
15 require a divulging of attorney-client information. But it
16 seems like it would just -- I just want to know kind of how we
17 got to where we're at, where we have a motion to compel as
18 opposed to, hey, convening authority, give us what you gave
19 the prosecution.

20 DC [Maj BARE]: Yes, sir.

21 MJ [Col COHEN]: All right. Thanks.

22 DC [Maj BARE]: Thank you, Your Honor.

23 MJ [Col COHEN]: Thank you. All right. Rather than try

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1 to -- we're just going to take a break. I was looking to see
2 if we could get something done in the next 12 minutes to use
3 the time efficiently, but I think it's unreasonable to think
4 we're going to resolve this additional argument in 12 minutes.

5 So let's go ahead and take a recess. We'll reconvene
6 at 1400 hours today.

7 [The R.M.C. 803 session recessed at 1218, 22 July 2019.]

8 [The R.M.C. 803 session was called to order at 1401, 22 July
9 2019.]

10 MJ [Col COHEN]: The commission is called to order. All
11 parties present when the court recessed are again present. If
12 that is incorrect, please notify me.

13 General Martins?

14 CP [BG MARTINS]: Mr. Hawsawi's absence.

15 MJ [Col COHEN]: That is correct. Mr. Hawsawi is not
16 here. Mr. Ruiz, that was -- you had previously indicated, I
17 believe, on his behalf that he wanted to absent himself; is
18 that correct?

19 LDC [MR. RUIZ]: That's correct.

20 MJ [Col COHEN]: And any objection to the court finding
21 that that was a knowing, voluntary, and intelligent waiver of
22 his right to be here?

23 LDC [MR. RUIZ]: No.

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1 MJ [Col COHEN]: Okay. Then I do so.

2 LDC [MR. RUIZ]: Judge, we also have some change in
3 personnel.

4 MJ [Col COHEN]: Okay. Please announce.

5 LDC [MR. RUIZ]: Ms. Lachelier is not present right now.
6 She's attending to other business.

7 MJ [Col COHEN]: Okay.

8 LDC [MR. RUIZ]: Lieutenant Commander Dave Furry has
9 joined us, and Major Wilkinson has left us.

10 MJ [Col COHEN]: Thank you, sir. I appreciate it.

11 Are there any other modifications? Mr. Nevin.

12 LDC [MR. NEVIN]: Your Honor, Ms. Leboeuf is temporarily
13 out of the courtroom. She'll be back.

14 MJ [Col COHEN]: She just returned.

15 LDC [MR. NEVIN]: She's here. You see how I ----

16 MJ [Col COHEN]: There you go. Prescient there,
17 Mr. Nevin. All right.

18 Any other modifications? All right. That's a
19 negative response from everyone else. All right.

20 We were taking up AE 637. Major Bare, I had left you
21 with a question as to the status of the convening authority
22 being a potential witness here, if the defense had made any
23 efforts to reach out to the convening authority, and you were

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1 going to provide me an explanation as to why that -- why that
2 did or -- did or did not happen or will or will not happen.

3 DC [Maj BARE]: Your Honor, the defense counsel for the
4 teams have been advised in the past by both the government --
5 by both the prosecution and the convening authority not to
6 approach the convening authority with requests for discovery
7 or similar sorts of requests for copies of records. An
8 example of this is in AE 008LL -- it's an (MAH) filing --
9 Attachment C.

10 MJ [Col COHEN]: Thank you.

11 DC [Maj BARE]: 008LL Attachment C, where the convening
12 authority's office says that discovery or requests for copies
13 of information should go through the prosecution.

14 Additionally -- and we can supplement the record
15 because this is not in the record, but the prosecution has
16 provided guidance directly to defense teams in the past that
17 requests for all requests for information as discovery be
18 submitted through the prosecution.

19 MJ [Col COHEN]: Thank you.

20 DC [Maj BARE]: Thank you, Your Honor.

21 MJ [Col COHEN]: I appreciate that, Major Bare. That
22 brings me up to speed as to -- obviously that was an issue
23 that also predated my arrival, and so that's why I ask

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1 questions sometimes is what -- why is there an atypical action
2 being taken by anyone, potentially an atypical action as
3 opposed to just reaching out directly, et cetera. So I
4 appreciate you bringing that to my attention. All right.

5 Are there any other arguments from the defense teams
6 on this matter?

7 That's a negative response from remaining defense
8 counsel.

9 Trial Counsel, you may argue.

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

12 MJ [Col COHEN]: Good afternoon.

13 TC [MR. RYAN]: Your Honor, we are in agreement with
14 counsel that the convening authority's office does have to be
15 neutral; however, they don't have to be and shouldn't be a
16 victim of Ramzi Binalshibh. They don't have to and shouldn't
17 stand by idly and hold back nonprivileged information that is
18 material to a matter before the military commission.

19 At issue, Your Honor, in this particular motion is a
20 document, just one document, that is found at 616S
21 Attachment B. It is a classified document. I won't make any
22 specific references to the information contained therein; that
23 is, in fact, classified. I will also note, sir, as an aside,

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1 really, that it was obtained well before the arrival of the
2 current convening authority.

3 The information that's contained in that document was
4 at issue before the military commission for the past four-plus
5 years. The information that is contained was put in issue
6 before the military commission by the defense for the past
7 four-plus years.

8 The information that is germane -- has been germane
9 to the military commission's consideration of this much larger
10 issue has been within the possession of the defense. The
11 defense has been well aware of it for the past four-plus
12 years, but was not shared with the military commission despite
13 its materiality, nor with the prosecution.

14 In 2015, sir, well before your arrival, on a certain
15 day in this courtroom, Ramzi Binalshibh made an announcement.
16 It was later described by the defense as like a bomb going
17 off. Litigation began almost immediately and has continued
18 ever since.

19 The heart of the defense's motions and claims since
20 that day have been that the United States Government, some
21 faction thereof, planted this individual on a defense team for
22 the purpose of either spying on that defense team and/or to
23 send a message to the accused that they were always being

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1 watched.

2 Based upon their claims, the defense for the past
3 four-plus years has sought a deposition of the individual and
4 other such relief related to it. Four-plus years later,
5 Military Judge Parrella issued AE 350RRR in which he ordered
6 the testimony of such individual. It is the subject of the
7 AE 616 series, which includes not only the military commission
8 but also the CMC.

9 After 350RRR was issued by Judge Parrella, the
10 prosecution found out new facts that were inconsistent with
11 what the defense had been claiming since 2015 and which, I
12 assert strongly, the military commission should have been
13 aware of before it made its decision on 350RRR.

14 Among those facts was that the Office of the
15 Convening Authority in its role to bring the cases, to staff
16 the cases, to get us down here for court, that the Office of
17 the Convening Authority had been made literally an unwitting
18 pawn of Ramzi Binalshibh in his choreographed announcement in
19 2015. Proof of that, sir, exists on the record at AE 616F
20 Attachments D through H.

21 And I'll stop, Judge, just to note quickly that as I
22 think you've been apprised, the prosecution intends to file a
23 motion to reconsider AE 350RRR. We expect that to be filed as

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1 early as tomorrow.

2 To corroborate some of the new facts the prosecution
3 learned that were inconsistent with the claims of the 350
4 series, the prosecution obtained from the Office of the
5 Convening Authority a chart showing relevant information and
6 dates going back to 2014, in a brief time period within 2014.

7 The chart contained no communications by the accused,
8 Mr. Binalshibh. It contained no privileged information. It
9 contained no significant content beyond the logistics of dates
10 and places. Finally, it contained no field of expertise, no
11 description of services that would indicate any sort of
12 defense strategy at work. What it was, sir, was a work chart
13 concerning an interpreter assigned by the convening
14 authority's office.

15 Now, this is hardly a matter of privilege, secrecy.
16 Everyone in this courtroom, everyone in this system, is
17 certainly aware that the accused are provided with the
18 services of interpreters. In fact, it's been a subject of
19 litigation throughout the history of the course of this case.
20 I can recall at least one motion in which a specific
21 interpreter was demanded -- probably more than just one, but
22 at least one case where a specific interpreter was demanded,
23 saying it had literally gotten to the point that it was part

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1 of his Sixth Amendment rights.

2 The defense, in its motion before Your Honor at 637,
3 fails to point, I submit, to any legally cognizable defense
4 that the discovery would support or how the discovery would be
5 material to such defense. They say quite candidly that what
6 they're seeking is to -- I think their word is evaluate the
7 neutrality, to look around, to consider if something is there.

8 Now, I understand the defense's obligation and desire
9 to investigate, but a thought, a whim, a concern does not rise
10 to a discovery obligation on the part of the United States.

11 This, Judge, is part of a much larger factual
12 scenario, and I submit that the facts that we put in our
13 response, as well as those you will see to come, will paint a
14 much larger understanding for the commission.

15 But on the narrow issue before you, as to this
16 specific document, we would submit that Your Honor should deny
17 the defense's motion.

18 And subject to your questions, sir, that's all I
19 have.

20 MJ [Col COHEN]: Thank you, Mr. Ryan. I do have a few
21 questions here.

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

23 MJ [Col COHEN]: With respect to information received from

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1 the convening authority, is the only thing the trial counsel
2 got then, if I understood you correctly, was this chart?

3 TC [MR. RYAN]: No, sir. That is the -- that chart is the
4 subject of their motion before Your Honor. There were other
5 communications that were received.

6 MJ [Col COHEN]: Okay.

7 TC [MR. RYAN]: And specifically, Judge, I'll point to
8 that which I made reference to before -- the court's
9 indulgence -- 616F Attachments D through H you will see were
10 communications or e-mails between defense counsel for the
11 Binalshibh team and the convening authority's office.

12 MJ [Col COHEN]: All right. Thank you.

13 With respect to -- call it evidence that the -- or
14 potential evidence that the trial counsel or prosecution
15 received from the convening authority, has -- notwithstanding
16 any e-mails between the prosecution and -- I mean, there's two
17 aspects of this. One is correspondence between the government
18 and the convening authority -- that's kind of -- that's the
19 way I interpreted that motion as well -- as well as then the
20 actual substantive documents.

21 Have all of those documents that were obtained from
22 the convening authority been provided to the defense?

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

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1 MJ [Col COHEN]: Okay.

2 TC [MR. RYAN]: I will double check it and make sure.

3 MJ [Col COHEN]: Okay. Because that's the first question,
4 is does the defense counsel ----

5 TC [MR. RYAN]: And, Judge, let me just make this notation
6 as well. That which we received, I believe, has been turned
7 over either to the defense directly or in the course of
8 providing documents as attachments.

9 MJ [Col COHEN]: Please provide me an update on that
10 because ----

11 TC [MR. RYAN]: I will, sir.

12 MJ [Col COHEN]: ----- if they've already got all of that,
13 then that's something that -- there's no reason to compel
14 something that they already have, so then it limits the issue
15 that I'm actually addressing.

16 TC [MR. RYAN]: I will, sir.

17 And then the last comment I just wish to make about
18 that is to just sort of refocus the commission to an
19 understanding that the communications -- the things we're
20 talking about were things from the defense, so it is correct
21 to say that they had it to begin with. That's why I say it's
22 been at issue before the military commission for all this
23 time.

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1 MJ [Col COHEN]: I understand that.

2 My question then is, is it stuff that they may have
3 believed though that was either quasi-privileged or at least
4 ex parte filings with the convening authority? Do they now
5 know what -- what the government knows ----

6 TC [MR. RYAN]: I'll double check.

7 MJ [Col COHEN]: ---- with respect to their
8 correspondence?

9 Last question here. Who advises the convening
10 authority on whether or not to release stuff? In other words,
11 if there's a discovery issue, if the defense has to go through
12 you all, then are you all -- for example, in a typical
13 court-martial, the staff judge advocate advises the convening
14 authority as to whether or not they should release something
15 or shouldn't release something.

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

17 MJ [Col COHEN]: Are you all serving the role of the staff
18 judge advocate? In other words, you all are advising the
19 convening authority as to whether or not to release it, or are
20 you simply making your own request and some independent legal
21 counsel advises the convening authority on whether or not to
22 comply with the request?

23 TC [MR. RYAN]: Well, as I think was pointed out, Your

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1 Honor, there -- going back quite a bit of time now, the
2 convening authority was taking the position that discovery
3 requests should go through the prosecution.

4 MJ [Col COHEN]: No, I understand that. What my question
5 is is: In a typical -- the rules say we look to
6 courts-martial for guidance. In a courts-martial, although a
7 staff judge advocate oversees prosecutors typically ----

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

9 MJ [Col COHEN]: ---- the staff judge advocate is not the
10 prosecutor, is not the trial counsel. So, therefore, even if
11 a trial counsel determines it is the trial counsel's
12 responsibility, at least by law -- in practice that can be
13 debated as to who makes the final call, but theoretically
14 under the law the trial counsel is supposed to determine
15 whether or not something is relevant and material and so
16 therefore should be disclosed. But then there's independent
17 advice that can be provided by the staff judge advocate to the
18 convening authority, him or her, as to I concur or nonconcur
19 with the prosecution's decision, the trial counsel decision.

20 My question is: Is there an independent analysis or
21 someone who can provide that type of advice? Or in this case
22 do we have a situation where you, as the prosecutors, by
23 virtue of the way the rules are, simply can both determine

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1 relevancy and then advise someone as to whether or not they
2 should agree with your interpretation?

3 TC [MR. RYAN]: Well, as to the discovery call, sir,
4 that's our call. As far as ----

5 MJ [Col COHEN]: All right.

6 TC [MR. RYAN]: But going to your larger question of who
7 advises the convening authorities regarding release of
8 information in a more general sense and possibly even in
9 certain situations where it's demanded, they have their own
10 legal staff and make their own legal determinations.

11 MJ [Col COHEN]: Okay.

12 TC [MR. RYAN]: The full extent of what they do in every
13 situation, I don't think I'm privy to by a long shot.

14 MJ [Col COHEN]: No, I understand. That's what I'm trying
15 to figure out, is there an independent counsel advising the
16 convening authority, or are you all acting in a dual role is
17 what I'm trying to get at.

18 TC [MR. RYAN]: No, I think the answer is clearly there
19 is.

20 MJ [Col COHEN]: Okay.

21 TC [MR. RYAN]: Independent in the sense that their own
22 staff has several attorneys who advise the convening authority
23 as to the proper steps to take in any given situation.

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1 MJ [Col COHEN]: So then in this particular instance or in
2 a similar situation, if you all wanted information that you
3 believed, deemed was relevant, you would then just submit that
4 request yourself to the convening authority who then would
5 make an independent call as to whether or not to concur with
6 that based on independent advice; is that correct?

7 TC [MR. RYAN]: Correct.

8 MJ [Col COHEN]: Okay. Thank you.

9 Any rebuttal argument?

10 DC [Maj BARE]: Yes.

11 MJ [Col COHEN]: You may.

12 [Pause.]

13 LDC [MS. BORMANN]: Judge, while Major Bare consults with
14 Mr. Harrington, I have a couple of comments, if I may be
15 heard?

16 MJ [Col COHEN]: Sure, ma'am. That would be fine.

17 Ms. Bormann.

18 LDC [MS. BORMANN]: Unlike Major Bare, I was here when the
19 whole thing happened, and I just have a couple comments upon
20 Mr. Ryan's argument.

21 One, the theory that the government now propounds
22 that this is some sort of conspiracy is unfounded and
23 unsupported by the facts.

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1 Mr. Ryan is correct. At some point, Mr. Binalshibh
2 made some comments, which I won't go into. But we also need
3 to point out in the AE 350 series that Mr. Bin'Attash made
4 similar comments. Mr. Bin'Attash didn't request a translator
5 to be here. Mr. Bin'Attash had relied upon that translator in
6 translating attorney-client privileged documents which are
7 found -- I'll get you the exact cite -- filed ex parte to this
8 commission to show the connection between the translator and
9 Mr. Bin'Attash and the invasion into the attorney-client
10 privilege by a person who had formerly been employed by the
11 CIA.

12 So the government's position with respect to AE 350
13 is not well-founded because it would have to be a vast
14 conspiracy involving Mr. Bin'Attash who had never laid eyes
15 previous to that singular day back so many years ago, which
16 then raises the second part of my argument.

17 Did the government also request the same information
18 from the convening authority about counsel for Mr. Bin'Attash?
19 Was there an open-ended request by the prosecution to the
20 convening authority for all communications made by
21 Mr. Bin'Attash's counsel -- myself at the time -- to the
22 convening authority for translator resources? I don't know
23 the answer to that.

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1 Before this occurred, I was ever hopeful, maybe
2 foolishly so, that the convening authority was, indeed,
3 neutral. It appears they're not. And that goes to my final
4 argument, which is this:

5 If there is to be parity in this system and if, in
6 fact, the convening authority is neutral and is required to be
7 neutral as Mr. Ryan seems to concede, then defense counsel
8 should be in the same position as the prosecution. We should
9 be able to draft a letter to the convening authority asking
10 for information from the convening authority.

11 In this case, the information would be regarding our
12 own situation. But if parity actually existed and the
13 convening authority was actually neutral -- and I am here to
14 tell you he's not -- then we would be permitted to submit a
15 request for information regarding the prosecution's
16 communications with the convening authority, and so long as
17 they weren't privileged, which I don't understand how they
18 could be, if they were a simple request for information, we
19 would be given them. But we're not.

20 So there is something wrong with this picture.
21 You're beginning to unpeel the onion. I mixed my metaphors.
22 I apologize.

23 At any rate, the discovery request issued by

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1 Mr. Binalshibh's team I think would go a little ways toward
2 uncovering that, and we have a distinct interest in
3 understanding how far the government's reach into our records
4 of our resources goes.

5 MJ [Col COHEN]: I understand, ma'am. Thank you.

6 Major Bare, if you're ready to argue, you may do so.

7 DC [Maj BARE]: Sir, the prosecution pointed to the fact
8 that this information is information the defense already had.
9 This isn't a motion to compel the spreadsheet. What we're
10 worried about is information we already have. That's the
11 nature of this request, to find out what information we
12 already have is going to the prosecution without our
13 knowledge.

14 Ms. Bormann spoke about parity in the system. And
15 this is part of a larger picture of intrusions into the
16 defense team, intrusions involving the fake smoke detectors,
17 spies being put on the defense teams, the red light in the
18 courtroom, the microphones, things like that that have been a
19 series of intrusions into the defense teams, and now knowing
20 the defense teams' records are not secure.

21 Additionally, the prosecution spoke about the
22 internal process of how the convening authority works, how the
23 convening authority is advised. We don't know that, how

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1 exactly -- at least from this litigation, we don't know
2 exactly how that process works. We might know the attorneys
3 are assigned there, but we don't know if there was independent
4 advice given to the convening authority about the release of
5 material.

6 Finally, there's -- the government focuses on this
7 allegation of sinister behavior by Mr. Binalshibh. That is
8 not the point of this litigation, and it may be separately
9 disproven. It is not for the court to consider in this
10 motion.

11 MJ [Col COHEN]: Thank you, Major Bare.

12 DC [Maj BARE]: Thank you.

13 LDC [MS. BORMANN]: Judge, for the record, the ex parte
14 filing I was discussing which reflects the translator's work
15 on Mr. Bin'Attash's team is AE 350C, as in Charlie, (WBA Sup).

16 MJ [Col COHEN]: Thank you, ma'am.

17 I'm going to order an in camera review of trial
18 counsel's discovery request, is what I think is the best way
19 of calling this, to the convening authority for these matters
20 as well as any responsive materials. I'll review those and
21 then issue a ruling as to whether or not they should be
22 disclosed, but I'm going to order an in camera review. The
23 government has two weeks to produce them.

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1 I think for an appearance standpoint alone, it's
2 important for the commission to take a look at what
3 correspondence is going on to make sure -- it may be perfectly
4 legit, but that's why an in camera review will put me in the
5 best position to understand what this is. There can be no
6 privilege attached to independent counsel on the part of the
7 convening authority, which I will take the assertion of
8 counsel. And it's a discovery request to -- to a -- to a
9 supposedly independent party. If the defense can -- if you
10 can have access to the defense's, then the question then
11 becomes: Why can't they have access to yours?

12 I'll take a look at what you have, and make sure that
13 any correspondence between the prosecution and the convening
14 authority does not raise any concerns for the commission and
15 then issue a ruling on this -- on this motion to compel at
16 that point in time.

17 DC [Maj BARE]: Your Honor, we had referenced an
18 additional document where the prosecution advised defense
19 counsel to seek discovery from the -- about the CA through the
20 prosecution. Would you like that supplemented as well?

21 MJ [Col COHEN]: That would be wonderful. Thank you.

22 I think it's important for everyone to realize, and
23 trial counsel should be cognizant of this as well. Mr. Ryan,

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1 you may have appropriately -- very appropriately argued this.
2 I am not making any findings of fact now. But when you -- but
3 the reference to the convening authority potentially feeling
4 duped by the defense or being part of any particular
5 allegation of wrongdoing by the defense raises questions for
6 the commission to make sure that they still remain partial,
7 that there are no feelings towards -- negative feelings
8 towards the defense moving forward as a result of this.

9 And I think it's my responsibility to take a look
10 at -- at that correspondence, et cetera, to make sure that
11 that -- that impartiality remains and that -- because it would
12 not be completely unnatural either for a human being to feel
13 like if they had been -- if their position had been misused by
14 someone else, that that may impact them. And so I think
15 that's something that I want -- that's another reason why I'm
16 going to order this in camera review, to make sure I see
17 exactly what is being told to the convening authority and what
18 the convening authority is saying back.

19 You made valid points, but there's also concerns that
20 are associated with those -- those valid points.

21 TC [MR. RYAN]: Your Honor, I understand. We will comply.
22 I will reiterate my suggestion that the commission consider
23 the full range of the litigation that led to this matter.

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1 MJ [Col COHEN]: Absolutely, sir. I've read all the
2 motions. I understand exactly how we got here. That's why
3 I'm saying you may have some extremely valid points, and you
4 may be right that ultimately you may have been entitled to
5 that in support of your motion. So that's not really the
6 issue.

7 The question I have is I need to see what you've got
8 so that I can determine whether or not there's any potential
9 issue with what you've got.

10 TC [MR. RYAN]: Understood, sir.

11 MJ [Col COHEN]: All right. Thank you.

12 So we'll call it granted in part. Whether it's
13 released or not, I'll determine that after an in camera
14 review. All right.

15 I think we are ready then for Appellate Exhibit 635.

16 DC [MR. FARLEY]: Good afternoon, Your Honor.

17 MJ [Col COHEN]: Good afternoon.

18 DC [MR. FARLEY]: Benjamin Farley on behalf of
19 Mr. al Baluchi.

20 MJ [Col COHEN]: Good to see you.

21 DC [MR. FARLEY]: Likewise.

22 Your Honor, AE 635 is Mr. al Baluchi's motion to
23 compel U.S. diplomatic correspondence relating to acts the

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1 United States characterized as torture between 21 October 1994
2 and 1 January 2007. 635 was filed on 31 May 2019 and it has
3 not previously been argued before the military commission.

4 In AE 635, Mr. al Baluchi is asking the military
5 commission to compel the government to produce to him
6 U.S. State Department cables transmitting diplomatic notes,
7 demarches or other diplomatic correspondence by which the
8 United States made official representations to foreign
9 governments concerning torture.

10 Based on the small set of publicly available U.S.
11 diplomatic correspondence on this topic, Mr. al Baluchi
12 believes these diplomatic communications are likely to contain
13 concrete and detailed descriptions of acts and circumstances
14 that U.S. officials believe rise to the level of torture as a
15 legal matter.

16 These sorts of details are generally lacking from the
17 United States' public diplomacy tools, like the annual Country
18 Reports on Human Rights, which often settle for more
19 conclusory assertions that one or another government engages
20 in practices that constitute torture without identifying the
21 nature or the specifics of those practices.

22 The U.S. diplomatic correspondence Mr. al Baluchi
23 seeks is therefore a repository of factual and legal precedent

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1 that will help Mr. al Baluchi and the military commission
2 evaluate whether his treatment while in CIA custody
3 constitutes torture, or at least whether the United States
4 Government would have considered it torture had another
5 government been responsible for it.

6 Mr. al Baluchi is entitled to this correspondence
7 under Brady v. Maryland and R.M.C. 701(c) because the
8 correspondence will serve as exculpatory evidence or material
9 evidence to Mr. al Baluchi's defense as well as
10 Mr. al Baluchi's case in mitigation.

11 The correspondence is exculpatory because, as the
12 military commission is well aware, the question of torture
13 will define the universe of admissible evidence the government
14 may use against Mr. al Baluchi in trial. In January of 2007,
15 following three and a half years of what the government calls
16 coercive and fully incommunicado detention while in CIA
17 custody, a joint FBI/DoD team interrogated Mr. al Baluchi and
18 others for several days.

19 The government intends to rely on these so-called
20 letterhead memoranda, the products of these interrogations, as
21 evidence at trial to convict Mr. al Baluchi, and the
22 admissibility of these statements, so-called statements, is
23 already at issue in AE 628.

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1 But 10 U.S.C. 948r and Military Commission's Rule of
2 Evidence 304(a) prohibit the military commission from
3 admitting statements derived from torture or cruel, inhuman,
4 or degrading treatment. The standard adopted by both
5 M.C.R.E. 304 and 10 U.S.C. 948r for the definition of torture
6 or cruel, inhuman, or degrading treatment is identical to the
7 standard adopted by the United States upon its ratification
8 and implementation of the Convention Against Torture and other
9 cruel, inhuman, and degrading treatment.

10 So when the United States evaluates the practices of
11 foreign governments and determines that those practices
12 constitute torture under the Convention Against Torture, it is
13 developing a precedent for its interpretation of what would
14 constitute torture under 10 U.S.C. 948r or M.C.R.E. 304.

15 As a consequence, these diplomatic correspondence
16 assessing particular acts and circumstances will assist
17 Mr. al Baluchi's defense by demonstrating that the so-called
18 inherently coercive nature of his time in U.S. custody in fact
19 constituted torture, potentially precluding the government's
20 use of the statements that are memorialized in letterhead
21 memoranda against him at trial.

22 Even if the January 2007 statements are not
23 suppressed as a result of U.S. diplomatic correspondence

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1 concerning torture between 21 October 1994 and 1 January 2007,
2 that correspondence is still material to Mr. al Baluchi's case
3 in mitigation.

4 Under Supreme Court precedent and Rule for Military
5 Commission 1001 -- sorry, 1000(b)(3) [sic] , Mr. al Baluchi is
6 entitled to broad latitude to present evidence in mitigation.
7 The Supreme Court has ruled that, quote, virtually no limits
8 are placed on relevant mitigating evidence that a capital
9 defendant may introduce, end quote.

10 The Supreme Court has also commanded that the
11 sentencer, in this case the eventual military commission
12 panel, make a reasoned moral judgment as to whether a death
13 sentence is an appropriate punishment in light of the crime as
14 well as the facts and circumstances of the defendant.

15 Bases for the exercise of a reasoned moral judgment
16 are whether they arise pre or post offense, or whether they
17 are in the nature of positive or negative mitigating evidence,
18 may include such things as the question of whether in the face
19 of U.S. Government-sponsored torture of Mr. al Baluchi a panel
20 of U.S. military officers may determine that the government
21 simply has unclean hands; that it lacks the moral authority to
22 execute someone it tortured for three and a half years. That
23 would present a reasoned moral basis for sentencing

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1 Mr. al Baluchi to a punishment less than death.

2 Similarly, a panel of U.S. military officers may
3 consider Mr. al Baluchi's torture for three and a half years
4 almost as an aggravated pretrial punishment, providing a
5 reasoned moral basis for panel members to conclude that
6 Mr. al Baluchi has simply already been punished, or punished
7 in such a way as to preclude his execution.

8 In either event, the government's own evaluation of
9 what facts and circumstances amount to torture will be more
10 persuasive and therefore more effective than any argument
11 Mr. al Baluchi's attorneys could craft.

12 While the panel might discount, and reasonably so,
13 Mr. al Baluchi's arguments as biased, it will be much more
14 difficult to discount the United States' official view, as
15 communicated privately to foreign governments, that certain
16 acts and circumstances constitute torture in a separate and
17 objective context unrelated to the facts at issue in this
18 case.

19 In light of the Supreme Court's liberal approach to
20 mitigating evidence and its injunction that the sentencer
21 apply a reasoned moral judgment to determining whether to --
22 to execute, to sentence him to a capital punishment,
23 Mr. al Baluchi asks the military commission to compel the

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1 government to produce these documents, the diplomatic
2 correspondence, as material to his case in mitigation as well
3 as to his case in defense.

4 MJ [Col COHEN]: All right. A few questions for you.

5 DC [MR. FARLEY]: Yes, Your Honor.

6 MJ [Col COHEN]: When -- and I'm glad you cited 948r,
7 which I think that is -- that is applicable. And I know -- I
8 was reviewing that myself in anticipation of these arguments.

9 The first question would be is: Who's going to make
10 the decision initially as to whether or not the statements
11 come in?

12 DC [MR. FARLEY]: Well, Your Honor will make the decision.

13 MJ [Col COHEN]: Right. So the question then becomes: If
14 the -- if the statements are -- and I'm just talking -- doing
15 this as a hypothetical, not as much as a ruling.

16 But if I ultimately determine that they are
17 admissible, for whatever reason, because they were voluntary,
18 they don't meet torture, or the other -- the other conjunctive
19 there is or cruel, inhuman, or degrading treatment; in other
20 words, it's torture or.

21 DC [MR. FARLEY]: Yes, Your Honor.

22 MJ [Col COHEN]: So it's not just torture. There's the
23 other definitions in there. So even if it doesn't rise to the

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1 definition of torture but it meets cruel, inhuman, or
2 degrading treatment as defined by, and then it goes on to talk
3 about the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd.

4 DC [MR. FARLEY]: Right, which incorporates the definition
5 found in the CAT ----

6 MJ [Col COHEN]: That is correct. Which then further
7 incorporates the exceptions, I guess we'll call them, that the
8 United States when they adopted -- when they adopted the
9 treaty with respect to intent, those kinds of things which
10 were not found in the actual ----

11 DC [MR. FARLEY]: Right.

12 MJ [Col COHEN]: ---- UN resolution.

13 DC [MR. FARLEY]: So-called RUDs.

14 MJ [Col COHEN]: Correct. So that being the case then,
15 when you talk about exculpatory ----

16 DC [MR. FARLEY]: Yes, Your Honor.

17 MJ [Col COHEN]: ---- in light of the fact that it -- a
18 decision will be made by the commission by necessity, by law
19 with respect to whether the statements are admissible prior to
20 them ever going before the trier of fact in this case, which
21 will be a jury or a panel of members, help me understand the
22 exculpatory nature of those with respect to then -- that
23 issue.

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1 DC [MR. FARLEY]: Yes, Your Honor. So Mr. al Baluchi's
2 position with respect to exculpation and these statements in
3 particular is that based on the government's own
4 representations and its litigation posture when the statements
5 were previously excluded by Former Military Judge Pohl, the --
6 the statements are of such critical importance, of such
7 magnitude to the government's case against Mr. al Baluchi and
8 the other men on trial, that their suppression or exclusion
9 may well lead to a finding of a -- of an acquittal or the --
10 you know, potentially the dismissal of charges against
11 Mr. al Baluchi and other men on trial.

12 Now, that is -- that's our argument, and, you know, I
13 understand where the military commission may be coming from.
14 And even if the military commission does not believe that
15 those statements are exculpatory and, therefore, discoverable
16 under Brady v. Maryland, for example, they would still be
17 material to Mr. al Baluchi's case in defense because, again,
18 they may serve to cut the legs out of the admissibility of
19 that evidence under 10 U.S.C. 948r or they would be
20 mitigating -- sorry, pardon me -- material in the sense that
21 they provide powerful mitigation evidence.

22 MJ [Col COHEN]: Okay. Now, I -- in just looking at some
23 general case law, you know, I came across the case of

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1 United States v. bin Laden that addressed this issue of
2 whether or not the international treaty -- I believe it was
3 Spain -- and whether their findings or the process would have
4 been properly followed, you know, death penalty wouldn't have
5 been authorized. In that particular case, they allowed it but
6 they allowed it because similarly situated codefendants or
7 other defendants would have been in a different position than
8 Mr. Bin Laden would have been in that particular case.

9 What type of similarities are -- are there in this
10 case to that particular case? Which is a district court case.
11 It was not -- persuasive and potentially but not binding on
12 this court, but at least it's an example of where that has
13 happened on one occasion.

14 DC [MR. FARLEY]: I'm sorry, Your Honor. I misheard the
15 predicate of the question.

16 MJ [Col COHEN]: Yeah. It would be what type of similar
17 situation would -- would particularly your client or any of
18 the other accused in this case find themselves to that found
19 in bin Laden, where other people were not facing the death
20 penalty and so, therefore, the court allowed it in in
21 mitigation because -- primarily because of the fact that
22 similarly situated accused were not facing the same potential
23 punishment as Mr. bin Laden.

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1 DC [MR. FARLEY]: And, I'm sorry, Your Honor. The "it" in
2 your question refers to evidence of torture or -- or the
3 fact ----

4 MJ [Col COHEN]: That -- in that particular case, the
5 mitigation was the -- the ruling or the proposed ruling by the
6 country of -- I believe it was Spain, that said that had our
7 procedures been properly followed, we would not have handed
8 over this information or the individual to the United States
9 if we would have known he was going to face the death penalty.

10 So essentially, this idea is -- it addresses this
11 issue of whether the United States has said something is
12 torture is not torture.

13 DC [MR. FARLEY]: Right.

14 MJ [Col COHEN]: It goes to mitigation. The question then
15 becomes: Virtually unlimited is not the same as completely
16 unlimited.

17 DC [MR. FARLEY]: Right.

18 MJ [Col COHEN]: So when you try to find the parameters as
19 to what are the right and left boundaries then, it's -- this
20 would not be directly related to -- to the accused himself.

21 DC [MR. FARLEY]: Right.

22 MJ [Col COHEN]: This would not be related to the nature
23 of the crime itself. This deals with treatment by the United

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1 States Government with respect to the accused and to what
2 extent then -- and I'm not saying it isn't, but in the context
3 of at least one case where they allowed in this pretty
4 expansive view where they allowed in the position of another
5 country, although modified, into the -- into that particular
6 case, United States v. bin Laden, how are -- but they
7 specifically said that the reason they found that probative
8 for mitigation in light of all the Supreme Court precedence
9 was because he was -- he was the only one out of the group who
10 was facing the death penalty, and so, therefore, it was
11 important for the jury to essentially know that that's the
12 reason why he was facing the death penalty in that case.

13 DC [MR. FARLEY]: Your Honor, I think I understand what
14 you're asking me, and what -- I think that one thing that
15 separates this case from that case and from other cases is
16 that it is unusual in American jurisprudence to have
17 individuals who have been detained by the U.S. Government and
18 held in incommunicado circumstances for years at a time and
19 subject to conduct that at least this side of the room
20 believes to constitute torture.

21 And on that point, that there's -- there may actually
22 be a material disagreement between the views of -- of the left
23 half of the room, or my left of the room, and the government's

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1 views as to whether the defendants were, in fact, tortured,
2 and for what period of time.

3 So while -- while generally it may make sense to
4 cabin the inquiry as to what is relevant mitigation evidence
5 to, you know, things that happened pre offense and post
6 offense and to look at whether behavior pre offense was good
7 or -- and behavior post offense would suggest that a defendant
8 need not be executed because he won't pose a threat to
9 society.

10 In this circumstance, we have this period of time
11 between the offense conduct, or the alleged offense conduct,
12 and the defendants being brought into some sort of more normal
13 detention situation. And during that period of time, the
14 defense alleges or argues that the U.S. Government violated
15 international and domestic law and violated its own principles
16 by treating these men brutally, by brutalizing them, by doing
17 horrific things to them and holding them outside of contact of
18 their families, outside of contact of the ICRC, outside of the
19 contact of counsel for, you know, three or four or more years
20 depending on the defendant.

21 MJ [Col COHEN]: So let's assume, though -- I mean, but
22 does it really -- when you get to a trier of fact, now,
23 that -- when you get to a trier of fact here, the facts and

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1 circumstances surrounding that detention, what happened to
2 them and all that kind of stuff -- let's just say that that --
3 you get all of that.

4 DC [MR. FARLEY]: Yes.

5 MJ [Col COHEN]: The real question is: What does the
6 opinion by someone at some point as a representative of the
7 United States deal with that issue of torture or degrading or
8 inhuman treatment because ----

9 DC [MR. FARLEY]: I see.

10 MJ [Col COHEN]: ---- at the end of the day, the trier of
11 fact is determining how -- what weight they want to give to
12 any of that. They're not called upon to make that decision as
13 to whether or not the statements themselves are admissible.
14 So that's -- I guess that's what I'm trying to understand.

15 DC [MR. FARLEY]: I understand.

16 MJ [Col COHEN]: That's why the bin Laden case was at
17 least one where I looked at and said, okay, they let a
18 third-party opinion ----

19 DC [MR. FARLEY]: Right.

20 MJ [Col COHEN]: ---- come in in mitigation but here were
21 the unique circumstances that they limited to. I'm asking are
22 there -- have you thought through that as to what ----

23 DC [MR. FARLEY]: Yes, Your Honor.

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1 MJ [Col COHEN]: ---- are those unique circumstances here?

2 Because all of that issues -- even if it wasn't torture ----

3 DC [MR. FARLEY]: Right.

4 MJ [Col COHEN]: ---- or degrading or inhuman, it's still
5 facts and circumstances surrounding their detention which will
6 be relevant potentially in this case.

7 DC [MR. FARLEY]: Right.

8 MJ [Col COHEN]: And the trier of fact will not have to
9 make that decision because the admissibility of the statements
10 may not be at issue anymore.

11 DC [MR. FARLEY]: Right.

12 MJ [Col COHEN]: But it may go to the weight ----

13 DC [MR. FARLEY]: Right.

14 MJ [Col COHEN]: ---- potentially down the -- down the
15 way. Because that's the way it would work in a court-martial
16 as well.

17 DC [MR. FARLEY]: Yes.

18 MJ [Col COHEN]: So my question is: Based on what the
19 trier of fact has to do with that information versus what a
20 commission has to do with that with respect to
21 admissibility ----

22 DC [MR. FARLEY]: Yes.

23 MJ [Col COHEN]: ---- how -- just make that distinction

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1 for me as to why it now matters whether or not it was or
2 wasn't torture as opposed to just what happened itself.

3 DC [MR. FARLEY]: Sure. I apologize, Your Honor, for
4 misunderstanding your question previously.

5 I guess there are two things. So if we assume that
6 Your Honor or a successor, potentially, decides that the
7 statements are inadmissible, the fact of my client's torture
8 incommunicado detention is still an issue for mitigation.

9 MJ [Col COHEN]: I understand. I don't disagree with that
10 concept.

11 DC [MR. FARLEY]: And so the -- in this case, we don't
12 just have some third party. We don't have, say, for example,
13 Human Rights Watch or Human Rights First who is opining about
14 the conduct in the abstract of one country and that conduct
15 qualifies as torture.

16 We have judgments made by -- made by official
17 U.S. Government representatives that under the law, under the
18 same standard that applies in 10 U.S.C. 948r, that specific
19 conduct and circumstances rise to the level of torture. And
20 these -- these assessments were made between the ratification
21 of the Convention Against Torture by the United States and the
22 period at which my client's interrogation, more or less,
23 began, right, the LHM-type interrogation.

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1 So this represents a discrete period of time that's
2 contemporaneous to the facts of this case and the facts of my
3 client's detention that represent -- that contain
4 pronouncements by U.S. Government representatives, speaking as
5 the U.S. Government, saying that specific acts that may
6 well -- and Mr. al Baluchi believes they are -- going to be
7 similar to the treatment that he suffered at the hands of the
8 U.S. Government qualify as torture or qualify as cruel,
9 inhuman, and degrading treatment.

10 And in those circumstances, those pronouncements both
11 serve as persuasive precedent in the same way that an agency
12 determination or interpretation of its own statute might serve
13 as persuasive precedent for Your Honor's consideration. But
14 they also serve as extremely powerful rhetorical evidence that
15 goes to a really important problem that the defendants in this
16 case face.

17 And that problem is that for the better part of 20
18 years the government, the United States Government, has
19 embraced a policy of euphemism around its treatment of
20 Mr. al Baluchi and the other men on trial here. And that
21 policy of euphemism describing their interrogation or their --
22 their detention as inherently coercive but not torture,
23 describing it as enhanced interrogation but not torture,

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1 creates a huge problem for the defense, because the panel
2 that's eventually going to sit has been subject to that
3 reliance on euphemism, as we all have, for the last 20 years,
4 or nearly 20 years.

5 And so one of the problems that we will face as
6 defense counsel is to convince the panel if -- should they
7 convict Mr. al Baluchi and the other men on trial that,
8 notwithstanding his conviction, that the government's torture
9 of him was, in fact, torture and that ----

10 MJ [Col COHEN]: Why do you need to prove that to them?

11 DC [MR. FARLEY]: We don't need to prove ----

12 MJ [Col COHEN]: I guess that's my point. There would be
13 no burden on the defense to prove that. In other words, even
14 if it wasn't torture ----

15 DC [MR. FARLEY]: Right.

16 MJ [Col COHEN]: ---- for whatever reason, let's say that
17 we go with the -- that it didn't have the intent associated
18 with it. This is purely argumentative.

19 DC [MR. FARLEY]: Right.

20 MJ [Col COHEN]: I mean, as far as just throwing it out
21 there as a hypothetical. I am making no finder whatsoever.

22 DC [MR. FARLEY]: Yeah.

23 MJ [Col COHEN]: All right.

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1 DC [MR. FARLEY]: Although I'm taken aback that you have
2 to represent that.

3 MJ [Col COHEN]: Well, the reason for that is I realize
4 people say that words have meaning, and this is just for me
5 facilitating the discussion, because when you say things to me
6 like "the defense has to prove," that question will never go
7 to the jury ----

8 DC [MR. FARLEY]: Right.

9 MJ [Col COHEN]: ---- as far as whether it was or was not
10 torture, or whether it was or was not inhumane or degrading
11 treatment. You guys are free to argue those types of things
12 potentially, even in a findings case as far as -- maybe not
13 even to argue it. You're free to present the matters as to
14 maybe what weight, depending on how the facts lay out. I
15 don't know how. We'll see when we get to that point.

16 But theoretically, conceptually, you could have a
17 situation where you're like, look, I rule as the commission or
18 a successor, as you mentioned, whoever -- whoever rules says
19 the statements are admissible. The -- not the statements
20 during the time period because those aren't being offered, is
21 what I'm understanding right now, but these LHM statements, or
22 any other statements.

23 And so, therefore -- but even if they're admissible,

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1 you want to argue the weight that someone should give to
2 those, those statements, as to how much the members -- the
3 members should rely on those statements going forward.

4 That is consistent with existing law in a trial by
5 courts-martial as well. The judge makes an admissibility
6 determination, but the voluntariness issue, et cetera, and the
7 weight to be given it is something that the defense counsel
8 can still present evidence on and argue that to the jury as
9 to, notwithstanding the fact these were admissible, you
10 should -- you should disregard them for the following reasons,
11 all right?

12 But they do not need to make a conclusion -- at least
13 I can't see in any law where they need to make a definitive
14 conclusion as a finding in this case as to whether or not
15 something was or wasn't torture or whether something was
16 inhumane or degrading. Because regardless of what we call it,
17 the behavior itself may give someone such pause to say, Look,
18 I don't care what when you call it, it's just unacceptable.
19 And so therefore I'm not going to give this -- to give this
20 much weight.

21 So my question is: Do you really believe that you
22 have that burden? Or is it -- or is it just something to --
23 that you're arguing because having the burden makes it more

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1 material? I'm trying to understand that.

2 DC [MR. FARLEY]: So, Your Honor -- and I do not mean this
3 glibly at all, and I recognize the pitfalls of having to
4 preface what I'm about to say with that. But I think you're
5 right that words do have power and meaning unto themselves,
6 and I think that, you know, if they didn't there would be less
7 of an inclination on the part of individuals who have defended
8 the RDI program to do so in the terms of enhanced
9 interrogation as opposed to calling it what it was or what we
10 believe it to be ----

11 MJ [Col COHEN]: Right.

12 DC [MR. FARLEY]: ---- torture. And so I think that we --
13 we may not have a burden. And if I said "prove," I apologize.
14 What I meant was convince. We may not have a burden to prove
15 that these activities were torture, at least beyond 10 U.S.C.
16 948r; but we do have an obligation to -- to strip away any --
17 any of the euphemism, any of the -- the sort of item -- totems
18 of comfort that the panel may have about the treatment of
19 these individuals.

20 And some of that will come -- come from describing
21 with particularity and granularity what actually happened to
22 them. But some of that will also come from -- from cutting
23 through the -- the panel's ability to discount what we say as

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1 mere argument on behalf of our clients, by holding it up and
2 comparing what happened to them and what was done to them, to
3 conduct that the United States itself recognizes as torture
4 when it is perpetrated by other entities, other foreign
5 governments.

6 Now, this is both going to sort of strip off the
7 varnish of statements like EIT and other euphemisms, but it is
8 also going to, you know, force the panel to confront the
9 inequity, so to speak, of the U.S. Government on the one hand
10 condemning foreign governments for activities, and on the
11 other hand perpetrating those or similar activities against
12 individuals in its custody.

13 MJ [Col COHEN]: You asked from 1994 until 2007, but why
14 not 2002 to 2006, for example, when this was actually going on
15 against these accused?

16 DC [MR. FARLEY]: Well, Your Honor, I guess the reason why
17 is because at this point we don't have a sense of what the
18 total volume is, what the total size is.

19 MJ [Col COHEN]: My point is is -- well, obviously, it's
20 the reason we're -- it's the reason we're even discussing this
21 issue is is that positions of governments can change with
22 respect to different types of activities over time.

23 DC [MR. FARLEY]: Right.

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1 MJ [Col COHEN]: And so why is a position that someone
2 took in 1994 relevant to something that was being done in
3 2002, as opposed to maybe even the time frames immediately
4 preceding and immediately after?

5 DC [MR. FARLEY]: Well, so having some sort of tail on it
6 that encapsulates the time period prior to the attacks of
7 September 11th and, say, legal and policy decisions that were
8 made in the immediate aftermath of September 11th, 2001, will
9 demonstrate, you know, the potential that the United States
10 had one view in, say, a more objective environment, and a
11 different view in a -- you know, in an environment where the
12 United States found itself to be a, you know, potential
13 perpetrator of acts that it previously condemned.

14 MJ [Col COHEN]: And that's a valid point. So then I
15 guess my question would then be is why not 2000 then, from
16 2000 to 2006 as opposed to -- and if you really wanted to show
17 that -- for example, clearly, something -- whether it was or
18 was not torture is something that -- that the public and we in
19 this court will probably continue to debate for some time, me
20 typically just applying the facts to the law and then reaching
21 a conclusion based on the law that's there.

22 But if you're wanting to show that there's a position
23 change in the United States, why not the time period of,

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1 like, '99 to 2000, which are the two years immediately
2 preceding the year 2001, as to what the government's position
3 was and then saying, Look, as a result of 9/11, their position
4 changed?

5 DC [MR. FARLEY]: Well, Your Honor, frankly, if you were
6 to grant us and order the government to produce diplomatic
7 correspondence that Mr. al Baluchi seeks from, you know, say,
8 January 1, 1999 forward, Mr. al Baluchi would be very pleased
9 with that outcome. Mr. al Baluchi selected -- or his counsel
10 selected 21 October 1994 as the date because that represents
11 the date that the United States ratified the Convention
12 Against Torture and began implementing its provisions.

13 Those -- you know, the Convention Against Torture in
14 some respects is part of a long history of international
15 regulation of, you know, prohibiting torture, but in some
16 sense represents a statutory sea change on the part of the
17 United States Government. And at that point the
18 representations by U.S. Government officials in the guise of
19 foreign service officers or American diplomats would be
20 directly pronouncing on a standard that is directly applicable
21 to the case before the military commission at this time.

22 You're absolutely right, though. The -- it is likely
23 that the standards articulated in, you know, November of 1994

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1 are very similar to those articulated in 1999. I don't know
2 that to be the case. And in some sense, you know, what we're
3 asking for is access to, like, a hidden body of precedent, you
4 know, like a -- a library of LexisNexis or Westlaw that the
5 government has access to that we don't have access to.

6 And, you know, just like, or very similar to case
7 law, these are examples where decision-makers who are
8 empowered by law to make assessments, analyze the facts,
9 applied the legal standard to the facts and came to
10 conclusions. And we believe that that body of precedent will
11 assist us in making a defense but also will assist yourself
12 and the military commission in applying the standards of 10
13 U.S.C. 948r.

14 MJ [Col COHEN]: I understand. What's your understanding
15 then based on the definition that's found in 42 U.S.C. 2000dd,
16 just thinking -- thinking down through this, let's say we're
17 back in the findings portion and we're dealing with the
18 voluntariness instruction that might go, assuming the
19 statements come in, or at least statements that are related to
20 this matter at all.

21 The definition itself talks about you look to the
22 Eighth, Fifth, and Fourteenth Amendment as examples of this,
23 and so typically in a voluntariness instruction, the judge

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1 instructs to the types of matters that a trier of fact may
2 consider in determining whether or not a statement was
3 voluntary and the weight that -- the weight that it should be
4 given.

5 So why can't existing case law, for example, or the
6 examples that you already have, suffice in entailing this type
7 of instruction and telling the members what factors to
8 consider in deciding this issue?

9 DC [MR. FARLEY]: Well, Your Honor, it's not that existing
10 case law does not necessarily suffice. It's that it's --
11 existing case law tends not to be as specific as the events
12 that have unfolded with respect to Mr. al Baluchi and the
13 other men on trial here.

14 The -- the small amount of diplomatic correspondence
15 that is publicly available -- and this generally relates to
16 events like the Dirty Wars in the '70s and '80s in Latin
17 America. The small amount of that diplomatic correspondence
18 that is publicly available tends to be granular and specific
19 in a way that case law is not, and it tends to refer to
20 situations that the -- that the defendants experienced that
21 the American case law has not necessarily encountered in the
22 same way.

23 So, you know, for example, I'm thinking of on the one

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1 hand, there are -- there's diplomatic correspondence that
2 discusses "el telefono," which was hitting somebody's head,
3 you know, with one's hands and essentially ringing their bell
4 as being torture, which is, you know, something that may be
5 important in this case. Whereas a lot of the U.S. case law at
6 least dealing with acts of torture overseas have been of a
7 different type. And, you know, I'm thinking here of some of
8 the cases concerning crimes committed during the civil wars in
9 the former Yugoslavia.

10 I don't want to get into a position of sort of
11 characterizing some acts of torture as being worse than all --
12 others because they're all proscribed universally, but they
13 share different characteristics.

14 It's also, again, not simply a question of what are
15 the legal precedents for evaluating 10 U.S.C. 948r, but it
16 goes to, again, convincing the panel that the treatment of
17 Mr. al Baluchi and the other men on trial was torture and
18 would have been considered torture by the U.S. Government had
19 it been perpetrated by a foreign entity.

20 But, you know, it is, you know, a peculiarly lawyerly
21 thing to do to look for precedent and as much precedent as
22 possible and make comparisons between the facts of those
23 precedents with the facts of your own client's case and draw

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1 conclusions based on those character -- those comparisons.

2 So while we will certainly look to American case law
3 and, to the extent that it's relevant, international case law
4 for persuasive value, it would, you know, be extremely
5 beneficial to Mr. al Baluchi's case to be able to rely on
6 U.S. Government evaluations of foreign government conduct in
7 an unusually detailed and objective way.

8 I mean, because these are communications that are
9 based on reports, some of which are public and some of which
10 are private and fed up through the sort of diplomatic
11 apparatus and they are communications and instructions and
12 strategies that are hashed out in, you know, classified
13 private government channels to communicate privately with a
14 foreign government so that those communications can be as
15 detailed and specific and as -- as discrete as possible in a
16 way that public diplomacy simply does not allow.

17 MJ [Col COHEN]: So I guess just a couple of final
18 questions as -- can I -- let's break it down.

19 With respect to relevance and materiality of the
20 information, whether it's with respect to findings or
21 sentencing in this case, do you see there's a way for the
22 commission to rule on this matter without starting putting --
23 starting to put some parameters on what is going to be the

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1 extent of mitigation evidence allowed in this case?

2 DC [MR. FARLEY]: So the -- so a determination of
3 materiality is not the same as a determination of
4 admissibility or relevance. So it is entirely possible ----

5 MJ [Col COHEN]: You are correct.

6 DC [MR. FARLEY]: So it's entirely possible for the
7 military commission to grant Mr. al Baluchi's motion to compel
8 and his request or some subset of it and his request for this
9 diplomatic correspondence today and allow that to be in the --
10 as it is in the normal course of things, wrapped up in
11 Mr. al Baluchi's investigation, the strategizing of his case,
12 the developing of arguments -- excuse me, the development of
13 arguments, and the pursuit of additional investigations based
14 on, you know, whatever leads may or may not exist in -- in the
15 corpus of discovery -- without prejudicing the military
16 commission or the parties to the ultimate decision of whether
17 this evidence would be admissible either in the case in chief
18 or during the mitigation phase.

19 In -- you know, irrespective of whatever
20 determination the military commission makes today, at some
21 point in the future, the military commission's going to have
22 to cross that bridge.

23 MJ [Col COHEN]: Right.

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1 DC [MR. FARLEY]: But it does not need to -- by granting
2 Mr. al Baluchi's request to compel this discovery, that does
3 not, you know, set in stone or make some sort of determination
4 today that the evidence will be admissible or will be
5 necessarily presented to the panel during the case in chief or
6 mitigation.

7 MJ [Col COHEN]: All right. And then just so that you all
8 have it, in case you hadn't read that case, United States v.
9 bin Laden is at 156 F.Supp.2d 359, United States District
10 Court for the Southern District of New York decided July 23rd,
11 2001.

12 DC [MR. FARLEY]: I'm sorry, Your Honor. What was the
13 volume of F.2d?

14 MJ [Col COHEN]: 156 F.Supp.2d 359.

15 DC [MR. FARLEY]: Thank you, Your Honor.

16 MJ [Col COHEN]: You're welcome. And then the last
17 question is on page 2 of the government's response, there was
18 an assertion that there have been an extended delay from the
19 denial of the discovery until the -- the request. Is that
20 accurate or -- and, if so, what caused the -- the significant
21 delay?

22 DC [MR. FARLEY]: Your Honor, it is accurate. It is
23 accurate. The reason for the delay was simply Mr. al Baluchi

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1 and his counsel being consumed with other litigation matters.

2 MJ [Col COHEN]: I understand.

3 DC [MR. FARLEY]: That's simply it.

4 MJ [Col COHEN]: Thank you.

5 DC [MR. FARLEY]: Thank you.

6 MJ [Col COHEN]: Ma'am?

7 ADC [MS. RADOSTITZ]: Thank you, Your Honor.

8 MJ [Col COHEN]: You're welcome.

9 ADC [MS. RADOSTITZ]: I'm going to address one of your
10 questions first ----

11 MJ [Col COHEN]: Please.

12 ADC [MS. RADOSTITZ]: ---- which is about the timing of
13 it. And as Mr. Farley said, the reason they chose the date
14 they did is because that's when we ratified.

15 The government has set this whole case in the context
16 of hostilities, and it seems that if we're going to pick any
17 date, we should at least encompass all of the hostilities.
18 And that either depending on which day they're arguing it, it
19 started in 1994 or 1996. And so I think there's reason to
20 expand it to at least encompass the whole time of their
21 allegations of hostilities.

22 MJ [Col COHEN]: I understand.

23 ADC [MS. RADOSTITZ]: Okay.

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1 MJ [Col COHEN]: Like I said, it's more just -- when I see
2 odd things -- well, odd is probably a bad word. When I see
3 things like that in a motion, I just like to follow up and
4 say, "Okay, can you give me context as to why this may or may
5 not be an issue?"

6 ADC [MS. RADOSTITZ]: Sure.

7 MJ [Col COHEN]: Thank you.

8 ADC [MS. RADOSTITZ]: So I really want to make -- focus on
9 three points.

10 The government has conceded that the behavior of the
11 government actors torturing Mr. Mohammad is relevant to three
12 issues: Suppression, which you've talked a lot about with
13 Mr. Farley; mitigation, again, which you've talked about with
14 Mr. Farley; but also any allegations of outrageous government
15 misconduct. And that's in AE 635 -- I'm sorry, AE 478 at
16 page 4.

17 Here, the government has used euphemisms throughout
18 this case. It's very rare for them to use the word "torture";
19 they used "enhanced interrogation." People who participated
20 in it and have written books about it say it's not torture.
21 So Jose Rodriguez has said it's not torture. James Mitchell
22 has said it's not torture.

23 And so the question becomes, as you've said and

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1 Mr. Harley -- Mr. Farley said, words matter. And so if
2 actions were taken by our government that they in other
3 contexts have defined as torture, it matters in this case.

4 Whether what they did was outrageous and has
5 consequences in -- that could include prohibiting
6 admissibility of evidence, dismissal of the case, dismissal of
7 the death penalty, what we as the government -- what the
8 United States Government said in other contexts is relevant
9 and material to whether it, in fact, is torture at this point.
10 And so I think that that is another aspect of why the --
11 this -- these cables would be material.

12 In the case the government cites United States v. --
13 I'm guessing on the pronunciation -- Graner, G-R-A-N-E-R,
14 which is a CAAF case from 2010, they set out that any
15 tendency -- any evidence that has any tendency to make the
16 existence of any fact that is of consequence to the
17 determination of the action more or less probable is material
18 and should be provided in discovery.

19 And so these cables in and of themselves may not be
20 evidence, but they do help make the existence of a fact, the
21 fact that when Mr. Mohammad was waterboarded 183 times, that
22 is torture and that that matters and, therefore, anything
23 derived from it is torturous and cannot be admitted.

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1 So there's been a lot of focus on statements. And
2 the government says, "Well, it's our determination that we are
3 not going to put in anything that was derived from torture."
4 However, that's not their decision to make as to whether it's
5 derived from torture.

6 We have filed in AE 644 a motion for a Kastigar
7 hearing. And in Kastigar the court has indicated that it's
8 the judge's decision as to whether something is derived from
9 torture, not the government's decision.

10 And so we still don't know yet everything that's been
11 derived from torture; that is still to be determined. And so
12 it may not be only statements from Mr. Mohammad or from
13 Mr. al Baluchi or any of the other defendants. It may be
14 other evidence that's also derived from torture because of how
15 it came about was through information provided during torture
16 led to something else later. We don't know that. We won't
17 know the answer to that until after the Kastigar hearing.

18 And then there's a third way in which the -- whether
19 this was defined as torture or not is relevant. And that
20 really is -- comes -- at some point we're going to have a
21 motion to dismiss based on speedy trial. And one of the
22 criteria that the court -- that the military judge will have
23 to consider is whether -- what conditions were prior that

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1 caused the delay.

2 And in this case, the defense will be arguing that
3 the reason there has been 16 years of delay from the time that
4 Mr. Mohammad was captured has to do with the torture, and that
5 will be relevant. And whether it was, in fact, by definition
6 torture or not is relevant to that legal determination.

7 The other thing I want to point out is you talked
8 with Mr. Farley a little bit about the Brady progeny of cases.
9 And I want to suggest that exculpatory is not really the
10 measure for Brady. That's a word we talk about all the time,
11 but really, that's not the best formation of what Brady says.

12 What Brady says is that the government has to
13 disclose any material evidence that may be favorable to the
14 defense. And it may be favorable to the defense that there is
15 a cable that -- where the administration said, Dear Prime
16 Minister of Egypt, or wherever, You just waterboarded somebody
17 and that violates the Convention Against Torture, and you need
18 to stop. That makes the fact of torture more -- stronger.

19 MJ [Col COHEN]: How would I use that though? So I think
20 you're correct, that that -- the law says I have to make that
21 decision. And I was talking about that with Mr. Farley as
22 well.

23 The issue then becomes is: How is that evidence used

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1 in support of these motions that you're talking about? I
2 mean, ultimately, what someone else's opinion was on the
3 matter, based on whatever facts or -- really, in reality, what
4 law -- who knows what -- what law or how they were applying
5 the law and those kinds of things is -- what kind of slippery
6 slope would that put the commission in for me to sit there and
7 say, well, because a diplomat at some point took a position,
8 this court should then take that position as well?

9 ADC [MS. RADOSTITZ]: Mr. Mohammad is being prosecuted by
10 the Government of the United States, and there's only one
11 entity of that.

12 MJ [Col COHEN]: Correct.

13 ADC [MS. RADOSTITZ]: So whether it's a diplomat or the
14 prosecution sitting at this table, it's one entity. And so it
15 is relevant what any entity, anyone who has the official
16 capacity to make such comments has to say.

17 And how you use that is when the government comes up
18 and says, This was not derived from torture because that
19 action, that behavior wasn't torturous, you can say, Well, we
20 said to Egypt that it was.

21 So how do you -- the question -- the answer may be
22 that they're estopped from making that argument. They're
23 estopped from making the argument that this is not torture or

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1 that it is only some other thing, enhanced interrogation or
2 whatever, because they've already formally, legally, in a
3 diplomatic cable called that action torture.

4 We talk about torture as if it's this one big thing,
5 but really it's the 183 times that Mr. Mohammad was
6 waterboarded. And even when I say that, that's sort of --
7 after you say it too many times, becomes not that big of a
8 deal.

9 But when I say he was placed on a table, and he was
10 strapped down to it, and gallons of water were poured on his
11 face and he couldn't breathe, and he had to sputter and he had
12 to beg to be stopped, that has impact. And when they say that
13 wasn't torture, and yet we have a cable that says those kinds
14 of actions are, that makes the fact that this is torture more
15 relevant.

16 And that's relevant in any Kastigar hearing. Because
17 in the Kastigar hearing what you're looking at is did this one
18 act which is what led to the evidence that they want to then
19 admit at trial or in a hearing or wherever, is it more likely
20 or not?

21 MJ [Col COHEN]: So going back to just -- I'd like to go
22 back to the Rules of Evidence as well.

23 ADC [MS. RADOSTITZ]: Sure.

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1 MJ [Col COHEN]: All right. M.C.R.E. 403 is not too
2 different from F.R.E. 403 or M.R.E. 403 is the same idea.

3 If we go down this road with respect to what someone
4 at some point may have believed to be torture, and then we
5 have the alternative view perhaps during a different time
6 period by the same United States that says this wasn't
7 torture, at the end of the day you're still left with the same
8 position of I have to make the decision as to whether or not I
9 believe it was torture or degrading, inhuman, or cruel
10 treatment.

11 And so the ----

12 ADC [MS. RADOSTITZ]: Right.

13 MJ [Col COHEN]: ---- question then becomes is, what is
14 the probative value with respect to competing interests, and
15 are we having a mini trial on which of these -- these
16 independent opinions should be the most persuasive to the
17 court, as opposed to the court just drawing its own conclusion
18 based on the facts and the law.

19 ADC [MS. RADOSTITZ]: And I guess what I would say is
20 that, just as with any other factual determination, you are
21 going to have to make that decision, and the more information
22 you have from the different realms, the more likely you can
23 make the right decision. And so if they are competing

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1 assertions by the government, that, to me, is relevant to your
2 determination of is this action and the evidence derived from
3 this action more or less likely.

4 And so at this point what we're just talking about is
5 discovery. And discovery is -- as Mr. Farley quite eloquently
6 said, it's not ----

7 MJ [Col COHEN]: No, you are both correct, that you could
8 potentially discover something and it not be admissible at
9 trial.

10 ADC [MS. RADOSTITZ]: Right. But what it does is it
11 gives ----

12 MJ [Col COHEN]: But what led to preliminary issues, other
13 than 403 -- I mean, perhaps 403 and those kind of things, but
14 with respect to the motions practice itself, the rules of
15 evidence are relaxed to a certain -- to a certain extent as
16 well.

17 And so my question is is: If this is primarily going
18 to be used initially even at a -- in support of motions,
19 theoretically, then that's why I've asked some of these
20 questions, as to, okay, at what point then are we going to
21 have a mini trial within a trial as to what is the actual
22 United States Government's position, for example?

23 ADC [MS. RADOSTITZ]: Right.

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1 MJ [Col COHEN]: Other than the clear language of the
2 United Nations Convention that was adopted by the Senate,
3 18 U.S.C., which adopts this, and 42 U.S.C. 2000dd. Those are
4 clear statements of law, international and otherwise.

5 ADC [MS. RADOSTITZ]: And so I would say that for the
6 pretrial determinations, you're a judge, and you can read all
7 those things, and you will decide.

8 But when the members are here, if you choose not to
9 suppress the LHM statements, we still get to argue to the
10 members that they were involuntary. If you decide that the
11 case should not be dismissed or the death penalty should not
12 be taken off because of outrageous government misconduct, we
13 still get to argue that to the members.

14 Both of those things are things that torture is
15 relevant to, and so we need to be able to persuade them. We
16 don't have to prove that Mr. Mohammad was tortured, but we do
17 have to persuade the members that he was tortured and that
18 "torture" is a -- is a word that matters; that the
19 U.S. Government violated their own treaty, the treaties that
20 they had -- the Senate had ratified, and that that -- that
21 they should be held accountable for that, and they may then
22 give up the right to execute Mr. Mohammad because of their
23 actions. That's an argument that can be made to the jury --

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1 or to the members. Sorry.

2 MJ [Col COHEN]: I understand. Thank you very much. I
3 appreciate you providing that clarification.

4 ADC [MS. RADOSTITZ]: Okay. Unless you have other
5 questions.

6 MJ [Col COHEN]: No, ma'am. Thank you for taking the time
7 to answer those.

8 ADC [MS. RADOSTITZ]: Sure.

9 MJ [Col COHEN]: Any other defense arguments?

10 Negative response from the remaining defense counsel.

11 Who will argue for the government? Mr. Trivett.

12 Mr. Trivett, we've been going for approximately an
13 hour and 20 minutes. I think we're just going to take just a
14 brief, quick comfort break.

15 MTC [MR. TRIVETT]: Yes, sir, I appreciate it.

16 MJ [Col COHEN]: And we'll be back in 15 minutes.

17 [The R.M.C. 803 session recessed at 1522, 22 July 2019.]

18 [The R.M.C. 803 session was called to order at 1543, 22 July
19 2019.]

20 MJ [Col COHEN]: The commission is called to order. All
21 parties present when the commission recessed appear to be
22 present.

23 LDC [MS. BORMANN]: Judge, one clarification on that.

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1 MJ [Col COHEN]: Yes, ma'am.

2 LDC [MS. BORMANN]: I've asked Mr. Perry to go prepare a
3 supplement to the trial scheduling proposals.

4 MJ [Col COHEN]: Okay.

5 LDC [MS. BORMANN]: We have some new information we
6 received this afternoon that we believe is germane.

7 MJ [Col COHEN]: Okay.

8 LDC [MS. BORMANN]: I'll be asking for an AE number, so I
9 don't know if your staff wants to do that orally or you want
10 us to do an MFL in writing.

11 MJ [Col COHEN]: I have found that if I speak out of turn
12 on those AEs, I end up getting all of us in trouble with
13 misnumbering. So let's just go ahead and follow the process
14 on the AE, and we'll make sure that we get the proper one.

15 LDC [MS. BORMANN]: Terrific. Thanks.

16 MJ [Col COHEN]: All right. Thank you.

17 All right. Mr. Trivett, before you argue, just an
18 update for you and the parties. I am being informed by my
19 CISOs that we still have not been able to resolve the 639C
20 issue.

21 I would like the parties to get together, and the
22 government to the extent that you can assist with SC/DRT
23 taking a look at this particular issue this evening so I can

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1 have an update by tomorrow. Whatever -- whatever the issue is
2 that they need to do to -- to the extent that you all can
3 powwow a little bit this evening and get some true fidelity on
4 the matter, I would greatly appreciate it.

5 MTC [MR. TRIVETT]: Yes, sir. And we have worked that
6 throughout the day. We have confirmed that one of the
7 attachments is classified ----

8 MJ [Col COHEN]: Okay.

9 MTC [MR. TRIVETT]: ---- without getting into any more
10 detail on that. What we need to further confirm is as to
11 whether or not there is any substance that may also be
12 classified.

13 MJ [Col COHEN]: Okay.

14 MTC [MR. TRIVETT]: So that's what we're going to work on.

15 MJ [Col COHEN]: Perfect.

16 MTC [MR. TRIVETT]: We know at a minimum that, and can
17 represent that there is that one classified document.

18 MJ [Col COHEN]: Okay. Great. And like I said, to the
19 extent that you guys can keep Mr. Connell's team, as the -- as
20 the drafter of that, alert as to what the issue was so that we
21 can avoid it moving forward, I would greatly appreciate it.
22 Thank you.

23 LDC [MR. RUIZ]: Judge?

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1 MJ [Col COHEN]: Mr. Ruiz.

2 LDC [MR. RUIZ]: May I have one comment on that?

3 MJ [Col COHEN]: Absolutely.

4 LDC [MR. RUIZ]: So I think as you're aware at this point,
5 we joined the -- there's a joint pleading which all teams are
6 part of, and at least I know Mr. Bin'Attash's team submitted a
7 separate position.

8 I think the only real difference is they got a
9 different AE number, which allowed their position to be
10 received by the commission. I'm not sure if it not may be
11 equally as feasible to do that for ours.

12 I mean, it really is a -- an ex parte supplement, but
13 if the issue is that we're kind of waiting for the
14 classification issue to be resolved, it may just be more
15 expedient to issue us another AE number that we can file our
16 own position so that the commission will have it and the
17 commission can begin considering that without having to wait,
18 and you can at least begin that analysis.

19 It would simply be the issuing a separate AE with the
20 understanding that it is just our position as ex parte.

21 MJ [Col COHEN]: If your team wants to request that, I'm
22 not necessarily opposed to that. But once again, I will -- I
23 will tread lightly on the assignment of AE numbers.

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1 LDC [MR. RUIZ]: Very well.

2 MJ [Col COHEN]: As a matter of practice, I'm not
3 generally -- I'm not opposed to the idea.

4 LDC [MR. RUIZ]: And I was addressing you, but I was
5 really addressing everyone.

6 MJ [Col COHEN]: I know. I understand. Yeah, I've got
7 two wonderful paralegals that work with the court reporters to
8 make all that happen, and I don't want to get too far ahead of
9 them in assigning those numbers. But I agree, the faster we
10 can get this information shared, the more likely we can take
11 it up at least no later than Friday.

12 LDC [MR. RUIZ]: Thank you, Judge.

13 MJ [Col COHEN]: All right. Thank you.

14 And then if it's at all possible, even if it's a
15 matter of just providing an unclass redacted version of
16 whatever that document was that is classified to -- as a
17 potential attachment, that would also be acceptable to the
18 commission if the parties can agree on what that is. All
19 right. Thank you. All right.

20 Thank you for the opportunity to address those
21 administrative issues, Mr. Trivett.

22 Mr. Trivett, so now we are at the issue -- at the
23 issue of 635.

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1 MTC [MR. TRIVETT]: Thank you, sir.

2 MJ [Col COHEN]: You're welcome.

3 MTC [MR. TRIVETT]: The defense request for discovery in
4 AE 635 is incredibly overbroad and is purely speculative. The
5 defense wants complete and unredacted versions of all U.S.
6 demarches and diplomatic notes relating to acts or conduct the
7 United States Department of State characterized as torture for
8 a 13-year period between 21 October 1994 and 1 January 2007.

9 I wanted to take a step back to explain how different
10 the discovery process is here than it is in typical
11 court-martial practice. I've been a practitioner of military
12 justice, either active duty or reserve, for the better part of
13 the last 17 years. I often wax nostalgic about when I would
14 get a case and it would simply have a file, and that was
15 probably 99 percent of the discovery that we were going to
16 have to provide. Maybe if the local police had some
17 involvement in the investigation, we may have to go there.
18 But likely, that was going to be the entire part of the
19 discovery obligation of the prosecutor. We would provide it.

20 And because those are the types of cases that often
21 get prosecuted in courts-martial, we have developed what's
22 called an open file system generally, and I'm sure you're even
23 more familiar with it than I am. That's not this.

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1 The government is a vast enterprise. It's got many
2 different parts of the executive agencies. If Mr. Connell and
3 Team Ali have their way, the entire Executive Branch becomes
4 that open file.

5 And so when they make a request for discovery, we
6 generally have a decision tree that we go through. And the
7 first one is, is what they're asking for discoverable on its
8 face? And if it is, even if it's going to be a monumental
9 undertaking, we have an obligation to do it. And we do do it,
10 and we have in the past. That's why we waded through
11 6.2 million documents related to the RDI program. That's why
12 we waded through over 600,000 pages of discovery in six
13 separate trips to the presidential libraries to look at
14 information relating to hostilities.

15 But what you need to understand is that this is never
16 a surgical request. And even when we went back to the defense
17 over a year ago, or close to a year ago and asked them for
18 specific documents they may have, we didn't get any. We
19 didn't see them until they actually attached them to their
20 motion.

21 So if there's any way to limit those documents, we
22 would seek to have that done, because the second part of our
23 decision tree is: How difficult is this? If the answer in

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1 the first part is we have an obligation, then it doesn't
2 matter how difficult it is. We're the United States, and we
3 own it; we do it.

4 But the next question is if it isn't discoverable on
5 its face, what's the next step? How much is it? If it's a
6 couple of documents we'll say okay, how difficult is it going
7 to be to get these couple of documents, even if they're not
8 discoverable and even if we don't concede they're discoverable
9 and just provide them so we can avoid these motions to compel?

10 We do that often and all the time. If we have a
11 discrete, specific request, even if we feel like it's not
12 discoverable, it's easier to discover it, providing there's no
13 classified equities and national security implications and
14 national security privilege, we'll just do it.

15 But when we get an overbroad request, such as having
16 13 years' worth of diplomatic notes and demarches, and there
17 is no way to limit it and on its face it is not discoverable,
18 we fight it here. Because the reality is that it never comes
19 back as simple as the defense may think it does. It's a
20 quaint idea that this is somehow like a Westlaw database where
21 we can do a very surgical request, get back only those 50
22 documents that are exactly on point and exactly relevant, and
23 then make the determinations from there. The reality is is

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1 that we get a silo of information dumped on us. And then we
2 have to go through and pick the wheat from the chaff of the
3 silo of information that gets dumped on us.

4 And again, if we have an obligation to do it, we do
5 it. But this concept that we're -- that this is just as easy
6 as hitting a button, it's not. We've lived that for the last
7 seven years. So that's the reasoning why we come before you
8 today to argue against this motion to compel what is a vast or
9 potentially vast amount of documents.

10 What do we know about these documents in particular?
11 Not much. State Department determinations on other countries
12 isn't something that's ordinarily in our obligation to review.
13 We do know that the ones that were left public for Mr. Farley
14 were at some point marked confidential. That means they were
15 classified. And so I have every reason to believe that the
16 other ones they request are also classified.

17 If, in fact, they are, then we're in a narrower
18 discovery ambit under 505, and that's only if it's material to
19 a legally cognizable defense, rebuttal of the prosecution's
20 case in chief, or at a sentencing. And we believe that it's
21 none of those three things. But it is a much narrower ambit.
22 So any argument about theoretical materiality under regular
23 unclassified discovery case law is not the right standard to

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1 be looking at for this information.

2 What we also know from Mr. Farley's
3 representations -- and he would know far more than us just
4 because he used to be an employee of the State Department, I
5 believe. But in the end, what we do know is, from his
6 representation, there's very few of these things that have
7 ever been made public. I suspect there's a reason for that,
8 and I suspect that not only are they classified, but it's very
9 sensitive government-to-government communications about very
10 specific topics that they want to talk about. So that's what
11 we do know about the documents.

12 What don't we know about the documents? We don't
13 know who wrote them. We don't know if it was the Secretary of
14 State, the legal advisor, an ambassador, a deputy ambassador,
15 some low-level staffer who wrote something on behalf of
16 someone because they had a walk-in who described how they were
17 treated. We don't know anything about these documents. And
18 that's what makes them completely speculative and also
19 completely irrelevant.

20 And I think Ms. Radostitz claimed that anyone who
21 works on behalf of the U.S. Government can make a
22 determination that certain conduct constitutes torture and
23 then, therefore, they're entitled to that information and then

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1 also entitled to present that to the members. That can't be
2 the standard.

3 It's important to note that when these particular
4 enhanced interrogation techniques were being considered, that
5 issue went up to the Department of Justice Office of Legal
6 Counsel and they were asked to make a very specific
7 determination on very specific enhanced interrogation
8 techniques and whether or not they were lawful or whether they
9 constituted torture. The defense has all the evidence of
10 that. So that's what occurred before the RDI program was even
11 put into place. So we know that there were specific opinions
12 on specific facts that were germane to this case that
13 determined that it was not torture.

14 What we don't know about these demarches is what
15 conduct they were even referencing and what would even be
16 relevant of that. They don't argue for only those opinions
17 that were specific to any of the enhanced interrogation
18 techniques that were approved. It's any torture at all. It
19 could be pulling out fingernails, gouging out eyeballs.

20 At some point, are we going to be litigating how
21 close or how far any opinion made -- from someone we don't
22 even know in the State Department that something constituted
23 torture, is or was not related to the actual techniques that

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1 occurred in this case? It's an impossible task to do with the
2 13-year period of time in which they're asking us to do it.

3 What we're asking -- and I think you'll find this as
4 well, and I think Your Honor asked some of these questions.
5 We're just asking the defense to be lawyers. There's a
6 standard for torture. There's a standard for cruel and
7 inhumane and degrading treatment. And they have all the facts
8 they need. Let them make their argument.

9 Let them make their argument to you that whatever
10 happened constituted torture and that whatever came out of the
11 LHMs was derived from that torture. Let them argue that.
12 They have everything they need to make this argument. They
13 have everything they need to make the argument on hostilities.
14 But they want to continue to send us on these endless
15 discovery requests because it's to their advantage to do so.

16 Capital defense counsel never want to get to trial.
17 That's not a personal attack on them. That's a strategic,
18 commonly accepted part of capital defense. And the more they
19 can send us on these -- these aren't even fishing expeditions.
20 These are deep-sea fishing expeditions.

21 These are go to someone else who you don't often go
22 to, coordinate with everyone in the State Department who you
23 don't normally coordinate with, ask them to give you 13 years'

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1 worth of stuff that we're not really defining because we don't
2 know what's out there and come back to us in four years when
3 you're done. That's what this is. That's all that this is.

4 They have every argument -- they have every piece of
5 evidence they need to make whatever argument they want to make
6 in front of Your Honor.

7 But I agree with Your Honor's comments and questions
8 that this just isn't an issue before the members. They're
9 going to be able to present as part of the defendants'
10 background what happened to them. We're not going to oppose
11 that. We believe when it's being weighted it's like a feather
12 to an anvil of what these people are responsible for. But in
13 the end, they can argue it, and they have what they need to
14 argue it. But they don't need some unknown State Department
15 determination on some unknown piece -- or allegation of
16 torture to be able to do that.

17 And that's why we don't want to go on this fishing
18 expedition and we're not obligated to do it. It would take a
19 very long time, and it's not a simple process.

20 We certainly contest the defense allegation, not made
21 in argument but made in their briefings, that every one of
22 these demarches or diplomatic notes somehow constitutes an
23 independent source of international law. Again, without

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1 seeing what it was, who wrote it and the reasons for, there's
2 a certain irony to that argument because they fight against
3 Congress making determinations under their Article I,
4 Section 8 authority in the Constitution about the law of
5 nations all the time. And yet some unknown staffer now from
6 the State Department becomes a source of international law.
7 So please reject that argument on its face.

8 We keep hearing about all of these motions they're
9 going to file. It's unclear why they haven't filed some of
10 them yet.

11 We're going to be responding to the Kastigar issue.
12 Our position is that Kastigar on its face doesn't apply to
13 anything other than immunized testimony, but we'll argue about
14 that or you'll decide that on the papers before the
15 suppression motion.

16 We hear this claim of outrageous government conduct
17 that they want to continue to make. That's certainly not
18 something they're allowed to present to the members.

19 I didn't really take much quarrel with most of what
20 Mr. Farley was saying in regard to being able to make a sort
21 of reasoned moral argument, but at some point they get very,
22 very close in their arguments to what's just pure jury
23 nullification.

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1 And so we would ask that the commission stay
2 especially vigilant, not only in arguments, but later in
3 evidence and anything that they intend to present to the
4 members that seems to be advancing a moral and not legal
5 argument for a nullification of what they're otherwise
6 required to decide under the law.

7 But the outrageous government conduct, to the extent
8 that it does come up, to the extent that the defense ever gets
9 around to actually filing that motion, is going to be a legal
10 determination that you make. And other than a lot of the case
11 law indicating that it often gets denied with almost boring
12 monotony, we will defend until the end the prosecution -- the
13 U.S. Government's need to put in place an interrogation
14 program to stop the slaughter of 3200 people, and that there's
15 certainly nothing outrageous from having the motivation of
16 saving your own citizens after 3200 had already been killed.
17 But that's just a little bit of a preview of, I think, what
18 you will face in the future.

19 Subject to your questions, sir.

20 MJ [Col COHEN]: Yeah. Thanks, Mr. Trivett. To the
21 extent I can -- it doesn't always work out that way, but to
22 the extent I can, I'm trying to wait until you all finish at
23 least with your initial comments.

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1 I want to go back then and talk about -- I'll just
2 pick up towards the end where you talk about the outrageous
3 government conduct motion, all right? The same caveat applies
4 to these hypotheticals and theoreticals, as always, all right?

5 If the law would allow them as part of an outrageous
6 government conduct motion to -- for example, to present
7 evidence that -- let's say -- let me start the hypothetical
8 over.

9 Let's say that the commission is inclined to agree
10 that, okay, the time period is too broad, the scope is too --
11 is too broad with respect to what you're asking for, but, for
12 example, if the United States during the period of time when
13 the enhanced interrogation techniques were being used, was at
14 the exact same time sending these demarches or cables to other
15 countries and saying it is unlawful for you to engage in the
16 exact same behavior that we are engaging in, what is the
17 government's position on whether or not that might be relevant
18 to an outrageous government conduct motion?

19 MTC [MR. TRIVETT]: Not presentable to the members.

20 MJ [Col COHEN]: Right. But with respect to presentable
21 to the court as a -- in support of a motion for outrageous
22 government conduct.

23 MTC [MR. TRIVETT]: There's a certain danger in the

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1 question in that it's ----

2 MJ [Col COHEN]: Okay.

3 MTC [MR. TRIVETT]: ---- it's a -- it would be sending us
4 on a quest to prove a negative, right? I have no reason to
5 believe that there were inconsistent positions coming out of
6 the United States Government, but I don't know.

7 But ultimately, if you look at the motivation for why
8 the conduct occurred, which I just previewed for you a bit,
9 and when you look at the outrageous government conduct case
10 law, the vast majority that we found deals with
11 entrapment-type cases, where the government somehow is
12 inducing someone to commit a crime, not when the government is
13 trying to protect itself in detaining people and interrogating
14 people under the law of war. There's never been a case that
15 I'm aware of that that had the scenario that that was somehow
16 outrageous.

17 So at some point, I think it best that we brief the
18 issue of outrageous government conduct and the contours of
19 what it really is and then you make a legal determination.
20 And at some point, if you make a legal determination, you can
21 reconsider whether or not that evidence is relevant.

22 But to assume that it is up front when I don't
23 believe it to be the case because like I -- like most of the

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1 case law indicates, most of the -- these are dealt with with
2 boring monotony and that's when there's beatings and
3 entrapment cases and those types of things.

4 This was a high-level government decision to make a
5 determination that we had to interrogate people under coercive
6 conditions so we didn't get attacked again. I mean, that's
7 the justification. There's plenty of evidence to indicate
8 that. We can present you ample volumes of information as to
9 why we did this. You'll hear probably some of that testimony
10 before the suppression hearing.

11 You'll apply those facts to the law, and we're
12 confident that you'll come out and decide that there wasn't
13 anything outrageous about this at all. But to let the defense
14 sort of chase down a rabbit hole before we determine the legal
15 parameters of what an outrageous government conduct claim
16 really is and because it would be asking us to search for a
17 negative -- and whenever we're asked to search for a negative,
18 oftentimes for purposes of the commission, we just stipulate,
19 right? We do that all the time for hostilities -- or at least
20 we try to, right?

21 When the request is, We want to see everything the
22 FBI was doing because that shows that we weren't at war, we
23 say, Well, we'll stipulate that we didn't take any kinetic

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1 action after 20 August until after September 11, 2001, because
2 I don't know how I show you documents that prove the negative.
3 It might show that they're investigating, it might show -- but
4 in our mind it doesn't prove and is not mutually exclusive
5 from the actual act of hostilities.

6 So in this instance, if, in fact, we determine the
7 law requires them to have it, we would likely just stipulate
8 to something, even if it weren't true. Sometimes because
9 that's the only way to get through the silo full of
10 information that gets dumped on our heads sometimes.

11 So I would say that that would need to be briefed
12 first, and I think you can reconsider all of your discovery
13 rulings -- and I think Judge Pohl did this a few times --
14 based on new evidence that might come or a new case that might
15 come, I think we're in very dangerous areas when we start
16 assuming we know what the law is in a particular area and then
17 just start granting discovery in advance of that because I
18 think oftentimes there would be way more discovery required
19 that is actually -- would be relevant evidence to that motion.
20 If that answers your question.

21 MJ [Col COHEN]: It does. And then I don't disagree with
22 you or counsel that -- I said unless the issue is ripe and has
23 been briefed, then I will not make conclusions of law with

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1 respect to those particular issues.

2 Help me understand, to the extent that you can, if I
3 was to take a narrower approach and say -- using the other
4 one. Let's say I looked at and said, okay, so from
5 1 January 2000 until September 10th, 2001, did the government
6 take a position -- or I guess, really, did the State
7 Department -- someone in the State Department take a position
8 on behavior that -- or conduct that was identical -- if I said
9 "identical," for example -- just use waterboarding -- did they
10 take a position on waterboarding with respect to any other
11 country during that time frame prior to September 11, 2001,
12 walk me through the process that you would have to go through
13 to even start to ascertain whether that -- that order of the
14 court would -- would retrieve any relevant information.

15 MTC [MR. TRIVETT]: So the first step we would take if
16 ordered to do it is we would often send to the agency what's
17 called a prudential search request, or colloquially a PSR, for
18 the information that you've specifically ordered to be
19 provided or at least be reviewed. And we would look through
20 whatever that is, 21 months or 22 months of information with
21 demarches and diplomatic notes.

22 But the reality is is that we're not going to only
23 get demarches or diplomatic notes specific to whatever issue

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1 you asked for, right, because that would require a team in the
2 State Department to be put together in order to sort of
3 surgically excise the chaff from the wheat, right? We're
4 always the ones responsible for doing that.

5 So what I can say is shorter time is better, but
6 still very difficult. In the end, if we get something in that
7 21-month time frame, we would then have to review every
8 document and would look at whatever you ordered, but from your
9 waterboarding ----

10 MJ [Col COHEN]: Example.

11 MTC [MR. TRIVETT]: ---- example ----

12 MJ [Col COHEN]: Right.

13 MTC [MR. TRIVETT]: ---- I think we would then probably
14 add the other enhanced interrogation techniques that we did
15 that were approved and see if there were any comments made at
16 that time. So that would be the process.

17 But what I don't know -- and I've never worked for
18 the State Department -- I don't know how many diplomatic
19 notes, demarches or anything else goes out. I don't know if
20 they consider it privileged. I don't know anything about the
21 character of this type of evidence because we don't work in
22 this evidence. We just don't.

23 So there would be some size silo dumped on us, and

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1 then we would have to review it to see if anything mentioned
2 any of those enhanced interrogation techniques. That's the
3 only way to get through it.

4 In the end, if they are all classified, we could
5 then -- if we had to protect national security implications,
6 we'd have to get a declaration from the State Department
7 asserting national security privilege over certain
8 information. We'd have to come to you for 505 relief of some
9 type, whether it be a substitution summary or deletion. And
10 then eventually it would get to the defense. How long that
11 would take is -- I can't hazard a guess because I don't know
12 how big the silo is.

13 So -- but that's the general process. That's the
14 process we've been working through with those agencies that we
15 determined had relevant information. But we still concede --
16 we still will not concede that this is discoverable in any
17 way.

18 MJ [Col COHEN]: And I'm not asking you to. I was just
19 generally curious what happens when I order something and
20 then ----

21 MTC [MR. TRIVETT]: That's the process, sir.

22 MJ [Col COHEN]: Okay.

23 MTC [MR. TRIVETT]: And ultimately that agreement to

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1 stipulate to those types of things we would argue as a matter
2 of law didn't matter. And if you agreed, then it wouldn't
3 matter if you had it or not. Or if you just conceded for
4 purposes of the motion that we did do this, it still doesn't
5 make outrageous government conduct under the current case law.

6 MJ [Col COHEN]: Copy. All right. So give me one second
7 just to look at my notes from the other arguments.

8 I believe you all in your response cited to
9 United States v. Higgs from the Fourth Circuit.

10 MTC [MR. TRIVETT]: I'm sorry, what was the case name,
11 sir?

12 MJ [Col COHEN]: 353 F.3d 281.

13 MTC [MR. TRIVETT]: Do you have a page cite?

14 MJ [Col COHEN]: Just the case in general. I don't have a
15 specific page. On your motion.

16 MTC [MR. TRIVETT]: I'm tracking. I have it. It's on
17 page 10.

18 MJ [Col COHEN]: Okay. Sorry about that. I didn't have
19 your motion pulled up in front of me right now.

20 MTC [MR. TRIVETT]: Okay.

21 MJ [Col COHEN]: I was just doing that off of
22 recollection. All right.

23 You all, if I recall your motion correctly, cited

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1 that for the proposition that -- that this virtually unlimited
2 is still within a paradigm of limitation, and that you cited
3 to the Fourth Circuit case for that proposition; is that
4 correct?

5 MTC [MR. TRIVETT]: Yes, sir. And then we detail it
6 further with the Penry case and the Gabrion case.

7 MJ [Col COHEN]: Okay.

8 MTC [MR. TRIVETT]: Which I think puts more of a fine
9 point on the point of the fact that it's limited. It's got to
10 be relevant and it has to be a reasoned, moral response to the
11 defendant's background, character, and crime. That's the
12 Penry case, and that's the case that's often cited to and was
13 cited to in Gabrion for the proposition that it can't be
14 whatever the defense wants.

15 And the citation they give, meaning the Gabrion case,
16 is they say, "Otherwise, for example, the Eighth Amendment
17 would compel admission of evidence regarding the positions of
18 the planets and moons at the time of the defendant's offense,
19 so long as he can show that at least one juror is a firm
20 believer in astrology. To read the Tennard passage and others
21 like it in the manner that Gabrion suggests would be to
22 transform mitigation from a moral concept to a predictive one
23 and make a caricature of the law."

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1 So while it's wide and while they have the
2 information about their background, they're not entitled to
3 present to the members anyway this concept that a State
4 Department employee made a decision that something that was
5 sort of like this was torture, therefore, don't put to death
6 my client. We don't believe that -- we believe that that
7 falls specifically into the transforming of mitigation to a
8 predictive one.

9 MJ [Col COHEN]: With respect -- I asked defense counsel
10 this question, so I'd like to get the government's position as
11 well.

12 Can I -- at what point does the commission -- do you
13 believe that the commission needs to -- well, let me rephrase
14 it.

15 Can I reach a decision on the discoverability of this
16 information without specifically addressing the issue of what
17 the outer limits of mitigation evidence are?

18 MTC [MR. TRIVETT]: Yes.

19 MJ [Col COHEN]: Okay. In what way?

20 MTC [MR. TRIVETT]: So I agree with the principle that
21 generally for discovery under 701 that the ultimate admission
22 of the document is not the standard of materiality.

23 Materiality is defined within the D.C. Circuit. If you look

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1 at the -- I'm trying to remember the cases, but there are
2 D.C. Circuit cases that we have cited in the past.

3 MJ [Col COHEN]: And I would agree generally. I think
4 both of you are correct on that.

5 I guess the real question though becomes is, is at
6 what point -- not even admissibility, but just the
7 discoverability, if it's not tied to trying to determine that
8 necessity or materiality prong ----

9 MTC [MR. TRIVETT]: Yes.

10 MJ [Col COHEN]: ---- what's kind of the government's
11 position with respect to -- so even if it's broader, where are
12 the inner -- the upper and outer limits of -- of this type of
13 information?

14 MTC [MR. TRIVETT]: So if it's broad under 701 -- if it's
15 this -- if it's this broad under 701, from what we do know
16 about the documents being classified, it then becomes this
17 broad. And then it's just focused on legally cognizable
18 defense, rebuttal of the prosecution's case in chief, or
19 sentencing.

20 So the sentencing aspect -- and we had initially
21 presented a bench brief on the scope of mitigation to
22 Judge Pohl. That was not well received by the commission. He
23 asked that that -- and actually ordered that that never happen

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1 again.

2 MJ [Col COHEN]: Okay.

3 MTC [MR. TRIVETT]: So we have imputed it within the
4 appropriate defense -- our responses to the appropriate
5 defense motions. But you can make a determination on this
6 information alone not being -- not being proper mitigation
7 evidence. You can make that determination just as it comes
8 before you based on what they're requesting.

9 What they're requesting is a legal opinion from
10 someone else. It's a contemporaneous third-party assessment.
11 Even if it's the government, it's someone in the State
12 Department making opinions on statements that at least
13 Judge Parrella just determined was not necessary to be
14 discovered when they requested ICRC determinations on
15 hostilities.

16 And I can point you to that motion as well. Give me
17 a second.

18 MJ [Col COHEN]: Absolutely.

19 MTC [MR. TRIVETT]: That's 617K, sir.

20 MJ [Col COHEN]: Thank you.

21 MTC [MR. TRIVETT]: So part of Judge Parrella's decision
22 on that was, while he acknowledged the special role given to
23 the ICRC within the Geneva Conventions, what Mr. Ali was

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1 seeking in regard to the ICRC was essentially a
2 contemporaneous third-party assessment of relevant facts and
3 circumstances rather than evidence of the facts and
4 circumstances themselves.

5 And that goes back to the first part of my argument,
6 just -- we're just asking you to be lawyers. You have the
7 facts; you have ample facts. As the stipulation of facts that
8 we've attached to whatever suppression motions we did -- I'm
9 losing track exactly what we have done yet.

10 They have a tremendous amount of information to be
11 able to make their argument. They have the legal standards.
12 They cited to the legal standards. That's what lawyers do.
13 We fight for your position. Mr. Connell is very fond of
14 saying that. We fight for a position, we win or lose, and we
15 move on. But they have what they need to fight. They have
16 all of the weapons they need to fight. They have the facts,
17 and they have the law.

18 But in the end you have to question do they really
19 want this fight? I don't think they do. I think they want us
20 to go on a deep-sea fishing expedition and be gone for the
21 next couple of years because that's to their advantage,
22 so ----

23 MJ [Col COHEN]: Okay. Let me just take a look at my

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1 notes one last time. Are you familiar with the bin Laden case
2 that I addressed with counsel?

3 MTC [MR. TRIVETT]: I am, sir. We cited it in our
4 response to the German agreement.

5 MJ [Col COHEN]: That is correct.

6 MTC [MR. TRIVETT]: Yes, sir. And it was actually, I
7 believe, South Africa.

8 MJ [Col COHEN]: You are correct. I believe I said Spain.
9 You are correct. It was South Africa, now that you mention
10 that.

11 MTC [MR. TRIVETT]: Yes.

12 MJ [Col COHEN]: I knew it started with an S.

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

14 MJ [Col COHEN]: So what's the government's position? I
15 asked defense counsel specifically, okay, what are the
16 similarities between bin Laden where they made this specific
17 exception based on the unique facts and circumstances of that
18 case in comparison to this case?

19 MTC [MR. TRIVETT]: Right. So U.S. v. bin Laden case was
20 the first time bin Laden was indicted by the federal court.
21 Obviously, he wasn't on trial. It was the East Africa Embassy
22 Bombing case. So codefendants for the Kenyan/Tanzania attacks
23 were all on trial, and the government had sought the death

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1 penalty against them, for a certain number of them, excluding
2 Mr. Khamis, the extradition agreements within their country
3 specifically required that if they were extradited to the
4 United States, that they not be subjected to capital
5 punishment. So as a result of that and the agreement with the
6 extradition between the countries, they were not being tried
7 capitally.

8 They were equally culpable defendants in that they
9 were all involved with the attacks, and in the case of Khalfan
10 Khamis Mohamed, the court ultimately found that had the -- the
11 court ultimately found that the South African Supreme Court
12 determined that had their extradition agreement been followed
13 correctly, Mr. Mohamed would also not have been subject to the
14 capital punishment.

15 And so based on the equally culpable defendant
16 mitigation area of the law which is a recognized area, that --
17 these three people didn't get put to death, so don't put me to
18 death, the judge made a very specific factual circumstance
19 determination that that decision from the South African court
20 would be one that could go before the members so that they
21 could make a determination that he shouldn't have been sitting
22 here based on their country's law for the capital punishment
23 either.

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1 So ultimately, it was just a mitigating factor that
2 was considered on the unique circumstances of that case and,
3 quite frankly, because another country's Supreme Court made
4 that determination. So they weren't making their own -- the
5 court didn't make its own determination on that issue; they
6 were just relying on the fact that the South African Supreme
7 Court had made that determination.

8 So I think it's completely -- I think facts and
9 circumstances will govern the mitigation component of this
10 case. We haven't ever argued against it. I just don't see
11 the bin Laden case being something you can hang your hat on
12 for purposes of asking for 13 years' worth of State Department
13 information. I think it was very specific to that case, and
14 it was tied to the equally culpable defendants.

15 If there had not been other people in the dock who
16 were not -- who were not equally culpable, not subject to the
17 death penalty or not subject to the death penalty, I don't
18 believe that that would have ever been instructed. I think it
19 was based on the equally culpable defendant aspect of
20 mitigation specifically which we don't have here. We're
21 alleging that they're all equally culpable, although they had
22 different roles within the conspiracy.

23 MJ [Col COHEN]: Okay. So then -- right.

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1 So I think you've answered my question, but you would
2 believe then that bin Laden kind of stands independently on
3 his own with respect to any facts or circumstances that may
4 arise in this particular case?

5 MTC [MR. TRIVETT]: Yes, sir. I think there would have to
6 be a situation where one of the defendants still had
7 capital charges on them; the other four didn't. And the
8 reason why the other four didn't is because their country --
9 we had violated some extradition agreement with their country,
10 and we had this same violation for this one person, but we're
11 still trying to put them to death.

12 MJ [Col COHEN]: Right.

13 MTC [MR. TRIVETT]: I think it's very factually specific
14 but doesn't speak to a higher mitigation standard.

15 MJ [Col COHEN]: Thank you, Mr. Trivett. I appreciate
16 your time.

17 MTC [MR. TRIVETT]: Thanks.

18 MJ [Col COHEN]: Mr. Farley, would you like rebuttal
19 argument?

20 DC [MR. FARLEY]: Yes, Your Honor. Your Honor, I'll be
21 brief. It's very close to prayer time.

22 Initially, though, I'd like to put the government's
23 mind at ease and the military commission's mind at ease as

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1 well and answer the government's question directly: Yes, we
2 want the discovery that we're asking for here. We're not
3 trying to send the government on some wild goose chase to eat
4 up time. We actually want the documents that are responsive
5 to this discovery request.

6 MJ [Col COHEN]: I'll take your word at it.

7 DC [MR. FARLEY]: Okay.

8 MJ [Col COHEN]: I assume that you're not filing frivolous
9 motions with me, so I assume you're only filing a motion
10 because you really want it.

11 DC [MR. FARLEY]: And let me explain just a little bit
12 why, and I think maybe I didn't do a good job of answering
13 this question the first time around.

14 Part of the reason why we want this evidence is
15 because we want to connect, as my colleague describes it, the
16 last link of the chain of moral reasoning for the -- for the
17 members eventually during mitigation. And we want to cause
18 them to be faced with the -- the sort of question that
19 underlies this case, which is, you know, if the defendants are
20 convicted and are sentenced to death, is that an expression of
21 the panel ratifying choices that the U.S. Government made to
22 brutalize them, you know, between 2002 and 2006?

23 And fundamentally, they should be -- you know, they

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1 should be faced with the reality of what was done. And
2 certainly that's the facts and circumstances of what was done,
3 but it's also the characterization of what those facts and
4 circumstances are when they're done by other governments.

5 And it has been the policy of the United States
6 Government and it's been the legal position of the United
7 States Government for, you know, going on 70 years, if not
8 longer, that torture is universally proscribed.

9 And part of the reason that jurors and panel members
10 are asked to engage in independent moral reasoning with
11 respect to punishment is to ensure that the types of
12 punishment that violate the values of our society, the
13 principles of American governance, are not inflicted. Like
14 those brutal and foreign punishments are not inflicted on
15 people who face justice in the American system.

16 With respect to limiting factors, you know, it is
17 not -- we're not asking for every State Department document.
18 We're not even asking for every State Department cable. We're
19 asking for cables containing demarches or reports on demarches
20 and diplomatic notes that reference the word "torture" between
21 21 October 1994 and 1 January 2007. It's a much narrower set
22 of documents.

23 We're not talking about draft documents. We're

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1 talking about documents where the State Department
2 headquarters instructed an embassy or a diplomatic mission
3 abroad to go in and take a message to a foreign government
4 based on an assessment that certain alleged activities
5 constituted torture and to admonish or condemn that
6 government's reliance on the practice of torture. Or on the
7 other hand, reports coming back from the embassy saying, yes,
8 I delivered this message and this was the foreign government's
9 response.

10 This is not -- you know, I am a former State
11 Department employee. I have a lot of, you know, esprit de
12 corps for my old institution, and I got to say, it was hard to
13 hear some of the characterizations of the department. You
14 know, these are -- the department takes these things -- in my
15 experience, they took these things seriously and these would
16 not be, you know, some low-level employee out on a frolic and
17 exercising unauthorized authority.

18 MJ [Col COHEN]: So how many are we even talking about
19 theoretically, based on your experience? I mean, just
20 hypothetically, what are we even talking about as far as the
21 universe of discoverable documents?

22 DC [MR. FARLEY]: Your Honor, I am really not in a
23 position to say.

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1 MJ [Col COHEN]: Okay.

2 DC [MR. FARLEY]: I do know this: Cables going back at
3 least to the early 2000s and I believe all the way back to
4 1994 are digitized. They live in databases that are machine
5 searchable.

6 It would be, you know, not extremely -- if I were
7 sitting at the department and I were looking for these
8 documents, I would call up the records custodian and ask the
9 office of the historian or the records custodian to search for
10 that term and those parameters. And if I wanted something
11 more specific than that, then I would give them more specific
12 guidance and a couple of days would go by and they would send
13 me ----

14 MJ [Col COHEN]: Based on your experience, a Boolean
15 search is capable of this?

16 DC [MR. FARLEY]: Sorry?

17 MJ [Col COHEN]: A Boolean search of this type of
18 information is capable?

19 DC [MR. FARLEY]: Yes, Your Honor, at least to the early
20 2000s and I believe to 1994 as well.

21 MJ [Col COHEN]: Like I said, I'm not making findings of
22 fact along these lines, but it does give me just a little bit
23 of context, I understand that we're still back to proffers

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1 don't matter, and proffers aren't evidence, but at least it
2 gives me some idea of what we're talking about.

3 DC [MR. FARLEY]: Yes, Your Honor, and I appreciate that
4 because I don't want to be held to represent an
5 institution ----

6 MJ [Col COHEN]: No. Like I said, when I throw out
7 hypotheticals, it's the same thing, you must assume every
8 fact -- I must find that every fact within the hypothetical is
9 true in order for the hypothetical to be used, but at least it
10 facilitates a discussion of the issues, so thank you.

11 DC [MR. FARLEY]: Thank you, Your Honor. I think I'll
12 leave it at that.

13 MJ [Col COHEN]: All right. Thank you very much. Ma'am?

14 ADC [MS. RADOSTITZ]: In Kyles v. Whitley -- or Whitley, I
15 always pronounce it wrong. It's Kyles v. Whitley, the Supreme
16 Court said it's not enough for the government to say, oh,
17 well, we didn't know about it. It was the police in that case
18 that knew about it, and the prosecutors never asked.

19 Here, the prosecutors haven't asked the State
20 Department whether this would be difficult to find. They
21 should be at least obligated to ask. They haven't done that,
22 and as Mr. Farley said, it sounds like it could be really
23 easy. We don't know because they won't ask, and they have

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1 that obligation. That's the clear thing that they need to do.

2 I also just want to very briefly respond to something
3 that the government said, which is that if we argue outrageous
4 government misconduct to the members, that that would be
5 equivalent to a jury nullification.

6 And I just want to say, there is no such thing as
7 jury nullification on the penalty phase of a capital case.
8 Every single juror can decide to vote for life for whatever
9 reason they want. They like the fact that Mr. Mohammad's
10 beard is red, they get to vote for life. There is no such
11 thing as jury nullification, and I think that that's a really
12 important fact that we need to constantly rebut.

13 MJ [Col COHEN]: No, if I understand you correctly, I
14 think based on that argument then is that to the extent that
15 the government said -- what may have been a concern that that
16 would have been something to be argued essentially as jury
17 nullification in the findings phase, you're saying, whoa,
18 whoa, we're talking about sentencing with respect to whether
19 or not the death penalty should be adjudged.

20 ADC [MS. RADOSTITZ]: Absolutely.

21 MJ [Col COHEN]: Understood. Thank you for that
22 clarification, and hopefully now the parties are now seeing
23 the issues similarly.

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1 ADC [MS. RADOSTITZ]: Okay. Thank you.

2 MJ [Col COHEN]: Thank you. All right. Mr. Ruiz?

3 LDC [MR. RUIZ]: Judge, I have some rebuttal comments.
4 I'm not sure where we are on timing, though.

5 MJ [Col COHEN]: We'll go ahead and proceed for the
6 next -- for a few more minutes. I'd like to wrap up this
7 motion today.

8 LDC [MR. RUIZ]: Judge, I just want to key in on a few
9 different points, but they seem to be ones that came up a
10 number of times throughout the course of the argument.

11 You asked the question a number of times,
12 specifically in regards to defining the scope of mitigation
13 and the question about whether we could even begin to address
14 these issues without defining the scope of mitigation. And I
15 just want to submit to you what our position is on that ----

16 MJ [Col COHEN]: Please.

17 LDC [MR. RUIZ]: ---- on behalf of Mr. al Hawsawi, is that
18 not only should you not do that, but there -- there is an
19 appropriate time to do that, but that time is not now.

20 The attempt to try to define the universe of what
21 mitigating evidence, in and of itself, I think would be a very
22 difficult task, but of course difficulty shouldn't deter you
23 from trying to take on some of these undertakings.

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1 But because this amorphous term "mitigation," in my
2 view would be too difficult to -- to kind of grapple with and
3 get our arms around that. And I've actually briefed and
4 argued this in the past, where the prosecution has, and for a
5 very long time tried to -- tried to persuade Judge Pohl to
6 define this universe of mitigation, and thankfully the offer
7 was not accepted.

8 I'd ask you to look at it in terms of a timeline.
9 Where we are on this timeline now is in the investigative
10 phase of our case. And I think Mr. Farley touched on this,
11 and I think you had a discussion in terms of whether
12 discoverability then also factored into admissibility. And I
13 agree with the comments that were made, that a discoverable --
14 something that is discoverable may not necessarily ultimately
15 be admissible.

16 MJ [Col COHEN]: And I agree with you and the other
17 counsel who said that. I think that is the state of law.

18 LDC [MR. RUIZ]: And certainly, the other point I wanted
19 to add is that just because I receive a piece of discovery, it
20 doesn't necessarily follow that I'm going to proffer that for
21 admissibility in the future. It may be -- and, quite frankly,
22 there's been quite a bit of discovery, some that we've
23 received, that we've looked at and we've put in the pile of,

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1 okay, that's not something that is going to lead to either a
2 motion or some strategic endeavor or even ultimately
3 admissibility. So I wanted to dissuade you from the mindset
4 that if we obtain anything in discovery, it's even going to be
5 proffered for admissibility.

6 Certainly, we think when we're making these discovery
7 requests that there may be use; otherwise, we wouldn't be
8 doing that. But there may be instances where, once we get
9 information we look at it, we analyze it -- which is that
10 second piece of the continuum, the investigative phase,
11 obtaining the information, analyzing it, and then making that
12 determination at some point if we're going to submit that to
13 the court as a proffer for admissibility, right?

14 And so that's -- that's what I want you to take away
15 from, at least from our presentation and our discussion is
16 that you should resist the urge when we have these kinds of
17 discovery issues that come up, particularly when we start
18 talking about potentially mitigating evidence, to want to jump
19 to an admissibility determination.

20 Certainly, the information has to be relevant on its
21 face. And I will submit to you that if this were, for
22 instance, let's say, a case where you had a servicemember
23 killing a commanding officer or a case where a servicemember

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1 had rolled a grenade into a tent of fellow servicemembers --
2 both are actual fact scenarios that have happened in military
3 jurisprudence -- then requesting diplomatic notes on what the
4 government's position is with respect to torture would be a
5 very difficult burden to carry before a military judge as to
6 why that information may ultimately be something that we may
7 use. And so -- but that's not the case here.

8 I think it's at least relevant on its face that the
9 issue of torture is an issue that is at least one of the
10 issues that is central to the case for many reasons, whether
11 it be suppression and the admissibility of evidence or
12 ultimately potentially mitigating evidence that is submitted
13 to a fact-finder. So there is a reasonable discussion that
14 goes -- that's around this type of information. It's not this
15 far-reaching effort that we're discussing.

16 In terms of -- so that's what I have to say in terms
17 of the production and admissibility of ----

18 MJ [Col COHEN]: And I don't disagree with you. I think,
19 just for clarification, I wasn't thinking of it so much in the
20 idea of admissibility. I think everyone is correct on the
21 law, and that's the way I understood the law as well when I
22 was asking the questions. The real issue becomes is a 401
23 relevance, what fact or consequence does this make more or

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1 less likely ----

2 LDC [MR. RUIZ]: Understood.

3 MJ [Col COHEN]: ---- which is the general standard of
4 401.

5 So that's why I was asking about the parameters of
6 sentencing to the extent that findings, okay, you evaluate
7 that with, you know, what fact of consequence or could -- that
8 this could lead to, and understanding that discovery is
9 broader and those kinds of things could be beneficial to the
10 presentation of the defense's case, et cetera.

11 So that's why I was more asking the question as is
12 what is the paradigm with respect to relevance and sentencing
13 if that is the area where I find it to be the most probative
14 as opposed to, you know, potentially these others. So it was
15 less about admissibility than just understanding the general
16 relevance argument.

17 LDC [MR. RUIZ]: So certainly when we talk about the
18 relevance and sentencing and determinations in terms of
19 mitigating evidence, we always go back to 1004,
20 Rule 1004(b)(3) which talks about the "broad latitude," I
21 think ----

22 MJ [Col COHEN]: You are correct.

23 LDC [MR. RUIZ]: ---- is the term that is used in terms of

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1 the defendants should be given broad latitude in terms of the
2 admissibility of particularly sentencing mitigating evidence.
3 And I think you were alluding to that in terms of somewhat the
4 relaxation of the rules.

5 So we do think that that is -- it means what it is,
6 right? It's about latitude. It is broad latitude. So I
7 would just commend that to your consideration. I know you're
8 aware of that rule ----

9 MJ [Co1 COHEN]: All right.

10 LDC [MR. RUIZ]: ---- when it comes to that analysis.

11 MJ [Co1 COHEN]: Thank you.

12 LDC [MR. RUIZ]: I do want to address a couple of other
13 points ----

14 MJ [Co1 COHEN]: Okay.

15 LDC [MR. RUIZ]: ---- that Mr. Trivett made that I
16 disagree with, and I want to let the court know why that is
17 the case.

18 MJ [Co1 COHEN]: Please.

19 LDC [MR. RUIZ]: First of all, I strongly disagree with
20 Mr. Trivett's characterization of capital counsel never
21 wanting to get to trial.

22 Number one, I respectfully submit Mr. Trivett is not
23 qualified to offer that opinion with his one case in capital

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1 trial experience. And I will submit to you in my experience
2 that it's not always the case. Certainly, there are many
3 times in capital cases which are purely sentencing cases,
4 where really the only question that remains is: Is it going
5 to be a life sentence? Is it going to be a death sentence?

6 That is not the case with Mr. al Hawsawi's case. And
7 I have always been very clear in discussing that, that
8 Mr. al Hawsawi's case is a manufactured capital case, and that
9 is in the sense that it's not a true capital case that becomes
10 a purely sentencing exercise.

11 There are factual issues that will need to be
12 resolved in Mr. al Hawsawi's case. And I've always said that
13 my assessment of Mr. al Hawsawi's case, in expressing a desire
14 to bring that case to a resolution, because what gets lost in
15 the analysis a lot of times is that the only finality that we
16 seek here is not one on the government's side. This is a man
17 who has now for 16, 17 years lived in isolation and been
18 imprisoned without having a resolution to the facts at issue.

19 And I can tell you, having represented Mr. al Hawsawi
20 now for close to a decade, that this is not a man who is
21 afraid of facing a trial; this is not a man who is afraid of
22 facing a jury; and certainly is not a man who has who has
23 embraced a strategy of delay in this case.

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1 We certainly have not shown that by our litigation,
2 and in fact for many, many years, we actually sought to sever
3 this case. And we sought to sever this case because part of
4 the analysis was that if we were able to sever that case --
5 and the instances in which we sought to sever this case were
6 instances where there were other issues in the case that were
7 actually slowing the progress of the entire case.

8 One of those issues being, for example, the
9 infiltration of the FBI teams on one of the other defense
10 teams. It wasn't our defense team. We said, look, once we've
11 analyzed this issue, we don't have a conflict. We shouldn't
12 be burdened by continuing to go through this protracted
13 process, which took approximately two years. Sever our case,
14 and then we will continue to make expedited progress on our
15 case, and it will lead us to a resolution of this case.

16 I didn't make that request just once. I made it a
17 number of times. And I looked at the prosecution and I'll say
18 it again: If you sever our case now, we will continue to make
19 progress on our case, and I'm pretty certain that our case
20 will get to trial a lot sooner than a case with five
21 defendants will get to trial.

22 So what I'm saying to the government is put your
23 money where your mouth is. If you really want to get this

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1 case to trial, I'm game. I'm ready to do it. All you have to
2 do is sever the case right now. And I do believe that the
3 general course of the litigation will take us to a resolution
4 of this case. And I'll leave it to the government to see
5 whether they want to do that or not.

6 But this whole proposition that I've now heard
7 Mr. Trivett make, not only during this hearing but the
8 previous hearing, that capital counsel never want to go to
9 trial, is absolutely incorrect. There are many cases where
10 they may want to do that, but certainly in Mr. al Hawsawi's
11 case, that is not our strategy. Our strategy is to continue
12 to litigate, to continue to obtain this information, and to
13 continue the best we can and move expeditiously to a
14 resolution.

15 And I will tell you that when Mr. Trivett continues
16 to stand up here and say they have what they need, they have
17 what they need, be lawyers, litigate, well, here's what I'll
18 say to Mr. Trivett: You said that in 2012. 2012, you have
19 what you need. 2013, you have what you need. 2014, you have
20 what you need. Guess what? 2019, you have what you need.

21 Judge, in the short time you've been on that bench,
22 you've seen the discovery disclosures that we've received,
23 sometimes posts have filing motions. Mr. Connell filed his

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1 motion to suppress in good faith with the timeline that was
2 given by the commission, and what happened? He didn't have
3 what we needed. He got an extra 500 pages of discovery
4 thereafter.

5 In 2014, we didn't have what we needed. We got that
6 from the Senate committee who disclosed in executive summary
7 of the torture that Mr. al Hawsawi and many of these men had
8 actually endured.

9 But in 2012, the prosecutor was standing here looking
10 at another military judge and saying, Judge, they have what
11 they need to go to trial in 2012 and in 2013. Yet in 2014, we
12 obtained information from an independent source that had
13 nothing to do with the government that very much made it clear
14 to everyone that we didn't have what we needed.

15 So when Mr. Trivett tells us to stand up here and be
16 lawyers, I'll tell Mr. Trivett: We are being lawyers, and we
17 don't have what we need, and thank you for trying to try our
18 case, but we can do that ourselves.

19 And so I will tell you, Judge, that when we stand up
20 here and we tell you we don't have what we need, we think we
21 need additional information, there are reasons for that. It
22 is after careful, reasoned analysis, and it is informed by the
23 experience that we have had in this commission with the

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1 discovery process and with the process of trying to extract
2 this information from the government.

3 I do agree with Mr. Trivett that this is a vast
4 enterprise. I absolutely 110 percent agree that this is not
5 an open file system, and that is where I think we can see eye
6 to eye. He's got 17 years' experience in the Navy JAG Corps;
7 I've got 23. And I do agree that for the most part, my
8 practice has been that it has been an open file discovery.
9 That's not what it's been here, and that drives this
10 litigation and continues to drive this litigation.

11 In terms of the proposition that we should litigate a
12 motion first and then see what evidence informs that, I would
13 absolutely ask you to reject that invitation by Mr. Trivett,
14 and I will tell you that my experience litigating in front of
15 Judge Pohl certainly wasn't that that was his preferred method
16 of litigating. In fact, there were many motions where I stood
17 here and Judge Pohl kept asking me a similar question and he
18 would say to me, "When does it end," right? Because we'd file
19 a motion, and then we'd get additional facts, and there would
20 come a supplement.

21 There are some motions on the record that have seven,
22 eight, nine supplements to the motion, and Judge Pohl would
23 always ask me, "Mr. Ruiz, when does it end?" It certainly was

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1 not his preferred method of litigation, of file first and then
2 let's figure out where the parameters are and what's -- what's
3 relevant and what's not. So I would ask you to reject that
4 approach that Mr. Trivett is asking you to obtain.

5 And then just very simply, in terms of the outrageous
6 government conduct, I would just simply say that the
7 recitation about what outrageous government conduct is was a
8 gross oversimplification, and we certainly intend at some
9 point to file that, but we're not going to do that before I
10 think we have the facts that are necessary to give the court
11 all of the information that the court ought to have up front
12 in order to begin making a reasoned analysis.

13 So those are all our comments. Thank you for your
14 time, Judge.

15 MJ [Col COHEN]: Mr. Ruiz, thank you very much for the
16 clarifications.

17 LDC [MR. RUIZ]: Thank you.

18 MJ [Col COHEN]: That will conclude ----

19 LDC [MR. HARRINGTON]: Excuse me, Judge. Can I just put
20 something briefly on the record?

21 MJ [Col COHEN]: You may, sir. Mr. Harrington, the time
22 is yours.

23 LDC [MR. HARRINGTON]: As I advised you in the last

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1 hearings, we've had a continuing problem with respect to my
2 client and the treatment he alleges at the camp.

3 I just want the court to be aware that I've spoken to
4 Mr. Trivett and I'm providing him with some requests and at
5 your suggestion we're trying to collaboratively work through
6 this preliminarily. We may be coming back to you later in the
7 week about this, but we're trying to work through it.

8 MJ [Col COHEN]: Thank you. I appreciate the endeavor to
9 work this -- resolve the issues amongst yourselves. Thank
10 you. Mr. Harrington, thank you for letting me know there's
11 still some concerns. All right.

12 Before we -- with respect to the -- tomorrow, so that
13 the public is aware -- I referenced it this morning, but I'll
14 remind everyone, tomorrow will be a closed session so that I
15 can have the 505(h) hearings. We will begin at 0930 hours
16 tomorrow morning. We will continue until we're done tomorrow.

17 So these are the notices that I'm currently aware of.
18 If there are ones that you need to bring to my attention, now
19 would be a good time to say: AE 530CCCC, AE 530IIII, AE 628E
20 (AAA) -- excuse me and IIII was (WBA) and (MAH) was CCCC for
21 AE 530 -- AE 639B (WBA), AE 642A (AAA), AE 642E (AAA),
22 AE 645 (AAA), and then I have an AE 530JJJ (MAH).

23 Are the parties prepared to address all of those

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1 tomorrow morning? If not, please let me know now and are
2 there any additional ones that need to be added?

3 LDC [MR. CONNELL]: Sir, could we have just a moment?

4 MJ [Col COHEN]: You may. Please.

5 Mr. Trivett?

6 MTC [MR. TRIVETT]: The prosecution will be prepared. We
7 will also be filing a 616 notice today.

8 MJ [Col COHEN]: Okay. When can you get that in so that
9 the defense has an opportunity to look at that?

10 MTC [MR. TRIVETT]: If it hasn't been filed yet, sir, it
11 will be shortly after recess.

12 MJ [Col COHEN]: Okay.

13 MTC [MR. TRIVETT]: Sir, you also mentioned in the 802
14 that there may be other 505s that have been filed that aren't
15 necessarily relevant to any of the docketed motions, but that
16 you may want to get through?

17 MJ [Col COHEN]: Yeah, these are the ones that I was
18 tracking, but if there are other ones, now would be a good
19 time to let me know what those are that you want to take up,
20 and I'm more than willing to spend the entire day addressing
21 these matters.

22 LDC [MR. RUIZ]: Judge, just real quickly, 530 is JJJJ as
23 opposed to JJJ.

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1 MJ [Col COHEN]: You are correct. It is JJJJ (MAH).

2 Thank you very much for the clarification.

3 Ms. Bormann.

4 LDC [MS. BORMANN]: Judge, we intend to file along with
5 the supplement a 505(h) notice based on information we were
6 provided while we were in court today.

7 MJ [Col COHEN]: Okay.

8 LDC [MS. BORMANN]: And that's on 639. I don't know the
9 number yet, but ----

10 MJ [Col COHEN]: Okay.

11 LDC [MS. BORMANN]: ---- we'll get it to you shortly.
12 That's why Mr. Perry is out of the courtroom.

13 MJ [Col COHEN]: Nope, understand. And that will be
14 great. It looks like the government has got one too, so if
15 you guys will both get those in as soon as possible, and we'll
16 push those in later -- later in the day to give the parties an
17 opportunity to look at it. If at the end of the day the
18 parties we just can't address those issues, I understand. But
19 if we can use the time we have here, then I'm more than
20 willing to do so.

21 Mr. Connell?

22 LDC [MR. CONNELL]: Thank you, sir. I just took the
23 opportunity to consult with the government about this, and

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1 just for your planning purposes, because I know you have a lot
2 to look at here, 628E does not seem ripe to us because today
3 was -- we tabled 628 in light of -- until we have a
4 schedule ----

5 MJ [Col COHEN]: Okay.

6 LDC [MR. CONNELL]: ---- something might change.

7 And 645, the government hasn't had the opportunity to
8 respond yet, so that one is still in the briefing cycle.

9 MJ [Col COHEN]: Okay.

10 LDC [MR. CONNELL]: Thank you. And we're prepared to go
11 forward on the others.

12 MJ [Col COHEN]: Okay.

13 TC [MR. RYAN]: Your Honor, if I may?

14 MJ [Col COHEN]: You may, sir.

15 TC [MR. RYAN]: Your Honor, I believe the last one you
16 stated was 530JJJ. I have it as JJJJ.

17 MJ [Col COHEN]: Yeah, that is correct, it's JJJJ. Yes.
18 Thank you. That is a clarification that needed to be made,
19 and I apologize.

20 There is no rush on behalf of the government
21 following -- I'm more inclined -- more than inclined to follow
22 the typical motion schedule with respect to responses.

23 With the AE 645, is there any chance that the

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1 government would be ready to address that before sometime
2 tomorrow?

3 MTC [MR. TRIVETT]: Sir, we'll be prepared to address it.
4 I just spoke to Mr. Connell. He indicated he might have a
5 reply ----

6 MJ [Col COHEN]: Okay.

7 MTC [MR. TRIVETT]: ---- so that may push it off, but I'm
8 willing and able to address whatever you need us to do.

9 MJ [Col COHEN]: Okay. If we need to have another session
10 at some point later in the week, I'm okay with that as well.
11 Let me know. If you guys will track that, let me know what
12 the defense and the government's standpoint is. Just while
13 we're all together, if we have the opportunity to do a closed
14 session, that would be ideal. But we'll follow the normal
15 cycle otherwise, unless you guys tell me that you're
16 willing -- that you think we can take it up this week. So no
17 pressure intended. Just please let me know. All right.

18 LDC [MR. RUIZ]: Judge?

19 MJ [Col COHEN]: Yes, Mr. Ruiz?

20 LDC [MR. RUIZ]: If you're done with the 505 discussion, I
21 just want to raise one other scheduling question before
22 we ----

23 MJ [Col COHEN]: You may.

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1 LDC [MR. RUIZ]: ---- before we break.

2 So I know that in the time that we've had to address
3 the schedule of events you have not really touched on the 530
4 series, the TTT and the BBBB. And I just wanted to let you
5 know that very, very shortly here I'm going to provide the
6 government with a proposal for stipulated facts. But I was
7 just -- if you could or if you can, I was just curious as to
8 what your plan of attack was for that particular series.

9 MJ [Col COHEN]: Yes. So we had the additional filing I
10 believe that you all just put in on that one. I got a copy of
11 that classified document attachment this morning. Obviously
12 it's something I would want to take up tomorrow, and we can
13 work the way ahead as to how we want to address that. But I
14 definitely want to take care of that this week.

15 LDC [MR. RUIZ]: Great. Thank you.

16 MJ [Col COHEN]: Okay. Thank you. All right.

17 Are there any other matters to take up before we
18 recess for the evening?

19 That's a negative response. The commission is in
20 recess.

21 [The R.M.C. 803 session recessed at 1651, 22 July 2019.]

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