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1 [The R.M.C. 803 session was called to order at 0902,  
2 26 July 2019.]

3 MJ [Col COHEN]: The commission is called to order. Good  
4 morning, everyone. We'll start with the trial counsel.

5 General Martins, if you'd please account for your  
6 team.

7 CP [BG MARTINS]: Good morning, Your Honor. All  
8 prosecutors who were here before are here for the  
9 United States.

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

11 Mr. Nevin, I recognize Mr. Mohammad is not here.  
12 Would you otherwise account for who is here on your team.

13 LDC [MR. NEVIN]: Yes, Your Honor. David Nevin;  
14 Lieutenant Colonel Poteet, United States Marine Corps; and  
15 Ms. Radostitz.

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

17 Ms. Bormann, I also recognize Mr. Bin'Attash is not  
18 here. However, with respect to the attorneys, who is present?

19 LDC [MS. BORMANN]: Captain Caine, myself, Mr. Perry, and  
20 Mr. Montross.

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

22 Mr. Harrington, I ---

23 LDC [MR. HARRINGTON]: Mr. Binalshibh is here, Judge.

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1 MJ [Col COHEN]: He is here. Okay. Thank you.

2 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,  
3 James Harrington, Wyatt Feeler, Air Force Major Virginia Bare.

4 MJ [Col COHEN]: Thank you, sir. It appears Mr. Ali is  
5 not here. Mr. Connell, you obviously have your team here.

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

7 MJ [Col COHEN]: Good morning.

8 LDC [MR. CONNELL]: Myself, James Connell, Ms. Pradhan,  
9 Mr. Farley, and Captain Andreu.

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

11 Mr. Ruiz, it appears that Mr. al Hawsawi is not here,  
12 but I see attorneys.

13 LDC [MR. RUIZ]: Yes, correct, Judge. Ms. Suzanne  
14 Lachelier, Lieutenant Commander Dave Furry, Mr. Sean Gleason,  
15 and myself are here on behalf of Mr. al Hawsawi.

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

17 Government, do you have a witness with respect to the  
18 gentlemen who are not here?

19 CP [BG MARTINS]: We do, Your Honor, and as it is ----

20 [microphone button not pushed; no audio.]

21 MJ [Col COHEN]: That would be fine, sir.

22 CP [BG MARTINS]: Major, please proceed to the witness  
23 stand. Remain standing, raise your right hand for the oath.

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1 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
2 was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the Chief Prosecutor [BG MARTINS]:

5 Q. You are a U.S. Army Major?

6 A. Yes.

7 Q. And you are an assistant staff judge advocate in  
8 Joint Task Force Guantanamo?

9 A. Yes, sir.

10 Questions by the Trial Counsel [MR. SWANN]:

11 Q. Major, do you have in your possession Appellate  
12 Exhibits 648G, H, I, and J?

13 A. Yes, sir.

14 Q. All right. All of those documents, with the  
15 exception of H, consists of two pages, H being three pages.  
16 Am I correct?

17 A. Yes, sir.

18 Q. Did you have occasion to advise these men of their  
19 right to attend today's proceeding?

20 A. Yes, sir.

21 Q. Mr. Mohammad first. AE 648G, two-page document.  
22 What time did you do that?

23 A. 0618.

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1 Q. And did you use the form that you have in front of  
2 you?

3 A. Yes, sir.

4 Q. Did you read that form to him?

5 A. I did.

6 Q. And did he indicate that he wanted to attend or not  
7 attend?

8 A. That he did not want to attend.

9 Q. And is that his signature on page 2?

10 A. Yes, sir.

11 Q. With respect to Khallad Bin'Attash, what time did you  
12 advise him?

13 A. 0604.

14 Q. Is that his signature on the third page, the Arabic  
15 version of this form?

16 A. Yes, sir.

17 Q. Did you advise him in both English and in Arabic?

18 A. I advised him in English. The interpreter advised  
19 him in Arabic, sir.

20 Q. Did he indicate that he did or did not want to  
21 attend?

22 A. He indicated he did not want to attend.

23 Q. With respect to Ali Abdul Aziz Ali, Appellate Exhibit

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1 648I, is that his signature on the second page of this  
2 document?

3 A. Yes, sir.

4 Q. And it indicates that you advised him at 0608 this  
5 morning?

6 A. Yes, sir.

7 Q. And did he indicate that he wished to attend or not  
8 attend?

9 A. Not attend.

10 Q. And with respect to the final detainee, Mustafa Ahmed  
11 Adam al Hawsawi, is that his signature on the second page of  
12 this document?

13 A. Yes, sir.

14 Q. And I'm talking about Appellate Exhibit 648J.

15 A. Yes, sir.

16 Q. Did he indicate that he wished to attend or not  
17 attend?

18 A. Not attend.

19 Q. And did you read this form to him in English or in  
20 Arabic?

21 A. In English.

22 Q. Now, with respect to all of these men, do you believe  
23 they voluntarily waived their right to attend this morning's

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1 proceeding?

2 A. I do, sir.

3 TC [MR. SWANN]: Thank you, Judge.

4 MJ [Col COHEN]: Thank you, sir. May I have those  
5 documents, please.

6 WIT: Yes, sir.

7 MJ [Col COHEN]: Thank you.

8 Mr. Nevin, did you get the opportunity to see  
9 Appellate Exhibit 648G?

10 LDC [MR. NEVIN]: Yes, Your Honor.

11 MJ [Col COHEN]: Any questions?

12 LDC [MR. NEVIN]: No, sir. Thank you.

13 MJ [Col COHEN]: Thank you.

14 Ms. Bormann, did your team get the opportunity to  
15 review Appellate Exhibit 648H and do you have any questions?

16 LDC [MS. BORMANN]: We did review it, and I have no  
17 questions.

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

19 Mr. Connell, did your team get the opportunity to  
20 review Appellate Exhibit 648I and do you have any questions?

21 LDC [MR. CONNELL]: Yes; and no, sir.

22 MJ [Col COHEN]: Thank you.

23 LDC [MR. CONNELL]: Thank you.

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1 MJ [Col COHEN]: Mr. Ruiz, same questions to you with  
2 respect to Appellate Exhibit 648J.

3 LDC [MR. RUIZ]: I have reviewed it. I have no questions,  
4 Judge.

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

6 LDC [MR. RUIZ]: And Judge, just -- there is one matter I  
7 would like the opportunity to address after -- at the  
8 appropriate time this morning.

9 MJ [Col COHEN]: Okay.

10 LDC [MR. RUIZ]: It should be short. Thank you.

11 MJ [Col COHEN]: All right. Thank you. Handing those  
12 appellate exhibits to the court reporter.

13 Major, thank you for your testimony. I'll  
14 permanently excuse you. I don't anticipate we'll need you  
15 back during this session.

16 WIT: Thank you, sir.

17 MJ [Col COHEN]: Thank you.

18 [The witness was permanently excused and withdrew from the  
19 courtroom.]

20 MJ [Col COHEN]: The commission finds that Mr. Mohammad,  
21 Mr. Bin'Attash, Mr. Ali, and Mr. Hawsawi have knowingly and  
22 voluntarily waived their right to be present at today's  
23 session. The commission also notes Mr. Connell's standing

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1 objection.

2 LDC [MR. NEVIN]: And, Your Honor, that's -- that just --  
3 just so we're clear, that's a standing objection from -- my  
4 recollection is from all of the defendants, but certainly from  
5 Mr. Mohammad as well.

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

7 LDC [MR. NEVIN]: Thank you.

8 MJ [Col COHEN]: With the coming in and out of the closed  
9 sessions yesterday, I need to make sure that we did something  
10 in open session. Mr. Ryan, it was my personal recollection,  
11 but that could be incorrect, that you had made that oral  
12 motion to withdraw 350 ----

13 TC [MR. RYAN]: TTT.

14 MJ [Col COHEN]: ---- TTT during the open session at 1400;  
15 is that correct?

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

17 MJ [Col COHEN]: Okay. That's my understanding as well,  
18 so I granted that as well. All right.

19 Mr. Ruiz, I'll give you the opportunity to be heard  
20 after I summarize yesterday's 802.

21 Following the conclusion of the R.M.C. 806 hearing  
22 yesterday afternoon to address classified testimony and  
23 argument with respect to Colonel Yamashita's testimony and

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1 530TTT, motion filed by the al Hawsawi team, I held an  
2 R.M.C. 802 conference with the parties. The accused were  
3 absent.

4 At this conference Ms. Bormann advised the commission  
5 that she intended to move orally this morning to withdraw AE  
6 530AAAA (WBA) on the record during today's court session. If  
7 she does so, I will issue an oral ruling at that time.

8 Ms. Radostitz asked that the commission arrange the  
9 schedule to give the parties time to handle return travel  
10 preparation. I will also work with the parties to make sure  
11 they have the opportunity to do that today.

12 AE 639, our trial scheduling series, is on the docket  
13 for today. The parties and I had some discussion about the  
14 issues raised in that series. Mr. Connell asked me to give  
15 certain guidance about issues to focus on today. I advised  
16 the parties that definitive dates as proposed by the  
17 government and sequencing as proposed by the defense appear  
18 practicable and that we would discuss that at length today.

19 The issue facing the -- facing the commission is what  
20 dates to give for each sequence and the necessity to establish  
21 a date certain for discovery, et cetera, and we'll discuss  
22 that at length today, I'm -- I'm positive.

23 The commission and the parties agree that there was a

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1 need for certainty regarding witness testimony during the  
2 September schedule. I gave some guideposts regarding how we  
3 could potentially proceed during the September session and  
4 potential issues that might -- might arise after the witnesses  
5 testify. I made no rulings at all; just threw out some ideas  
6 for the parties to think about.

7           Specifically, I indicated that I would remain  
8 consistent with my belief that the testimony should be in  
9 support of -- of a specific matter before the commission to  
10 have in-court testimony, whether that be something as simple  
11 today as a ruling on whether or not someone voluntarily waived  
12 their right to be present at the proceedings or an existing  
13 motion.

14           Currently, there is an existing motion to suppress  
15 that Mr. Connell's team has filed and so, therefore, if we --  
16 if the parties believe that it would be appropriate to start  
17 down that process, that's something they -- they could -- we  
18 could discuss. And we talked about some -- some ways that  
19 that issue might be handled. And if we need to put more on  
20 the record, I'm more than willing to do so.

21           Lastly, I advised the parties that the general --  
22 that for general discovery depositions or interrogatories  
23 are -- are normally appropriate. In view of the circumstances

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1 of this case, the way that the issues may arise even during  
2 any testimony of witnesses, et cetera, due to the unique  
3 nature and identities, et cetera, of various witnesses and  
4 what is maybe unknown at a particular time; that I was willing  
5 to work with the parties to take a -- a more liberal view of  
6 what constitutes extraordinary circumstances for depositions  
7 under R.M.C. 702 to address specific issues to follow up, as  
8 well as to consider affidavits, et cetera, which is completely  
9 consistent with -- with motion practice and what is admissible  
10 and proper consideration at that.

11           Moreover, under the rules that guide -- that guide  
12 this court, hearsay is not an objection to -- to something to  
13 be offered during a -- during motion practice.

14           That's a generalized summary of the -- of the topics  
15 that we -- that I recall discussing last evening. However, if  
16 either side would like to augment my summary, you are more  
17 than welcome to do so. I'll start with the trial counsel.

18           CP [BG MARTINS]: Your Honor, the government has no  
19 additions.

20           MJ [Col COHEN]: All right. Do any of the defense counsel  
21 wish to augment the R.M.C. 802 summary?

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

23           MJ [Col COHEN]: You may do so, Mr. Ruiz.

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1 LDC [MR. RUIZ]: Judge, as part of the 802 conference, you  
2 also acknowledged the existence of pending motions to  
3 reconsider Judge Parrella's ruling in regard to Judge Pohl's  
4 motion -- Judge Pohl's ruling to suppress FBI statements for  
5 all purposes. You acknowledged that is, in fact, an issue  
6 that remains before the court as well as -- then you then  
7 articulated that even in that regard you do have a preference  
8 and a concern to have sufficient findings of fact even to  
9 address that issue.

10 MJ [Col COHEN]: That is correct.

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

12 MJ [Col COHEN]: Are there any other augmentations?  
13 Mr. Connell.

14 LDC [MR. CONNELL]: Sir, in the augmentation line, I had  
15 asked for just a brief time this morning to address 118N. As  
16 an update on that question, the government and I have  
17 continued to talk and resolved that issue, so we're pressing  
18 ahead with the -- with the meeting on -- that you ordered in  
19 118N.

20 MJ [Col COHEN]: Great. Thank you.

21 LDC [MR. CONNELL]: The other thing that I'll advise the  
22 court is that at the 802 on Sunday I had requested an  
23 accommodation for lunchtime for today, and that issue is now

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1 resolved, the issue that I had.

2 MJ [Col COHEN]: Okay.

3 LDC [MR. CONNELL]: And so I'm at the court's disposal.

4 MJ [Col COHEN]: All right. Thank you, sir. I appreciate  
5 the update.

6 LDC [MS. BORMANN]: Judge?

7 MJ [Col COHEN]: Yes, Ms. Bormann.

8 LDC [MS. BORMANN]: Would you like me at this point to put  
9 on the record that we move to withdraw AE 530AAA?

10 MJ [Col COHEN]: Great. That motion is granted.

11 LDC [MS. BORMANN]: Thanks.

12 MJ [Col COHEN]: Thank you. AAAA.

13 LDC [MS. BORMANN]: AAAA, yeah.

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

15 LDC [MS. BORMANN]: It's one A short.

16 MJ [Col COHEN]: That's fine. Thank you for the  
17 clarification. That motion is still granted.

18 Let's go ahead and put on the record, because I don't  
19 think it's anything that's inappropriate for the public to  
20 hear: Access to classified information, the 505(h) process,  
21 the 806 hearings that we have, have been replete for years --  
22 consistent with what you probably recognize about my  
23 methodology is I like to have as much certainty in a process

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1 as -- as I possibly can. I believe that assists me in making  
2 the calls that I need to.

3 I suspect that I am going to take a very -- I'm going  
4 to take a new look at the -- at the current process for 505,  
5 for 806, et cetera, as well as for means for us to -- all of  
6 us have an obligation to protect classified information. I  
7 have heard that replete numerous times this week. I believe  
8 that. I think that the law does require, whether you're  
9 defense counsel, prosecution, or the judge, to be cautious  
10 and -- and to protect that information.

11 What I'm going to look for and -- and look to  
12 implement is a way for us to have better guidance ourselves at  
13 the beginning of each session for what -- what the hot topics  
14 may be for anything and to have specific guidance.

15 One of the things that I am considering doing, for  
16 example, is -- is having a closed session 802 where we will  
17 discuss specifically classified matters that may come up  
18 during the week and make sure that we're all on the same page  
19 with respect to that.

20 And I will also work through the 505 process with --  
21 with the government, as is required by the law, to -- to  
22 establish processes and to -- to address that, so that we  
23 all can minimize inadvertent disclosures, et cetera, moving

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1 forward.

2 That's just something that I feel like I need to do.  
3 And the more -- the more I am capable of doing so, the more  
4 I'm going to be able to assist you all in doing your job and  
5 in maintaining the proper protection of classified  
6 information.

7 So -- so stand by as to -- as to kind of what those  
8 processes may be. Right now, they're more just mulling around  
9 in my head, but I believe in particular is -- as -- one of the  
10 things that may come up -- in the 802 last night -- is that,  
11 Mr. Connell, you and the government are -- with any potential  
12 witnesses that may be called in September have thought  
13 through -- started to think through this. And I want to work  
14 with you and the prosecution and -- and all the other defense  
15 counsel in making sure that we have a -- a workable process  
16 that gives some fidelity to -- to how we're going to do this.

17 Mr. Connell.

18 LDC [MR. CONNELL]: Sir, could we have permission to file  
19 some kind of pleading giving you our thoughts on that?

20 MJ [Col COHEN]: Sure.

21 LDC [MR. CONNELL]: Okay.

22 MJ [Col COHEN]: That's fine. You can ask for an AE  
23 number, and you're more than welcome to do that. Yeah, that

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1 in particular.

2           And I suspect that, like I said, I will -- I'm not  
3 going to hide from anyone. I suspect that there will be some  
4 ex parte discussions with respect to classification under 505  
5 with the government with respect to that, which is what the --  
6 what the law requires me to do. So -- but, yes, I don't want  
7 it to be one-sided; I want input from -- from the defense as  
8 well. Because if I don't know what your concerns and issues  
9 are, it's hard for me to mull those around in my head.

10           But at the end of the day, there will be more  
11 fidelity and a process to assist all of us so that we -- what  
12 became kind of apparent to me this week is that we think we  
13 all understand things and that we're all on the same page, but  
14 there may be some nuances that may not be the case. And so I  
15 want to, to the extent that we can, resolve those nuances in  
16 advance. I want to do that before we start sessions each  
17 time.

18           Mr. Connell.

19           LDC [MR. CONNELL]: I rise only to say, sir, that I don't  
20 think that I understand. I'm under no illusions.

21           MJ [Col COHEN]: Okay. And I think -- I think that's --  
22 for the proper protection of classified information, I -- I  
23 don't think we can -- we can work within a realm where --

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1 where there is no certainty; and in particular, I know I  
2 can't. And ultimately, I -- I have to make the call on  
3 whether to push a red button or not, and so I have to have  
4 absolute certainty.

5           So that's just some general ideas, so expect that.  
6 And I understand that if we start taking some of this  
7 testimony in September -- and we will hear more about that  
8 later -- I'll have to -- I'll have to work diligently to make  
9 this happen and give you some specific guidance before --  
10 before we come back. All right.

11           I would like to start, then, by taking up AE 639.

12           LDC [MR. RUIZ]: Judge?

13           MJ [Col COHEN]: Mr. Ruiz. You still have an additional  
14 matter? Okay. I wasn't sure if the 802 was a clarification,  
15 but, yeah, if you have something else, you may do so.

16           LDC [MR. RUIZ]: Thank you.

17           MJ [Col COHEN]: Absolutely. Yes, sir. Good morning.

18           LDC [MR. RUIZ]: Good morning.

19           Judge, I received a document yesterday afternoon  
20 after court that I did not have in my possession, could not  
21 utilize during the sessions yesterday. I would like to tender  
22 this exhibit at this time -- and I'll give you a little bit of  
23 background on it -- to rebut Colonel Yamashita's on-the-record

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1 under-oath testimony.

2 I provided a copy of this document to the prosecution  
3 as well as to the parties. It has been premarked as Appellate  
4 Exhibit 530MMM (MAH), and it is a document that's the --  
5 labeled Communal Movement Rules ----

6 MJ [Col COHEN]: Okay.

7 LDC [MR. RUIZ]: ---- of the -- of the camp. I will  
8 reference that during the -- the commander's open session  
9 testimony, he, in fact, referenced communal operations, which  
10 is why I believe I can -- I can say that here in open court  
11 consistent with the commander's testimony.

12 Now, this document came to me without any  
13 classification markings. I think it's somewhat appropriate  
14 that we're discussing these issues and how they arise.

15 MJ [Col COHEN]: Right.

16 LDC [MR. RUIZ]: It had no classifications markings. It's  
17 a document that has the rules for the detainees within  
18 Camp VII in the cell, and it's provided to them. And I will  
19 just note that no -- no classified material has ever been  
20 provided to the detainees. We're not allowed to do that.  
21 There are certain documents that are classified, marked as  
22 DISPLAY ONLY that we received from the prosecution, but I  
23 infer from that that this is not a classified document.

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1           But I give it to the court, obviously with cautionary  
2 words that I'm not sure what the prosecution -- they are free  
3 to opine on it, but I do not believe it to be a classified  
4 document. It does, however, as you can see, detail communal  
5 movement rules within the camp, something which was the  
6 subject of the commander's discussion and pointed testimony on  
7 that issue.

8           Judge, I would simply draw your attention. There are  
9 two markings on this document. Do you have a copy?

10          MJ [Col COHEN]: I don't have it in front of me right now.

11          LDC [MR. RUIZ]: Yes, sir.

12          MJ [Col COHEN]: Oh, I do now.

13          LDC [MR. RUIZ]: All right.

14          MJ [Col COHEN]: Thank you.

15          LDC [MR. RUIZ]: And I'm not going to refer to the actual  
16 substance unless the prosecution tells me that this is an  
17 unclassified document that I can discuss.

18          TC [MR. RYAN]: I cannot, sir.

19          MJ [Col COHEN]: Okay.

20          LDC [MR. RUIZ]: All right.

21          TC [MR. RYAN]: I have provided to camp personnel so we  
22 can verify authenticity, but also to check on that issue, sir.  
23 In light, though, of other litigation and other events

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1 already, I would suggest no reading from that document should  
2 take place in an open session, in an abundance of caution.

3 MJ [Col COHEN]: Okay. Tell you what. What I will allow  
4 you to do, if it turns out to be classified, I'll allow you to  
5 file a brief supplemental argument that addresses this, what  
6 specific paragraphs you want me to hear.

7 LDC [MR. RUIZ]: If there's a question as to authenticity,  
8 Judge, I know somebody who can probably authenticate it,  
9 right?

10 MJ [Col COHEN]: For purposes of -- to be honest with you,  
11 it's a motion practice.

12 LDC [MR. RUIZ]: Yes.

13 MJ [Col COHEN]: So if you just want to submit the  
14 document in support of that motion -- I mean, unless there's  
15 evidence later that it's not authentic, it just comes in as a  
16 document.

17 LDC [MR. RUIZ]: Sure.

18 TC [MR. RYAN]: Yes, Judge. I'm sorry. I wasn't -- I  
19 have no objection to counsel proffering it in.

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

21 LDC [MR. RUIZ]: So if I can just say a couple of words  
22 without referring to the substance.

23 MJ [Col COHEN]: That would be fine.

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1 LDC [MR. RUIZ]: As I've indicated, Judge, there is --  
2 there are two red markings on the document that I provided to  
3 you to highlight specific paragraphs.

4 MJ [Col COHEN]: I see those.

5 LDC [MR. RUIZ]: And the only thing I have to say about  
6 that is they directly rebut specific testimony by the  
7 commander, that he gave, and I ask the commission to consider  
8 this camp's rules directly on the credibility of the camp  
9 commander and on any weight that you would give to his  
10 declaration and the assessment that he makes ----

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

12 LDC [MR. RUIZ]: ---- in his version. To the extent that  
13 he does not know his own rules, Judge, I submit that you  
14 should give little to no weight to any declaration that was  
15 drafted for him and signed by him.

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

17 LDC [MR. RUIZ]: So at this time, I tender this exhibit  
18 into evidence, Judge, 530MMM (MAH).

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

20 LDC [MR. RUIZ]: Sir, did you accept it? I wasn't sure.

21 MJ [Col COHEN]: Yeah, it's accepted.

22 LDC [MR. RUIZ]: Okay. Thank you.

23 MJ [Col COHEN]: Thank you.

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1           Government, what -- that will not be a public posting  
2 until you let me know whether or not it's classified.

3           TC [MR. RYAN]: Yes, sir.

4           MJ [Col COHEN]: All right then. We'll just start off  
5 with -- as part of the 639 discussion today, let me just kind  
6 of give -- catch the public up on the framework without going  
7 into substance. We had significant -- substantial argument  
8 yesterday on -- with respect to some classified issues that  
9 might impact the scheduling order here, discovery, et cetera.  
10 I am, at this point, acutely aware of what those issues are  
11 and I have a deep understanding of -- of the significance of  
12 those matters and how they might impact the ability of the  
13 defense teams to -- to prepare -- prepare for trial.

14           The parties are welcome to argue as much as they  
15 want, but please do so with the understanding that I do  
16 understand what we discussed yesterday in the 639 discussion  
17 in a closed session. Therefore, this afternoon -- this  
18 morning, what I'd like -- briefly like to talk about is I'll  
19 give -- we'll start off with an open-session discussion of the  
20 AAA motion to suppress and kind of where we are as a status,  
21 now that the parties have had an opportunity to think about  
22 that overnight. Whether you've conferred or not, I don't  
23 know, I guess I'll find out, because that will drive some

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1 discussion as to what we do in September. And then I will  
2 then have the government kind of make a summary of -- of 639  
3 as to what your -- your preference is for -- for scheduling,  
4 and then I will have some specific questions for everyone as  
5 we go throughout -- throughout this morning.

6 Mr. Connell.

7 LDC [MR. CONNELL]: Sir, does the military commission have  
8 AE 628L, the government's notice -- witness notice in front of  
9 it?

10 MJ [Col COHEN]: I can have it. One second. I have it  
11 now.

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

13 MJ [Col COHEN]: Thank you.

14 LDC [MR. CONNELL]: So if -- if I understand the  
15 commission's instructions, here's what I'd like to do. I'd  
16 like to lay out what our basic position is with tweaks from --  
17 from the conversation yesterday and then I'll yield the podium  
18 or answer any questions that you want.

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

20 LDC [MR. CONNELL]: Okay. So I have to caveat this at the  
21 beginning that the positions in AE 039 [sic] are joint among  
22 the defense teams and that everyone vetted those and agreed to  
23 those. The tweaks that I'm going to propose I can only speak

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1 only for myself.

2 MJ [Col COHEN]: I understand. And in particular, this  
3 only addresses your motion to suppress.

4 LDC [MR. CONNELL]: That's right.

5 So the first part of -- of what I propose is that  
6 AE 628L, which I just brought to the military commission's  
7 attention, lists 16 government witnesses. These include some  
8 witnesses that are not directly or completely about  
9 Mr. al Baluchi, which was the -- sort of the distinction  
10 between 16 and 18, the military commission mentioned at the  
11 last hearing. It was 18 between defense and prosecution. Now  
12 it's 16 for prosecution and there are some -- some agreed  
13 defense witnesses on top of that, although there's also  
14 significant overlap.

15 So here's my proposal, sir. In -- AE 628 is not the  
16 only evidentiary motion which is pending before this military  
17 commission. The 502 motion challenging personal jurisdiction  
18 has been around for more than two years now and  
19 Mr. al Baluchi, since the beginning, has been claiming -- has  
20 been explaining that in our view it's ripe, and the -- when we  
21 should start calling witnesses on it.

22 At the last hearing the government explained that it  
23 considers the testimony of its witnesses on -- at the time it

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1 was talking about witnesses, about suppression to be  
2 co-extensive with the witnesses on personal jurisdiction,  
3 because the government believes, in the government's theory,  
4 corroboration of the statements in -- of the statements  
5 themselves has a reliability function under 948r, and that's  
6 the same evidence that they would introduce to prove personal  
7 jurisdiction over Mr. al Baluchi and others.

8           So what my proposal is, is that we start that  
9 evidentiary hearing in September. And the government has  
10 witnessed 16 -- has noticed 16 witnesses, as I mentioned. And  
11 essentially, in my view, all of those are appropriate to call  
12 and really on the -- on the personal jurisdiction motion, as  
13 opposed to calling them on the suppression motion, per se.  
14 But the government has explained that it considers them to be  
15 the same witnesses and the same evidence.

16           So whether mentally it is the 628 or mentally it is  
17 502 is really of no, you know, significant consequence, but  
18 legally the difference is that it would allow us to sequence  
19 the discovery leading to the motion to suppress in a proper  
20 way at the same time as honoring the considerations the  
21 military commission put forward yesterday about, number one,  
22 moving forward with evidentiary presentations, which have a  
23 variety of benefits, including a foundation that the

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1 government used -- can use if it later chooses that it just --  
2 in argument on the motion to suppress, it just says, look,  
3 we've already heard from these witnesses. We've asked all the  
4 questions we wanted to ask. You knew what was coming and --  
5 sorry, I'll slow down. You know, it seems to me they would  
6 just rely on that.

7           At the same time, if -- the military commission  
8 mentioned yesterday that if a new document is produced in  
9 a rolling discovery or is compelled that bears on the witness  
10 of a particular -- the testimony of a particular witness,  
11 there are ways to address that. If it's something very  
12 significant, we might call them back. If it's not that  
13 significant, we might do a deposition to cover that specific  
14 point. There might be a stipulation that could cover it, or  
15 something else.

16           So I can say for myself -- and I speak for no one  
17 else -- that given the universe of discovery that we have  
18 right now, my questions for these witnesses will be  
19 essentially -- with one exception, will be the same now as  
20 they -- as it would be after the evidence that I -- the  
21 further discovery that I anticipate receiving from the -- from  
22 the government. There could be a bombshell, you know,  
23 something out of the blue. But barring that, with one

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1 exception, it's all the same.

2           So what my proposal is, is that, yes, let's go with  
3 the -- we have a three-week, nice, long hearing in September.  
4 Let's start calling the -- let the government call its  
5 witnesses, and it -- it wants to call them for multiple  
6 purposes; makes perfect sense to me. That was its plan that  
7 it articulated in the June hearing -- excuse me, in the --  
8 yeah, in the -- in the June hearing, and -- and that's what we  
9 should do.

10           So the only -- the only difference between what the  
11 government proposed on this and what I proposed is what is the  
12 nature of the primary motion which is under consideration.  
13 But in practical terms, I doubt that makes much difference.

14           MJ [Col COHEN]: Right. I think I had mentioned in the  
15 802, so just to -- I guess I'll further augment the 802 based  
16 on what you just said is one of the guideposts I gave the  
17 parties is a witness' testimony may be relevant to more than  
18 one issue ----

19           LDC [MR. CONNELL]: Sure.

20           MJ [Col COHEN]: ---- and so -- but the idea is you need  
21 the testimony.

22           And so what you're telling me here is, is that you're  
23 ready to start testimony in September. Your primary purpose

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1 may be to address to personal jurisdiction, but you recognize  
2 that, from the government's standpoint, while that is an  
3 issue, their primary purpose for the exact same witness may be  
4 the motion to suppress or suppressive -- suppression evidence.  
5 Either way, the scope of the testimony would likely be  
6 relevant to -- to both issues, given what the assertions of  
7 the government are.

8 LDC [MR. CONNELL]: That's precisely right, sir.

9 MJ [Col COHEN]: Okay.

10 LDC [MR. CONNELL]: There are two sort of caveats that I  
11 want to give there.

12 The first one is that there is one witness on -- on  
13 the government's witness list who does not fall into that  
14 category, and that is Witness #4, Special Agent Stephen  
15 Gaudin. And that is because Special Agent Stephen Gaudin's  
16 testimony related -- excuse me, discovery specifically related  
17 to Mr. Gaudin is at issue in the 538 series, which -- I know  
18 that the military commission ruled on the government's 505  
19 substitutions. That was the document -- the three-page  
20 document that we discussed in the classified session  
21 yesterday. And so Special Agent Gaudin, in my view, is a  
22 carve-out from that.

23 Like we need to resolve 538. The military commission

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1 is either going to order additional discovery or it's not  
2 going to order additional discovery. If it does, it will  
3 significantly affect the scope of the examination of Special  
4 Agent Gaudin. But for the rest of them I don't -- I don't see  
5 any delta between the -- the discovery we expect.

6           The second caveat or nuance that I want to give with  
7 respect to that is that I would ask the military commission  
8 not to decide 586 and 641 yet. I know that the -- the  
9 government in 628L, footnote 2, suggests that they must be  
10 ruled upon before the suppression hearings. And in -- in my  
11 main argument I'm going to discuss at some greater length why  
12 I think that is not -- that it would be better for the  
13 military commission to hear some argument on the very closely  
14 related issues to those two ex parte pleadings before making a  
15 decision on it.

16           And so those are the two sort of carve-outs that I  
17 have. But otherwise our position is we are ready to go  
18 forward in September on the -- in the scope that you  
19 articulated, sir.

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

22           Mr. Trivett, are you the one that should be heard on  
23 this? Or if not, someone else is welcome to do so.

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1 MTC [MR. TRIVETT]: Good morning, sir.

2 MJ [Col COHEN]: Good morning.

3 MTC [MR. TRIVETT]: I'm only going to address the motion  
4 to suppress aspect and would ask of you ----

5 MJ [Col COHEN]: That's fine.

6 TC [MR. RYAN]: ---- that Mr. Ryan be able to do the rest  
7 of 639.

8 MJ [Col COHEN]: Absolutely.

9 MTC [MR. TRIVETT]: So we are in agreement with  
10 Mr. Connell that we should begin to take witness testimony in  
11 the September hearings. We would just ask for some  
12 specificity from the commission on exactly what week we're  
13 going to start.

14 We would prefer to start on that Monday taking  
15 testimony from Special Agent Fitzgerald. But if for some  
16 reason the commission believes that it needs the first week to  
17 conduct other litigation, then we would just want to know.  
18 And it's just so we can subpoena certain people; that we can  
19 make the U.S. Government employees and their -- at their  
20 current jobs fully aware of when we need them so they can  
21 schedule accordingly.

22 MJ [Col COHEN]: Let me just ask you this question.

23 I'm -- I'm not opposed to starting with testimony that Monday.

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1 We talked -- let me raise up a 505 question for you guys,  
2 is -- is when can we whittle down what are going to be the  
3 stoplights for -- for classified testimony? Because I think  
4 we need to -- I think we need to decide that before we  
5 start -- before we put the witness on the stand.

6           So what's the plan for -- so, in other words, do we  
7 need that first week to also work through that issue and have  
8 a proper 505(h) hearing that's -- I mean, with the level of  
9 specificity to say, okay, what factors do you know that are  
10 currently classified that you specifically want to ask this  
11 witness on the stand or that will -- that will -- that will  
12 address these matter so that I can issue a ruling as to -- as  
13 to either, yep, I agree that's something they should be able  
14 to go to, and that gives you an opportunity to do a summary  
15 and substitution option. Because that's the reality of how  
16 this is going to work.

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

18           MJ [Col COHEN]: I mean, that's what 505 -- even if CIPA  
19 was directly applicable, that's exactly how this would work.

20           So do we need that week to do that, or is that  
21 something that we can get done beforehand? Because I'm  
22 willing to do that as well, but I just need to know -- because  
23 that would impact me as to what day we start taking the

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1 testimony.

2 MTC [MR. TRIVETT]: Sure. So we've been rethinking a bit  
3 our 505(h) practice. In many ways, there will be 505(g)  
4 notice given that we don't object to, and yet we still have to  
5 have a hearing, and then you need to make your determinations  
6 in writing. I don't know that the hearing would be necessary  
7 if we make clear, because we're the protector of the  
8 classified information, that we don't object to the use of  
9 that in -- providing the 505(g) notice is sufficient.

10 Now, we have worked with Mr. Connell and we've had  
11 conversations on -- they do realize they need to give 505(g)  
12 notice for their witnesses. I would anticipate that those  
13 notices come at some point prior, and it might be appropriate  
14 for you to set a date for those. We can also have a 505(h)  
15 hearing prior to coming down at all. There is precedent for  
16 that. Judge Parrella did that on at least one occasion up in  
17 the United States.

18 MJ [Col COHEN]: And I'm not opposed to that idea either.

19 MTC [MR. TRIVETT]: So we can discuss the left and right  
20 limits of that. If for some reason the commission doesn't  
21 schedule it in advance of the hearing, I wouldn't anticipate  
22 that we would need an entire week to do it. We have a  
23 discrete number of witnesses.

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1           And I can tell the commission right now based on  
2 the -- our witness list went up primarily because 641 is not  
3 yet ruled on, and we put our -- we want to give ourselves as  
4 much flexibility as possible for chain of custody witnesses  
5 relating to 641 materials.

6           Based on the commission's comments and how he's  
7 handled so far the litigation and that hearsay is certainly  
8 admissible, and hearsay is admissible in suppression hearings  
9 specifically and found in federal court, that we may not have  
10 to call a lot of those chain of custody witnesses for this  
11 purpose.

12           We would still anticipate calling many of them at  
13 trial to lay a further foundation. But to the extent that  
14 hearsay is appropriate, the number may go down, and we may  
15 focus more just on substantive witnesses.

16           MJ [Col COHEN]: So ----

17           MTC [MR. TRIVETT]: So I wanted to give everyone an  
18 awareness of that.

19           MJ [Col COHEN]: With respect to Mr. Connell asking the  
20 commission to hold off on -- on the 586 and 641 for now, how  
21 do you feel about that?

22           MTC [MR. TRIVETT]: I believe we need -- we need the  
23 protection set requested in 641 prior to the suppression

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1 motion. I mean, Mr. Connell's arguing a little bit in the  
2 blind because it's an ex parte request.

3 MJ [Col COHEN]: Would you be willing to -- to provide any  
4 proposed protective orders so that they could -- that can be  
5 reviewed in advance to see whether or not we're there?

6 MTC [MR. TRIVETT]: We would not do that. Based on past  
7 practice, we don't want to -- quite frankly, our opinion of  
8 how the first protective orders went when it was a -- when it  
9 was more of an adversarial process than is envisioned under  
10 505 with the ex parte requirements and privileges that we have  
11 in order to protect the national security information at -- at  
12 issue, we would continue to want that to be done in  
13 ex parte ----

14 MJ [Col COHEN]: Okay.

15 MTC [MR. TRIVETT]: ---- based on past practice.

16 MJ [Col COHEN]: I understand.

17 MTC [MR. TRIVETT]: I did want to put all parties on  
18 notice, we already did in our written filing on this. We  
19 envision -- we envision the testimony of the individuals who  
20 took the statements to be very similar to how Special Agent  
21 Perkins testified in December 2017 for Mr. Hawsawi's  
22 jurisdictional hearing. Whereas at the beginning, they lay  
23 out a lot of the documents, where they have obtained the

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1 documents, when they obtained the documents, and we believe  
2 that those documents ultimately do establish certain aspects  
3 of each of the five's AUEB status, the alien unlawful enemy  
4 belligerent status. For purposes of suppression, they all are  
5 corroborative and help show the reliability of the statements.

6           So we would be doing that in anticipation both of a  
7 suppression motion and a jurisdictional challenge. We don't  
8 have active jurisdictional challenges from Mr. Mohammad,  
9 Mr. Bin'Attash, or Mr. Binalshibh. We're about to have active  
10 suppression motions for all five following your August, I  
11 believe, 15th deadline.

12           So we would envision it and anticipate the testimony  
13 being similar in structure to how Special Agent Perkins  
14 testified and that we would rely primarily -- there may be a  
15 few loose ends we have to clean up when we do get a  
16 jurisdictional challenge from those individuals, if we do, but  
17 that primarily this would be a hearing that could kill two  
18 birds with one stone.

19           It can address all matters related to suppression; it  
20 can address nearly all matters related to jurisdiction, at  
21 least for purposes of the government's presentation; and I  
22 know it will also hopefully give you more findings of fact to  
23 make your determination on whether or not to reconsider

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1 Judge Parrella's reconsideration of Judge Pohl's suppression  
2 order. So that's how we envision it going. I wanted to put  
3 everyone on notice of that.

4           We -- we would like certainty on when we start, even  
5 if it's -- it doesn't have to be on a day, but it could just  
6 be on a block of time, like you envision it the first week,  
7 you envision it the second week, and then the witnesses we  
8 intend to get through, we gave our estimations. They might be  
9 wildly optimistic. They might be more broad than necessary.  
10 We won't know until the defense, obviously, ask the questions  
11 that they're going to ask.

12           But I think it is important that if we identify  
13 exactly which witnesses are going to testify, how you envision  
14 it happening in September, that puts the other defense teams  
15 on notice, because there are certain aspects of it that aren't  
16 -- isn't relevant to just Mr. Ali but is relevant to all five,  
17 and we don't want to have to call them five additional times.

18           MJ [Col COHEN]: I understand.

19           MTC [MR. TRIVETT]: So subject to your -- any additional  
20 questions you have, sir.

21           MJ [Col COHEN]: Is there a particular -- for example, the  
22 one last issue that was raised by Mr. Connell, that is -- if I  
23 was inclined to -- to ask the -- the government to move

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1 Mr. Gaudin to -- towards the end of the list while -- while I  
2 continue to look at this issue, would that cause you any  
3 problems?

4 MTC [MR. TRIVETT]: No, sir. I'm glad you brought that  
5 up. I should have mentioned that.

6 So your requirement that we file a witness list, we  
7 took as a witnesses for all five suppression motions ----

8 MJ [Col COHEN]: Right.

9 MTC [MR. TRIVETT]: ---- not just Mr. Ali. And we have no  
10 intention of calling Mr. Gaudin for purposes of Mr. Ali's  
11 suppression motion. He is primarily envisioned by the  
12 government as a witness against Mr. Bin'Attash and for his  
13 suppression motion because he's the main agent who took the  
14 four different statements that he took from Mr. Bin'Attash.

15 So we would never envision Mr. -- or Special Agent --  
16 he just retired, Retired Special Agent Gaudin testifying in  
17 September, and we don't envision every one of those witnesses  
18 that we listed to be relevant to Mr. Ali.

19 MJ [Col COHEN]: And then just to clarify, my -- my  
20 understanding of -- of the scope that you -- that I believe  
21 you referenced, the government is -- is of the position  
22 that -- or of the preference that the scope be -- be enough  
23 that the -- the witness would have to -- to testify for

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1 motions practices as few times as possible; is that correct?

2 MTC [MR. TRIVETT]: Oh, absolutely, sir.

3 MJ [Col COHEN]: Okay.

4 MTC [MR. TRIVETT]: Absolutely. Although, I think all of  
5 it is arguably relevant to suppression anyway ----

6 MJ [Col COHEN]: Right.

7 MTC [MR. TRIVETT]: ---- which we have an active  
8 suppression motion for. It will also help support later  
9 jurisdictional challenges. And so the ordering -- the  
10 ordering may seem a little out of order for a pure suppression  
11 motion, but it's still all corroborative of the statements.

12 MJ [Col COHEN]: Right.

13 MTC [MR. TRIVETT]: It's an important part for us to  
14 establish the independent source from which the witnesses had  
15 information about the accused prior to their captures. That's  
16 an important aspect of our legal argument as to why, even if  
17 they did have any access to any statements that may have been  
18 made, they had an independent reason to want to ask questions  
19 about it primarily from documents.

20 Four of the five suppression motions are going to be  
21 primarily geared toward information the FBI gathered and  
22 already had in their possession while all five accused were  
23 still fugitives of justice. So that's an important part of

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1 our process. That's why we envisioned laying out in advance  
2 everything that they had and then what they took into the  
3 interviews and then the interviews that they had and the --  
4 and the answers that the accused ultimately gave to those  
5 statements.

6 So that's why it's all relevant to suppression. The  
7 order in theory, if it were just a suppression motion, might  
8 be what did he say and how do we corroborate it, but I want to  
9 focus first on the independent source that they had and how  
10 they developed the questions that they -- they did.

11 MJ [Col COHEN]: Copy. All right. Thank you. I -- I  
12 will -- Mr. Connell, you and Mr. Trivett, you make sense.  
13 I -- I think I'm going to allow you guys to start presenting  
14 evidence on -- on those two particular issues and if it's --  
15 if the testimony is relevant to other matters moving forward,  
16 you can always reference back to testimony in -- in support of  
17 those motions.

18 We will begin testimony on those issues where in  
19 particular you, Mr. Connell, have filed motions, and those are  
20 in support of those motions ----

21 LDC [MR. CONNELL]: Sir, can I ----

22 MJ [Col COHEN]: ---- or that the government needs to  
23 produce evidence to -- to, like, for example, your suppression

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1 motion. So it -- you are right. Whether your primary focus  
2 is one motion or the other, it's relevant to both, let's start  
3 taking the testimony.

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

5 MJ [Col COHEN]: Thank you.

6 LDC [MR. CONNELL]: Can I address just a few of the other  
7 points?

8 MJ [Col COHEN]: Most definitely.

9 LDC [MR. CONNELL]: Sir, I respect the government's needs  
10 for dates certain; it has witnesses who are traveling,  
11 et cetera, makes perfect sense to me. I would expect the same  
12 if I were arranging for witnesses.

13 If I correctly read your docketing order, the  
14 September hearing is the hearing on which we will travel on  
15 Sunday; is that correct, sir?

16 MJ [Col COHEN]: No. I was expecting we would travel on  
17 that Saturday.

18 LDC [MR. CONNELL]: Oh. Very good. All right. Well then  
19 that makes the next question ----

20 MJ [Col COHEN]: Yeah. I believe it will be the, when we  
21 come back the end of October, November ----

22 LDC [MR. CONNELL]: Right.

23 MJ [Col COHEN]: ---- that's one? That's the one I would

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1 need to travel on a Saturday. I have a pre-existing case that  
2 doesn't quite reach this level, but has had multiple and  
3 thousands of pages of discovery as well. I need to conclude  
4 that -- that case, and if it was to run late by a day, that  
5 would cause problems for my travel, so ----

6 LDC [MR. CONNELL]: Got it, sir. That makes sense.

7 So my suggestion is -- so I -- I do think the idea --  
8 I mean, we will see. But I think the idea that we're going to  
9 get through all the witnesses -- and depending what all the  
10 witnesses are, because I understand the government has choices  
11 to make there, it might be optimistic.

12 But here's what I want to say: It does make sense to  
13 me to give the government a date certain of 16 September to  
14 have two solid weeks to present evidence, because we do have a  
15 substantial number of other motions. And just sort of  
16 thinking of -- of pacing, this week we had eight motions on  
17 the docket and it's been a full five days of litigation.

18 634, the -- excuse me, 643, the convening authority  
19 issue, which is quite significant, is out there. 645 and 645A  
20 are out there and will be ready and those relate to the XYM  
21 discovery that we're going to be discussing in a lot of other  
22 contexts too. The 538, 561, is a substantial argument.

23 So there's a lot of other things to do that -- to

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1 move the case forward in its other aspects too ----

2 MJ [Col COHEN]: I understand.

3 LDC [MR. CONNELL]: ---- so that's my suggestion, for what  
4 that's worth.

5 The government -- so the military commission posed a  
6 hypothetical about 6 -- about 586 and -- and 641. And I'll  
7 just go ahead and address parts of that now, this -- that one  
8 piece, since you asked about that one piece, which is the --  
9 and the government's argument was past practice says that you  
10 shouldn't do that.

11 Well, the -- in many ways, that kind of depends on  
12 exactly what relief the government is seeking in those two  
13 motions. And, of course, I've never seen them. I have from  
14 the military commission's and the prosecution comments this  
15 week been able to piece together that 586 is probably Raid  
16 substituted evidentiary foundation of some kind and 641 is  
17 probably XYM substituted evidentiary of some kind.

18 And that's radically different from ordinary 701(f)  
19 substitutions, because that is where the government in an  
20 ex parte process can go and take away defenses. And I'm going  
21 to -- I have case law on this which I'm going to address in  
22 the main argument. But I did -- on this past practice  
23 argument the government makes, the -- there have been two

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1 occasions where the military commission -- the government has  
2 approached the military commission ex parte and asked it to  
3 take away a defense.

4           The first one of those was in -- or the second one,  
5 I'll start with, was in the 574 series, and the -- that was  
6 conducted wholly ex parte, came out of the blue. We had no  
7 idea that it was coming, and it just descended upon us, barred  
8 us from doing a bunch of things that we thought -- that we, in  
9 fact, were actively doing and thought we were allowed to do.  
10 That one did go completely ex parte.

11           In the 524 series, however, I would like to -- to  
12 address the military commission's attention to AE 524R, and  
13 that is a situation where the government -- although it had  
14 been adversarially litigated up to that point, as it did in  
15 some other series, the government went ex parte in the middle  
16 of the adversarial litigation and proposed a protective order  
17 to the military commission. And the military commission in  
18 524R ordered the government to provide just the proposed  
19 protective order to the defense so that we could provide our  
20 comments on it, not their ex parte declarations, not whatever  
21 other justifications they had made, not their motion; but the  
22 order itself, since it was going to bind the defense, the  
23 military commission considered it appropriate to let the --

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1 the defense have comment on it.

2           And I suggest that that was, in fact, fruitful. We  
3 were at least able to articulate our positions, and those  
4 positions were, to some extent, taken into account in the  
5 final Protective Order #4, which came out after the government  
6 gave its proposed order.

7           So I think there is past practice for that particular  
8 idea of just providing us the protective order, and -- and as  
9 I'm going to discuss later, it's really important in this  
10 situation, which I'll tell you about.

11           The last thing that I want to make is, of course, the  
12 government is the arbiter of what witness it calls, but I will  
13 go ahead and say here on the record that if the government  
14 elects to present testimony that does not relate specifically  
15 to Mr. al Baluchi, we will not be making a relevancy  
16 objection. Like I understand their call the witness once  
17 pre-trial idea, and we will not make a relevancy  
18 objection ----

19           MJ [Col COHEN]: Okay.

20           LDC [MR. CONNELL]: ---- with the understanding that, of  
21 course, any -- any counsel whose ox is gored would have the  
22 opportunity to examine.

23           MJ [Col COHEN]: I understand. Thank you, sir.

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1 LDC [MR. CONNELL]: Thank you.

2 LDC [MR. RUIZ]: Judge, may I be heard?

3 MJ [Col COHEN]: Mr. Ruiz.

4 LDC [MR. RUIZ]: Judge, just a couple of observations,  
5 perhaps points for discussion, maybe clarification from my  
6 perspective. And that last point from Mr. Connell kind of  
7 dovetails into the issue I wanted to clarify.

8 Is it -- is it your intention, if testimony is taken  
9 in September on Mr. Connell's motion to suppress, that  
10 Mr. al Hawsawi -- that our team would be required to  
11 cross-examine those witnesses? Is that -- is that what the  
12 commission envisions if -- if, in fact, suppression-related  
13 testimony is taken in September? Which I thought I heard you  
14 say let's go ahead and start with the testimony. So I took  
15 that to mean you made a decision that there is going to be  
16 testimony on the suppression issue.

17 So then my question is -- and that also, obviously,  
18 implicates 524MMM. That sounds an awful lot like a ruling to  
19 me. If we are going to begin making -- taking testimony, and  
20 that's, in fact, what you articulated, then that sounds a lot  
21 like a denial.

22 But the question I have is: If that happens, is it  
23 your expectation that Mr. al Hawsawi's team will then engage

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1 in the examination of these witnesses?

2 MJ [Col COHEN]: I hadn't actually ruled on that, and I  
3 don't think that that -- that the taking of the testimony -- I  
4 mean, for example, Mr. Connell wants testimony that -- the  
5 same witnesses for -- for a completely unrelated issue to --  
6 to suppression. So I don't think I have to necessarily rule  
7 on that one issue to call the same witnesses to address  
8 this -- this other motion. They -- if the two parties -- they  
9 both have their own reasons why they want to call them, but  
10 they're still the same witnesses, so ----

11 LDC [MR. RUIZ]: I understand that the 502 issue was  
12 raised, and so from my perspective, the way I viewed  
13 approaching that is if the scope is defined as 502, I don't  
14 really see that I have a dog in that fight, and so I -- I  
15 obviously wouldn't engage in any cross-examination.

16 If, however, the scope is defined as a  
17 suppression-type scope, then my question remains, is -- and,  
18 of course, factor into that Mr. Trivett's comment,  
19 Mr. Trivett's comment about we are about to have five active  
20 motions to suppress. I want to -- I want to be very clear  
21 with the commission about what our current position is.

22 MJ [Col COHEN]: Well, I completely understand what your  
23 position is.

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1 LDC [MR. RUIZ]: Sure.

2 MJ [Col COHEN]: I've seen it in writing.

3 LDC [MR. RUIZ]: Yes. So August 19th is the date you've  
4 provided; that has been helpful to us to continue to try to  
5 make progress to perfect the motion that we want to file. But  
6 come that date, we have to make a determination whether we  
7 have a motion to suppress that is ethical and is zealous and  
8 is appropriate to file.

9 In other words, I'm not going to be put in a position  
10 that Mr. Connell finds himself in where he's filed a motion to  
11 suppress. He's -- he's expended an inordinate amount of time  
12 in writing that motion, in putting that together, and then  
13 things keep rolling in, information keeps rolling in, or  
14 incidents of my defense are not ready to -- to do that.

15 So I wanted to -- I wanted to just make sure that --  
16 make -- based on the comments that were made, not only you,  
17 but the government is on notice that the issue of filing a  
18 motion to suppress by September for us is not a -- has not  
19 been predetermined. We still have to analyze where we are.  
20 That also dovetails into the ex parte piece that we have  
21 submitted for your consideration in the overall scheduling  
22 issue.

23 So it could -- there could be a situation where, if

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1 we come to that date and determine it's just not in  
2 Mr. al Hawsawi's best interest in this capital case to file  
3 this motion in the current state of preparedness for us, it  
4 could be a situation where, come September, we have not filed  
5 a motion to suppress, yet the scope of the testimony involves  
6 suppression issues.

7           You've -- you've heard the government articulate at  
8 least a preference for a one-time shot on the stand and one  
9 shot only. But we would potentially be in a position where  
10 we've not filed a motion to suppress -- it's nonexistent --  
11 but yet there's an expectation potentially -- and that's why  
12 I'm asking -- that we go ahead and question witnesses on an  
13 issue we have not yet put, for Mr. al Hawsawi, before the  
14 commission.

15           So that's -- as that issue about taking of testimony  
16 was being raised, I was in my head trying to work out exactly  
17 where the commission stands on that, where -- what the  
18 prosecution's position is as well. So is the prosecution's  
19 position, Judge: We're going to call them, one-shot deal, and  
20 that's the opportunity all defense will have? Or is the  
21 prosecution's position that if there are parties -- myself, I  
22 know Ms. Bormann has not filed her motion; I don't speak for  
23 her -- that have not done so, that those witnesses will be

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1 recalled when we file the appropriate motion on behalf of  
2 Mr. al Hawsawi? So those are questions that I have.

3 MJ [Col COHEN]: Well, irrespective of what the  
4 government's position is, ultimately, I have to rule. I mean,  
5 that's -- that's the bottom line. I mean, they can take  
6 whatever position they want. If there's -- if there's a valid  
7 reason to recall a witness, then I make a ruling. And they  
8 either recall the witness or -- or I address the matter for a  
9 failure to comply with a court order. It's the same that if I  
10 ordered you all to file motions to suppress -- I'm not saying  
11 I will -- or any other motion, then either you comply with the  
12 court order or there's good cause for not doing so.

13 I mean, at the end of the day the parties can have  
14 their preferences. Then I have to make a ruling on -- on  
15 addressing those particular preferences. So, sure, I mean, I  
16 understand that the government wants to only call the witness  
17 one time. I mean, I get that. It's also one of the reasons  
18 why I talked about it is, is -- you know, I'm not going to  
19 rule on these proffers right now because it involves  
20 outstanding motions before -- before me.

21 LDC [MR. RUIZ]: Sure.

22 MJ [Col COHEN]: But I will say this: I mean, one thing  
23 for you all to consider is, is I made it very clear yesterday

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1 that one thing I was considering doing is -- is, you know,  
2 really from a -- from a defense standpoint, especially the way  
3 that I -- that I explained it last night, is, is you just have  
4 to sit there and say the statement was involuntary. The  
5 burden then shifts to them, period.

6 LDC [MR. RUIZ]: I understand some parties have taken that  
7 approach, Judge.

8 MJ [Col COHEN]: Well, I mean, that's the law. I mean,  
9 you just have to make the claim and then the burden shifts to  
10 them to prove by a preponderance of the evidence that it was a  
11 voluntary -- that it was a voluntary statement.

12 And if I go with my thoughts that I shared with you  
13 last night, that then once all evidence on any -- on the  
14 matter has been presented, there will be final briefings that  
15 incorporate all of the evidence.

16 I'll be honest with you. To -- I don't see how it's  
17 feasible to -- if we're going to have substantial testimony,  
18 some by -- by the very directors or the -- the creators of --  
19 of this particular RDI program, that that wouldn't be facts  
20 that -- that both sides would want to incorporate into this  
21 particular issue.

22 And so to deprive the parties the opportunity then to  
23 address those facts that have come out in a -- in a final

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1 supplemental brief, doesn't seem that that would be beneficial  
2 to me at all. And so at the end of the day, the motion kicks  
3 off -- kicks off the -- kicks off the issue, but it's not --  
4 that first motion is not the final word on -- on this if I --  
5 if I'm inclined to do the process the way that I -- that I've  
6 mentioned.

7 LDC [MR. RUIZ]: And I'm cognizant and I made note of your  
8 comments in -- in earlier proceedings of your desire and your  
9 understanding to -- that each defendant stands on their own  
10 and that we have individualized justice as well. So I'm  
11 cognizant of that.

12 MJ [Col COHEN]: Right.

13 LDC [MR. RUIZ]: But I'm also always in search for more  
14 clarity to -- to aid my own analysis because the -- the  
15 opportunity to question a witness is something that has to  
16 factor into that. So that's why I'm trying to be ----

17 MJ [Col COHEN]: Right. So I would ----

18 Right now, the -- the -- the order stands, a date of  
19 19 August has been provided. That is the current order of the  
20 court. Whether that gets modified or not, to be determined,  
21 and I'm not going to make that decision right this second.

22 LDC [MR. RUIZ]: And I'm not ----

23 MJ [Col COHEN]: But I will say this: For witnesses on

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1 the stand -- because I addressed this earlier and I mentioned  
2 in the 802 summary as well is -- I mean, even as the -- even  
3 as the commission not having nearly as much evidence as you  
4 all do and I have the right to ask questions of the witnesses.  
5 I mean, I'm already able to formulate certain questions I have  
6 of witnesses when they come up here.

7 LDC [MR. RUIZ]: It's not a matter of ----

8 MJ [Col COHEN]: You know, so, so ----

9 LDC [MR. RUIZ]: ---- I could do it right now, Judge,  
10 and ----

11 MJ [Col COHEN]: Right, right. That's my point. I mean,  
12 so the issue then becomes is, if there are -- in a  
13 hypothetical situation, even if you were to initially question  
14 and then some reason -- some other factor comes up that you're  
15 like, wow, I didn't really -- if I would have known this, I --  
16 you know, in fact, that changes by virtue of testimony of  
17 witnesses. Hold on a second. This witness said this. Well,  
18 I wasn't anticipating that. Now I need to verify that fact  
19 with this other witness. That happens in litigation all the  
20 time.

21 So then the question becomes is, is do you need to  
22 recall the witness? Mr. Connell -- like I said, I'm primarily  
23 addressing his -- his motion, but even he recognizes that,

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1 yes, so I may need to either do it by stipulation or an  
2 affidavit or a deposition, or perhaps the best way of handling  
3 this is recalling the witness entirely.

4 That's just the -- that's the way this process is --  
5 it's going to work. But it's no different than any other --  
6 any other trial with respect to how witness testimony leads to  
7 new issues, potentially new discovery, all -- all these other  
8 kinds of stuff. That's why it's a motion practice right now.

9 LDC [MR. RUIZ]: I will -- respectfully, Judge, in -- in  
10 co-accused trials that I've been involved in, we all tend to  
11 have one starting line. And I know that's what we're trying  
12 to get to. This is highly unusual, that we may be in a  
13 position to question witnesses on motions that are not filed.  
14 So in that regard, I would -- I would gently push back and say  
15 it's not like any other case.

16 MJ [Col COHEN]: Well, right now there is a date certain  
17 for everyone's motion to be filed.

18 LDC [MR. RUIZ]: Sure. Right. Understood. Understood.  
19 And like I said, we will cross that bridge if we want to get  
20 to it. But then I wanted to make sure that I at least  
21 discussed that with you at this point and got any clarity that  
22 it was possible in terms of ----

23 MJ [Col COHEN]: I can't give you any more clarity than

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1 right now there's a standing date for motions to suppress to  
2 be filed.

3 LDC [MR. RUIZ]: Well, in terms of the -- I guess I can  
4 seek it after the August 19th depending on where we are on  
5 that.

6 MJ [Col COHEN]: That's correct.

7 LDC [MR. RUIZ]: My main concern now is access to  
8 witnesses. And I'll discuss that in more detail when we talk  
9 about the full scheduling issue.

10 MJ [Col COHEN]: That's fine.

11 LDC [MR. RUIZ]: I don't think that impacts it because the  
12 issue you raised in terms of formulating questions, and you  
13 can do so on the bench right now. I understand that. But I  
14 take this obligation very seriously when a man's life is at  
15 issue, and I don't ----

16 MJ [Col COHEN]: And so I.

17 LDC [MR. RUIZ]: ---- do things off the hip. And so that  
18 is why -- I didn't mean to imply that you didn't, Judge, but,  
19 I mean, I'm trying to articulate for you why I may not be so  
20 inclined to proceed on the motion that I've not yet filed.  
21 The formulation of questions for witnesses who are  
22 specialists, who have specialized background, training, and  
23 experience also involves having the access to experts that may

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1 inform my development of that examination. And -- I've  
2 provided to you very specific information on that issue.

3 MJ [Col COHEN]: Yes.

4 LDC [MR. RUIZ]: So it's not as simple as to say that I  
5 can just formulate questions.

6 MJ [Col COHEN]: No. And, Counsel, other than the 19th of  
7 August, that's all I can tell you right now.

8 LDC [MR. RUIZ]: Okay. Thank you, Judge.

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

10 Mr. Nevin? Yes.

11 LDC [MR. NEVIN]: And I ask, just because our motion -- I  
12 asked to be heard just because our motion presents a slightly  
13 different wrinkle on this question.

14 In 524LLL, Judge Parrella directed that motions to  
15 suppress be filed on the grounds of voluntariness. We took  
16 him at his word -- or took the order at its word and filed a  
17 motion solely limited to voluntariness. And we were very  
18 careful to exclude other grounds for suppression which might  
19 be there, because we read him to be saying: My solution to  
20 resolving 524, the restrictions on investigation of -- of  
21 torture program witnesses is going to be -- this is how I'm  
22 going to resolve that issue. I'm going to -- I'm going to see  
23 how you guys do on voluntariness, but just on voluntariness.

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1 I'm not going to deal with outrageous government conduct. I'm  
2 not going to deal with Miranda. I'm not going to deal with a  
3 variety of other subjects. Just going to deal with  
4 voluntariness.

5 And so that's how we filed our motion. And we did  
6 exactly what the military commission just said. We filed, I  
7 guess what you would call a bare-bones motion that just says,  
8 it wasn't voluntary, and that shifts the burden to the  
9 government to disprove that.

10 And we did also ask you for an extension -- or asked  
11 the military commission for an extension of time within which  
12 to identify witnesses. And that has now -- that's now been  
13 scheduled. But our motion has a different -- our motion to  
14 suppress has a different scope. I -- I believe it's correct  
15 that Mr. Connell's -- that -- that the al Baluchi team's  
16 motion to suppress is -- I don't know if you would call it  
17 global, but it's broader in scope than -- than our motion was  
18 and is.

19 So this question of what these witnesses are going to  
20 be testifying about is important to us for a slightly  
21 different reason. And I want to bring that to your attention,  
22 and I ----

23 MJ [Col COHEN]: So here's the way I would envision your

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1 motion, Mr. Nevin. I will -- I look at the four corners of  
2 your motion and I say this is -- this is -- this is their  
3 basis and I have read -- and I understand why you took the  
4 position that you did based on the ruling of -- of  
5 Judge Parrella. I understand -- I see the language in the  
6 ruling that -- that you've relied on.

7           Obviously, with respect to what -- to that base  
8 issue, you'd be able to ask the person questions. But I think  
9 it's also consistent with what I've heard from Mr. Connell  
10 and -- and Mr. Trivett this morning is, everyone understands  
11 that -- that for example, outrageous government conduct, if --  
12 if this particular witness, Agent X testifies -- and there's  
13 no one in the witness list called Agent X. This is just for  
14 lack of a better word.

15           If Agent X testifies -- if you wanted to use that  
16 opportunity to -- to gain some additional facts that you might  
17 be able to use for -- for something else, I don't think I'm  
18 going to hear an objection that it's beyond the scope of the  
19 limited motion that you've found.

20           So this also provides essentially a way for you to  
21 get evidence that you may later use with respect to -- to  
22 other motions. And I'm going to give you -- I'm -- under the  
23 circumstances, I'm going to give the government and the -- and

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1 the defense, for those who have filed motions to which the  
2 testimony is relevant, greater leeway, because I understand  
3 that you don't always have complete access to these witnesses,  
4 some of them. You know, we'll see. Maybe you do. I don't  
5 know. But to the extent that you don't, you will -- you will  
6 while they're on the stand. And so I'm going to give you some  
7 leeway.

8           And so -- but you're right. Your motion addresses a  
9 specific issue, and that's the issue that I will -- that I  
10 will rule on with respect to your motion. And I'm not going  
11 to issue a ruling right now that that precludes you from --  
12 from any errors -- if that ----

13           LDC [MR. NEVIN]: I ----

14           MJ [Col COHEN]: ---- from filing any other types of  
15 motions to suppress.

16           LDC [MR. NEVIN]: Right.

17           MJ [Col COHEN]: That's not an issue that's before me. It  
18 has not been briefed. It has not been argued, and it would be  
19 inappropriate for me to sua sponte issue a ruling. I want --  
20 the parties will be heard on anything like that. Right now, I  
21 have your motion as -- is voluntariness, but if you choose to  
22 use the opportunity to -- to get -- gain additional  
23 information that may relate to another matter, you certainly

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1 will be allowed to do so.

2 LDC [MR. NEVIN]: And thank you, Your Honor. And just so  
3 we're clear, our position is that discovery is not complete;  
4 that we don't have all the discovery we need to -- to do this  
5 examination. I'd use the example of Miranda just as a -- just  
6 as a way of talking about the problem.

7 MJ [Col COHEN]: Right.

8 LDC [MR. NEVIN]: Miranda is fairly simple, at least  
9 potentially a fairly simple issue: "Did you give a Miranda  
10 warning?"

11 MJ [Col COHEN]: Correct.

12 LDC [MR. NEVIN]: "No, I didn't."

13 And then after that -- you know, so that's a fairly  
14 simple issue. But some of the other issues -- and outrageous  
15 government conduct is one of them -- is much more fact  
16 intensive, and -- and our position is that we haven't -- we  
17 don't have adequate discovery yet to fully address these  
18 issues. And so one -- one reason that this becomes important  
19 is that, while we have the opportunity to examine, we may not  
20 be in a -- in a good position to actually do it.

21 MJ [Col COHEN]: I understand.

22 LDC [MR. NEVIN]: It's certainly a ----

23 MJ [Col COHEN]: Well, and I also understand that the

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1 outrageous government conduct could also come in the form of a  
2 motion to dismiss ----

3 LDC [MR. NEVIN]: Right.

4 MJ [Col COHEN]: ---- as opposed to, necessarily, a motion  
5 to suppress.

6 So the idea here is not to preclude any issues. It's  
7 to address the issues that are -- that are before the court.  
8 And unless I have a motion that would somehow argue that you  
9 should be precluded from areas -- but you're right. But there  
10 may be facts that you could glean from a witness -- and I  
11 don't -- I'm just saying -- and if you chose to do that at  
12 that point, to build a -- a basis for filing a -- a different  
13 type of motion, that's fine.

14 LDC [MR. NEVIN]: Okay. And I -- I appreciate your having  
15 read our motion and understanding its scope, but you will have  
16 seen also -- I imagine that there was some debate in the  
17 government's response and in our reply. The government was  
18 taking the position that this is your one chance to talk to  
19 this witness on every subject that relates to this. There  
20 won't be another -- there will be no more witnesses and so on.

21 And I heard the military commission say ----

22 MJ [Col COHEN]: For me to make a decision prior to ever  
23 hearing testimony or hearing a good-cause argument from a

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1 party to -- to rule on that would be inappropriate for me as  
2 the commission.

3 LDC [MR. NEVIN]: All right. Then -- then ----

4 MJ [Col COHEN]: There always are -- there can always be  
5 motions for exceptions based on good cause.

6 LDC [MR. NEVIN]: Then the second issue is, is just to  
7 remind the military commission that -- that we asked for  
8 the -- the ability to examine the witnesses on personal  
9 jurisdiction in the 502 series. A number of witnesses were  
10 called. We asked for permission to examine them at the time,  
11 and that was denied.

12 And -- because Judge Pohl had been clear: You're not  
13 part of this. You declined joinder, so I'm not going to let  
14 you cross-examine the witnesses. And we were not allowed to;  
15 we did not, in fact, cross-examine them. And then at the end  
16 of the day the ruling in 502 was applied to us, and we filed a  
17 motion to reconsider on that question. But that's -- that's  
18 part of our sensitivity to this.

19 MJ [Col COHEN]: No, I understand, sir. I mean, from my  
20 perspective -- is you have a motion in front of me. I  
21 understand what -- what -- what the basis of your -- of  
22 your -- this current motion to suppress that is before me is.  
23 I will allow you to answer -- obviously to ask questions of

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1 any witness in addition to supplementing the witness list.

2 I mean, just because Mr. Connell wants, you know, X  
3 number of witnesses, that does not mean that you want the  
4 exact same witnesses.

5 LDC [MR. NEVIN]: Right.

6 MJ [Col COHEN]: I mean, this going to be a process.

7 LDC [MR. NEVIN]: Right.

8 MJ [Col COHEN]: I am not going to ever rule in advance of  
9 having facts before me and actual motions that would preclude  
10 you from defending your client in any way.

11 LDC [MR. NEVIN]: And finally, I just point out that there  
12 is a motion for a Kastigar hearing pending. And to the extent  
13 that some of these witnesses are going to be giving testimony  
14 that addresses connection to torture or cruel, inhuman, and  
15 degrading treatment, not only with respect to these defendants  
16 but also with respect to other witnesses, which is an issue, I  
17 think it would be useful to know whether or not Kastigar is in  
18 play when these witnesses testify.

19 MJ [Col COHEN]: Yeah, the way I understand -- and I'm  
20 going to hold -- I -- the way I understand the government is  
21 that clearly their preference is to call these witnesses as  
22 few times as possible.

23 LDC [MR. NEVIN]: Right.

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1 MJ [Col COHEN]: So, therefore, to the extent that you  
2 have a pending motion to which you believe that -- that they  
3 could -- they could testify to, if you will simply just  
4 indicate that this is now -- that I'm -- this -- this evidence  
5 is relevant to this motion, I will give you leave of court --  
6 leave of the commission, excuse me, to -- to go into -- into  
7 these areas. It just makes sense.

8 I do that routinely as a matter of judicial economy,  
9 in -- in trial by courts-martial. I just ask that the parties  
10 indicate, okay, now we need to go into this because this is  
11 related to a pending motion. Or, even if you don't highlight  
12 it for me, if later in a briefing you'll simply indicate that  
13 this portion of the testimony is relevant to this, that --  
14 that will be sufficient as well.

15 LDC [MR. NEVIN]: Thank you, Your Honor.

16 MJ [Col COHEN]: Absolutely. Like I said, I'm sure I'll  
17 hear more comments with respect to 639.

18 LDC [MS. BORMANN]: Judge?

19 MJ [Col COHEN]: Yes, ma'am, Ms. Bormann.

20 LDC [MS. BORMANN]: I'm really confused because the  
21 conversation now has turned to issues writ large, and I  
22 thought that this began as a discussion of Mr. al Baluchi's  
23 motion to suppress.

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1 MJ [Col COHEN]: That is correct.

2 LDC [MS. BORMANN]: Okay. So I have comments on 639 and a  
3 trial scheduling order and where we are with all of that.

4 MJ [Col COHEN]: And I haven't even gotten to that one  
5 yet.

6 LDC [MS. BORMANN]: Okay. That's what I thought.

7 MJ [Col COHEN]: Now, we started with what we're doing in  
8 September. All right. Here's what I would like ----

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

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

11 LDC [MR. HARRINGTON]: I think I'm more confused than  
12 Ms. Bormann is, Judge, and I'm not sure that my comments now  
13 apply to this or apply to later arguments about 639. But I  
14 want to -- I want to make a couple of comments, Judge.

15 We have not known you that long, but I can tell you  
16 this, that every one of us looks at you as a serious, logical,  
17 and orderly person and judge, and you are really trying hard  
18 to come into this chaos and make some sense out of it. I'm  
19 not just talking about the whole case; I'm talking about  
20 the -- the things that we're talking right now.

21 But I have to say, Judge, I've been a lawyer for 50  
22 years. I've got a lot of scars on my back. And I don't  
23 believe what you're saying. Now, lawyers don't say that in

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1 military courts; I understand that. In civilian courts, we  
2 say those kind of things all the time. It's not personal.

3 But when I hear you say ----

4 MJ [Col COHEN]: Believe what?

5 LDC [MR. HARRINGTON]: I knew that was the moment, Judge.

6 When you say, "The witnesses up here. If you want to  
7 explore some things, I'm going to give you an opportunity,"  
8 here's what I -- what I hear: "You're not getting that  
9 witness back."

10 I know you say you can bring them back. I know you  
11 say that.

12 MJ [Col COHEN]: Well, I can promise you I -- I have no  
13 problem saying that. That is -- that is not a decision I'm  
14 making right this second.

15 LDC [MR. HARRINGTON]: But ----

16 MJ [Col COHEN]: It is absolutely the opposite of what you  
17 just said.

18 LDC [MR. HARRINGTON]: Okay.

19 MJ [Col COHEN]: I just -- in fact, I could not have made  
20 it more clear. It would be inappropriate for me to prejudge  
21 any potential motion to compel a witness.

22 LDC [MR. HARRINGTON]: I ----

23 MJ [Col COHEN]: That's what I'm telling you. All I'm

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1 saying is I will give you leeway to address these issues, and  
2 then you will determine whether or not -- for example, I'm  
3 also addressing this issue of -- of perhaps there may be --  
4 there may be a bombshell discovery based on a motion to compel  
5 that you're like, holy cow, had I known that this witness  
6 could -- you know, could have testified about this, I would  
7 have wanted to recall this witness.

8           There's a very good possibility -- I don't have the  
9 motion in front of me, but for you all then to make a motion  
10 to compel the witness be produced for additional testimony,  
11 and you present that as good cause, why would I not consider  
12 that?

13           LDC [MR. HARRINGTON]: No, Judge. There's where the  
14 rubber hits the road, is what is good cause? Now -- can I  
15 finish?

16           MJ [Col COHEN]: You may.

17           LDC [MR. HARRINGTON]: Because the witness testifies. We  
18 ask him questions for a half an hour about a particular  
19 subject, and we file a motion later on the subject that we  
20 questioned the witness about, and we realize we have three  
21 questions to ask that witness -- that's all -- and we want to  
22 bring them back. I know from experience the difficulties, the  
23 hurdles it's going to be.

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1           The prosecution is going to say, "You had him up  
2 there. You asked all your questions. You can make your  
3 argument." We know they're going to say that. And that's --  
4 that's their role. That's what they do.

5           And you are going to be saying that you're going to  
6 have to make that decision, is there good cause? As opposed  
7 to had we filed a motion and had the witness up there and  
8 known what we know, we wouldn't have to bring them back.  
9 That's -- that's all I'm saying.

10           When I say I don't believe you, it's not a personal  
11 attack on you. I'm trying to tell you what my experience has  
12 been and what I think in reality is -- is likely -- likely to  
13 happen with -- with that process.

14           MJ [Col COHEN]: Well, I can tell you what my experience  
15 is. The defense has to have the right to have a fair trial.  
16 So does the government. I am keenly aware of that. I will  
17 never make any decision which I believe tilts this case in  
18 favor of the government in any way, nor will I make any  
19 decision that tilts this case in favor of the  
20 prosecution [sic].

21           I also am keenly aware of the issues we discussed  
22 yesterday with respect to ongoing -- ongoing discovery and  
23 everything else. That's why I -- I caveated this -- you are

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1 correct in that I am trying to put order to a process that I  
2 did not create. And I understand your concerns. And it is  
3 possible that nothing I say even at this moment will alleviate  
4 your concerns, other than your client has to have a fair  
5 trial. I want your client to have a fair trial. I want you  
6 to have access to every bit of, piece of evidence that the --  
7 that the law requires you to have. I want you to have a  
8 meaningful opportunity for cross-examination. I want you to  
9 have an opportunity to -- to present your case in accordance  
10 with the law. And I have no doubt that you -- that you are --  
11 that you will be able to do so.

12 I am already envisioning that there will be  
13 circumstances where, for whatever reason, whether it's your  
14 team or Mr. Connell's team or Mr. Nevin's team, that there may  
15 be something that comes up, even by -- by virtue of testimony  
16 of another witness that may make it necessary to recall a  
17 witness. I'm -- I expect that that may be the case. Or it  
18 may be the case that you all decide, based on your own  
19 tactical decisions or strategic decisions that you make as  
20 counsel, is I really just need a deposition, Your Honor.  
21 Because I don't really need to recall him here to GTMO, but I  
22 just need access to this information, these questions, so I'm  
23 asking for a deposition. Or, I need an affidavit. I've

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1 drafted an affidavit. This is what I believe the facts are,  
2 if the witness is willing to sign the affidavit.

3 I'm not going to dictate how you do it, but I can  
4 tell you right now, I am willing to recall witnesses to bring  
5 out substantive evidence that is relevant to whatever issue  
6 is -- is being there. Absolutely. And when I say "good  
7 cause," it is a term of art. I mean, that -- that -- but I'm  
8 also under the circumstances -- you know, I -- I'm not going  
9 to take a very strict view of good cause.

10 I mean, if you sit there and say, Your Honor, I would  
11 have asked the following five questions if I would have known  
12 this information; and I might be like, yeah, I can see why you  
13 would have asked those five questions. Absolutely. So then  
14 how are we going to get that information? And then whether  
15 it's recalling the witness, whether you want to do a  
16 deposition, you want to do an affidavit, you want to do  
17 written interrogatories, my job is to make sure you get access  
18 to that information and I -- you have my word, both sides have  
19 my word, that I will -- that I will make sure that this  
20 process is fair. Thank you.

21 LDC [MR. HARRINGTON]: Judge, and one question. It hasn't  
22 been addressed. Is the hearing in September going to  
23 address -- you indicated the other day Judge Parrella said I'm

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1 reserving on Judge Pohl's decision in 524LL because I need a  
2 fuller record. You said the same thing. You said -- I  
3 believe you said you believe that there needs to be a more  
4 developed finding of fact which is -- is the way that you like  
5 to decide a case.

6           So we still have this reconsideration motion of --  
7 for -- that Judge Parrella has decided. Is September supposed  
8 to deal with that with -- or not?

9           MJ [Col COHEN]: I will -- any pending motion that you  
10 believe that witness testimony is relevant for I'm willing to  
11 hear. So yes. And let me give you a little bit further  
12 guidance on that, to the extent that -- that anyone is  
13 uncertain.

14           Judge Pohl did not suppress the statements based on  
15 involuntariness.

16           LDC [MR. HARRINGTON]: Right, right. Yes.

17           MJ [Col COHEN]: He applied a remedy based on the fact  
18 that he believed that the protective orders in place precluded  
19 the parties from having the same opportunity to gather  
20 evidence on -- on this matter than they otherwise would have  
21 had.

22           I think that goes beyond just the statement. So that  
23 was just the remedy he imposed. That is not the only remedy

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1 that's out there. I also read Judge Parrella's to say that  
2 the -- the maximum punishment in this case was always  
3 potential -- was also potentially back out there as a remedy,  
4 that no one has really argued.

5 Judge Pohl just made a decision that he thought,  
6 okay, this -- this will put everyone in, and I'm not going to  
7 address the issue of whether capital punishment should be on  
8 the table or not. This is what I believe is a remedy.

9 If Judge Parrella's stands, then maybe the statements  
10 aren't suppressed, but he didn't address the issue of -- about  
11 but maybe there still is this -- the process isn't completely  
12 fair and that everyone is not on the same page, so maybe there  
13 still need to be remedies that are out there.

14 So I would say as long as those motions are pending  
15 that, yeah, if these witnesses have relevant evidence that's  
16 relevant to what remedy should -- should still be imposed with  
17 respect to the limitations that the protective orders have  
18 placed on the defense's ability to -- to gather evidence in  
19 this case, I -- that seems like a relevant line of  
20 questioning, you know, for them. And I would have no problem  
21 letting the parties ask those questions.

22 At the end of the day, I suspect that as I gather  
23 more facts that I will ask for supplemental briefs based on

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1 the facts along a multitude of issues. And so conceivably,  
2 for example, I could say the government has proven by a  
3 preponderance of the evidence that these were voluntary  
4 statements. But based on the protective orders that were in  
5 place, et cetera, da, da, da, da, da, I believe that the  
6 proper remedy in this case, nonetheless, is to preclude the  
7 government from using those statements based on the -- the --  
8 the limitations that have been placed on the defense in  
9 presenting their case.

10 In other words, there needs to be some -- there needs  
11 to be some equalizing of access to -- to evidence in those  
12 kinds of things. This is just a hypothetical.

13 In addition, I could also sit there and say is, is  
14 look, this really goes with their ability to access  
15 information with respect to sentencing more than -- than these  
16 particular statements. And so, therefore, because they are  
17 precluded from having access to -- you know, to the sentencing  
18 evidence that they needed in -- in this case, perhaps I need  
19 to re-look at what -- what the maximum punishment is that  
20 should be authorized.

21 All of those are hypotheticals. But they are ways in  
22 which testimony could be related to multiple different issues  
23 that are currently pending before the commission in which I

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1 would be happy to let you guys ask questions along those  
2 lines.

3           And in which just because you went on one doesn't  
4 mean you -- that I don't also still need to address that  
5 issue. I still believe that the issue that was ultimately  
6 addressed by Judge Pohl needs to be addressed. The government  
7 asked for reconsideration of the remedy that was imposed. So  
8 even if I was -- so I still believe that that's an issue that  
9 I need to address. So what is the proper remedy? The more  
10 facts I have, the better I can assess what remedy, if any,  
11 should be -- should be imposed based on that matter.

12           And so I believe that is a -- that would be -- to the  
13 extent that any -- any witness called in September or even  
14 moving forward, any witness, to the extent it addresses --  
15 addresses multiple issues, you will always have leave -- both  
16 sides will have leave of the commission to address these  
17 issues to building the record for -- for these matters.

18           LDC [MR. HARRINGTON]: I have other comments, Judge, but  
19 we can address them later.

20           MJ [Col COHEN]: Thank you.

21           LDC [MR. HARRINGTON]: Thank you.

22           MJ [Col COHEN]: And I did not take it as a personal  
23 attack, Mr. Harrington.

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1           We're going to be in a ten-minute recess.

2 [The R.M.C. 803 session recessed at 1032, 26 July 2019.]

3 [The R.M.C. 803 session was called to order at 1054,  
4 26 July 2019.]

5           MJ [Col COHEN]: The commission is called to order. The  
6 parties are present.

7           To move into 639, I'll just put on the record again,  
8 so that it's very clear to -- to everyone, to include the  
9 public: I do not prejudge anything. That includes witness  
10 requests, motions, et cetera. Every -- every item presented  
11 before the commission is validated on its merits. It would be  
12 improper for me to prejudge anything. I will remain impartial  
13 throughout, and -- and making sure that all the parties get a  
14 fair trial is the most important thing to me, period. All  
15 right.

16           Mr. Ryan, I believe you were going to address 639.

17           TC [MR. RYAN]: Good morning, sir.

18           MJ [Col COHEN]: Good morning.

19           TC [MR. RYAN]: Your Honor, first -- first order of  
20 business, and to take us out of the world of complex legal  
21 subjects, is I'd like to note the presence today of various  
22 family members who have traveled with us to be here this week  
23 for this session of the military commission. They've come

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1 far, as we all have, and they're here to represent some of the  
2 lost of the 9/11 community. They're here representing, among  
3 those lost, Fire Marshal Ronald Bucca; Police Officer John  
4 D'Allara; Detective Joseph Vigiano of the New York Police  
5 Department; his brother, Firefighter John Vigiano, Fire  
6 Captain William F. Burke; and Ms. Karlie Rogers. We welcome  
7 them and are grateful for their presence.

8           Your Honor, in June, you looked out at us and said we  
9 are going to set a scheduling order. You noted, sir, that you  
10 were new to this case, but you said to us that you were not  
11 new when it comes to knowing how you get a trial to get to  
12 trial. You also told the prosecution in no uncertain terms,  
13 which we took very much to heart, that deadlines must be set  
14 and must be honored and that you intended to hold people  
15 accountable in this courtroom.

16           My friend and partner, Mr. Trivett, smiled and said,  
17 "Oh, Judge, we've been begging for that for years." And we  
18 have, sir, because as the old saying goes, a goal without a  
19 deadline is nothing but a wish. And we have, sir, because for  
20 too many years we heard -- have heard far too often, "You  
21 don't even have a trial date," which we have found translates  
22 roughly to, "We'll get to you when we get to you," among the  
23 many, many players that are necessary to help us get down to

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1 this island and, most importantly, get to trial. And we have  
2 found that with each year that went by, faith in us eroded  
3 further.

4           Your Honor, you, as the military judge, can change  
5 this path that we've been on that seems to have been of, by  
6 and for continuing litigation. It's been seven years. You,  
7 sir, can change that simply by picking dates because dates  
8 drive will and dates drive action. Dates energize and  
9 mobilize. I ask you, sir, on behalf of the United States to  
10 adopt the prosecution's proposed schedule in 639A.

11           Now, Your Honor, because you will hear and have heard  
12 many objections about any trial date, and if -- if there is  
13 a -- not an objection to a trial date, certainly to the  
14 prosecution's proposed trial date, I would like to address  
15 some of, I think, the big issues that have been at the  
16 forefront and of concern to the commission in the past.

17           The first one, no surprise here, being discovery.  
18 And specifically, RDI discovery. We are in the final chapter,  
19 sir, of that massive project that has been going on now for  
20 years. I won't cover the whole long history, but I do want to  
21 hit on some of the more salient points that Your Honor should  
22 take into account and the small bit, I think, of institutional  
23 knowledge you should know.

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1           Certainly, this much is true: RDI discovery has  
2 probably taken up more court time and more pleading space than  
3 any other issue in this case. Certainly far more than the  
4 events that bring us here in the first place; that is, what  
5 happened to American 11 and United 175 and American 77 and  
6 United 93 on September 11th of 2001.

7           You've heard lots of complaints about RDI discovery,  
8 and I imagine you're going to hear more. What you haven't had  
9 the benefit of, or maybe it's the curse of, is having had to  
10 have sat through and gone through and suffered through every  
11 little bit of that discovery over the past several years.  
12 That's in some ways a benefit to you because of the massive  
13 amount of it, but in some ways puts you at something of a  
14 disadvantage because now, as you come in very late in the game  
15 as to that project, you will miss out, unless you seek it out,  
16 a full understanding of exactly what the government has done,  
17 all of the government's efforts, and everything that has been  
18 provided to the defense through the years.

19           That is important in a legal sense to some  
20 significant degree, Judge, just because it impacts on issues  
21 of cumulativeness and so on. And in classified litigation, of  
22 course, cumulativeness is an important consideration.

23           I'll note this for you, sir: As is known in 505, you

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1 are authorized to require the prosecution to have a conference  
2 in an ex parte fashion to explain various aspects of their 505  
3 process. Both Judge Pohl and Judge Parrella took advantage of  
4 that option.

5           Now, we have, sir, summarized our efforts in the RDI  
6 world in a few different places, and I'll refer you to -- to  
7 them to the extent that you wish to go back and look. First  
8 would be AE 542, an ex parte pleading that was filed back when  
9 Judge Pohl was here. Second, 639A, so our Attachment B to the  
10 motion before Your Honor right now, which is the chief  
11 prosecutor's oral summary that he made to Judge Parrella  
12 several months ago, again summarizing the road traveled in --  
13 specifically in this area.

14           And, finally, Judge, we have summarized our efforts  
15 back in 478CC, which was government -- the government's notice  
16 regarding RDI discovery, and it was filed on 1 June 2018. In  
17 478CC, with great satisfaction we announced at the time that  
18 we were in compliance with 701 and AE 397F, which is generally  
19 referred to as the judge's order -- Judge Pohl's order at the  
20 time -- in which he had put in place the ten-paragraph  
21 construct. The ten-paragraph construct was described  
22 previously in the -- before Your Honor as the widest  
23 classified discovery order ever issued, and we believe that to

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1 be the case.

2           At the time -- I'll just take a moment to note,  
3 Judge, at the time of 397 being put in place, we were well  
4 down the road of what we believed to be a sufficient model of  
5 discovery regarding the RDI program that was compliant with  
6 701 and existing law. Judge Pohl in the Nashiri case entered  
7 this -- or constructed these ten paragraphs, understanding  
8 that the same judge was overseeing our case. We adopted it at  
9 the time, but it placed enormous new burdens and challenges  
10 before us.

11           But at the time of 478CC, so just over a year ago, we  
12 were confident that we had closed the book on RDI discovery,  
13 that we had accepted Judge Pohl's challenge in the ten  
14 paragraphs, and mobilized enormous resources, met the  
15 challenge, and satisfied our obligations. Understanding, of  
16 course, that we always have an obligation to be on the lookout  
17 for any material information out there that would benefit the  
18 defense and also with the intention of performing quality  
19 control efforts.

20           So that's back just over a year ago. Three things  
21 came into effect that changed our belief and changed our  
22 practice at that time. Number one, the military judge issued  
23 his order in 524, which we already made reference to today,

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1 suppressing FBI statements because our RDI discovery lacked  
2 what he called rich and vivid detail, words that do not exist  
3 in the ten paragraphs. They don't exist in Brady v. Maryland  
4 or 701, and so on.

5           Now, we practiced in front of Judge Pohl for six  
6 years or so and hold him in the highest of regard. He served  
7 with great honor. But at that moment when we were basically  
8 suffering suppression without there being a suppression  
9 motion, based on our discovery practice, we felt like  
10 something of a bait and switch had occurred. We did our job.  
11 We met the ten paragraphs, and somehow Judge Pohl had  
12 decided -- again, with all due respect to him -- that it just  
13 wasn't enough, as is entirely within his province.

14           So that happened. Some of our most significant  
15 evidence was suppressed and we felt like we hadn't even gotten  
16 up to bat. Number one.

17           Number two, the second thing that happened was the  
18 filing in -- sometime before that, January of 2018, of 538C,  
19 and that was referred to this morning as well. In 538C, the  
20 defense, specifically the accused Ali, put forth the theory of  
21 suppression that the FBI and the CIA had engaged -- and other  
22 factions possibly of the United States Government had  
23 essentially engaged in what's been described as one long

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1 interrogation.

2           Now, that came into effect -- or it was put forth  
3 before the commission. And the initial reaction, I think, at  
4 least from my side of the room, was it probably -- it wouldn't  
5 matter because we were ultimately focused on the issue of  
6 voluntariness, as Your Honor has already mentioned that this  
7 morning; that is, when an accused gives a statement, then  
8 pursuant to the Rules of Military Commission, when he gives  
9 such a statement, if he is acting in a voluntary fashion,  
10 that's, in our view, the end of the story, at least as to that  
11 specific issue.

12           However, after the pleadings, after a long oral  
13 argument and recognizing other issues come into play as to  
14 other evidence and derivations and things like that, we  
15 made -- we came to the conclusion that the prudent move on the  
16 prosecution's part was to agree to the discovery. So we did  
17 not insist on a ruling from Judge Pohl; we volunteered that we  
18 would, in fact, provide discovery.

19           That set us on a path as well of new searches. And I  
20 would refer Your Honor, if you so wish, to 538K and 538M,  
21 which are government prosecution filings in which we describe  
22 the discovery that we had determined was material and relevant  
23 and that we had, in fact, provided. And I'll even note, sir,

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1 that it included going out and taking statements from FBI  
2 agents and essentially creating discovery which, under the  
3 law, we were not typically -- we are not typically required at  
4 all to do. So that was number two, 538C.

5           Number three was in May 2018. A discovery request  
6 was received from team Mohammad that was based upon the  
7 testimony that had occurred in Congress. Upon reading that  
8 and upon some reflection, we determined that we -- it was,  
9 again, the prudent thing to do to satisfy that as well.

10           So that means, sir, that for the past year, this book  
11 we thought we had closed was opened again. New searches took  
12 place, and it was no longer based just on satisfying that  
13 ten-paragraph construct of Judge Pohl, which, again, we  
14 thought was an extremely broad discovery order. Now we went  
15 looking in different places as well. That process has been  
16 ongoing, and that's much of what you've been hearing about in  
17 the form of complaints from the defense as to these items they  
18 are receiving.

19           As an example, though, of, you know, how much effort  
20 we put into this, you haven't even met Mr. Groharing yet --  
21 he's one of the trial counsel in this case -- because that's  
22 been his job for literally a few years now, of just overseeing  
23 this process.

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1           But I will say that of the hundreds of man-hours that  
2 have happened over the last year as a result of these three  
3 things and the -- and the reopening of the discovery process  
4 as to RDI, that we have been turning over, we are turning  
5 over, and we will still turn over, to some extent, more  
6 discovery in the RDI world. We are in the final stages now.

7           After consultation with all of my colleagues on this  
8 and the chief prosecutor, I can say that we will have  
9 everything to the defense or to Your Honor for a 505  
10 proceeding by 1 September.

11           I have been assured that the -- that the total amount  
12 of pages -- not documents, but pages that will be going to the  
13 defense between now and 1 September as a result of these final  
14 stages of this project will be about 200 pages. And that's,  
15 again, either direct to the defense or through Your Honor, a  
16 total thereof.

17           In regard to discovery as a whole, sir -- I make that  
18 report, Judge, as to this very important part of the case.  
19 But in regard to discovery as a whole, we fully expect you to  
20 establish deadlines and hold us accountable. We recognize our  
21 discovery obligations and will continue to meet -- and will  
22 continue to honor them and meet your deadlines.

23           Another big area, Judge, it is discovery, but it's

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1 not RDI, and it is significant to the case that I wish to  
2 report to Your Honor as well, is what's known as medical  
3 evidence and/or medical records. This is, again, an area of  
4 significant litigation in the past.

5           The most germane order that's in existence by the  
6 military commission is 523J. In that, Judge Pohl found that  
7 the government's position in regard -- at the time the  
8 position we were taking in regard to medical records and  
9 medical evidence was -- was unreasonably impeding the defense.  
10 This was entered in August -- excuse me, sir, I misspoke --  
11 entered in August 2018.

12           Judge Pohl further ruled that the government will  
13 provide the defense with the names, military e-mail addresses,  
14 and military telephone numbers for all persons identified by  
15 pseudonym in the accused's medical records that have been  
16 provided in discovery. If the government cannot locate the  
17 identifying information for any of these individuals, it will  
18 notify the commission. Again, we took this on, we took it for  
19 action, and we began a process.

20           Now, this also turned into a very significant heavy  
21 lift, and I want to report it to you, and I want to be very  
22 precise in the way I describe it. In the effort to identify  
23 all persons identified by pseudonym in the accused's medical

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1 records, as articulated in the judge's order, we expended over  
2 800 man-hours of work reviewing medical records, personnel  
3 rosters, directories, and activity logs to the extent that  
4 they exist.

5           Based on the best information currently available,  
6 there are approximately 750 pseudonyms in all of the medical  
7 records for high-value detainees at JTF-GTMO from  
8 September 2006 until the present and which may appear in some  
9 capacity on discovery documents. These medical providers,  
10 that sort of broad phrase, includes physicians, physician's  
11 assistants, specialist doctors, corpsmen, technicians, and  
12 others. However, due to an apparent practice by many of the  
13 individual providers of using a different pseudonym on  
14 different occasions, the true number of distinct medical  
15 providers at issue is likely closer to about 350 to 400. That  
16 is our best assessment at this time.

17           Even before the commission's order in 523J, the  
18 government had made efforts to gather the medical provider  
19 information implicated, but that information was largely  
20 incomplete. Making it tougher, complicating these efforts,  
21 were the turbulence associated with regular turnover of  
22 personnel and what had become a practice of recycling  
23 pseudonyms amongst multiple medical providers usually of the

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1 same position and without any master key or standardized  
2 process as to which pseudonym applied to which person.

3           Due to these facts and the fact that no comprehensive  
4 logs exist of the true identities of medical providers  
5 interacting with the HVDs, the government cannot ascertain a  
6 specific number of medical providers constituting a closed  
7 universe of personnel that used a pseudonym in the accused's  
8 medical records.

9           As such, in accordance with the commission's order,  
10 the prosecution does state that it cannot locate the  
11 identifying information for all pseudonyms that have been  
12 provided and that this information has been provided in a  
13 spreadsheet to the defense, that is, by pseudonym.

14           Despite these significant challenges described above,  
15 though, progress has been made. As of the date of the filing,  
16 the government has identified 179 distinct individuals  
17 connected to pseudonyms appearing in the accused's medical  
18 records as well as their contact information subject to --  
19 subject to the commission's order, again, 523J.

20           Of these, the government has been able to contact or  
21 confirm the identities of 91 individuals with an additional  
22 six who were contacted but requested to confer with a lawyer  
23 or their chain of command before acknowledging even to us

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1 their identities. For any remaining pseudonyms found in the  
2 accused's medical records, the government has been unable to  
3 affirmatively match a true name to an identity -- I'm sorry,  
4 true name and an identity.

5           As part of this labor-intensive investigation -- so  
6 continuing on from what we were able to determine, sir, the --  
7 we did create the list of confirmed true names. The  
8 government then reached out to 146 individuals identified.  
9 Part of this process, just to kind of create some emphasis in  
10 it and some authority was, we included sending a letter from  
11 Admiral Tidd, who was the former commander of U.S. SOUTHCOM,  
12 encouraging the medical provider participation in the effort  
13 to match true names with pseudonyms. This process is ongoing,  
14 but as we go forward, we are updating and letting the parties  
15 know what we can.

16           Continuing on this theme, Judge, we expect to have  
17 all unredacted medical records -- and this was a bit of  
18 litigation that went on for quite a while -- all unredacted  
19 medical records from 2006 through 2007. So the time of the  
20 earliest stay -- from the time of the arrival and the first  
21 year of detention of these individuals here in Guantanamo, to  
22 all the accused, still containing the pseudonyms, but again,  
23 subject to the process I just described, and that will occur

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1 in the next few weeks.

2 That will continue -- so we're not stopping it. It  
3 will continue on a rolling basis right up to the present. But  
4 again, it will be on a rolling basis.

5 Now, as far as what the defense is requesting in this  
6 area, at this point in time we have from the Ali team a  
7 request, approximately ten pages in length with something like  
8 400 lines, regarding pseudonyms, in which they're requesting  
9 that we give the identities for them. And we're working in  
10 that process. We are willing to do that with each of the  
11 five -- with each of the other accused.

12 So to sum up, Judge, on a rolling basis they will  
13 ultimately have -- the accused will ultimately have all  
14 unredacted classified medical records that -- for the  
15 attorneys to view, as well as redacted versions that will be  
16 released to the accused. And at the same time, we will  
17 provide all identifying information that we possibly can  
18 provide pursuant to the judge's order in 523J. It has been a  
19 significant process, but I think we've made some significant  
20 headway as well.

21 I'd like to turn now, Your Honor, to 639C, which is  
22 the defense's proposals in regard to Your Honor's observations  
23 regarding setting of a schedule. Instead of actual deadlines

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1 by which the parties -- oh, I'm sorry. 639C is now I.

2 MJ [Col COHEN]: That is correct.

3 TC [MR. RYAN]: I appreciate counsel reminding me.

4 Instead of ----

5 MJ [Col COHEN]: Actually, I appreciate him reminding all  
6 of us of this.

7 TC [MR. RYAN]: ---- deadlines by which parties can be  
8 held accountable, the defense offers a system of D dates by  
9 which all entities except defense counsel must certify various  
10 matters to the satisfaction of -- while it's not 100 percent  
11 clear, I mean, presumably it includes the military commission,  
12 or should be the military commission, but at the same time, I  
13 have to suspect that the defense will feel they have a vote in  
14 that matter as well.

15 But at the same time, within the certification  
16 process, there is the possibility that the non-dates reset and  
17 we start all over again if the certification does not happen,  
18 or presumably if it was not accepted. For example, D1  
19 converts to a certification requirement. The rules of  
20 discovery, that being established with which the government  
21 has been and we believe remains in compliance, demanding more  
22 than what the prosecution has stated to this commission and  
23 maintains here in the courtroom today, is a dodging, I

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1 suggest, sir, of the essential -- the essential question.  
2 What should be the calendar dates entered as milestones now  
3 that the commission itself, in 631A, has recognized that,  
4 quote -- I'm sorry, recognized that demanding, quote,  
5 100 percent assurance that discovery is complete prior to  
6 advancing on substantive issues is not reasonable and will  
7 prevent and forestall any forward progress.

8           The date the defense calls D2 brings a whole new  
9 player into the trial. It lists seven things the convening  
10 authority should certify have been done or obtained. And only  
11 upon this occurring, and assuming all the other D dates are  
12 met as well, can we come within 60 to 75 days of an actual  
13 trial date.

14           Let me say this, sir: The government does not  
15 disagree that the defense office spaces should be ready for  
16 occupancy, and that housing, transportation, communications,  
17 and other logistical support of the various participants must  
18 be adequate before, during, and after the trial.

19           And I'll make these observations, sir: Our proposed  
20 trial date and our schedule of milestones along the way were  
21 not plucked out of thin air, nor are they a surprise to anyone  
22 within the United States Government who has any interest or  
23 stake in this whole -- in this whole scheme of events that

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1 have to occur for this trial to take place.

2 First, when AE 639A was submitted, the prosecution  
3 had obtained concurrence from the key entities of the  
4 commitment to that date with regard to logistical support.

5 Second, without a trial date set by this commission,  
6 it will be virtually impossible to generate the necessary  
7 commitments and priority across all of the government  
8 components involved, and they are significant, to actually  
9 gain the support required at a given time for the things that  
10 must occur. It is only natural -- it is only human nature,  
11 Judge, because we've seen it so much that the various bill  
12 payers and equity holders, in terms of manpower and resources,  
13 will ultimately go back to the mantra "You don't even have a  
14 trial date. Come back to me when you have one."

15 Third, rather than invent an entirely new approach to  
16 gaining government logistical support for trial, this military  
17 commission, I submit, sir, should employ mechanisms that  
18 military courts use for scheduling on a regular basis, such as  
19 Rule for Military Commission 802 conferences, in which the  
20 players, the convening authority, the prosecution, the  
21 defense, and anyone else necessary for consideration would  
22 report the status of things as it goes along to Your Honor.

23 This could be done in a sort of rolling basis, in a

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1 far more live-time situation and would prevent, Your Honor,  
2 the situation that I'm sure you don't want, that when we come  
3 down on a session at a time, sometimes separated by a month or  
4 two months or so, we suddenly see all sorts of things that  
5 haven't happened that should have happened and Your Honor is  
6 left wondering what's going on? Who's responsible? And why  
7 hasn't this happened?

8           If Your Honor was to hold 802-type conferences, and  
9 it could happen of course in the National Capital Region, you  
10 would be updated on a far more regular basis. And I would  
11 suggest, sir, that the -- the face of the judge looking out at  
12 these players has an impact.

13           MJ [Col COHEN]: I understand that, and so I'll take your  
14 recommendation. I'll ask for any defense counsel to make  
15 comments to kind of address that issue. This case is  
16 different. And as far as the scope of -- of people involved,  
17 but my typical practice currently with trials I get weekly  
18 updates. That wouldn't necessary be what we need do here, but  
19 the idea of everyone having more of an idea of what's going on  
20 definitely makes sense; that the defense should know, for  
21 example, what the convening authority is, where we're at as  
22 far as status, as far as logistics, all those kinds of things.  
23 So I take it is, is -- I am interested, but I will hear from

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1 the parties as to how be we might get more -- a better flow of  
2 information.

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

4 MJ [Col COHEN]: Thank you.

5 TC [MR. RYAN]: The dates D3 and D4 suffer from some of  
6 the same concerns as the other dates. But I'll point out  
7 today, in conjunction with the defense's proposed schedule at  
8 pages 8 through 10 of 639I, build a situation in which the  
9 United States must make disclosures regarding experts and  
10 witnesses well in advance of the defense doing the same.

11 In addition, setting a date, as they propose, eight  
12 months away for the filing of legal motions, we submit, is far  
13 too long. It's been seven years since arraignment. By  
14 definition, legal motions, such as challenges to the MCA or  
15 various rules, should long since have been litigated.

16 Motions for discovery, D1 plus 120 days. We've been  
17 litigating motions to compel discovery since the day we  
18 arrived. We certainly agree there should be a deadline, sir,  
19 but submit that four months away is excessive.

20 Last observation as to 639I: The one thing that is  
21 missing from their proposal and their proposed schedule is  
22 really the only one that matters for purposes of bringing  
23 closure to this entire issue, and that is a trial date.

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1           Throughout the pleadings filed by the defense -- and  
2 I know there are attachments and some separate -- they speak  
3 in almost shotgun terms about the many different other  
4 impediments they believe exist as reasons that Your Honor  
5 can't possibly be thinking too seriously about putting this  
6 case on a path to trial. The examples include hiring issues,  
7 office space, MRIs, evidence inspections, and so on, all of  
8 them we recognize to be significant.

9           But, Your Honor, I submit that such impediments are  
10 all solved as long as there is the sufficient attention, will,  
11 and, ultimately, dollars. That will come with dates and  
12 deadlines, and that, sir, requires real dates, including the  
13 end date of when we will walk in here for trial. I cannot  
14 emphasize enough that we believe this to be the ultimate  
15 important issue in this case that will drive everything  
16 necessary for this case to be tried in a proper fashion.

17           Your Honor, you are the judge now in the military  
18 commission case of the worst crime ever committed against the  
19 people of the United States. This country will not forget  
20 that offense. This country has not put that behind it,  
21 although some may suspect so. This government -- I speak from  
22 complete confidence and with the complete backing of the Chief  
23 Prosecutor, this government will support you and all of us

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1 when it is believed that trial really is going to happen.

2 Dates push us to the head of the line.

3           You have been and will be deluged with the talk from  
4 the parties to my left of the needs, the wants, and the rights  
5 of these five self-avowed enemies of the United States. I  
6 know that because that's where we have been for such a long  
7 period of time.

8           I address you, sir, on behalf of the client who gets  
9 little attention in this matter; that is a nation that was  
10 attacked and its people murdered. Our client, this nation,  
11 deserves a reckoning. The families of 2,976, which include  
12 people who honor us by their presence seated behind the glass,  
13 deserve justice.

14           I ask you, Judge, in the most solemn way I can, with  
15 every bit of persuasive ability I may have, that this is the  
16 time that you set us on a path to the end of this case, to  
17 include the milestones we must reach along the way, and  
18 ultimately to include the trial date itself.

19           Subject to your questions, sir.

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

22           So my staff, in particular -- I won't mention anybody  
23 by name, unless he wants me to. The major sitting here has

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1 helped me overlay dates and the -- the process of -- of the  
2 defense. Which these aren't set dates, but I just want to  
3 talk about a few things here.

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

5 MJ [Col COHEN]: So assuming I can take the government --  
6 one second.

7 Assuming I take the government at its word and that  
8 you will have complied with all obligatory discovery  
9 obligations as of the 1st of September 2019, meaning that  
10 everything under 701, Giglio, Brady, to the extent that they  
11 apply, all of that -- if I was to overlay that start date,  
12 that D1 is complete between the two motions; and then I was to  
13 notionally go through that while we're in the process of  
14 running D1 -- and I understand the argument that 120 days, for  
15 example, is -- is too long, that it should be shortened.  
16 Those are issues I can deal with later.

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

18 MJ [Col COHEN]: But just notionally, if I was to go  
19 through that, then essentially, allowing for an additional  
20 even 60 days at the end of this to -- for the unknown, it  
21 would theoretically get us to trial on -- in February 2020 --  
22 sorry, 2021. So let's talk about how -- how we might shorten  
23 some of these things.

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1           The way I understood your argument is, whether it's  
2 an MRI or access to interpreters who have the proper  
3 clearances, all these kind of things, I do generally agree,  
4 and I -- I doubt that I will -- well, I suspect that  
5 the defense will not necessarily disagree that me imposing  
6 dates on the government to get certain things done will  
7 provide a greater emphasis on -- on the government getting  
8 certain things done. And I'm talking big G, not you as the  
9 trial counsel necessarily. And I -- and I do generally agree  
10 that the dates are -- are important to drive action.

11           So then the question then is, is even if I was to  
12 review most of D2 as logistical and/or administrative matters  
13 that need to be addressed by the convening authority, they can  
14 be going throughout.

15           Now that the DoD owns the clearance process, that  
16 would be one of the -- one of the most important things for me  
17 to kind of know, is this -- okay. So what date can I give  
18 them that's going to be realistic, where they actually have  
19 access, or, for example, they get an expert witness, you know,  
20 approved or an expert consultant; and that way, they can do  
21 that consultation and share the classified information with  
22 that individual, et cetera. Because we all know that there  
23 are varying -- that everyone -- lots of different agencies

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1 need the clearances, now that it's all back with -- now that  
2 it's under the umbrella of DoD to get that done.

3           What kind of fidelity can you give me based, on your  
4 conversations with -- with the government, as to when we can  
5 get that done?

6           TC [MR. RYAN]: As you might expect, Judge, the  
7 conversations with those outside of the trial team with any  
8 faction of the DoD is most advantageous to us when it involves  
9 a man with a star on his shoulder. So if you -- if you don't  
10 mind, sir, let me consult with ----

11           MJ [Col COHEN]: Absolutely.

12           TC [MR. RYAN]: ---- General Martins.

13 [Pause.]

14           MJ [Col COHEN]: Mr. Ryan.

15           TC [MR. RYAN]: The -- a few things that affect your  
16 question, a very valid question, is -- or comment, really.

17           The prosecution thus far has not been aware of who  
18 the experts are, who those types of persons you're concerned  
19 about are, nor the number. So it's difficult for us to commit  
20 any -- any other part of either DoD or the convening  
21 authority's office without that kind of information. It would  
22 help us to know that, so that we could impress upon the  
23 persons with whom we work and with whom -- or who have

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1 significant involvement and possibly authority in this world,  
2 that this is an extremely high priority.

3           And the last thing, Judge, I'm going to ask you in  
4 this regard, as I have about just about everything else, is I  
5 think in the past -- I think it's fair to say that in the past  
6 we have fallen by the wayside at times because we waited for  
7 an event to happen before we did the further schedule. What  
8 my sincere request to you is, sir -- is that you consider that  
9 the end date will drive much of what must happen in the -- in  
10 the middle.

11       MJ [Col COHEN]: And I have. Like I said, in fact, that's  
12 why I've internally ran some numbers ----

13       TC [MR. RYAN]: Yes, sir.

14       MJ [Col COHEN]: ---- overlaying the -- the notional dates  
15 and actions in 639I ----

16       TC [MR. RYAN]: Yes, sir.

17       MJ [Col COHEN]: ---- along with specific dates and really  
18 when you all could -- D1, which you all recognize is really  
19 your responsibilities as the prosecutor, which I think is why  
20 you start off saying, look, we're going to have essentially D1  
21 done on this date.

22       TC [MR. RYAN]: Yes, sir.

23       MJ [Col COHEN]: This is our affirmative date. Because

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1 then D1, even under their guidance then would -- would do  
2 that. So I agree that assigning you a date to have D1 done  
3 is -- is what I'm going to do. What I'd really want to make  
4 sure is that if I say 1 September versus 1 October or  
5 1 November, that you all are prepared. Because while  
6 discovery is always ongoing and I understand -- and that never  
7 changes throughout the trial.

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

9 MJ [Col COHEN]: What I referenced last month and I will  
10 do again today is the trickle has to stop. In other words,  
11 the -- the spigot has to go dry ----

12 TC [MR. RYAN]: Yeah.

13 MJ [Col COHEN]: ---- for them to file motions to compel,  
14 and then for you all to actually assert that, no kidding,  
15 based on the rulings that are -- that are -- that are -- have  
16 been made and our own independent review of the evidence and  
17 obligations under -- under 701, Brady, et cetera, we have  
18 provided everything that is relevant and material to the  
19 preparation of the defense under the law that we believe.

20 And if that is what you're telling me is that  
21 1 September is that date, then it wouldn't surprise me that I  
22 tell you that, fine, that will be the date that you are  
23 required to make that assertion.

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1 TC [MR. RYAN]: Since we have proposed another date in  
2 our -- in our schedule of milestones, could I have one more  
3 moment?

4 MJ [Col COHEN]: You may.

5 [Pause.]

6 TC [MR. RYAN]: The court's indulgence, sir.

7 MJ [Col COHEN]: Yes, Mr. Ryan.

8 Mr. Ryan, as you're looking at that ----

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

10 MJ [Col COHEN]: ---- what I'm asking is not necessarily  
11 to get the exact language of D1, but the general obligations  
12 under 701, Brady, Giglio, anything along those lines.

13 TC [MR. RYAN]: Well, yeah. And one of the things I was  
14 going to say, and I'm not prepared for full remarks to answer  
15 your question, but let me say this much, sir. As far as the  
16 areas of affirmative discovery and the orders that have been  
17 in place, such as the ten-paragraph construct and the other  
18 things that I discussed with you before, we're quite firm on  
19 our statement of -- that it will be done by 1 September. I am  
20 conferring ----

21 MJ [Col COHEN]: So here's what I don't want to have  
22 happen, all right? Let me just -- let me give you an example.  
23 This is what happened this week. If under 701 you released

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1 the information to the defense this week, once you assert on  
2 September -- that should not happen if that area has already  
3 been something that's in litigation and referenced.

4 TC [MR. RYAN]: Sure.

5 MJ [Col COHEN]: So, in other words, there has -- the  
6 spigot has to go dry.

7 TC [MR. RYAN]: The spigot has to ----

8 MJ [Col COHEN]: So that they can then say, okay, we've  
9 gotten everything the government believes is relevant and  
10 material to the preparation of the defense. Now is our  
11 opportunity to say we think there's more they're required to  
12 provide us. Now I'm filing my motion to compel.

13 TC [MR. RYAN]: Understood, sir. The spigot has to go dry  
14 and then there has to be accountability.

15 MJ [Col COHEN]: That's right.

16 TC [MR. RYAN]: I'm recognizing all of that.

17 MJ [Col COHEN]: Okay.

18 TC [MR. RYAN]: I'll state just a couple of things to you.  
19 First, and Your Honor mentioned it just a second ago, in some  
20 areas, for example, discovery regarding specific witnesses,  
21 like Giglio, is an issue that's often not decided until the  
22 witnesses are known for ----

23 MJ [Col COHEN]: And I understand. So to the extent that

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1 that would be -- I just referenced that as a general idea of  
2 discoverable materials. But I understand that if a witness is  
3 never testifying, then Giglio may not -- may or may not -- I  
4 get that part of it. Not that that would be what you would be  
5 asserting.

6           What your requirements are under the law as far as  
7 affirmative discovery is what I would need you to -- to  
8 certify ----

9           TC [MR. RYAN]: Got you.

10          MJ [Col COHEN]: ---- so that then they can say, we  
11 disagree with that, Your Honor. Now here's our motion to  
12 compel them to produce additional information. That is the  
13 date certain. And I'm going to -- and to the certain extent,  
14 I will hear from you as to when you're ready to make that --  
15 that assertion.

16          TC [MR. RYAN]: Yes.

17          MJ [Col COHEN]: Because then I am going to hold you to  
18 that assertion, and a failure to comply with that will be a  
19 violation of the court's order.

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

21          MJ [Col COHEN]: All right.

22          TC [MR. RYAN]: One other carve-out just on this area,  
23 because I want to be sure about it. I think we're on the same

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1 page with this one, because I know it's part of normal  
2 military practice, but 914, what I refer to as Jencks  
3 material, we expect certainly to turn over not what's said in  
4 the rules and statute of, at the time of trial or after the  
5 witness testifies, but we have not thus far litigated what  
6 date that will be, or have had the -- Your Honor establish  
7 that yet.

8           We don't -- all I'm saying is we don't include that  
9 in the day where we say we are finished with discovery. We  
10 expect that and we propose that in our pleading, that that is  
11 some date later from there.

12       MJ [Col COHEN]: Okay. And how much later?

13       TC [MR. RYAN]: In our proposal, sir, we said May 1st.

14       MJ [Col COHEN]: Of next -- of next summer?

15       TC [MR. RYAN]: Yes, sir. Next spring.

16       MJ [Col COHEN]: Okay.

17       TC [MR. RYAN]: Not to quibble.

18           And as to the larger issue of the dates, sir, can I  
19 have another moment to confer? We were in the middle of  
20 discussion.

21       MJ [Col COHEN]: Most definitely. And if you can't give  
22 me a firm date today, that's okay, because I'm not going to --  
23 I'm not going to -- I'm probably not going to have the level

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1 of fidelity after argument. I'm going to have to go back and  
2 think about this.

3 TC [MR. RYAN]: Yeah.

4 MJ [Col COHEN]: But I want to notionally get through some  
5 of these issues of how they're going to inform the decisions  
6 and the dates that I make ----

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

8 MJ [Col COHEN]: ---- and then let you know what my  
9 expectations are going to be for these dates.

10 TC [MR. RYAN]: Well, you have every right to expect that  
11 we would have a date, because we would have been the ones  
12 demanding it, hoping for it, begging for it. The only reason  
13 I keep conferring is because some of these things literally  
14 change on a day-to-day basis, so I want to make sure, and  
15 General Martins and typically the one ----

16 MJ [Col COHEN]: So let me give you this notionally just  
17 to kind of let you in on a little more insight.

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

19 MJ [Col COHEN]: The government has asked for a trial date  
20 next summer. While I will continue to consider that, if I was  
21 to -- to the extent that if I was to overlay the defense's  
22 with -- with your dates, and allowing for these dates, and  
23 assuming that D1 occurs on 1 September 2019, D2 and D3 and/or

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1 D4 could be happening simultaneously, but that there is a date  
2 certain, and that essentially that D2, D3, or D4 then are  
3 completed to some extent during other -- other periods of --  
4 of like, for example, if there's 60 days after D2 or D3 or 75  
5 days after D2 or D3 based on 60 -- 639I, that then those  
6 additional steps or D dates would be accomplished during that  
7 other time period. The earliest I could calculate that we  
8 could get to trial would be Wednesday, December 9th, 2020,  
9 assuming all of those things worked out perfectly.

10 Now, that doesn't mean those are the dates or that I  
11 agree with the 120 versus 75 versus the 60 or those kinds of  
12 things, but that's kind of like I have put that level -- well,  
13 my staff, the young major in front of me has done this -- this  
14 work on my behalf to say, Your Honor, these are the dates  
15 based on what -- what the two parties are saying.

16 Then a building in just even 60 days of, okay, let me  
17 build me in some buffer here, because things happen ----

18 TC [MR. RYAN]: Sure.

19 MJ [Col COHEN]: ---- then we're looking at the week of  
20 Sunday, February 7th, 2021 being when we would get to trial.

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

22 MJ [Col COHEN]: All right. As you indicated, all those  
23 dates have to be met. If they're sliding, then things slide

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1 to the right. But I agree with you. The intent of this --  
2 this -- this commission will be to initially set dates using  
3 the -- notionally the stuff that the defense has provided and  
4 the request of the government to have firm dates.

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

6 MJ [Col COHEN]: And like I said, both -- both sides  
7 have -- I think everyone is in agreement that we need to have  
8 a scheduling order.

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

10 MJ [Col COHEN]: And even if you weren't, we're going to  
11 have a scheduling order. But there -- I recognize the  
12 concerns that the defense has of having some fidelity on when  
13 things are going to get done so that then they can do it, and  
14 I need that myself.

15 TC [MR. RYAN]: Of course, sir.

16 MJ [Col COHEN]: And I think it makes sense from a  
17 sequencing standpoint. Up to this point, we haven't really  
18 had a true sequencing, which kind of led to the -- the lively  
19 discussion that we had this morning as to just what we're  
20 going to do in September.

21 But moving forward, given that at least some of the  
22 parties are willing to take things a little bit slightly out  
23 of sequence -- not all, but some are -- I don't want to do

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1 that consistently. I want to have a sequence, because -- and  
2 a sequence makes sense. And under normal circumstances, I  
3 would have imposed a scheduling order from the very beginning  
4 of this.

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

6 MJ [Col COHEN]: And I would have given you a date certain  
7 for discovery, and I would have given a date -- a date certain  
8 for motions to compel in discovery, and I would have given a  
9 date -- date certain for motions to -- you know, for -- for  
10 requests for expert consultants and for motions to compel  
11 expert consultants. And that's how I would have done this  
12 case. It doesn't mean that anyone else did anything wrong or  
13 any different; it's just that that's what I would have done.

14 So moving forward, to the extent that I can still  
15 address the issues that were already in existence before I get  
16 here, that is what I'm going to do.

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

18 MJ [Col COHEN]: But everyone has to be on board, and that  
19 would include the convening authority, OCAs, everybody.  
20 Because if they aren't, then -- then I probably will get  
21 slightly frustrated, not with the government, but just with  
22 the process in general -- is like, well, then why aren't  
23 people complying with court orders?

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1 TC [MR. RYAN]: Absolutely.

2 MJ [Col COHEN]: Because that's what the public expects.  
3 The very public that you just -- that you just referenced,  
4 they expect that. The defense expects that. The accused  
5 expects that. And, most importantly, that's what I expect.

6 So ----

7 TC [MR. RYAN]: I do give you my assurance, sir, on behalf  
8 of the prosecution team, that this has been discussed in great  
9 detail with every possible relevant important player we could  
10 think of, and have impressed our needs and received assurances  
11 that the players are on the same team in this. And when I say  
12 "same team," I mean getting this matter taken care of to the  
13 satisfaction of the commission.

14 MJ [Col COHEN]: So let me ----

15 TC [MR. RYAN]: Let me take all of your comments on the  
16 first part ----

17 MJ [Col COHEN]: Yeah, I mean, absolutely. So let me just  
18 go ahead and give you, you know, some more ideas.

19 So if, for example, 1 September 2019, you cannot  
20 essentially assert that you have provided all affirmative  
21 discovery and any discovery related to already-ruled-on  
22 motions to compel, just by sliding that 30 days, that already  
23 throws you out to Tuesday, March 9th, 2021 ----

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1 TC [MR. RYAN]: I understand.

2 MJ [Col COHEN]: ---- based on the same kind of notional  
3 schedule. If for some reason that was to slip to November of  
4 2019, now we're looking at moving the trial all the way out to  
5 April of 2021. So for every 30-day slippage, it pushes the  
6 timeline out.

7 What -- and, you know, for example, is the convening  
8 authority willing to look at all types of contracting  
9 capabilities to -- to assist in the hiring of these -- these  
10 experts and stuff like that in this case? I mean, those may  
11 not be answers that you have right this moment ----

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

13 MJ [Col COHEN]: ---- but those are things that I think  
14 about, is -- okay. You know, if we have to go through the  
15 regular, you know -- if everything has to go through a regular  
16 GS hiring process, which that may be the case, that is going  
17 to slow this down unbelievably so. I mean, I've just gone  
18 through my own process of hiring individuals. And sometimes  
19 before I can even put the posting out, the position has been  
20 vacant for several months.

21 TC [MR. RYAN]: Yeah. I fully understand, Judge, and  
22 appreciate it.

23 I will return to this statement, that when we

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1 selected our date -- and backing up just for the moment, Your  
2 Honor has already seen plenty. However, those in the  
3 convening authority's office and other places within the DoD  
4 and the government, have seen it even longer, some of them  
5 very much in a sort of hands-on kind of way.

6           So the full understanding of the things that slow us,  
7 stop us, throw us completely off track I think are  
8 appreciated. So when we selected that date in our proposal --  
9 in our proposed schedule that would bring us to trial in a  
10 year, we got buy-in from those persons and those players that  
11 Your Honor has already just expressed a little bit of concern  
12 about.

13           So I believe I'm fully -- I'm fully within an area of  
14 authority to say that the United States Government is  
15 committed to trying this case as early as June of 2 -- of next  
16 year, understanding everything you've said about other dates  
17 and slippage along the way and what that can do. We take that  
18 fully to heart.

19           MJ [Col COHEN]: Okay. I'll take you at your word that  
20 you're committing the United States of America to expending  
21 the funds and resources that it needs to get this case to  
22 trial.

23           TC [MR. RYAN]: That is correct, sir.

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1 MJ [Col COHEN]: Okay. All right. That's all the  
2 questions I have for you right now.

3 TC [MR. RYAN]: Thank you, Your Honor.

4 Can I ask that I be able to get back to you as to  
5 that -- the specific question of are you saying 1 September is  
6 your date for the finish?

7 MJ [Col COHEN]: Absolutely, you may. Because that will  
8 drive my scheduling order.

9 TC [MR. RYAN]: Understood, sir. Thank you very much.

10 MJ [Col COHEN]: Thank you.

11 I'm going to go ahead and put us in a recess for  
12 lunch, to accommodate the earlier request for some check-ins  
13 and for lunch and prayer. We'll reconvene at 1340 hours  
14 today.

15 [The R.M.C. 803 session recessed at 1152, 26 July 2019.]

16 [The R.M.C. 803 session was called to order at 1342,  
17 26 July 2019.]

18 MJ [Col COHEN]: The commissions is called to order.  
19 Lieutenant Colonel Poteet is not here, Mr. Nevin. I notice  
20 that. Looking down the rows, I believe all other parties are  
21 present. If that is incorrect, please correct me. Okay. I  
22 suspect he'll probably be joining us here shortly, sir; is  
23 that correct? All right.

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1           One other factor that I will take into consideration  
2 in establishing any dates on here is the fact that we -- we  
3 only have the one facility to -- to hear cases. And so I  
4 will -- obviously that will impact -- impact us as well. But  
5 I'm aware of what the scheduling dates are, et cetera, for  
6 other cases, because those are published -- or at least will  
7 be published -- and so I will -- I will look at those as well.

8           Mr. Nevin, I'll just start with your team. If you  
9 could -- you may say whatever you want to, but just -- not to  
10 keep you from talking about things, but to just -- just to --  
11 to make sure that everyone understood generally what I was  
12 saying is the defense motion where you were asking for  
13 sequencing and those kinds of things, that all makes sense,  
14 but if there's nuances to that that you definitely want to  
15 argue, et cetera, or -- or uniqueness, because there have been  
16 some other filings where some of the teams have unique issues,  
17 you're welcome to highlight those to the extent that you wish  
18 to do so as well, sir.

19           LDC [MR. NEVIN]: So, Your Honor, you're not returning to  
20 the earlier discussion, you're speaking now of argument on  
21 639I?

22           MJ [Col COHEN]: That is correct, sir.

23           LDC [MR. NEVIN]: And if it's all right with the military

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1 commission, I'd like to defer to Mr. Connell -- Connell,  
2 because I believe the way the arguments will flow, I just  
3 think it would probably work better that way.

4 MJ [Col COHEN]: That would be fine, sir. Absolutely.

5 LDC [MR. NEVIN]: Thank you.

6 MJ [Col COHEN]: Absolutely. Mr. Connell, then, let's  
7 start with you and then we'll let the teams build off of your  
8 initial argument.

9 LDC [MR. CONNELL]: Yes, sir. And I'm mindful of the  
10 time. I have slashed my argument. And so if it is less  
11 organized than you might otherwise expect, it is because I'm  
12 skipping over giant pieces.

13 MJ [Col COHEN]: That's fine. However, like I said, and I  
14 have absolute faith in you all. I'm sure you will tell me  
15 what you believe I need to hear here today, but feel free to  
16 take the time that you believe you need to represent your  
17 interests and any other interests in this joint motion.

18 LDC [MR. CONNELL]: Thank you, sir. For one thing, it's  
19 completely clear that the military commission has made a close  
20 study of our position and I don't feel that I need to repeat  
21 anything that we put in the briefs, but I do -- there are some  
22 new facts, some things I want to highlight, but one thing is  
23 that the military commission sometimes says that it, very

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1 respectfully, holds its questions for the end. I invite you  
2 to ask your questions at whatever time, because I just want to  
3 talk about what you want to talk about.

4 MJ [Col COHEN]: Okay. I appreciate that.

5 LDC [MR. CONNELL]: The -- I laid out -- I was trying to  
6 be all military and have a bottom line up front, and I tried  
7 but, you know, that didn't completely work.

8 You've heard and agreed with the structure that I  
9 proposed for September. I once again have -- if there's a  
10 tweak to what our position in the brief was, it is mine alone.  
11 I can't on behalf of anyone else. But the one thing that no  
12 one has specifically addressed is what a calendar for next  
13 year -- assuming that we're not having a trial in June 2020,  
14 which, you know -- but what might the calendar for next year  
15 look like.

16 And the proposal that I wanted to -- the government  
17 has 187 days of court on its -- given its eight-week trial  
18 estimate, has 187 days. But I don't think even that would  
19 complete trial before Hadi, certainly because I can't endorse  
20 in any way a -- an eight-week trial estimate. It seems more  
21 like six months to me. But we'll do a little experiment in  
22 September. How about that? And we'll see how long it takes  
23 to talk to the witnesses.

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1           But my proposal is that we have a two-week hearing,  
2 which seems sufficient for witnesses, every other month. And  
3 then on the off months that we block off a week and that --  
4 you know, on the part -- all the parties' schedules, and that  
5 week be used for depositions. It would be used for 505(h)  
6 hearings, as appropriate, and it would be used for perhaps the  
7 802 conferences that the military commission anticipates from  
8 the convening authority. I have some other suggestions on  
9 that, but I'll get to them in just a second.

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

11          LDC [MR. CONNELL]: Your Honor, yesterday I tendered to  
12 the military commission slides which have been marked as  
13 AE 639E. They were previously approved by the convening -- by  
14 the CISO. May I have the feed from Table 4 and display to the  
15 gallery?

16          MJ [Col COHEN]: You may.

17          LDC [MR. CONNELL]: Thank you. Your Honor, the -- the  
18 first slide that I'm displaying is a -- is a chart which lays  
19 out -- or a timeline which lays out the military commission  
20 hearings to date. The -- just the key, which has dropped off  
21 of this slide as it has grown over the years, is that the  
22 yellow or orange represent hearings which were cancelled, the  
23 gray represents hearings which took place, and the -- the sort

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1 of sideways carets represent hearings that take place, but  
2 sometimes those were also cancelled for medical issues or a  
3 hurricane or something else.

4           The -- I'm skipping over a great deal of history.  
5 There are just a few things that I want to point out to you.  
6 The first one is that we heard yesterday from the government  
7 about the signing of the MOU. And I want to point out as a  
8 reason why it took them so long to do discovery. I want --  
9 and I covered this to some extent in the brief. But I just  
10 want to point out that Mr. al Baluchi's team signed the MOU  
11 less than two weeks after the amended MOU was issued. We  
12 signed it on 19 February 2013. And it was many years before  
13 discovery actually began to flow significantly.

14           But despite that, there have been -- this argument  
15 today is actually the fifth time that the government has  
16 announced that it has complied with its discovery  
17 responsibilities and is ready for trial. The first of those  
18 was in June 2013 when it announced that -- in AE 175 that  
19 discovery is nearly complete.

20           The second was in September of 2016 that -- in  
21 AE 397G that it had complied with its discovery  
22 responsibilities and was ready for trial.

23           At the beginning of 2017, something like January 3rd,

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1 it said that it had complied and it was ready for a March 2018  
2 trial. In -- that was in AE 478. In AE 478 (Sup) filed later  
3 that year, the government said that -- again, that it had  
4 complied with all of its discovery responsibilities and was  
5 ready for a January of 2019 trial. That was on  
6 31 January 2017.

7 I heard a lot -- I mean, the government has won the  
8 strategic communications battle over this. Everybody  
9 blames -- despite our efforts and diligence and everything  
10 else, everybody blames the defense for why is it taking so  
11 long? And I think it's because the government is free to  
12 announce its readiness for trial without ever being held to  
13 any responsibilities associated with that.

14 The last one was on -- of course, on July 3rd of  
15 2019. And when you look at this timeline, I think that there  
16 are a couple of things that are revealed by it fairly well.  
17 The first is that we -- this military commission -- it might  
18 not have been on the schedule that anyone wanted, but it has  
19 worked hard. The only -- the red square on this is the only  
20 time that a hearing was cancelled because there was not work  
21 for it to do.

22 The military commission has had a lot of work to do,  
23 a lot of people -- not just the ones in this courtroom. I

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1 mean, the people in this courtroom in many ways are the -- are  
2 the least important in this process. There are so many  
3 people, so many staff, and so many security people and so many  
4 guards and so many people who work so hard on this that I -- I  
5 think that some recognition is due at what diligence that  
6 everyone, government included, has exercised here.

7           The second thing that I think is illustrated is a  
8 great deal of optimism on behalf of the government, in that it  
9 has been observed in other cases that perhaps the government  
10 has underestimated its burdens or has overestimated its  
11 readiness. But there seems to be a pattern across cases that  
12 the facts on the ground do not always match up with the  
13 rhetoric.

14           And the significance of -- the reason why we -- or  
15 I -- we proposed this certification-based process is to match  
16 reality and rhetoric. And we're going to talk about  
17 incentives in just a moment, but I think that's important.

18           The last thing that I think this timeline points out  
19 is the rolling nature of the government's productions. I've  
20 tendered to the parties and the military commission just three  
21 pages -- I'm not going to put it on the screen because we just  
22 put it together this morning -- of AE 639K. Does the military  
23 commission have that? It's a piece of paper that we passed up

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1 earlier.

2 MJ [Col COHEN]: I do now.

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

4 If you could be so kind as to look at the third page  
5 of that document. The third page ----

6 MJ [Col COHEN]: Would you make sure -- one second. Would  
7 you make sure the translators are able to see the display?  
8 Okay. Hopefully AV is accomplishing that. Thank you.

9 LDC [MR. CONNELL]: The slide display, sir?

10 MJ [Col COHEN]: Yes.

11 LDC [MR. CONNELL]: Yes.

12 MJ [Col COHEN]: Sorry about that. So we're at ----

13 LDC [MR. CONNELL]: Page 3.

14 MJ [Col COHEN]: ---- page 1 of -- page 3 of the three  
15 pages of 639K?

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

17 MJ [Col COHEN]: Got it.

18 LDC [MR. CONNELL]: And what this demonstrates is the  
19 number of individual productions of discovery that the  
20 government has made, and I think what it really illustrates is  
21 just how rolling it's been. From 24 productions in 2014, 33  
22 in 2015, 59 in 2016, 86 in 2017, 100 in 2018 -- meaning that  
23 in 2018, basically every other business day, the government

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1 was making a discovery production.

2           And I think that shows diligence on their part. I do  
3 not -- I would -- I'm the last person who would impugn that in  
4 that -- given the amount of discovery that we have to deal  
5 with and -- and that they take the first cut and it's 10 times  
6 or 20 times as large, I understand.

7           The fact that we only got 5,000 pages out of 60 --  
8 600,000 pages of possibly responsive hostilities discovery was  
9 not lost on me the other day, either in the way of is that  
10 really the right balance, but also in what an incredible lift  
11 the 600,000 pages is.

12           And 2019, with 47 productions, so far seems to be  
13 on -- on path.

14           But let's just talk about a couple of the -- the most  
15 recent details. If you'd turn to page 1 of 639K, page 1 of  
16 639K lists the discovery productions that the government has  
17 made in between the time that we filed AE 628, the motion to  
18 suppress, and when the military commission issued AE 639, the  
19 trial conduct order requiring descriptions. And where they  
20 are produced on different systems, they're essentially  
21 different productions. So you'll notice that there were three  
22 different productions on June 18th; that's because they were  
23 on three different systems, at Unclassified, Secret, and

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1 Top Secret.

2           One of the things that you'll notice about this --  
3 and I know you're not entirely familiar with this trigram  
4 system yet, but in this set, between May -- between the filing  
5 of the motion to suppress and the issuance of the trial  
6 conduct order, it doesn't fall under the categories that the  
7 government described this morning.

8           This is not the FBI discovery, for example. It's  
9 much older than that. CSRT discovery from 2007 on the 28th of  
10 May, hijacker -- HJK is hijacker -- discovery from, you know,  
11 the 2001 to 2003 period. And the rest of it is -- of this is  
12 RDI-related. PRG is program, for RDI program. 2C is a  
13 reference to 397F, et cetera.

14           Page 2 of 3 is a record of the government  
15 production -- discovery productions between the trial conduct  
16 order that you issued in AE 639 and today. The total between  
17 628 and 639 was 628 pages.

18           Since the issuance of the trial conduct order, the  
19 government has made a number of other descriptions: Flight  
20 records. JTF SOPs; that's what SOP stands for, obviously.  
21 Letterhead memoranda; those were notes related to the 2007  
22 interrogations themselves. And then also the FBI -- the three  
23 pages of FBI discovery.

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1           Now, it occurred to me that as counsel for the  
2 government on Monday was arguing the defense has everything  
3 they need, they don't need anything else, essentially as that  
4 was happening there was a transfer of these three pages of FBI  
5 discovery. And I thought that was somewhat ironic, until  
6 today.

7           Because when we filed -- we prepared this, the final  
8 version of this chart, at 8:00 this morning. And over the  
9 break, over the morning -- midmorning -- what Judge Pohl used  
10 to call the coffee break -- over the midmorning break, the  
11 government produced another 96 pages of discovery. So really  
12 I asked the paralegal, "Have you handed out that chart  
13 already? Because I need to make handwritten changes to it."  
14 So, in fact, the page count of discovery between the issuance  
15 of AE 639 and today is 2,117 pages.

16           That's not -- I mean, producing discovery is good,  
17 not bad. I'm in favor of production of discovery altogether.  
18 But I do think that the rolling nature of it is something that  
19 has intersected with the single deadline that exists in the  
20 case, which is the filing of a motion to suppress. And  
21 whether that's 10 May or whether that's 19 August, right,  
22 there's really just one date occurring in a vacuum that  
23 imposes an obligation on one party without any corresponding

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1 obligations on other parties.

2 Now, I told you in the little introductory argument  
3 this morning that I wanted to address the questions of 586 and  
4 641, but before I do that, could the court reporters be so  
5 kind as to take a screen shot? 639M, I assume? Yes.

6 With respect ----

7 MJ [Col COHEN]: L or M? L. 639L.

8 LDC [MR. CONNELL]: 639L. Thank you.

9 MJ [Col COHEN]: 639L.

10 LDC [MR. CONNELL]: Alphabet, right? That order.

11 The issue in 586, as I guess, is -- relates to a  
12 substituted evidentiary foundation for Raid evidence; that is  
13 almost all of the physical evidence or a great deal of the  
14 physical evidence in the case.

15 I challenged my good friends, the interpreters, on  
16 27 July 2016 at page 13220 in the transcript when I described,  
17 back then in 2016, the evident -- the chain of custody, the  
18 evidence that we know about where the physical evidence comes  
19 from as a "disastrophy." It was later explained to me how  
20 difficult that was to translate into Arabic, and my thanks to  
21 all the hard work that they do. But it is, in fact, true.

22 And a standard defense technique, which I'm sure the  
23 military commission has used, opposed, and supervised, is to

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1 attack the provenance of -- of physical evidence. In fact, so  
2 much so that it's enshrined as a constitutional principle in  
3 *Kyles, K-Y-L-E-S, versus Whitley, W-I-T-L-E-Y [sic]*, at  
4 514 U.S. 419 (1995), which talks about the value to the  
5 defense of, I quote, opportunities to attack not only the  
6 probative value of crucial physical evidence and the  
7 circumstances in which it was found but the thoroughness and  
8 even the good faith of the investigation.

9 In just looking for examples, the military cases are  
10 replete with examples of this. One that I noticed is found at  
11 *United States v. Adens*, 56 M.J. 724, an Army Court of Criminal  
12 Appeals Case from 2002, in which the central issue in the case  
13 was whether a hair had been delivered to the lab in one box or  
14 in two boxes, and the fact that the government denied access  
15 to the -- the physical evidence itself and would not allow  
16 that defense to be explored was the basis for reversal in the  
17 case.

18 So I say this in that a substituted evidentiary  
19 foundation is a completely untested mechanism. It -- the  
20 language does appear in CIPA, but there is not a single case  
21 in any court that we have been able to find on this mechanism.  
22 It seems to fly in the face of the Sixth Amendment,  
23 *Melendez-Diaz*-type cases. I mean, what is a breath sheet from

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1 a -- from a blood technician if not a substituted evidentiary  
2 foundation, right? It skips over -- it substitutes for the  
3 individual blood tech or whoever coming in and testifying.

4 Now, I know that we haven't decided the question of  
5 whether confrontation clause applies in this court yet or not,  
6 but certainly the principle of fair trial does. And one of  
7 the elements of due process is the opportunity to meet  
8 evidence against you and to produce evidence on your own  
9 behalf. And even if it's not -- doesn't sound specifically in  
10 the Fifth Amendment, it -- in the Sixth Amendment, rather, it  
11 must sound in -- in the idea of a fair trial, which is laid  
12 out in the Military Commissions Act.

13 So that brings us to 641, and I wanted to address  
14 that, which, as I surmise, is a substituted evidentiary  
15 foundation request for the XYM documents. It's at the heart  
16 of an incredibly huge undertaking that's at issue in 645, in  
17 645A, and was the focus of AE 575. It's also the focus of a  
18 massive convening authority effort which may require outlay of  
19 something like 2 percent of the annual budget of the convening  
20 authority to address this particular issue.

21 And that -- those facts come from AE 645  
22 Attachment G, which lays out the matter, which I'm not going  
23 to describe in detail because some aspects of it are

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1 classified.

2           But separately, the government's public invocation of  
3 the -- of the national security privilege yesterday is a  
4 matter that should be debated. I would point the military  
5 commission to the transcript of 25 February 2016 in which the  
6 government explicitly waived the national security privilege  
7 with respect to that precise piece of information, and then we  
8 proceeded to take evidence about it.

9           And the -- this information directly affects the  
10 motion to suppress -- motions to suppress themselves. In  
11 fact, we briefed this specific information that I believe the  
12 government now seeks to substitute in AE 628. So the -- my  
13 request to the military commission is -- I'm not asking  
14 specifically for a denial at this point. What I'm just asking  
15 is: Take up 586 and 641 in their proper context at the  
16 September hearing. We can address them in a closed session  
17 and I can lay out my arguments, to the extent they're  
18 classified, in open session which they're not.

19           I can assure -- I will tell the military commission  
20 that now having a sense of what these things are about, I  
21 will -- I gave my sort of usual generic briefing. And in 641  
22 I tried to give -- because there have been some changes in the  
23 law with the Ali case out of the CMC, I tried to discuss that

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1 in a little more detail. But now I can do that with more  
2 substance, now having a sense of what the situation is.

3 So moving on from there to the question of  
4 sequencing, and I know -- I'm not going to belabor it because  
5 I know the military commission has already said I've got the  
6 sequencing point.

7 In the government's original proposal in which all  
8 witnesses on the al Baluchi motion to suppress would need to  
9 testify in September, that would occur before what the  
10 government describes as the final discovery date. It would  
11 occur before the government's expert disclosures, and before  
12 motions to compel. The legal motions in the government's  
13 proposal would appear -- would be due before the motion to  
14 suppress was even complete, given that in the government's  
15 proposal, it stretches on into -- into mid-2020. And motions  
16 in limine, for example, would be due before 404B disclosures.  
17 The sequencing of the government's brief does not -- or  
18 proposal does not seem to make a lot of sense.

19 So I'm not going to repeat what I see as the proper  
20 sequencing. The military commission has showed complete  
21 command on it. But I do want to talk about this. I want to  
22 talk about why we suggested a certification-based approach as  
23 opposed to hard deadlines. I understand what the military

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1 commission is saying about deadlines. I'm, in fact, even  
2 going to talk about some deadlines, but I want to tell you why  
3 I think that this certification-based approach is right.

4           Because in the vast majority of situations, it  
5 correctly incentivizes the parties. Let me give you an  
6 example. What we're talking about now, and I'm bracketing XYM  
7 because there is this situation as is raised in 465A where the  
8 government has given extremely late notice of use of  
9 statements. And obviously we're going to be talking about  
10 that in September. But the -- bracketing that 304 noticing of  
11 statements question for a moment, which is sequencing wrong.  
12 Other than that, all the evidence that the government would be  
13 producing in discovery is in the nature of exculpatory  
14 evidence or evidence that the defense might want to use,  
15 whether it's actually exculpatory or material to the  
16 preparation of the defense.

17           And the incentive for, for example -- or we're  
18 talking about whether the defense has -- the experts have had  
19 their security clearance adjudicated. We can't require  
20 security clearances but we can require adjudication of them.  
21 All of that is only helpful to the defense, right? The  
22 government's motive to comply -- or incentive to comply with  
23 those is only to avoid a hypothetical sanction from the

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1 military commission. And the sanctions which were available  
2 to the military commission in that sort of thing are  
3 relatively limited. It's not a situation where you can  
4 exclude the evidence like we're asking in 645A because the  
5 government gave late notice because it's helpful to the  
6 defense.

7           And if -- you know, the only remedy that the defense  
8 really has in that situation is to ask for a continuance. And  
9 rather than asking for continuances, it makes sense to us to  
10 incentivize the compliance in the first place, which is if --  
11 if the things the government needs to do are done, they have a  
12 powerful incentive to get that done, right? Whether that's  
13 September 1st or November 1st or August 15th, right? That  
14 gives them something, a clock that runs. And it's a clock  
15 imposed against the defense. The defense clock runs then.  
16 They've done -- the government says we've done what we're  
17 supposed to do, now we want the defense to do what they're  
18 supposed to do.

19           And if we file afterward, right, there might be  
20 sanctions for that, depending on whether there's good cause or  
21 not. The -- but it -- it correctly aligns most of the  
22 incentives. The reason why I say "most of the incentives" is  
23 there's one situation where it does not, but I don't think

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1 there's anything to do about it, which is that if the  
2 government is sanctioned for late disclosure of exculpatory  
3 evidence is a resetting of a clock, then it incentivizes them  
4 not to disclose that information in the first place.

5           So in that situation, I think we just have to rely on  
6 the good faith of -- of the officers of the United States  
7 Government that they know their responsibilities on that  
8 particular point and will do their best. The ----

9           MJ [Col COHEN]: So let me ask you about that.

10          LDC [MR. CONNELL]: Sure.

11          MJ [Col COHEN]: Because I -- I definitely understood the  
12 certification approach and what you were just arguing. I  
13 guess in my mind, conceptually, I can see a situation where I  
14 can still have a date that I was requiring things to be done  
15 which still put a burden on the government, which then  
16 triggered the defense response. Do you believe that that's --  
17 that's an impossibility or that they can dovetail? In other  
18 words, I say, for example, you have until 1 September 2019 to  
19 certify the following. Convening authority -- so say to the  
20 extent that, you know, I'm ordering a briefing on the  
21 logistical -- the logistics or ----

22          LDC [MR. CONNELL]: Sure.

23          MJ [Col COHEN]: Or convening authority all outstanding

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1 ex parte requests, if they exist for -- for expert witnesses  
2 or -- or expert assistance or whatever it is must be acted on  
3 by this date, and a failure to do so will be considered a  
4 denial. And therefore you can file your motion to compel and  
5 I'll rule on those accordingly. To make this date happen,  
6 government, you're going to have to -- to adjudicate all the  
7 security clearance requests by -- by this date. Those types  
8 of things.

9 All of which then trigger, as you indicated, that if  
10 I -- if I go with the -- with the notional concept that you  
11 all have of then those completions then require the defense to  
12 do certain things, because notionally, without a date, no one  
13 does -- no one really has -- really has -- there's nothing on  
14 the clock. The clock's not ticking.

15 LDC [MR. CONNELL]: I understand, sir.

16 MJ [Col COHEN]: So I guess what I'm trying to match up  
17 is, is how do I balance the valid points that you all make in  
18 your motion -- or proposal, with the idea that the government  
19 says is for us to even do our job we need to be able to tell  
20 people we have to have things done by a certain date?

21 LDC [MR. CONNELL]: Sure. I have two thoughts about that.

22 MJ [Col COHEN]: Okay.

23 LDC [MR. CONNELL]: Three. I want to answer the specific

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1 question. No, I'm certainly not saying that a date-based -- a  
2 hard date-based approach is impossible. It's the norm. In  
3 every case from, you know, a Fairfax County, Virginia, DUI to  
4 a capital case in the Southern District of New York, they  
5 do -- I mean, right?

6           That's the ordinary situation. I completely  
7 understand that. I read the Air Force Trial Practice Manual.  
8 You know, I even reviewed, sir, some of your prior orders,  
9 trial scheduling orders and reviewed trial scheduling orders  
10 from capital cases in the Air Force, so I understand it's the  
11 normal situation.

12           I would suggest that here, history has demonstrated  
13 to us that we are not in the normal situation. The -- we're  
14 going to discuss -- I'll go over just a little bit later some  
15 of Judge Pohl's observations, but we are not in a normal  
16 situation. Yesterday Colonel Yamashita testified -- I mean,  
17 made a comment about, yeah, nothing happens fast at  
18 Guantanamo, and there were chuckles and rueful glances and --  
19 but a general recognition of its truth.

20           And part of the -- I mean, one of the points  
21 Judge Pohl used to like to make was that the government chose  
22 this venue. There's nothing magical about this venue. They  
23 chose it. They chose it with its one courtroom. They chose

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1 it with its barge-based logistics. They -- it's their  
2 decision. But -- so certainly I'm not saying that's  
3 impossible.

4 But here's the point that I want to make. Let's take  
5 your example. Let's say that you ordered that on 1 November  
6 the government has to report that it has turned over all  
7 statements of the defense -- of the defendant, right, just as  
8 an example. No, no, no. Better example: We need one that's  
9 exculpatory, so they have turned over all RDI evidence, right?  
10 They say they're very close to that. Let's use that one.

11 The question is what happens if they don't. And if  
12 they don't, very little happens, you know? They -- they would  
13 face the displeasure of the military commission, stern  
14 talking-to, probably, and during that time our date is  
15 running. You know, our time is running without the RDI --  
16 without complete RDI discovery. And I use that as an example,  
17 right? RDI discovery obviously has a -- but -- but if you --  
18 if -- so I wanted to answer your dovetail question.

19 MJ [Col COHEN]: Let me just make sure I understand that  
20 analogy. When you say that your clock is running, does your  
21 hypothetical -- are you basing that on the assumption that  
22 they -- that they didn't actually do what they said they did?

23 LDC [MR. CONNELL]: No, that -- not that they didn't do

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1 what they said they did, but they just didn't accomplish it,  
2 right? So November 1st comes and goes, and, you know, you  
3 have a right -- when you set a date, unless someone objects to  
4 it, you have a right to expect that it will be complied with.

5 MJ [Col COHEN]: So what if I -- what if I built a hybrid  
6 in that, said you will make this certification by 31 July --  
7 let's just throw that out there.

8 LDC [MR. CONNELL]: Sure.

9 MJ [Col COHEN]: This is probably a date that I'm not  
10 going to -- not going to say.

11 LDC [MR. CONNELL]: Of course.

12 MJ [Col COHEN]: 31 July. They -- if they don't comply --  
13 but then your motions are then due X number of days after  
14 that -- that -- that ticking clock. In other words, your  
15 clock doesn't start ticking until they have done ----

16 LDC [MR. CONNELL]: Yes.

17 MJ [Col COHEN]: ---- whatever that requirement is.

18 LDC [MR. CONNELL]: Yes. That's a successful hybrid.  
19 That works. My earlier comments assumed that -- for example,  
20 let's just pick 90 days, 90 days after July 31st, and it was  
21 going to be October 31st.

22 I was assuming that, as in a normal situation, there  
23 would be a date that says close of voluntary discovery is on

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1 31 July, and the defense motion to suppress or -- or motion to  
2 compel, or whatever it is, is due 31 October. That's what I  
3 meant by our clock is ticking ----

4 MJ [Col COHEN]: I understand that.

5 LDC [MR. CONNELL]: ---- if -- even without compliance.

6 And, you know, in most cases, that would not be necessary,  
7 but -- and not just from this RDI discovery issue, but on lots  
8 of issues, it has turned out to be important.

9 So, yes, I think there -- there are two ways to  
10 structure that, right? You could -- you could structure it as  
11 a negative incentive, must be done by 31 July, and the defense  
12 is -- response is due 90 days later after 31 July or the  
13 government certification, whichever occurs later, right?

14 MJ [Col COHEN]: Right.

15 LDC [MR. CONNELL]: Or you can incentivize it positively,  
16 must be done no later than 1 September 2019, but you could  
17 certify earlier, and the defense date would run from the  
18 earlier of the two dates, right? You can incentivize it  
19 either way.

20 MJ [Col COHEN]: Right.

21 LDC [MR. CONNELL]: And that seems like a valuable -- both  
22 setting expectations of the military commissions and requiring  
23 the certification of ----

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1 MJ [Col COHEN]: Well, in a sense, it kind of -- not to  
2 take sides, but, I mean, if the government says we really want  
3 to take this to trial, it allows me the opportunity to say  
4 well, then the United States of America needs to put the money  
5 and the effort towards it; and that doesn't mean necessarily  
6 the prosecutors, but the convening authority, agencies,  
7 et cetera.

8 LDC [MR. CONNELL]: Yes, sir. Makes a good deal of sense.

9 So I want to address where convening authority duties  
10 come into this. We had a -- had proposed a certain approach  
11 because -- for example, you know, I don't know how many people  
12 on the original convening order are still in the military.

13 MJ [Col COHEN]: That's a great question.

14 LDC [MR. CONNELL]: You know, we need an amended convening  
15 order, for example. And I -- having investigated that, how  
16 the convening -- being a civilian and not knowing anything  
17 about convening orders, having investigated how it works, I  
18 understand what a kind of -- in a multi-branch situation what  
19 a kind of big gathering of information has to take place.

20 The expert security clearances, one of the things,  
21 military commission, is such a stumbling block. We have three  
22 on our team -- and I noted this in the briefs. We have three  
23 experts who would -- for whom we have requested security

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1 clearances who have not been -- they have not been  
2 adjudicated. But one of them, for example, filled out and  
3 sent in his SF 86 more than two years ago.

4           And what that means is, as I understand it -- and  
5 believe me, I'm no expert, but as I understand it, that means  
6 he doesn't come into the new DoD process because the legacy  
7 people stay with whoever had the process before, and it's only  
8 fresh requests. You know, one of the reasons why the hope is  
9 the DoD is going to run faster is we're talking about fresh  
10 requests.

11           So, you know, that is, in a sense, a budget question.  
12 At various times the convening authority has paid a surcharge  
13 from its budget, essentially, to get speedier processing of  
14 security clearances. That exhausts my knowledge of that  
15 subject because I don't know how that works.

16           But the -- the other -- so there are other major CA  
17 issues. Those are the first two.

18           The third one is this linguist contract, right? As I  
19 understand it, the contract is let or made, or whatever it is  
20 that happens to contracts. There's waiting for a task order.  
21 And this task order is not expected to be acted upon in fiscal  
22 year 2019. The -- you have almost exhausted my knowledge of  
23 it there, but that's the latest -- everything else in is 645

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1 Attachment G, but that's the latest that came after  
2 Attachment G.

3           The other point is the logistical support plan. And  
4 I won't read it. I'll point the military commission to the  
5 brief that Judge Pohl, you know, in about his fifth year down  
6 here, had -- had about had it with the lack of unity of  
7 command, with the lack of a published logistical support  
8 policy, made a number of comments about it on the record, many  
9 of which I put in the brief. And it's about to get worse.

10           The -- and I attached this to the brief as well, but  
11 the -- the multiple places which are administered by Navy  
12 Gateway & Suites [sic] right now, including the high-rise  
13 building, which is where I think most of the trial judiciary  
14 stays, the East Caravella where many of the defense stay and  
15 the prosecution and the victim family members as well, and --  
16 and our -- East Caravella is about to go to the base. The  
17 high-rise is about to go to the base. And all Navy Gateway  
18 rooms are going to be concentrated in the low-rise building  
19 over near the Tiki Bar.

20           The -- and I understand that's not a net loss; I'm  
21 told that it's an eight-bed gain. But it means we're all  
22 right there. If we're staying that way, we are all right  
23 there together. And, sir, it's one thing for me to bump into

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1 you in the hallway when -- you know, when I'm doing my  
2 laundry, but it's another thing for members to bump into  
3 victim family members or me or, you know, General Martins or  
4 anything like that. Like, I just don't understand how it's  
5 going to work, but some -- but it's not my job to figure out  
6 how it's going to work, but it's somebody's job.

7 MJ [Col COHEN]: No, I agree with you. Those are all  
8 concerns that I -- I've been thinking about for the last two  
9 months myself, is as we get towards trial, is where people are  
10 going to stay, how are we going to -- how are we going to make  
11 this happen?

12 LDC [MR. CONNELL]: Right.

13 MJ [Col COHEN]: And then -- so I've -- yes, I completely  
14 agree with you. I think that's about all I will ----

15 LDC [MR. CONNELL]: Sure.

16 MJ [Col COHEN]: ---- spend on our time. But you are  
17 correct, that those are all things we need to address.

18 LDC [MR. CONNELL]: The last convening authority piece  
19 that I want to address is the media status. Now, I've read  
20 the -- as I said, the Trial Practice Manual, and I understand  
21 that media is not that big in many cases and -- but there's  
22 always got to be some kind of a media plan. Well, the media  
23 situation here has declined precipitously in my -- in our

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1 seven years here.

2 At the arraignment there were 60 members of the media  
3 who were put up in tents and had workspaces and a press  
4 conference room, right? The chief prosecutor gave a press  
5 conference, defense gave a press conference, victim family  
6 members, right? Everybody had a place to address the media.

7 The hangar that contained that built building is now  
8 condemned. No one is allowed inside it. It has a big red  
9 sign in front of it saying that nobody can go in it. That --  
10 and that's sort of the end state. It went through periods  
11 where you could go in it with a hard hat, where you could go  
12 in it but they recommended against it.

13 And what that means is that the media -- there's no  
14 place for the prosecutors, defense, victim family members, you  
15 know, whoever appropriately addresses the media wants to --  
16 has a place to do that, no place to have an interview, no  
17 place to -- to do anything, really, other than invade the  
18 media space and their workstations.

19 And they have 20 workstations right now. If the  
20 kickoff of this trial has anything like the arraignment, it's  
21 going to be hopelessly too small.

22 And, you know, at times, even that -- the media has  
23 been evicted from that space to be put in a tent. I happened

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1 to be in the media tent when it started raining one time. I  
2 don't mean the tents that they have to live in, I mean an  
3 office tent. And water bubbled up from underneath the floor  
4 because, you know, this is a tropical area and it rains hard  
5 here sometimes.

6           And so, you know, it just seems like from a pure  
7 worm's eye view perspective, because that's all I have, it  
8 seems like these issues are not being addressed. It seems  
9 like they're getting worse. The media situation is getting  
10 worse, that the support for the NGOs is getting worse. And  
11 I'm not blaming the people who are involved. It's a money  
12 budget -- what was it Mr. Ryan said? Will, attention, and  
13 dollars. I mean, that's what the problem is.

14           So moving on from there and talking about  
15 intersections of these dates. The hybrid proposal that you --  
16 that you suggested makes sense. Another way to do it is to  
17 start the date, right? I mean -- or to give dates to one  
18 particular of these, or that we have another status conference  
19 and see how far along we are and what else kind of date that  
20 we can set because you -- that's what's going on.

21           So I do want to talk about -- a little bit about the  
22 other things that go into D1, because the government addressed  
23 two of them in particular: the RDI production and the medical

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1 witnesses. But there were some other things -- and so I'll  
2 start with the medical witnesses.

3           This is a self-inflicted wound to the government.  
4 The United States Government chose to impose this pseudonym  
5 process. And if I understood correctly, and this is -- this  
6 is supported by, you know, the individual meetings that I've  
7 had with the prosecutors, I understand -- understood Mr. Ryan  
8 to say this morning that they didn't keep the key to the  
9 pseudonyms. Right? I mean, these pseudonyms are like  
10 Doctor 1, Doctor 2, Doctor 3, Doctor 68, whatever. And I  
11 always assumed that there was something else on the end of  
12 that.

13           So what Mr. -- the government really did refer to  
14 this, and I think that it is -- that it's accurate. But on 19  
15 April 2019 we expected to find that the government had  
16 produced a chart or replaced the pseudonyms with the true  
17 names. And on many occasions they did. Something like 90  
18 occasions those turned out to be accurate. On some occasions  
19 they turned out to be wildly inaccurate.

20           We accidentally interviewed one of the comptrollers  
21 here at GTMO because he was produced to us as a -- as a true  
22 name of the -- with the phone number and everything of the  
23 witness, of the medical witness. And he's like "Can't help

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1 you. You know, you want to know anything about the budget?"

2           And the -- by our estimation, they produced true  
3 names for about 60 to 70 percent of the medical providers. I  
4 take the government at its word that it was a heavy lift to  
5 produce even that. But, you know, this is the United States  
6 Government that is producing this discovery. This is -- and  
7 it's really even JTF, right? It's not State Department or  
8 Commerce Department or something that is particularly far  
9 away.

10           So what we did is we produced a very detailed  
11 spreadsheet. And Mr. -- of the government referred to it of  
12 -- we went through every -- you know, line by line through all  
13 the medical records. And everybody that we could not match up  
14 a true name with, we produced -- we produced that to the  
15 government with a specific reference to here's where you can  
16 go in the medical records to find this person.

17           So it's not a matter of we just threw up our hands  
18 and said, oh, these are not very good, it's we did a great  
19 deal of work of telling them exactly with unbelievable  
20 specificity what we needed from them, and they're working on  
21 it.

22           But that doesn't seem to be incorporated in any  
23 1 September date or any other date, right? The government

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1 talked about how difficult it was and how apparently earlier  
2 mistakes by the government are coming home to roost in this  
3 process, but nothing about 1 September.

4           Let's talk about the MRI. I hope the MRI is the  
5 easiest of these, because the government has indicated its  
6 hope that the MRI, which is court ordered -- excuse me, CA  
7 ordered for Mr. al Baluchi -- it's not true in every  
8 situation, but for him it is, that the defense [sic] tensor  
9 imaging, which is a specific type of MRI, which they were not  
10 able to accomplish on the two previous attempts that -- why  
11 technically is beyond my scope, but I understand what the  
12 situation is.

13           MJ [Col COHEN]: Will everyone please check their pockets  
14 to make sure there are no cell phones in this room. Just one  
15 moment while I figure out what the ----

16           LDC [MR. CONNELL]: Of course, sir.

17           MJ [Col COHEN]: ---- the cell phone alarm has gone off,  
18 so I need to figure out what we're going to do. One second.  
19 [Pause.]

20           MJ [Col COHEN]: Given that everyone has just done a  
21 preliminary search, it is possible that there is -- there was  
22 just a false alarm. If it goes off again, we'll take a recess  
23 and we will have everyone take a little bit harder look at

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1 whether or not they have those devices. And we'll just  
2 proceed at that point.

3 LDC [MR. CONNELL]: Just as a bit of history, the -- and I  
4 know the military -- the court comes in through the back, but  
5 we go through two separate cell phone detectors on the way in.  
6 So it's not an honor system, it's ----

7 MJ [Col COHEN]: Right.

8 LDC [MR. CONNELL]: And we've had a number of things that  
9 appear to be false alarms. I myself have the questions about  
10 that technology, but that's just me. I don't care.

11 MJ [Col COHEN]: I understand. Like I said, I made the  
12 call. We'll proceed for now. If it goes off again, I'll have  
13 to reassess.

14 LDC [MR. CONNELL]: Yes, sir. So the last point I want to  
15 make about D1 is about this physical evidence review, which is  
16 a process that also seems like a self-inflicted wound to me  
17 but one which has been sanctioned by the military commission.  
18 On most -- almost all nonholiday Mondays between April 2016  
19 and September 2018, members of Mr. al Baluchi and  
20 Mr. Mohammad's team went to the FBI and reviewed the physical  
21 evidence. More than 2,100 items. These were obtained in  
22 raids. Some of them are designated affirmative use by the  
23 government, some defense use by the defense, and some neither.

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1           Sixty-four percent of all the physical evidence we  
2 reviewed. And in September of 2018 the government halted that  
3 review, ostensibly to transfer the evidence down here to -- to  
4 Guantanamo. As of late June, that transfer had not taken  
5 place. Maybe it's taken place now. I don't know.

6           But in response to our objection in AE 604, the  
7 military commission ordered that -- approved a government plan  
8 that once the evidence was down here they would establish a  
9 protocol for us to access it and it would go forward. But  
10 that is right there in 701. It's a core part of the  
11 government's responsibility, and it's something that didn't  
12 even merit mention in the government's argument this morning,  
13 or brief.

14           And I think that -- I'm not saying we have to finish  
15 the evidence before D1, but -- because that's on us, right? I  
16 mean, that's our responsibility. But to have it available to  
17 us ----

18           MJ [Col COHEN]: I understand.

19           LDC [MR. CONNELL]: ---- is important.

20           And the last piece that I want to address  
21 specifically about the evidence is -- because I said yesterday  
22 in the argument on 639 that I was placing a hook, because I  
23 had some unclassified things that I wanted to say about the

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1 military commission's question of, well, have you requested an  
2 interview with that person identified by UFI.

3           And under the Protective Order #4 framework,  
4 Mr. al Baluchi's team has requested interviews with everyone  
5 who has a UFI. And that -- a description of that process is  
6 found in the record at AE 524RR (AAA Sup) Attachment B.

7           We interviewed five of those individuals: NY7, that  
8 is described in AE 524RR Attachment B and AE 562 (AAA Sup)  
9 Attachment B; F1G, AE 562I Attachment B; Medical Provider #2,  
10 562I Attachment C; D95, 526 -- excuse me, 562 (AAA Sup)  
11 Attachment C; and I2F at 562I Attachment C.

12           This procedure -- this Protective Order #4 has been a  
13 failure, which is described in -- by actual -- by another  
14 declaration at 524 (AAA 2nd Sup) Attachment C. This process  
15 has slowed things down tremendously, and I don't have a place  
16 in the -- in the D dates which describe how to address that  
17 problem. But it did come up in the closed argument yesterday.  
18 Obviously we've discussed today the intersection of 524,  
19 Protective Order #4, and this process, and I just wanted to  
20 close the loop on that and give you the information about the  
21 enormous efforts that we have made under that protocol, which  
22 is not a substitute for actual defense investigation.

23           So ----

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1 MJ [Col COHEN]: And I understand that. I -- yeah, I  
2 understand.

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

4 I want to answer any other questions that the  
5 military commission has.

6 MJ [Col COHEN]: Let me ask you a little bit more about  
7 D2.

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

9 MJ [Col COHEN]: While I -- when I reviewed this -- well,  
10 one, as the -- one of the things I say routinely in the  
11 Air Force court is, you know, I try to stay in my lane. And  
12 so I look to what my legal authorities are to require --  
13 especially other -- other entities to -- to do things.

14 Even within these rules, I combine the convening  
15 authority with respect to certain things, and then if they  
16 don't agree with my orders, you know, to compel, et cetera, I  
17 can abate proceedings. I have remedies that I can impose for  
18 a failure to comply with a commission order.

19 You're right that there probably needs to be a --  
20 some kind of support agreement between -- between the two  
21 entities. Do you -- do you have a specific authority that  
22 gives me the right to -- to order that, other than just say,  
23 hey, this really makes sense. You probably ought to look into

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1 this? Because if you have specific legal authority, I'm more  
2 than happy to go back and take a look at that.

3 LDC [MR. CONNELL]: If I had specific legal authority,  
4 Your Honor, I would have -- I would have given it to you ----

5 MJ [Col COHEN]: That's what I thought.

6 LDC [MR. CONNELL]: Yeah.

7 MJ [Col COHEN]: Okay.

8 LDC [MR. CONNELL]: But I have just a couple of  
9 observations. The first is that the convening authority is  
10 very close in the court family ----

11 MJ [Col COHEN]: Yes.

12 LDC [MR. CONNELL]: ---- right? There's a little bit of a  
13 difference between a direction to a convening authority versus  
14 a direction to the Arkansas State Police. I mean, you  
15 know ----

16 MJ [Col COHEN]: You are correct.

17 LDC [MR. CONNELL]: ---- and we saw that, actually, this  
18 week. Judge Pohl and Judge Parrella believed that they did  
19 not have the authority to -- or said that they believed that  
20 they didn't have the authority to tell the military -- the  
21 convening authority when flights should run, but the military  
22 commission put it in an order that we were going to travel on  
23 Sunday, and then, poof, we traveled on Sunday.

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1           The -- I -- I can't speak for the convening  
2 authority, but if I were them, I would want to know -- I would  
3 be an eager participant in this process. I'd want to know  
4 what the military commission wanted to know, and I would want  
5 to know what they need to tell you in order to move this case  
6 along.

7           I mean, multiple -- I mean, think about Major  
8 General Ary who was convening authority for a substantial  
9 period of time, resigned after his efforts to make the case go  
10 faster by ordering the judges to live at Guantanamo was found  
11 to be unlawful influence by two different judges of this  
12 military commission.

13           I mean, the -- the convening authority has made no  
14 secret of its desire to move the case toward trial, and I'm  
15 not -- I'm not saying that's a bad desire. I'm saying that's  
16 a good desire. It's its responsibility to provision the case.  
17 And there are some parts that -- of this case that have  
18 suffered. I mean, I -- I mentioned how disastrous the media  
19 situation is. In some cases, you know, sometimes the squeaky  
20 wheel gets the grease.

21           MJ [Col COHEN]: No, I understand. And I don't -- I  
22 will -- I will -- yes. I have no problem, as you guys have  
23 noticed, letting people know what I'm thinking. I was just --

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1 on that particular issue, I was just -- if there was a  
2 particular R.M.C. that you were thinking of ----

3 LDC [MR. CONNELL]: I wish so.

4 MJ [Col COHEN]: ---- I would be happy to go take a look  
5 at that one.

6 LDC [MR. CONNELL]: And I love the R.T.M.C., sir. I live  
7 in that thing because there's all kinds of useful stuff in  
8 there, but nothing about this in particular, other than the  
9 duty of the convening authority to carry out this function.

10 MJ [Col COHEN]: Correct. I agree with you there.

11 The other thing I had here, with respect to D2 and  
12 the interplay of D2 and D3. D3 I definitely got. It was --  
13 when you -- given that you filed -- I assume that you --  
14 you -- did you come up with the D2?

15 LDC [MR. CONNELL]: I'm sorry.

16 MJ [Col COHEN]: Did you come up with the D2 concept?

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

18 MJ [Col COHEN]: Okay.

19 LDC [MR. CONNELL]: Yes, sir, I did.

20 MJ [Col COHEN]: All right. Good. I just wanted to make  
21 sure I was asking -- I was asking the right person. All  
22 right.

23 When you -- when you were envisioning D2, I was -- I

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1 guess I can envision D2 as it may take longer periods of time  
2 notionally, but at the end of the day, not everything has to  
3 be done at a particular time so long as big muscle movements  
4 are all done by the time we wanted to get together.

5           So when you were trying X number of days, whether it  
6 was 75 or 60 -- it may have been 75 -- to D2 ----

7           LDC [MR. CONNELL]: Right. I'll tell you exactly what I  
8 was thinking.

9           MJ [Col COHEN]: ---- what were you thinking?

10          LDC [MR. CONNELL]: Okay. I was thinking that there comes  
11 a point in the trial -- in the case where we are ready for the  
12 big stuff ----

13          MJ [Col COHEN]: Okay.

14          LDC [MR. CONNELL]: ---- right? And so I thought -- and  
15 to me, the big stuff is the -- the evidentiary hearings, like  
16 the big evidentiary hearings, like the motions to suppress,  
17 the -- I had thought probably personal jurisdiction, but I  
18 came up with this plan to slot it in here. And -- and, of  
19 course, trial and the major hearings before trial because  
20 that's when this process gets stressed.

21          MJ [Col COHEN]: Right.

22          LDC [MR. CONNELL]: I mean, there's an argument in which,  
23 if I truly did -- had harbored all the ill intent that the

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1 government accuses me of, I would agree their plan because it  
2 would break Guantanamo. It would break it.

3           Because when they are moving these -- you know, the  
4 hotels are moving around? I called to try to switch all of my  
5 reservations from the East Caravella to the -- to the  
6 high-rise so that I could -- wouldn't get frozen out in East  
7 Caravella when the transition occurred. There are no more --  
8 there's -- for the rest of our hearings this year, there are  
9 no reservations available, at least for ordinary people.  
10 Maybe if you have a robe or a star you can get one. But, you  
11 know, for ordinary people there's are no reservations left,  
12 which means the thing is at capacity or very, very close to  
13 capacity.

14           And, you know, dumping 60 media, I don't know how  
15 many observers, a whole bunch of witnesses, a whole bunch of  
16 members into this ecosystem as it stands right now would break  
17 it.

18           MJ [Col COHEN]: Right.

19           LDC [MR. CONNELL]: And the -- so that's what I meant.

20           What I envisioned was what has to happen for someone,  
21 you, sir, the military commission, to -- to feel, okay, we are  
22 ready for the big stuff. And it occurred to me that there  
23 were two things that had to happen for that.

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1           The first is that we had to close out this discovery  
2 process, right? There might be the drib or drab here, I  
3 understand. And I understand the 914 question, right? I've  
4 litigated in 502 series the 914 question. I understand how  
5 that's different. I understand how Giglio is sometimes  
6 different, right? Some courts don't have Giglio due until a  
7 very short time before.

8           But there has to come a time where ----

9 [Alarm in courtroom went off.]

10          MJ [Col COHEN]: All right. Let's go ahead and take a  
11 five-minute recess, and everyone just please take a really  
12 hard look to see if something is missing in a bag or  
13 something. We're in recess.

14 [The R.M.C. 803 session recessed at 1440, 26 July 2019.]

15 [The R.M.C. 803 session was called to order at 1510,  
16 26 July 2019.]

17          MJ [Col COHEN]: The commission is called to order.  
18 Parties are present. Thank you for the indulgence. Took a  
19 few extra minutes so that Mr. Binalshibh could have some  
20 additional time as well.

21           All right. Mr. Connell, we were discussing D2.

22          LDC [MR. CONNELL]: Yes, sir. And just to summarize it,  
23 it occurred to me that there was a time when one could say,

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1 "All right. The stage is set. We're ready for the big  
2 stuff," and we did not, on the defense teams, reach a  
3 consensus on what exactly to do about a trial date, which is  
4 not mentioned there.

5           One good idea is that once the stage is set and we  
6 know -- like I don't know if Hadi is actually going to be next  
7 summer or not, right? It's impossible to know. But -- and  
8 when Nashiri is going to come roaring back, I don't know.  
9 When the Malaysian cases are going to start going, I don't  
10 know. But it seemed -- one like solid approach to that  
11 question seemed to be that, well, once that -- I described it  
12 as D2 or D3, whichever occurs later. But what that means is  
13 once both of those conditions are satisfied, the logistics are  
14 in place and the discovery is in place, that's the way that I  
15 thought of it, then that might be a good time to set a trial  
16 date.

17           But what I hear the government saying today is that  
18 they find trial date.

19           Helpful to them in their logistical maneuvering,  
20 which is, you know, two orders of magnitude bigger than the  
21 logistical maneuvering that I have to do, and mine is painful  
22 enough.

23           So if -- if that's the approach, my recommendation to

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1 the military commission is to set a trial date in October of  
2 2021. My reasoning for that is that I know that the military  
3 commission did the math. I did the math too. Mine came  
4 out -- I think the military commission got a best case of end  
5 of 2020. Mine didn't come out quite that well. I thought  
6 April was best case -- April of ----

7 MJ [Col COHEN]: I have run numbers along those lines as  
8 well.

9 LDC [MR. CONNELL]: Yes, sir. And -- but this is  
10 Guantanamo, and nothing goes perfectly, with the best will of  
11 everyone in the world.

12 So my idea is build some comfort into that -- some --  
13 you know, some room for slippage so that every -- because  
14 there's perverse incentives when every discovery violation  
15 causes, you know, slippage of the trial date, because nobody  
16 wants to move a trial date once it's set. I mean, that's just  
17 a courtroom dynamic anywhere in the world. Nobody wants to  
18 move a trial date when it's set because people plan to it, for  
19 good reason.

20 And so that's my suggestion for whatever that is  
21 worth.

22 MJ [Col COHEN]: Okay. Thank you, sir.

23 LDC [MR. CONNELL]: Thank you.

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1 I have just two more minor thoughts that answered  
2 other questions of yours.

3 MJ [Col COHEN]: Please.

4 LDC [MR. CONNELL]: The first one is, you were asking  
5 about mechanisms for the convening authority. It occurs to  
6 me -- and I'm not the decider, you're the decider -- but 643,  
7 the question of the convening authority -- the current  
8 convening authority's disclosures which -- about items which  
9 might affect his neutrality is a serious issue.

10 MJ [Col COHEN]: I agree.

11 LDC [MR. CONNELL]: And I'm sure this military commission  
12 is going to take it seriously, so it occurs to me that we're  
13 going to have the person who occupies both the convening  
14 authority and director of the office of convening authority  
15 slots testifying either by VTC or down here at some point.  
16 Maybe that's in September. I don't -- or maybe it's October.  
17 I don't know. But that we could sort of -- that that might be  
18 an appropriate time to sort of, I don't know, voir dire him  
19 or, you know, have questioning led by the military commission;  
20 if the parties had questions they might contribute them or ask  
21 them or do something. But it seems to me that that process  
22 is -- and the 643 process are likely to dovetail, as the  
23 military commission said, in a way that might -- we might be

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1 able to -- to make economies of scale.

2           And the last point is -- that I have is I wanted to  
3 make a comment about the definition of "done." When the  
4 government was describing its September 1st date, which seemed  
5 to collapse at the first question, but it was a description of  
6 when they felt they could have things to the convening -- to  
7 the military commission.

8           And with the best will in the world, things in 505  
9 review or 701(f) review, or however you want to call it,  
10 are -- are not the equivalent of them being in the hands of  
11 the defense, because sometimes it takes a while. Sometimes  
12 it -- the military commission has to send it back once or  
13 twice because it -- it doesn't think that they're fulsome  
14 enough and it wants more.

15           And that process does take time. I mean, depending  
16 on its volume. And if it's 200 pages at the end of a process,  
17 you know, I know very well that could be a thousand or 10,000  
18 pages at the beginning of the process depending on what the  
19 narrowing process is. So done, for purposes of D1 to me, does  
20 not include having information to the military commission. It  
21 would mean to the defense so that we can use it and prepare.

22           MJ [Col COHEN]: Conceptually, what if -- if D4 was --  
23 became D2 and D2 became D4, how would that impact your

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1 analysis?

2 LDC [MR. CONNELL]: I considered the possibility that that  
3 could happen. The reason why sort of the final date in the  
4 run-up to actual trial is written as D2, D3, or D4, whichever  
5 occurs last, is that it occurred to me that we could show up  
6 this week and you could say, "I'm going back to Judge Pohl's  
7 approach to 524. Statements are suppressed. Do you have any  
8 other evidentiary motions? Okay. We're going to have that  
9 shorter evidentiary motion, whatever it is, and we're moving  
10 on." Right? In which case the evidentiary motions would get  
11 ahead of the CA certification -- or, you know, the CA  
12 logistics plan and the -- and the government completion of  
13 discovery. Right? That occurred to me as a possibility.

14 So I think in some ways, it already accounts for the  
15 possibility that D2 and D4 would get out of order, which is  
16 not 100 percent your question. Your question actually is, you  
17 know, what if D2 moved to the end and was essentially the  
18 equivalent of D4, right? As I understand your question.

19 MJ [Col COHEN]: Right.

20 LDC [MR. CONNELL]: It's really what if we give the  
21 convening authority more time.

22 MJ [Col COHEN]: If you take the language in D4 and put it  
23 into D2 and D2 into D4.

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1 LDC [MR. CONNELL]: Right. I think what would really have  
2 to happen is that you would have to change it to be -- that  
3 you would really just take D2 out altogether and take the  
4 language of D2 and put it in D4 without swapping D4 back to  
5 D2.

6 MJ [Col COHEN]: Okay.

7 LDC [MR. CONNELL]: Because D4 is end of evidentiary  
8 motions, and it doesn't make sense to have, for example, you  
9 know, defense suspenses for -- about evidentiary motions  
10 running from the end of evidentiary motions, right? But I  
11 know that's not what you meant. What you really mean is how  
12 can we give the convening authority more time.

13 MJ [Col COHEN]: Correct. That's essentially why I was  
14 asking.

15 LDC [MR. CONNELL]: Right.

16 MJ [Col COHEN]: Because there's things based on your  
17 notional recommendation that, right, the logistics is the --  
18 that's the biggest muscle movement by someone other than --  
19 than the parties or the judiciary.

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

21 MJ [Col COHEN]: And so to the extent that we could give  
22 that aspect more time while still moving forward, that's why I  
23 was asking that question.

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1 LDC [MR. CONNELL]: Right. So parts of it -- and I  
2 could -- I could probably speak better to it ----

3 MJ [Col COHEN]: With the exception of things like experts  
4 and interpreters and those kinds of things. But like, no  
5 kidding, like ----

6 LDC [MR. CONNELL]: Because most of what's in D2 right now  
7 applies to big evidentiary motions too, right? So Mitchell  
8 and Jessen testifying is going to generate media interest. We  
9 were discussing over lunch how are they going to ration 20  
10 spots, for example. Like if the number of -- half the number  
11 of people show up who showed up for the arraignment, how are  
12 they going to ration 30 media into 20 spots. We were thinking  
13 about First Amendment and, you know, view point and  
14 discrimination, just how is that going to work.

15 And there are -- most of the things there, experts  
16 we've already talked about, but things like having a  
17 functioning media space matters on an ongoing basis.

18 Having a place for witnesses to stay matters on an  
19 ongoing basis because that's going to -- you know, they're  
20 going to be -- we don't know how many witnesses are going to  
21 be presented in the defense part of 628, for example, right?  
22 We know there are six, it could be ten times that number.  
23 That would be half of the number of witnesses that we actually

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1 requested.

2           The -- so, you know, having logistics matters. If we  
3 called up today and tried to get hotel space for those people,  
4 it wouldn't exist.

5           So that's why I felt that D2 is properly paired with  
6 D3 as opposed to waiting to right before the trial because the  
7 trial is not the only big event. It is ----

8           MJ [Col COHEN]: I understand.

9           LDC [MR. CONNELL]: It is a critically important event,  
10 and I understand why everybody focuses on it, but it is not  
11 the only big event.

12          MJ [Col COHEN]: Right. I understand how you -- what you  
13 were addressing more thoroughly. Thank you.

14          LDC [MR. CONNELL]: Yes.

15          MJ [Col COHEN]: That's all the questions I have.

16          LDC [MR. CONNELL]: Thank you, sir. You've been very  
17 generous with your time.

18          MJ [Col COHEN]: Thank you.

19                 Mr. Nevin, you may.

20          LDC [MR. NEVIN]: Thanks, Your Honor. And Mr. Connell  
21 covered a bunch of ground that I don't have to cover, and  
22 that's why I asked you to let him ----

23          MJ [Col COHEN]: Absolutely, sir. I appreciate you doing

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1 so.

2 LDC [MR. NEVIN]: ---- yeah, let him go first.

3 But there are several things that I do need to say,  
4 and I guess I should begin by asking whether you have  
5 Appellate Exhibit 639J in front of you or if you could get it  
6 there. And I will represent ----

7 MJ [Col COHEN]: I can definitely get it. One second,  
8 please.

9 LDC [MR. NEVIN]: And let me just represent that I  
10 submitted this, admittedly, in a nontimely fashion to your  
11 Court Information Security Officer and on a one-time basis.  
12 It was accepted, and I believe these have been cleared. And I  
13 will ask for -- and I very much appreciate the accommodation,  
14 and, second, ask for access to the document camera to display  
15 these to the gallery.

16 MJ [Col COHEN]: That's granted.

17 LDC [MR. NEVIN]: Thank you. And it will be a minute  
18 before I actually get to that, but, yeah.

19 MJ [Col COHEN]: That's fine, sir. Thank you.

20 LDC [MR. NEVIN]: So I heard counsel, referring to  
21 Mr. Ryan, speak in several ways about the delay that has --  
22 about how long it's taken us to get here. We're seven years  
23 after the arraignment. And he also referred to the idea that

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1 legal motions should have been filed a long time ago and  
2 that -- so we clearly need a deadline, he says, for -- for  
3 legal motions.

4           And with that in mind, I -- I just wanted to -- and  
5 this hasn't been done by others at this point. I just want to  
6 set the table, and I am very sensitive to the table-setting  
7 that Mr. Ryan did with respect to the victim family members  
8 and the need for -- their need for justice and for closure.  
9 And we do -- the military commission may know we typically do  
10 victim family member meetings when we're down here, for those  
11 members of the victims' family who want to meet with defense  
12 counsel. And that's intended as a gesture of respect and  
13 accommodation. I understand that.

14           But, of course, the military commission will  
15 understand that there is a separate mission here as well that  
16 is reflected by -- by the -- by the constitutional, statutory,  
17 and ethical obligations that the lawyers on this side of the  
18 room have.

19           So I just -- I want to begin by saying that --  
20 reminding the military commission of Indiana v. Edwards and  
21 the directive that -- that all proceedings in a case like this  
22 one must be fair and they must appear fair to all who observe.

23           And with that in mind, I will say to you that from

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1 our perspective, torture is only always at the center of this  
2 case. If there -- if the RDI program didn't exist, we  
3 undoubtedly would not have had the pleasure of meeting each  
4 other. We would not be here. We probably wouldn't be  
5 anywhere at this late date. But that's not the case.

6           And when they took Mr. Mohammad into custody on  
7 March the 1st of 2003, they started to break the law. And  
8 that decision to break the law went all the way to the highest  
9 levels in the country. It was not a rogue agent somewhere on  
10 his or her own in some backwater somewhere who violated a law.  
11 It was the policy of the United States to break the law. And  
12 when -- and when Mr. Mohammad was taken into custody, there  
13 also commenced a conspiracy to cover that up, and that also  
14 reached to the highest levels of the government.

15           All of this is exculpatory with respect to sentence.  
16 All of it is relevant to the question of what -- the correct  
17 sentence that should be imposed on Mr. Mohammad in the event  
18 of a conviction of either a capital or a noncapital offense,  
19 of what the sentence should be.

20           And I said this to you briefly previously, but the  
21 idea that classification is used -- has been used two ways  
22 here, both as a shield to protect the government from being  
23 required to turn over materials that are clearly relevant and

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1 would otherwise be discoverable, and also as a sword to  
2 threaten counsel; and we saw that just this week with the  
3 discussion we had in the 350 series.

4 I understand that 350TTT has been withdrawn now,  
5 which I appreciate, but as I told you at the time -- and it  
6 may well have been in a closed session -- that's not the first  
7 time that we have had these kinds of shots across our bow.  
8 They began early. They began in 2008, as a matter of fact,  
9 and have continued throughout this case.

10 And then the -- maybe the broader issue or perhaps  
11 the higher-order issue is the effect that the torture program  
12 had on Mr. Mohammad, because Mr. Mohammad in many ways is not  
13 the same person that he was on the day that he was arrested on  
14 March the 1st of 2003. Now, that's important for a variety of  
15 reasons. And so I -- I, and I think many others, believe that  
16 what I said at the outset is true, that so much of the reason  
17 that -- that we are seven years down the road has to do with  
18 the torture program.

19 While Mr. Ryan was saying in an impassioned way about  
20 it being seven years since the time of the arraignment, I  
21 thought to myself Mr. Mohammad was arrested on March the 1st  
22 of 2003, didn't see a lawyer until sometime in the spring of  
23 2008, five years later. And for a long period of time after

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1 lawyers were permitted to interact with Mr. Mohammad, there  
2 were such stringent limitations on what we were able to talk  
3 about that the -- an effective attorney-client relationship is  
4 still evolving, even at this point.

5           So it may well be that Mr. Ryan looks at seven years  
6 since arraignment as being a number of a certain magnitude.  
7 May well be that it strikes me differently, and it strikes  
8 Mr. Mohammad differently, given the delays that occurred  
9 before this case ever got to arraignment.

10           So ----

11           INT: **[Speaking in Arabic.]**

12           MJ [Col COHEN]: Did you mean to speak English over the  
13 comm to tell us to do something, or ----

14 **[Pause.]**

15           MJ [Col COHEN]: Mr. Nevin, if you will just carry on,  
16 please.

17           LDC [MR. NEVIN]: Okay, Your Honor.

18           So we then -- we look at an issue -- I mean, we -- I  
19 heard the references to the -- to the high degree of effort  
20 that went into producing the discovery materials, all the  
21 materials that have been reviewed and so on by the -- by the  
22 prosecution, and I don't -- I don't doubt any of that. I'm  
23 sure it's been a lot of hard work.

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1           But when we hear that discovery is down to a trickle,  
2 we bear in mind that 286, AE -- Appellate Exhibit 286, a  
3 motion to produce to Senate Select Committee on Intelligence  
4 report, the full report and all the materials that underlie  
5 it, we understand that there are 6 million documents behind  
6 that. We understand that we've been provided at this point  
7 something on the order of about .03 percent of those  
8 documents.

9           And I take it from reading the report that's been  
10 made public and from listening to the hearings, that those 6  
11 million pages, it's not like somebody went and made 5 million  
12 copies of the same document so that 5 million of them are  
13 cumulative. And, you know -- I mean, I take it that these  
14 are, for the most part, discrete documents and each of them is  
15 Brady material. Each of them documents the details of the  
16 torture program. Each of them is critical to us and -- in  
17 terms of having them.

18           So the idea that discovery is complete, I understand  
19 and I've heard both Your Honor and also previous military  
20 judges speak to the proposition that -- that you do not go out  
21 and comb the vaults of the United States Government looking  
22 for discoverable material. It falls to trial counsel. But  
23 here's one where we know what's there and we know what a

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1 tiny percentage of it has been provided.

2 Now, I'm sure you will decide AE 286 in due course.  
3 I don't mean to argue it now. But I do mean to say that when  
4 we hear the proposition that discovery is complete, it's  
5 something that we -- that we wonder about. And I ask you to  
6 wonder about it, at least to this extent, to take these ideas  
7 into consideration.

8 Now, if you have 639J in front of you, I just would  
9 direct you to the third page of that, and this is a proposed  
10 trial schedule from June of 2008. This is not in this  
11 military commission. This would -- this would be relating to  
12 the prior round of military commissions in which Mr. Mohammad  
13 was named as a defendant or an accused.

14 And as you will see, this, signed by Mr. Trivett,  
15 apparently, is suggesting a trial date -- I'm sorry, an  
16 arraignment on June the 5 of 2008. And I just realized that I  
17 needed to -- so given the way the camera works, I'll start  
18 with the top half of this, a date of 4 June 2008. And the  
19 proposed trial schedule is for an arraignment on June the 5th.  
20 A legal motion is due two days later. A week after that,  
21 argument of the legal motions. A day after that, discovery  
22 and witness lists due. Two weeks later, motions to compel  
23 discovery. Two weeks after that, evidentiary motions due.

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1 Two weeks after that, evidentiary motions argued. And two  
2 weeks after that, the trial begins.

3 And I'm going to take this off the document camera  
4 now. I call that to your attention just to, again, ask you to  
5 think about the various occasions on which trial counsel have  
6 told you that they were ready, that discovery was complete and  
7 that they were ready for trial. And Mr. Connell put that up  
8 on the -- put -- made that diagram, presented that to you, and  
9 I think that indicates clearly that this has -- is something  
10 that is a claim that has been made from time to time and it  
11 hasn't -- it hasn't been accurate yet.

12 And the proposition is that it is accurate now, it is  
13 going to be right now, but I ask you again not exactly -- to  
14 take that with a grain of salt. This has been said to be the  
15 largest criminal investigation in the history of the United  
16 States of America.

17 And so in some ways the idea that you would actually  
18 be able to get through all of these materials in time -- at  
19 periods of time that would look normal or that you would  
20 recognize in a regular case is folly. It's -- it would be  
21 surprising if it were otherwise, actually, that discovery  
22 could have been completed by now. I don't have a problem with  
23 where we are with discovery. The problem is the claims that

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1 we've seen all along that discovery was really complete when  
2 it -- when it actually wasn't.

3 I mean, the thing about -- the thing about this  
4 proposed trial schedule from 2008 is I don't know all of the  
5 exact circumstances that went into the production of this, but  
6 it's signed by a trial counsel and it says we'll be ready for  
7 trial in -- in three months. And I'm sure they must have  
8 known or had some idea the kind of evidence they were sitting  
9 on at that point.

10 And I don't -- I don't know. I don't know what may  
11 have been behind this. I don't know who knew what at what  
12 time, but it's -- it is, I think, definitely something that  
13 I -- that is fair for you to take into account.

14 Returning to 639J, in this same vein, I ask you to  
15 look at the -- it's actually the second page. The first page  
16 is an exhibit list, so this would be the first substantive  
17 page. And this is from -- this is from 478 -- excuse me, Your  
18 Honor.

19 MJ [Col COHEN]: That's fine.

20 LDC [MR. NEVIN]: This is from 478CC, 1 June of 2018, and  
21 at page 6 of the document, and it's -- it's highlighted here.  
22 There's a reference to discovery regarding the relationship  
23 between the FBI and the CIA during the period 2002 to 2007 and

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1 it says that the prosecution expects to serve all of the  
2 identified material by 2 July 2018.

3 And as we know, a good deal of that discovery has  
4 actually been provided, is still continuing to be provided  
5 this week. Again, I'm not -- I'm not complaining about the  
6 fact that it was disclosed this week. I'm happy to have it.  
7 I'm concerned about the overly optimistic assertions about the  
8 government's ability to really fairly and accurately certify  
9 that all discovery has been provided.

10 I can only imagine the difficulty that trial counsel  
11 must have negotiating with the agencies about what they're  
12 going to turn over and when they have to turn it over and  
13 matters of that sort. I think that's always a problem for  
14 prosecutors dealing with police agencies, even in little  
15 cases. It must be a gigantic problem here. So again, my  
16 point is only that the claims of -- of readiness for trial  
17 have been -- have been overstated.

18 The next page of 639J is in the same vein. That's  
19 page 11 of that same document. And the prosecution is saying  
20 that it has fulfilled its discovery obligations; that the  
21 remaining discovery is finite and nominal and, given the  
22 quality and quantity that's preceded it, largely immaterial.  
23 And the commission is fully armed to visualize the path

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1 forward and to issue an aggressive trial scheduling order, and  
2 that's a claim they're making again today.

3 Counsel pointed -- Mr. Connell pointed to this -- to  
4 this time frame on his -- on the timeline that he provided.  
5 But I ask that we all look at it and just think about what it  
6 means. The discovery that -- that Ms. Bormann was reading in  
7 closed session is largely immaterial on the question of the  
8 relationship between the FBI and the CIA? Of course not.

9 So -- so that's the -- that's the purpose of  
10 presenting those materials to you, just to ask you to take the  
11 claims of completion and readiness with a grain of salt.  
12 Because I think these -- there has been a tendency -- for  
13 reasons that would make sense to me, there's been a tendency  
14 to lead the military commission out on a limb and to say,  
15 "Look, we're ready. It's all good. We can go forward now,"  
16 and then three, six, nine months later, there is a bunch more  
17 material. And I guess my own concern and I think the beauty  
18 of a -- of a -- of a sequencing-type approach to -- to trial  
19 setting -- or to trial scheduling, is that it avoids that  
20 problem.

21 And on that score, I just wanted to join one thing  
22 Mr. Connell said, which is that if what the government  
23 produces out of time -- let's say that they certify discovery

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1 is complete and then a month later there's more discovery, if  
2 what they produce is, let's say, a statement of Mr. Mohammad  
3 or a statement of one of the other men, you could  
4 theoretically sanction that by saying you should have turned  
5 that over a long time ago. I'm going to -- I'm not going to  
6 allow you to use it. That's excluded. A motion in limine  
7 granted or a motion to suppress granted.

8           But what do you do about evidence like the type that  
9 Ms. Bormann was reading to you? How do you accommodate that?  
10 And you referred to the idea of sliding the trial date to the  
11 right if -- if something requires that. But I only make the  
12 point that it's difficult to sanction a late discovery of that  
13 kind of evidence, and -- just because of its very character.

14           So I was, of course, struck, and maybe others were as  
15 well, when Mr. Trivett said this week that the government has  
16 no obligation to engage in a continuing dialogue with the  
17 defense about discovery. We don't dance to their tune. We  
18 are not required to answer every request for discovery.

19           And I just wanted to say I also have been practicing  
20 law for a while -- it's actually 40 years this summer for  
21 me -- and I've dealt with discovery in all sorts of different  
22 ways in cases. Lots of times prosecutors don't want to turn  
23 over things to you, and I understand.

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1           But lately what I've been finding in federal courts  
2 that I practice in is that either on day one or very soon  
3 after that, I'm getting -- not only am I getting discovery  
4 documents; that is to say, I'm also getting databases that the  
5 government -- that government analysts have prepared, and --  
6 I'm not getting their -- their -- their own work product about  
7 what -- why this document is important or not, but I'm getting  
8 an explanation and the provenance of the discovery that I'm  
9 being provided, and I'm also -- it's in a way that makes it  
10 very easily accessible.

11           And what I'm also getting is a request for a trial  
12 setting in six months. And the government is standing up and  
13 saying, "We gave him this. We gave him that. They can use  
14 the materials we gave them, and they can be ready for this  
15 really, really quickly."

16           And I just wanted to say that has not been the case  
17 here. And Mr. Trivett's comments, all apart from whether  
18 they, you know, reflected the real obligations of prosecutors  
19 or not, I don't -- I don't need to debate that. But I think  
20 that clearly has been the case in terms of the way discovery  
21 has been handled.

22           If I could ask you to -- in 639J, there are three  
23 pages. It would be after the -- it would be the fourth page

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1 after the ----

2 MJ [Col COHEN]: I believe that's 5, 6, and 7 of the  
3 exhibit.

4 LDC [MR. NEVIN]: Okay. Thank you, Your Honor.

5 MJ [Col COHEN]: You're welcome. Or are you talking about  
6 the spreadsheets?

7 LDC [MR. NEVIN]: I'm talking about the spreadsheets.

8 MJ [Col COHEN]: Yeah, they begin on page 5 of the  
9 exhibits.

10 LDC [MR. NEVIN]: All right. And I'm not -- I don't need  
11 to actually show you all -- or display all three pages, but  
12 I'll just tell you that this is -- refers to discovery in the  
13 10024 trigram, and these are medical records, and on -- in the  
14 left-hand column, you see the Bates number. So you can see in  
15 the left-hand column, MEA-10024-000006 and some numbers that  
16 follow the 6. And these are sequential. Up at the -- up at  
17 the top of the page, they begin with 6326, and at the bottom  
18 they end at 6360.

19 But if you go over and look in the middle column, the  
20 one that has dates -- and I have -- what I have now is in this  
21 highlighted yellow section at the bottom -- you have the dates  
22 that these apply, the dates of the document themselves. And  
23 you see they -- just looking at the highlighted dates, they

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1 jump from 2012 to 2016, back to 2012, and within 2012, July,  
2 October, April, and so on.

3 I make the point that these -- as they were provided  
4 to us, these materials were not in sequence. Now, this --  
5 this got -- this got litigated previously. And I think  
6 Mr. Connell famously had a cart with materials here sitting  
7 next to the podium, and there were different-colored paper  
8 and -- indicating all the things that were out of order.

9 I will say the -- these materials that are  
10 highlighted in yellow, if you go and look at the date of them,  
11 it's not actually the date that's indicated on -- on this  
12 spreadsheet. That's why they're highlighted in yellow, the  
13 ones that the dates are wrong. So -- and I -- I don't need to  
14 put up the other two pages of this; they're the same.

15 But I just wanted to make this point to you that --  
16 you know, as they say, there's a nice way to do it, and  
17 there's a -- you know, there's another way to do it. And it  
18 may be that the government's obligation is satisfied just by  
19 turning the stuff over and saying, "Here it is." But if you  
20 do that, it should have consequences since, at least in the  
21 modern era, we know there's another way to do it, and it makes  
22 the process work a lot more smoothly. It's not the process  
23 that the government has decided to follow in this case.

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1           And so then the last thing I'll point you to -- at  
2 least I think it's the last thing -- in 639J is this  
3 photograph. And I -- we -- counsel spoke to me during the  
4 recess and pointed out that this had been provided to us in  
5 response to a request for discovery that we made about the  
6 children. Mr. Mohammad's children were taken into custody.  
7 They were held. They were mistreated. That's something to  
8 argue about on another day.

9           But we asked for any materials that they had that  
10 related to these two boys being -- being held for a number of  
11 months, also incommunicado. So we got back this picture with  
12 nothing, no explanation for when the picture was taken, where  
13 it was taken, who took it, the date that it was taken, those  
14 kinds of issues.

15           Now, does the government have to provide that? We  
16 have -- we had arguments early on in this case about whether  
17 the government was obligated to provide metadata related to  
18 photographs, and this got argued back and forth in various  
19 ways. So this is not the first time this has come up, but  
20 again, it's an example.

21           I mean, in typical practice, you would -- I would  
22 have seen this photograph with an FD-302, an FBI Document 302,  
23 which is a -- basically an FBI police report. And it would

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1 have said the children of Khalid Shaikh Mohammad were  
2 interviewed at such-and-such a date at such-and-such a time,  
3 and a photograph was taken, and you would have the photograph  
4 along with the 302, and it would explain the provenance of the  
5 photograph.

6           Do they -- do they have to provide that kind of  
7 information? I don't know. I mean, maybe we'll litigate that  
8 at some point. But that's something to bear in mind when --  
9 and it's something akin to what Mr. Connell was telling you a  
10 minute ago about this -- about this question of -- about the  
11 difference between providing materials to you and providing  
12 them to counsel. Those two, if that's to happen on  
13 1 September, those aren't the same thing. And so there are --  
14 I say this just to illustrate that there are -- there are  
15 things behind the scenes that affect the way the case  
16 progresses.

17           So -- I know you are aware. I don't think you  
18 were -- I don't think it has come up -- it has fallen into  
19 your bailiwick directly, but you've heard discussion of the  
20 fact that -- that we went through a period of time where there  
21 was infiltration of the defense teams. We know that. I have  
22 told you before that I was subject to investigation on  
23 multiple occasions. And all of these things slow the -- slow

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1 the process down.

2           So when we hear that no less a respected organ of the  
3 United States Government than the United States Senate Select  
4 Committee on Intelligence did a 6,000-page report and relied  
5 on 6 million documents in the process of doing it, and it's  
6 all about the central mitigating factor in this case. And  
7 when we hear that we're not going to see that, or at least  
8 it's not been ruled on, it is -- it seems surprising, let's  
9 say, and it affects the ability -- or our ability to be  
10 prepared for trial.

11           I ask that you consider, as you decide about 639, the  
12 trial scheduling order, that you consider also our motion for  
13 extension of time for giving notice of witnesses on our motion  
14 to suppress. Because there is -- there is a fair amount of  
15 material there in -- in that document that bears on the -- on  
16 what we need in order to be prepared in what -- what we need  
17 to be prepared to go forward.

18           And one of those things that we raised there was the  
19 medical records. And counsel spoke about that and so I'm not  
20 going to go into it at great length. But I did want to call  
21 your attention again to the objection -- the standing  
22 objection that the parties have to anonymous testimony. This  
23 is the kind of problem that arises when people are allowed to

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1 proceed anonymously.

2 I think this calls out for asking who approved the  
3 use of -- of pseudonyms in medical records. It wasn't the  
4 military commission, at least as I understand it, and the  
5 situation we have now. And I'd just call your attention to  
6 this, is that hundreds of witnesses have utterly disappeared.  
7 Neither we nor the government has a way to go find out who  
8 they are.

9 Now, again understanding, as I said at the beginning,  
10 that torture is such an important part of this case, part of  
11 what we need to do is to document Mr. Mohammad's medical  
12 condition over time since he's been here at Guantanamo and  
13 while he was in the black sites. And nothing is any more  
14 common to those of us who have litigated capital cases than to  
15 be interviewing a witness who handed Mr. Mohammad, let's say,  
16 or whoever the person at issue is, a pill on one day, and you  
17 go and you talk to that person and all they did was pass a  
18 pill along. But you say, "What happened?" And they suddenly  
19 are making observations and telling you things that you hadn't  
20 heard before and that are critical.

21 And it's why in a capital case the requirement for  
22 effective assistance of counsel is to conduct a thorough  
23 investigation. And now not only do we have obstacles like

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1 having to go through the prosecution in order to approach a  
2 witness and so on, the matters that were at issue in 524.

3 Now witnesses have just been lost. So that's --  
4 that's something that we will litigate over time, I imagine.  
5 I think there should be consequences for that, I submit. But  
6 for purposes of what we're talking about today, when you're  
7 talking about discovery still not being complete, even at this  
8 late date, discovery still not being complete, there -- the  
9 government expects in the next few weeks to have all the  
10 medical records for 2006 to 2007.

11 We've had indications of Mr. Mohammad having medical  
12 conditions in the last year that just arose that are thought  
13 to be extremely important. So we're now at -- we're dealing  
14 with records from 2006 to 2007? There's no such thing as an  
15 immaterial medical witness. No such thing as a cumulative  
16 medical witness.

17 So I asked the question earlier whether there would  
18 be -- whether there would be sanctions for a failure of  
19 discovery and -- and I think we will -- I think we will have  
20 an opportunity to address that shortly.

21 So last, Your Honor, the -- our materials -- and I  
22 believe this would be our materials in support of -- our  
23 supplement to 639I, it was a supplement to C at the time, but

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1 in any event ----

2 MJ [Col COHEN]: I know which one you're referring to.

3 LDC [MR. NEVIN]: Yes. It refers to the problems with the  
4 GS hiring process. And this has been for us a nightmare. And  
5 I heard the military commission refer to that just a few  
6 minutes ago or -- I guess it was probably this morning, but I  
7 call that to your attention as well.

8 MJ [Col COHEN]: Thank you. It is one of the things that  
9 I have -- I have definitely considered with respect to  
10 logistics and the needs of -- of making, obviously, things  
11 that have been approved. But we need to get things approved a  
12 lot faster if we really want to get this to trial.

13 LDC [MR. NEVIN]: Right. And you see the evidence -- you  
14 see the issue of the evidence platform that we've been waiting  
15 for for two years and that now I guess we're going to -- the  
16 whole process is starting over. That's referred to in those  
17 materials.

18 And also the issue of the -- of the provision of  
19 interpreter support, which ironically comes up today -- sorry,  
20 it comes up earlier this week in the materials that  
21 Ms. Bormann was reading to you from. Those are -- those are  
22 the materials that are at issue in the interpreter -- in the  
23 matter of those -- of those translations.

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1           You -- in some ways I think this hearing has been  
2 illustrative of another problem. You spoke, somewhat  
3 ruefully, earlier in the week about the problems of getting  
4 639C filed and that there was classified material in that  
5 pleading that caused its rejection, but nonetheless it was  
6 material that looked, to a reasonable observer from the  
7 outside, as if it was just fine given the circumstances. But  
8 it led to all the delays in the -- in getting that filed.

9           And you may have thought to yourself this is sort of  
10 interesting and anomalous. Actually, it's just exactly the  
11 kind of thing that has plagued the military commissions,  
12 whether it's a hurricane or a medical problem that can't be  
13 dealt with here on the island, or mold in the offices or all  
14 of the many, many problems that arise from trying to do this  
15 here in this remote location.

16           So those -- that's my argument, Your Honor, and I  
17 appreciate your hearing me out.

18           MJ [Col COHEN]: Thank you, Mr. Nevin. And -- yeah,  
19 everything that you put in your motion are -- are factors that  
20 will weigh, as well as anything the government has put in  
21 theirs. I have a lot to think about over the next few weeks,  
22 but I definitely appreciate you highlighting some of those  
23 things for me.

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1 LDC [MR. NEVIN]: Thank you.

2 MJ [Col COHEN]: Ms. Bormann, would you like to be heard?

3 LDC [MS. BORMANN]: I do. I just didn't know if you  
4 needed a break, if anyone needed a break.

5 MJ [Col COHEN]: I'm ready to press if you all are.

6 LDC [MS. BORMANN]: So I wasn't sure how to start this, so  
7 I'm going to start with something less dry, which follows the  
8 topic of something that Mr. Nevin just said. You might think  
9 that all of these strange things that happen, like the cell  
10 phone detector going off and having to stop court for 25  
11 minutes while we search in vein for something that didn't  
12 exist are anomalous, but unfortunately, they're not.

13 So here's how my lunch hour went. We, of course,  
14 have to check in to to get boarding passes for tomorrow.  
15 That's mandatory. So we -- you gave us extra time to do that,  
16 and we dutifully went there. And as is not anomalous, I  
17 wasn't added to the manifest. There was no reservation for  
18 me, despite the fact that I arrived on island with everybody  
19 else and I'm here and I'm scheduled to go home that day.

20 And so they tried to enter me into the Guantanamo  
21 computer base. And I've been in there for eight years now.  
22 And they were unable to process me, and I don't have a  
23 boarding pass.

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1           So tomorrow when I show up in the morning at the  
2 airport, I am hopeful that I get to go home. That is not  
3 anomalous. I no longer -- it no longer surprises me. It's  
4 just part of what we have to build into the problems here.

5           And I'm going to address some of the logistical  
6 things a little bit later, but first I want to start with  
7 discovery.

8           It was so interesting to see Mr. Ruiz get up in  
9 Mr. al Hawsawi's case earlier this morning and talk about --  
10 before we started the argument on 639 -- it seems like days  
11 ago at this point. But he provided to you a document that was  
12 marked and that he had just been provided overnight. And it  
13 was related to the testimony of Colonel Yamashita yesterday.

14           Now, why is that important? Well, it's important  
15 because if Mr. Ruiz had been given this document previous to  
16 Colonel Yamashita's testimony, we wouldn't be in the position  
17 where the day after the testimony he has to move to introduce  
18 it. You know, different lawyers practice differently. But if  
19 it had been me, I would have wanted to cross-examine  
20 Colonel Yamashita on this document. Without going into it, it  
21 completely contradicts his testimony.

22           Nevertheless, that's not what Mr. Ruiz asked, but I  
23 would have asked for that. And given your promises to be

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1 fair, I think you probably would have granted it, which would  
2 have provided yet more delay, when, in fact, if the discovery  
3 is provided in a proper sequence, we don't have to do that.

4           It doesn't mean it's always perfect, but it means  
5 that it's close to perfect. And we're not even close to that.  
6 I've been practicing for 30 years, and there have been times  
7 when, you know, matters come up in the middle of a pretrial  
8 litigation, and, you know, a witness finds a strange document,  
9 and so the prosecutor is put in the position where they have  
10 to tender to me an unusual document that was out of the  
11 ordinary that nobody anticipated, and so then we have to, you  
12 know, have a conversation with the judge about what to do with  
13 it. But that's not what's happening here.

14           Mr. Connell talked in his presentation on  
15 AE 639K (AAA), the three pages that he provided. On page 2,  
16 where he gave you the updated number of documents provided  
17 since July 10th -- it's now 2117 -- one of those documents  
18 provided on the 19th of July is titled "LHM" -- that's a  
19 letterhead memoranda -- and it's 12 pages. So we need to  
20 explain a little bit about this.

21           Letterhead memoranda are something that was made up  
22 for this case. So normally, if the FBI is interviewing  
23 somebody, they do 302s. That's -- it lists the dates and the

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1 times and what the agents asked and who was present and what  
2 the answers were, and there's a -- this is what we're used to  
3 getting. But here, in this system, we have these letterhead  
4 memoranda where all of that information is basically scrubbed,  
5 and you get a narrative of what a detainee supposedly said.

6           And my client's interrogation spanned three different  
7 time periods: One in early 2017, January; one in October of  
8 2017, and then again in -- I want to say it's February  
9 of 2000 -- not '17. Sorry. January of 2007, October of 2007,  
10 and then again in 2008.

11           The same agents were involved in each of those. And  
12 back in 2011 I requested from the prosecution the notes from  
13 those interrogations. It's now 2019. The government has  
14 answered "Ready" and has said they have completed discovery on  
15 numerous occasions. And just six days ago, I received the  
16 first handwritten notes from Special Agent Gaudin and talked  
17 about earlier today.

18           Now, those don't fall into that category of strange  
19 things that pop up in the middle of somebody's testimony.  
20 Everybody who practices law in this courtroom knows that that  
21 is an important thing. It's a defendant's statement. In  
22 military practice, those statements are tendered at  
23 arraignment. We're way past arraignment here.

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1           And for the record, those 12 pages are the first I've  
2 received. They related to the 2008 interrogation. I still  
3 don't have the 2007 notes. I'm hoping they're going to show  
4 up some day before I have to litigate a motion to suppress  
5 those statements.

6           Today Mr. Ryan told you that the discovery is in the  
7 final chapter, which is actually more generous than what  
8 they've said beginning in 2013. At least Mr. Ryan didn't say  
9 it's done. So I'm grateful for that.

10           I don't know how big the chapter is, but I urge you  
11 to set one date at this point, and that is for that  
12 completion. Because Mr. Connell is right. Obviously, there  
13 are going to be other dates set, but that's the first thing  
14 that needs to happen because it informs everything else.

15           So I'll give you -- you asked Mr. Connell why not set  
16 a subsequent date for motions to compel? And Mr. Connell  
17 said, well, you know, it's a possibility, but we really need a  
18 hard date on the discovery because there need to be  
19 consequences. And I agree with that.

20           But here's why you should set just one date and not  
21 require motions to compel discovery. If the government --  
22 you set -- let's say your date for their completion of  
23 discovery is October 1 and the government provides us no

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1 further discovery between now and then, or maybe just a few  
2 pages here and there. And on October 1, they say to you,  
3 "It's done." The numbers of motions to compel that I will  
4 have to file will be exponentially greater than I would ever  
5 have anticipated, and I just gave you an example of two.

6 If the government certifies that they've provided all  
7 their discovery on October 1 without providing more, I'm going  
8 to have to move to compel the handwritten notes of the  
9 interrogator who interviewed my client in 2007 over several  
10 days. So until we know what the government intends to turn  
11 over and the breadth of it, I can't tell you with any fidelity  
12 how many motions to compel I'm going to have to draft.

13 Why is that important? Because unlike the  
14 government, I don't really have unlimited resources, all  
15 right? So you're looking at it. These -- me, William, Edwin,  
16 and Captain Caine are it in terms of cleared defense counsel.  
17 We're it.

18 The GS hiring process has been a bit problematic for  
19 us, and so we're a little behind the eight ball there. We're  
20 hoping to bring on more people who will be cleared and can  
21 assist us at some point in the future. But at this point,  
22 subject to the vagaries of hiring issues and clearances, we're  
23 kind of at a loss. So until I know what the government says

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1 is the end date, I can't tell you how much time I'm going to  
2 need to file motions to compel.

3           You might say to yourself, well, Ms. Bormann, then  
4 you can come to me and you can simply say, Judge, you know, I  
5 need more time to file motions to compel because the  
6 government didn't even bother to turn over the handwritten  
7 notes. That's true. The problem I have is I have limited  
8 resources. So every time I have to write a motion and file a  
9 motion on something that I can prevent, I'd like to prevent it  
10 because it allows us to work more efficiently.

11           So that's why I would ask you just to set the one  
12 date, hold them to it. And then we can come in and -- you can  
13 set it on a date we're going to be in court, and then you can  
14 ask all of the defense counsel: How long do you need to file  
15 motions to compel? You know, and we can give you a very  
16 realistic, based upon how we're staffed and what we're  
17 missing, how long it's going to take.

18           So that's why I suggested that approach. There are  
19 obviously others who differ. You know, we joined the other  
20 motion and we have no objection to it, but we just think the  
21 better way to do it is start with the big picture first, let's  
22 get that set and then go from there.

23           I next want to talk about the funding for necessary

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1 expert consultants. We have right now before you in AE 633  
2 and AE 420 two pending motions to compel. When Judge Pohl  
3 excluded the statements in 524LL, the convening authority  
4 pretty much defunded the three experts that have been  
5 previously found necessary for our ability to fashion a motion  
6 to suppress and to litigate it.

7 I'm not talking about expert witnesses at this point.  
8 We haven't even gotten that far. I'm just talking about  
9 expert consultants, people who can say to us, "I'm looking at  
10 the discovery with you, Ms. Bormann." This -- I'm going to  
11 talk specifically about AE 633 right now. The person that we  
12 asked to be funded there, and it's continuing funding because  
13 he's already been found necessary, is an expert in  
14 interrogation, the science of interrogation, and has been  
15 recognized as such throughout the United States.

16 He is exactly the guy who we would want sitting  
17 watching the testimony in September if we're going to do a  
18 motion to suppress, so that he can advise us and consult with  
19 us about proper interrogation techniques. Unfortunately, we  
20 don't have any funding so we can't begin to schedule him for  
21 that until we get the funding. We need approval for his  
22 ability to provide us consultation expertise related to  
23 interrogation and a motion to suppress, because right now we

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1 don't have that and we need the funding to be able to get it  
2 done. So that's where we are with that.

3 AE 420 deals with a medical doctor who was also  
4 defunded as it related to pretrial motion practice. And  
5 obviously, Mr. Bin'Attash's medical situation -- and I'm not  
6 going to go any further; you have the filing in front of  
7 you -- as it affected his ability to voluntarily submit to  
8 questioning is an issue. And so we need our medical doctor  
9 funded as well. Those two issues directly impact our ability  
10 to write and process and litigate a motion to suppress. So  
11 you have those in front of you. We await answers. The ----

12 MJ [Col COHEN]: You will have those rulings shortly.

13 LDC [MS. BORMANN]: Thank you.

14 In relation to larger failures to fund necessary  
15 resources, I want to talk briefly about something that  
16 Mr. Nevin touched on, and it can be found at AE 639D -- that's  
17 our filing in this thing -- Attachment B. The convening  
18 authority has failed to comply with Judge Pohl's order and  
19 provide a certain resource, which we're all limping along  
20 here, some of us better than others.

21 But that resource would provide us the ability to  
22 take what Mr. Nevin pointed out to you as the discovery dump  
23 without any sort of organization and all sort of bits and

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1 pieces and done in fits and starts and allow us to smooth the  
2 process, which would allow us to move more efficiently. We  
3 recognized this early. We asked for it early. We moved for  
4 it early, and the convening authority has refused to provide  
5 it. So that's where we are with that.

6           GS hires. So funny. Mr. Ryan said during the  
7 morning session that they had received assurances from all the  
8 governmental agencies that they were going to move on this and  
9 they were going to provide all of the resources. And right  
10 before I went and waited for 45 minutes to get a boarding pass  
11 that I couldn't get, I looked at my e-mails when I got back to  
12 the office back there, and I had received an e-mail from  
13 General Baker, the Chief Defense Counsel, and he said  
14 basically there are two postings that finally went out for  
15 positions on my team.

16           One was for the defense security officer. We've been  
17 without a defense security officer for about -- I want to say  
18 a year and a half or so. We have been using Mr. Garber, who  
19 is an intel analyst as a -- we call him a budget DISO because  
20 he doesn't get paid for it, and he's excellent at what he  
21 does, but we are -- that takes time away from his ability to  
22 do what he could be doing for us as an intelligence analyst.

23           The other position that just got posted was for a

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1 supervisory paralegal. We are down on paralegals as well.  
2 So, you know, we're hopeful that this particular -- these jobs  
3 get filled. I'm not going to promise you that that happens,  
4 because more times than not what happens is some problem will  
5 be found. They'll withdraw the posting, then we have to  
6 repost or the -- it's just a -- it's a mess. The whole thing  
7 is a mess.

8           Then I want to talk a little bit about infrastructure  
9 and logistics. So I have been here now for -- since 2011. In  
10 2012, as we were getting ready to do the arraignment, we had  
11 established two offices. One here in the ELC -- the defense  
12 shared one trailer and each -- it's called ELC3. And each  
13 defense team has a little teeny room. And when I was brought  
14 onto the case, the then chief defense counsel took me on a  
15 tour and I walked into my little -- the Bin'Attash office and  
16 it had two chairs and two computer stations. And I said,  
17 "What am I going to do with this?"

18           And he said, "This is your office."

19           And I said, "This is a capital defense case involving  
20 a massive investigation. It's going to be hundreds of  
21 thousands of pages of discovery and we're going to need  
22 massive assistance. This kind of infrastructure won't work."

23           That was in 2011. That same office is now assigned

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1 to us but with a slightly -- I think it now has three  
2 computers. At one point, we had crammed, I think, seven in  
3 there, but then our office was infested with mold. That was  
4 about nine months ago. And it had to be shut down and my team  
5 was moved to a RASER. I don't know if you know what that is,  
6 but it's -- it's a little teeny container that has -- it's  
7 narrow.

8           When you walk in, it's maybe, I don't know, ten feet  
9 wide and maybe 40 feet long and it's got room for four people  
10 to sit in a row and it's got four computer stations. That's  
11 what we operate out of right now. The table that the  
12 computers on are so narrow that I can't spread papers out  
13 without undoing the keyboard and putting it up on top of the  
14 computer because otherwise a piece of legal paper won't fit in  
15 it.

16           So when I was preparing my argument yesterday --  
17 excuse me, the night before, when I was going through all the  
18 discovery that had just been tendered by the government, I was  
19 preparing what -- I think I spoke to you yesterday for an  
20 about an hour and a half. And I was going through everything  
21 and I'm trying to do it. I had -- it was amazing. Let's just  
22 say that. That's just the tip of the iceberg. The lack of  
23 infrastructure, just offices, stifles everything that we do.

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1 I had to use my intel analyst/DISO to assist me because part  
2 of the discovery was Top Secret. Now, I can't access Top  
3 Secret discovery in that area. In order to access Top Secret  
4 discovery, I have to go to a different building.

5           So I would send Mr. Garber from where I was working  
6 to run to a different building so that he could get onto a  
7 different computer and then print it, and each page prints at  
8 about 20 seconds per page. So if it's like ten pages, it  
9 takes about 200 seconds and the -- so three minutes just to do  
10 a quick print and then run back and give me the information  
11 and then run back again. This is what we do.

12           So if you want to talk about what takes time, it's  
13 the failure of the United States Government to predict what  
14 they needed to do to ramp this thing up so that we could try a  
15 case. And that's what everyone is talking to you about.

16           The housing issue that Mr. Connell talked about, I  
17 mean, Judge Pohl saw it. It took him about five years to get  
18 there because, you know, as the trial judiciary, as the judge,  
19 you're a little more protected on that issue. But regularly,  
20 our defense teams have reservations cancelled. Like they show  
21 up and they have no place to stay. That has to stop.

22           And if it's happening to the defense teams, then it's  
23 likely to happen to witnesses, panel members, and a whole

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1 variety of problems. So infrastructure is a problem.

2           The -- Judge Pohl saw some of this after five years  
3 or so of doing it. And in 2018, as Mr. Nevin noted,  
4 Judge Pohl heard arguments in 478, and those were the same  
5 arguments pretty much that the government makes now with  
6 different dates involved. Since that argument in 478 where  
7 they said they were pretty much done with discovery, we have  
8 learned a lot, because, in fact, they weren't done with  
9 discovery.

10           We have learned that the RDI program and the system  
11 put in place that resulted in the torture of my client and the  
12 other men here was not as it's been described. We have  
13 learned that the interrogators who participated in it were not  
14 as they were described. We have learned that the cables and  
15 the other documentation that was provided to the judge on  
16 which he based summaries and substitutions on were  
17 purposefully not accurate. We have learned that there is, as  
18 Mr. Nevin quoted the government's pleading, connections  
19 between the FBI and CIA that were just disclosed. All of that  
20 since the filing of 478.

21           There's a reason why Judge Pohl refused to issue an  
22 order in 478. You'll notice there's no order there. It's not  
23 because Judge Pohl was lazy. It's not because Judge Pohl

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1 didn't care about getting to trial. He did, very much so.  
2 It's because after the years that he spent here watching the  
3 situation devolve, he wanted to wait until the government did  
4 the first step in the process, and that is complete discovery.

5           You have requests for substitutions on the very  
6 issues involved with the motion to suppress that you want to  
7 hear witnesses on in September still before you. That's not  
8 the way the sequence of events are supposed to happen.

9           What I'm asking you to do is to take a hard stop,  
10 litigate what we can while the government completes discovery,  
11 and then make them certify it. Then hold them responsible  
12 when they violate it. Until we have that done, nothing on  
13 this case can move forward.

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

15           Mr. Harrington, I'll let you start. Prayer time is  
16 at 1635, so I may cut you off in about seven minutes  
17 momentarily, if that's okay.

18           LDC [MR. HARRINGTON]: I may finish in seven minutes.

19           MJ [Col COHEN]: Oh, okay. I just didn't want to -- if  
20 that was going to be a problem, I wanted to give you the  
21 opportunity to tell me you want to address it after prayer.

22           LDC [MR. HARRINGTON]: Not a problem, Judge.

23           Judge, I just want to mention a few other things.

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1 I'm not going to repeat anything that has been said by the  
2 other counsel. But just another anecdote for you to consider  
3 is that you have heard me and several of the other counsel  
4 allude to 292, which was the investigation of me and my team.  
5 And there is an overlap between the -- some of the agents in  
6 the RDI program and in 292. And in the recent discovery which  
7 we've received, that has been amplified.

8           And it's a -- going to be a very, I think, difficult  
9 and complicated issue. And part of the complication comes not  
10 just from the -- the facts themselves, but in 292 we have  
11 different prosecutors -- we have the Special Review Team, or  
12 the SRT -- who were appointed to wall off the prosecution here  
13 from being involved in the investigation of a -- of a defense  
14 team. And now we're going to have a witness who has worked  
15 intimately with both of the prosecutors. And somehow or  
16 another a procedure is going to have to be worked out to work  
17 our way through that.

18           But I just -- I bring that to the court's attention,  
19 not that you're going to do anything about it now. You don't  
20 even have a motion in front of you right now, but you will  
21 soon. And it's going to be a complicated and a difficult  
22 issue, and one of the witnesses that's going to be coming,  
23 with what is anticipated now, is one of those witnesses. So

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1 the issue is going to be am I going to be required to  
2 cross-examine that witness on both aspects or the one? You're  
3 going to need the SRT here if that's going to happen.

4           And then we have the other elephant in the room,  
5 which is should I be cross-examining anyone on 292 anyway  
6 since I was the target of the investigation. And ultimately,  
7 with some of the motions that will be filed, I would  
8 anticipate I would be a witness. So it's a difficult and  
9 complicated issue which will be coming and maybe taking  
10 extensive time to figure out.

11           And, Judge, you talked this morning about witnesses  
12 testifying and, in their testimony, leading to the need for  
13 other witnesses or the need to -- for further investigation,  
14 and you are aware of that and obviously will take that into --  
15 into account.

16           And I would also emphasize to you that we have  
17 questioned several of the -- the witnesses who are identified  
18 by letters and numbers and that even a witness that we  
19 interviewed that had no direct contact with Mr. Binalshibh  
20 gave us information, indirect information, which was extremely  
21 important to us in terms of that investigation. So this is  
22 like a rolling investigation and discovery.

23           Judge, this morning Mr. Ryan went through and he

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1 described for you the reasons why this most recent trickle, as  
2 you called it, of discovery came. And I was wondering, as he  
3 was talking about that, about what you had done in the first  
4 hearings that you were here. You were asking questions like:  
5 Have you talked to the other side about this? And I wondered  
6 why we didn't have a letter or an e-mail or something from the  
7 prosecution that told us what they were doing.

8           We have been operating in the dark about this new  
9 discovery, why it's coming now, where it's coming from. And I  
10 thought his explanation this morning was extraordinarily  
11 helpful, and it certainly would have been helpful before we  
12 filed papers with you on 639, to know what the reasons for the  
13 government's actions were. So this is -- it's -- this is a  
14 two-way street.

15           Judge, you made the comment this morning -- I don't  
16 think you meant anything by it, and I hate to be the person  
17 who comes up here and -- accusing you of things, but you  
18 said you said you figured out a trial date based upon  
19 combining the two proposals of the -- of the parties, and you  
20 got a particular date. And you said -- you said, "And I'm  
21 looking at that, and how can I shorten it?" And that -- I'm  
22 not accusing you of anything, and I know that you have an open  
23 mind on it.

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1 MJ [Col COHEN]: Right. Yeah. I don't recall saying it  
2 that way, but if I did, then that would not have been  
3 necessarily -- I looked at all -- I'm looking at all options.

4 LDC [MR. HARRINGTON]: Right. Because, I mean, the  
5 government has been saying they're ready for trial since the  
6 beginning of this case for a reason. I mean, anybody who  
7 tries criminal cases knows that the speed of getting the case  
8 into trial is an advantage for the prosecution. They have --  
9 they should have their ducks in order almost immediately when  
10 they indict somebody. They've been preparing a case for a  
11 long time. The prosecution here has been preparing this case  
12 forever. And so that -- I just want you to keep that in the  
13 back of your mind.

14 MJ [Col COHEN]: I will, sir. I've made no decisions.  
15 I'm -- I've also thought, based on the discussions here, about  
16 extending those dates too. I mean, I am all -- I am all over  
17 the board with what I'll actually do. No decisions have been  
18 made.

19 LDC [MR. HARRINGTON]: And we don't envy you, Judge, in  
20 doing this. We recognize how difficult and complicated it is.

21 And lastly, Judge, I would just say that Mr. Ryan  
22 made a -- sort of an emotional pitch this morning about -- and  
23 he talked about the evilness of our clients and how they

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1 attacked our country and our country needs resolution and  
2 that.

3           And I just think that we have to constantly keep in  
4 mind that in a case that's the worst case, in a case that  
5 maybe has the worst people who are charged, those are the  
6 cases where we have to be most vigilant. Those are the cases  
7 where we have to work harder than any other cases to make sure  
8 that there's fairness and that -- and that there's justice,  
9 regardless of what the outcome may be.

10           That's all I have. Thank you.

11           MJ [Col COHEN]: Thank you, Mr. Harrington. I appreciate  
12 your comments.

13           Is 15 minutes sufficient for prayer time? Okay.  
14 We're in a 15-minute recess.

15 [The R.M.C. 806 session recessed at 1631, 26 July 2019.]

16 [The R.M.C. 803 session was called to order at 1646,  
17 26 July 2019.]

18           MJ [Col COHEN]: Commission is called to order. Parties  
19 are present.

20           Counsel, although this is done through motion  
21 filings, there is no burden on this issue. It's essentially a  
22 means of having a -- I guess a public scheduling conference  
23 and catching the -- all of us up on that issue. With that

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1 being the case, I -- Mr. Ruiz will be the final comments for  
2 this evening since the government does not have a burden to --  
3 to prove anything. Any objection to that, Mr. Ryan?

4 TC [MR. RYAN]: No, sir. I will ask permission just to  
5 clarify something that you had asked me about this morning  
6 before Mr. Ruiz goes.

7 MJ [Col COHEN]: That would be wonderful. Thank you. All  
8 right.

9 Mr. Ruiz. The floor is yours.

10 LDC [MR. RUIZ]: So as I understand it, when I'm finished,  
11 we're finished but for Mr. Ryan.

12 MJ [Col COHEN]: Mr. Ruiz, that is the case, but you may  
13 take as much time as you think you need.

14 LDC [MR. RUIZ]: Thank you. I appreciate that.

15 MJ [Col COHEN]: Absolutely.

16 LDC [MR. RUIZ]: Judge, first I will direct your attention  
17 to 639F (MAH). That was our ex parte submission. What is now  
18 639I.

19 MJ [Col COHEN]: Okay.

20 LDC [MR. RUIZ]: And it was submitted ex parte --  
21 obviously I'm not going to discuss the contents of that, but I  
22 wanted you to have it up on the screen because I think I can  
23 comment generally. And if you need to refer to it, you can.

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1           The -- the idea for us in approaching this scheduling  
2 conference and the input that you wanted was that I think we  
3 were able to put our minds together on this side of the aisle  
4 and try to give you as much information. And for us, for  
5 myself, for Mr. al Hawsawi, my goal has been to give you as  
6 much information as possible. This is your second hearing.  
7 As you can tell, we've been here a long time, and there's a  
8 lot of history that informs the arguments and the -- and  
9 the -- the positions that we take.

10           For that reason, we joined in the 639I. Our original  
11 plan had been to file this as a supplement, an ex parte  
12 supplement that laid out some of our most specific facts and  
13 details about strategic efforts, ongoing efforts with the  
14 defense, and ongoing difficulties that are outside of our  
15 control and -- in making -- in making that progress and moving  
16 those efforts forward.

17           It ended up being filed as a -- as a separate number,  
18 but we still see that as a supplement to 639I as it  
19 complements some of the positions that we've -- we've taken.

20           MJ [Col COHEN]: I agree with that. That's the way I read  
21 it as well.

22           LDC [MR. RUIZ]: Yes, sir. Thank you.

23           And in essence, 639F, it's meant to give you a full

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1 picture of our internal operations, our ongoing defense  
2 efforts, and very specific issues as well as the interplay of  
3 those issues with the external entities that we've discussed.  
4 We feel that that is clearly work product privilege. And as  
5 such we felt it was appropriate to provide that to you in that  
6 form and that fashion.

7           So I ask you when you are considering everything  
8 you've heard today, to please also take into account that --  
9 that particular filing.

10           MJ [Col COHEN]: I will, sir.

11           LDC [MR. RUIZ]: Thank you.

12           I said it before, and I'll say it again. It's -- for  
13 me, again, continues to be kind of like a Groundhog Day kind  
14 of moment. Much -- much of the arguments that -- and  
15 positions that were stated today are ones that we've -- have  
16 been through. I recall Mr. Ryan's argument in a previous  
17 session the Field of Dreams argument, the Hey, if you schedule  
18 it, it will all come. If you -- if you give us a date,  
19 everything will fall into place. So the manna will fall from  
20 the sky, everyone will fall into place, the infrastructure  
21 will -- will appear, and all of a sudden we'll have a full  
22 house and -- and a full audience and everything will be great.

23           But what we haven't seen and what the commission has

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1 never seen to this date, even -- even from that initial and  
2 previous Field of Dreams argument is any concrete plan. There  
3 has been no concrete plan presented to you, Judge, in terms of  
4 what kind of infrastructure would be available to this  
5 commission to support the enterprise that we are about to  
6 embark on.

7           And I will -- and I will tell you that the last time  
8 we argued this, Mr. Ryan argued it with as much zeal and zest  
9 and passion and conviction that he showed today. And again,  
10 we are here, a different judge, a different setting, but what  
11 have you actually seen in terms of an infrastructure plan,  
12 right? And that's nothing.

13           The -- the argument remains the same. If you  
14 schedule it, it will come. And I would submit to you that  
15 that is troubling. It is troubling if you -- if you accept  
16 that proposition. Because in order to accept that  
17 proposition, you have to accept the proposition that the  
18 United States Government officials, all of whom Mr. Ryan says  
19 he's met with and they've talked to and they've coordinated,  
20 again, we've been here before.

21           So I have to make a reasonable inference that before  
22 we came and before he stood up and argued with that zest and  
23 zeal and conviction to another military judge in this very

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1 same courtroom, they had the same conversations about the same  
2 issues and the same problems with those same entities.

3           And it is indeed troubling if we accept the  
4 proposition that those people in our government, being aware  
5 of the people who need closure to this case, not just the  
6 family members who -- who've lost loved ones but also the  
7 people who are being judged, because that is what ultimately  
8 any criminal justice system is meant to do, is bring finality,  
9 accountability, closure to a situation that instills  
10 confidence in that process.

11           That's why we have things such as speedy trial. It's  
12 not just for the benefit of the defendants, it's for the  
13 benefit of society, of our society, to imbue that society with  
14 confidence in that process. And so it's very troubling if we  
15 are to accept the notion that there are government officials  
16 who have simply looked to the prosecution and said, "Eh, you  
17 don't even have a trial date yet, so, eh, get back to us  
18 when -- when that happens." Because that would have to  
19 necessarily accept the fact that those government officials,  
20 United States Government officials, understanding there are  
21 people who have been waiting many, many, many years for  
22 finality to this process, simply shrugged their shoulders and  
23 said, "Eh, you know, get back to us when there is a trial

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1 date." I find that very hard to believe.

2 I do believe that Judge Pohl sent many messages in  
3 his time on that bench in terms of what he deemed to be  
4 necessary for the support of that enterprise and -- in the  
5 trial in this case. And I think what Ms. Bormann and what my  
6 colleagues indicated as to why there continues to be no trial  
7 date, it's because Judge Pohl simply did not believe it.

8 Judge Pohl did not believe that there was the will to  
9 provide the infrastructure, to provide the support that was  
10 necessary to take this case to trial. And he refused to do  
11 so. He refused to simply pick a date. He refused to simply  
12 do what perhaps, Judge, Your Honor, would have been an  
13 expedient and a popular thing to do. Instead, he chose to do  
14 the unpopular and the difficult but the right thing, which was  
15 call the government and basically refused to set a trial date  
16 until they showed him the substance. Until they provided the  
17 substance that would lead to that.

18 And you've seen it today. You heard me earlier in  
19 the week in one of my rebuttals when I talked about the 2013  
20 and '14 and '15 and '16 and you saw today graphically. I was  
21 glad Mr. Connell put that up in graphic form in terms -- with  
22 specific pinpoint cites to the specific dates and arguments  
23 where the prosecution stood right here at this lectern, looked

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1 at the judge, looked him in the eye before the eyes and the  
2 ears of the world and yet again said, "They have everything  
3 they need. We are ready to go. We will pursue an aggressive  
4 trial schedule."

5           And I will tell you, I wasn't here in 2008, so I  
6 forgot to -- I forgot to highlight 2008 when I first stood up.  
7 And I had not seen the exhibit that Mr. Nevin highlighted  
8 today. And I will tell you that looking at that exhibit  
9 and -- it really bothered me. It really shocked me to see  
10 that in 2008 they were saying the same thing; that a  
11 prosecutor in this courtroom put their name to paper and said  
12 the things they said about the nature of discovery and the  
13 extent of discovery and the importance or relatively lack of  
14 importance of discovery in this case. And it shocked me,  
15 because I know from 2009 to this date how much -- how much  
16 I've seen that I consider to be incredibly important to  
17 carrying out the defense of Mr. al Hawsawi.

18           And so what that -- I think Mr. Connell touched on  
19 this, and I think what that does and what informs the court is  
20 that the government's assertions, their -- their dates,  
21 they're -- they're too optimistic, but they're unrealistic as  
22 well. And I understand that there's a real zeal and zest and  
23 desire for this prosecution team to take this case to trial.

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1 I see it every time that -- that I -- it seeps into closing  
2 argument on matters of law with the zest and that zeal in  
3 closing argument. I see that desire. I get it as a litigator  
4 as well, to get to -- to that end stage.

5 But at least from -- from my standpoint as  
6 Mr. al Hawsawi -- I stand by what I said. Mr. al Hawsawi's  
7 not afraid to get to trial. Neither am I. But I'm also no  
8 fool. In the defense of a capital case, the eventuality of  
9 taking this to trial, whether it's in a singular motion to  
10 suppress or the totality of the case, has to be done in a way  
11 that we do all our work up front and then -- and then we get  
12 to engage in that field.

13 And Mr. Ryan said, "Well, we feel like we haven't  
14 even been up to bat." Well, you got to choose the ballpark.  
15 You got to choose the field we play on. You got to choose the  
16 rules that were handed down to us. The defense didn't choose  
17 that. And I think that's what was alluded to earlier on in  
18 that sense.

19 So while we participated and we joined in the  
20 proposal, I do think it is the best aspiration. And so when  
21 you are -- when you are looking at actually picking some of  
22 these dates, I ask that you -- and you did say this at, I  
23 think the last hearing. You said I want the parties to help

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1 me do something that's realistic. And I -- I believe that.  
2 And I think -- this process, I think, bears that out, and I  
3 think all of the comments of -- of my colleagues, all of which  
4 I join, bear that out.

5 I did also have -- you know, I kind of -- I agree  
6 with Ms. Bormann, and I also agree with -- with the -- the  
7 position that we took jointly in terms of that initial  
8 discovery date. I think that initial discovery date is,  
9 perhaps, the most important because it needs to be the most  
10 realistic.

11 And having seen the progression and production of  
12 information in this case, I think as you've seen it presented  
13 now and you've seen it documented, I think it would be a  
14 mistake to make that date too soon rather than -- than to  
15 build in some reasonable cushion and some reasonable time. So  
16 that when the prosecution does finally stand up here for  
17 whatever umpteenth time and says, "They have everything they  
18 need," it's not a -- a case of the government again crying  
19 wolf, right? But it is, ultimately, this is it.

20 And this -- my colleagues have touched on a concern  
21 that I also share, which was the incentive -- the incentive  
22 piece, right? Because most of the discovery will probably be  
23 things that are exculpatory or helpful to our defense, so I

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1 join in -- in that regard.

2           You -- you raised, I think, the very reasonable  
3 question about your authority to -- to order other entities to  
4 do X, Y, or Z, such as the convening authority, such as the  
5 adjudicators of security clearances. And from -- from my  
6 perspective, the way I see that, is that you have the inherent  
7 authority, obviously, to regulate the conduct and -- and the  
8 means of presentation within the law and within the  
9 regulations that are established for timeliness, right?

10           MJ [Col COHEN]: Uh-huh.

11           LDC [MR. RUIZ]: So I do think -- and I saw an example of  
12 this in this litigation. It was the litigation having to do  
13 with the U-boat, and that was the 485D series. There are a  
14 couple of cites to that in our joint position here.

15 Mr. Connell alluded to -- alluded to some of that language.

16           There's other language that wasn't referenced, and  
17 one that I particularly -- I think is important, where  
18 Judge Pohl says that, you know, this is yet another example of  
19 external forces making decisions without full appreciation of  
20 the consequences those decisions have on the commissions. Ad  
21 hoc decision-making goes to the very integrity of the trial  
22 process. And then he abated the proceedings.

23           And while he could not order the -- the commanding

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1 officer of the base or the person who controls the assets that  
2 now carry you across the bay, Your Honor, he did act in a way  
3 that protected the integrity of the court until the government  
4 brought their conduct into compliance in a way that would  
5 allow the commission to move and, in that particular case, to  
6 preserve the independence of the judiciary and the separation  
7 that Judge Pohl thought was necessary to maintain that  
8 integrity and that separation.

9           So while Judge Pohl didn't order them to provide him  
10 an independent means of transportation, he did have the  
11 ability to regulate the conduct of this trial in a way that  
12 delivered a very real message to these external actors as to  
13 not only how it was impacting the proceedings but also to  
14 curtail that conduct. And I think you can fashion the same  
15 type of remedy. And I think certainly the convening authority  
16 stands in a closer relation, say, perhaps, than the naval  
17 station commander who -- who controls the assets in terms of  
18 how they flow across the bay.

19           MJ [Col COHEN]: Thank you. I appreciate you reminding me  
20 of that.

21           LDC [MR. RUIZ]: Yes, sir. So that's -- that's just one  
22 example.

23           I also think that in terms of the -- the

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1 infrastructure, there should be a plan that is put forth, that  
2 would -- with real meat on the bone and something that the  
3 commission can, in fact, consider and then the parties can  
4 opine on. Because the -- you know, and then other language  
5 that Judge Pohl used in that -- in that order that -- that I  
6 think is very important, is he said this may seem like a  
7 trivial issue, right? He included that in his order because  
8 he recognized that due -- to the outside observer, that could  
9 look like a trivial issue. Well, Judge, why can't you get  
10 across the bay and why can't you go with anybody else? Or,  
11 you know, why can't you find a different way of going around  
12 that?

13           And he recognized that. He said this may appear a  
14 trivial issue, but it's not a trivial issue. It goes to the  
15 integrity -- he used the word "integrity" -- of the judicial  
16 process. And this is ultimately what this discussion is  
17 about. It's about maintaining this integrity.

18           When, you know, Mr. Harrington gets up and says, ah,  
19 you know, we don't believe, Judge. I will say that it's very  
20 hard to believe in this system. It's very hard to buy into  
21 this commissions system and into the reasons it was created,  
22 to isolate, to insulate and isolate these men from true  
23 justice in many ways, with an inferior system of justice, and

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1 to insulate many of the violations that occurred.

2           And it is that conflict, it is that desire to create  
3 this system with an appearance of propriety or justice or  
4 whatnot, that has led us to this path of just having to  
5 wrench, constantly, dribs and drabs from the cold dead hands  
6 of the prosecutors and the -- and the government entities that  
7 control this information, which is why we're still here.

8           There's a recognition, certainly, that the  
9 prosecution have to interact with a number of external actors.  
10 Those external actors, those agencies, have had a real impact  
11 on the course of this process, on the timeliness of this  
12 process.

13           And so when you're building in timelines for this  
14 prosecutorial team, you have to remember, and I think you  
15 should remember, that they're also dealing with entities who  
16 may not have a desire to get this case to a trial resolution,  
17 who may not have as their primary objective to build  
18 transparency and openness and to have the integrity of this  
19 justice process ultimately be the benchmark. They have other  
20 agendas, and they have other primary objectives. And so when  
21 we talk about a date in September or November, I think that  
22 needs to be part of the analysis.

23           Judge, briefly on the UMI issue, we talk about the --

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1 the difficulty that raises in terms of access to a witness or  
2 locating a witness, but it's also more than that. It's also  
3 once you're looking at a medical record that is -- utilizes a  
4 particular UMI that doesn't actually correspond.

5           Mr. Connell talked about the comptroller that they  
6 interviewed. We probably interviewed him either the day  
7 before or the day after, not sure when, but we also  
8 interviewed the same person. And we expended time and energy  
9 in that interview. And during that interview we were thinking  
10 maybe we're missing something so we just need to continue to  
11 try to dig and probe and ask questions, and so we did, right?  
12 So we expended time and energy in that.

13           But what that brings me to is just the -- the -- it's  
14 not only the having, right? Because the -- the having, the  
15 getting is just the first portion. For us, on our team, once  
16 we get discovery, there is -- there is a process that we go  
17 through to analyze that, a number of layers that we analyze  
18 that, and then a number of second and third decision-making  
19 that goes into how we react to that discovery.

20           So once we get that discovery, there is still a  
21 pretty intricate process of how to go about analyzing that --  
22 that material and what -- how we're going to react to that  
23 material. Whether it's discovery requests in addition to it,

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1 whether it's making additional requests for witnesses, filing  
2 motions, whatever.

3           And so it's not just the getting, it's also the  
4 doing, and that's just the beginning of the -- the process of  
5 analysis and the process of formulating what next steps we're  
6 going to be taking. Of course we're doing that while other  
7 things are ongoing, right? While in this particular case the  
8 timelines are kind of close to like the discussion about the  
9 motion to suppress, right? And the -- the motion to suppress  
10 potentially driving all these witnesses and -- and so that's  
11 ongoing, all of those things. It just doesn't stop when we  
12 get discovery, right? Everything keeps going. So I think  
13 that's also important as well.

14           And I think Mr. -- Mr. Harrington said it best,  
15 ultimately, in terms of what we really have to guard against.  
16 I can definitely see a situation, you're coming into this case  
17 and you have a real desire to -- to organize and to put this  
18 case into place, and I think that's something that I think we  
19 welcome and we hope that maybe you are the person who can do  
20 that.

21           But again, for better, for worse, those of us who  
22 have been here for a long time operate with perhaps a rather  
23 unhealthy sense of skepticism, just borne from time in the

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1 litigation that we've been involved in. But always with --  
2 with supreme optimism in some regards.

3 But I would suggest to you that, you know, Mr. Ryan's  
4 recitation about the avowed enemies of the United States, I  
5 understand that, and I get why he says that. But I will tell  
6 you that the true enemy is really the degradation of our  
7 process, the degradation of our rights, the degradation of the  
8 integrity of the judicial process. That is -- that is far  
9 more of a threat to us as a society, as a people, than these  
10 men who have now been taken out of the fight, who have been  
11 neutralized, and who are now facing a judicial process that is  
12 supposed to proceed under our laws.

13 The Supreme Court of the United States have many,  
14 many times weighed in on what is required in a capital trial.  
15 And to degrade those standards for the sake of expediency  
16 would be the greatest enemy that we face right now, Judge.

17 So I appreciate your time. I appreciate your  
18 attention.

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

20 Mr. Ryan, you had an update on maybe a date that you  
21 all were thinking, perhaps?

22 TC [MR. RYAN]: That is correct, sir. You -- there was a  
23 question pending this morning when we broke. Before I speak

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1 to it, I need to just clarify something with the commission,  
2 if you will.

3 MJ [Col COHEN]: You may.

4 TC [MR. RYAN]: In our pleading -- well, first you'll  
5 recall during my argument and in our pleading as well, I made  
6 reference to 1 September as being the date by which we would  
7 have all RDI discovery completed with all the explanations  
8 along the way. And when I say completed, I meant to the  
9 defense directly and/or to Your Honor through the 505 process.

10 Also in our pleading at page 10, where we put down  
11 our proposed trial milestones, we set up a date as 6 December  
12 by which discovery deadline existed for all of the parties,  
13 both prosecution and defense. Now, when Your Honor was  
14 speaking with me and asking questions, you were clearly, I  
15 think, considering in your mind some possible equation of what  
16 got from point A to point Z, and understanding you were making  
17 no commitments or decisions as well.

18 But I wanted to inquire of you, sir, as far as the --  
19 the sort of D1 that we decided, that day that you were  
20 beginning the clock that you saw in your mind, were you  
21 considering that to be 1 September or the 6 December date that  
22 we had put in our pleading?

23 MJ [Col COHEN]: I -- thinking back to this morning, I

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1 think when I was asking you some questions and we started  
2 talking dates ----

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

4 MJ [Col COHEN]: ---- I was throwing out that if D1 was,  
5 for example, 1 September, overlaying the two perhaps I got us  
6 to sometime later in that. I'd have to look and see what --  
7 either late 2020 or early 2021. I don't have the  
8 specific ----

9 TC [MR. RYAN]: That's correct.

10 MJ [Col COHEN]: ---- the Excel spreadsheet in front of  
11 me. But, yeah, I know on that particular point I was -- I was  
12 thinking that. If -- just to see what you all were thinking  
13 about the idea of D1, to the extent that it complied with the  
14 rules of 701 ----

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

16 MJ [Col COHEN]: ---- Brady, et cetera.

17 TC [MR. RYAN]: Yes, sir. And in light of that, I am  
18 ready to commit at this time that we -- the prosecution commit  
19 that 1 October is the date by which we will have made sure we  
20 are in compliance completely with 701 and the various orders  
21 of this commission. That, Your Honor, is taking into account  
22 and taking to heart what you said at the last session about  
23 building in -- building in some wiggle room for ourselves on

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1 that.

2 MJ [Col COHEN]: I understand. So I -- I appreciate that.  
3 I will take that under -- under advisement.

4 TC [MR. RYAN]: And the last thing I'll say, sir, is that  
5 I understand, Your Honor has made it clear and it's been  
6 argued very extensively, but from where we go from this point  
7 forward, there are -- Your Honor has identified that there --  
8 there will have to be accountability, which also means  
9 consequences, if we don't live up to what we do. We  
10 understand that. We accept it.

11 MJ [Col COHEN]: Okay. Thank you. One other thing to  
12 kind of take back just -- just, Mr. Ryan, to -- to the  
13 government is, I don't know if you guys can provide me  
14 anything in writing or not. I'm not sure how I want to handle  
15 this. But I do have some questions that will factor into  
16 that, and that is: What are realistic timelines, for example,  
17 at least interim security clearances for individuals? As we  
18 prioritize these things, I think that will matter a little bit  
19 as I -- as I rule on that. To the extent that the government  
20 has -- has access to -- to someone who can kind of make some  
21 commitments on how fast some of this notionally can -- can be  
22 done ----

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

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1 MJ [Col COHEN]: ---- and that they're willing to commit  
2 to ----

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

4 MJ [Col COHEN]: ---- if you're willing to supplement that  
5 kind of information and provide it to the defense as well, it  
6 would be something that would probably be beneficial to me  
7 trying to put together a -- a scheduling order.

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

9 MJ [Col COHEN]: All right.

10 TC [MR. RYAN]: May I turn to another matter very quickly?

11 MJ [Col COHEN]: You may, sir.

12 TC [MR. RYAN]: The document that Counsel Ruiz offered up  
13 this morning and the commission accepted, which I believe is  
14 AE 530MMMM.

15 MJ [Col COHEN]: Correct.

16 TC [MR. RYAN]: I can advise the commission now is  
17 unclassified; however, it is FOUO.

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

19 TC [MR. RYAN]: It is likely that it will not be on the  
20 website, I am told.

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

22 TC [MR. RYAN]: But it is being reviewed.

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

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