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1 [The R.M.C. 803 session was called to order at 0905,
2 11 January 2018.]

3 MJ [COL POHL]: Commission is called to order. I'll note
4 that no accused are present.

5 General Martins, is there any change in the
6 prosecution team since we recessed yesterday?

7 CP [BG MARTINS]: Good morning, Your Honor. No, there is
8 not.

9 MJ [COL POHL]: Mr. Nevin?

10 LDC [MR. NEVIN]: No change, Your Honor.

11 MJ [COL POHL]: Ms. Bormann?

12 LDC [MS. BORMANN]: No change, Judge.

13 MJ [COL POHL]: Mr. Harrington?

14 LDC [MR. HARRINGTON]: No change, Judge.

15 MJ [COL POHL]: Mr. Connell?

16 LDC [MR. CONNELL]: No change, sir.

17 MJ [COL POHL]: And Mr. Ruiz?

18 LDC [MR. RUIZ]: No changes.

19 MJ [COL POHL]: Mr. Swann.

20 [END OF PAGE]

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

3 DIRECT EXAMINATION

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

5 Q. Major, I remind you that you are still under oath.

6 A. I understand.

7 Q. All right. No detainees are present this morning.

8 Let's start with Khalid Shaikh Mohammad first, what's been
9 marked as Appellate Exhibit 546D consisting of three pages.

10 Did you advise him of his right to attend this morning?

11 A. I did. I met with Mr. Mohammad this morning,
12 introduced myself, asked him how he was doing. He said he was
13 fine. I advised him that he had a military commission this
14 morning. He said he understood. I asked him if he was going
15 to come to commission. He said he did not want to come. And
16 then I asked him if he wanted me to read the advisement in
17 English and have it translated and he said, "Just read it in
18 English." And I started reading that to him at 6:31 this
19 morning.

20 Q. All right. Did you deviate in any way from the
21 hundreds of times that you have done this?

22 A. I did not.

23 Q. That said, do you believe that Mr. Mohammad

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1 understood his right to attend and that he voluntarily waived
2 his attendance this morning?

3 A. I do. I read both pages to him, asked him if he had
4 any questions; he said he had no questions. And then he
5 signed the document, handed it back to me, and then I signed
6 the document.

7 Q. All right. Let's move next to Khallad Bin'Attash,
8 546E?

9 A. Correct.

10 Q. Again consisting of three pages. Did you follow the
11 same procedure with Bin'Attash?

12 A. I did, I followed that same procedure.
13 Advised him that he had a military commission this morning,
14 asked him if he would like to -- if he was going to come. He
15 said he did not want to come. I asked him if he wanted me to
16 read the English version and have it then translated, which is
17 what he normally does. He said yes.

18 So I gave him the Arabic version, and he followed
19 along as I read the English version. And as you can see, he
20 filled out the Arabic version of the advisement. Once I
21 finished reading it in English, I had the interpreter read it
22 to him in Arabic, and then asked him if he had any questions.
23 He said he did not. He signed the document, handed it to me,

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1 I signed the document.

2 Q. All right. Any questions about the voluntariness of
3 his waiver?

4 A. No, not at all.

5 Q. Ramzi Binalshibh, 546F, consisting of three pages.
6 Same procedure with him?

7 A. Same procedure with Mr. Binalshibh.

8 I advised him that he had a military commission this morning.
9 He said yes, I understand. And I asked him if he was coming
10 to the commission. He said he was not going to come. And I
11 then asked him if he wanted me to just read the English
12 version, which is what he normally wants. He said, "Yeah,
13 that's fine." So I read both pages of the document to him.
14 And then he asked for the documents, he signed the documents
15 in my presence, and then I went ahead and signed the document.

16 Q. Any question in your mind about the voluntariness of
17 his waiver?

18 A. None at all.

19 Q. Ali Abdul Aziz Ali, 546G, three pages.

20 A. Yes. Same procedure. I met with Mr. Ali this
21 morning, advised him that he had a military commission. He
22 said he understood. He asked if it was going to be a short
23 session. They all kind of had that belief, that it would be a

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1 short -- a short session this morning in terms of an open
2 session. I told him that was my understanding. He said he
3 didn't want to come to the commission.

4 And he then -- I then asked him if he wanted me to
5 simply read the English version, which is his normal
6 procedure. He said, "Fine, that's okay." So I read the
7 English version to him, both pages. He signed it in my
8 presence and then I went ahead and signed it after I asked him
9 if he had any questions.

10 Q. And apparently he has a legal meeting at Echo II
11 today?

12 A. He agreed that -- after he said he didn't want to
13 come to commissions, I then offered him the opportunity to go
14 to Echo II, and he said he would go to Echo II this morning
15 and this afternoon.

16 Q. All right. Any question in your mind that it was a
17 voluntary waiver?

18 A. None at all.

19 Q. All right. And finally, Mustafa al Hawsawi, 546 ----

20 A. H.

21 Q. ---- H, consisting of three pages.

22 A. Yes. It's the same procedure I used with the other
23 detainees. I met with Mr. al Hawsawi, advised him that he had

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1 a military commission. He said he understood. I asked him if
2 he wanted to come to the commission. He indicated he did not
3 want to come to the commission. And I asked him if he wanted
4 me to read the document, have it translated, which is his --
5 his normal procedure. He said, "Yes, please."

6 I handed him the Arabic version, so he followed along
7 and filled out the Arabic version as I read the English
8 version. I then had the translator or the interpreter read
9 the Arabic version to Mr. al Hawsawi. I asked him if he had
10 any questions. He said he did not have any questions. He
11 signed the document, handed it to me. I signed the document.

12 Once he said he didn't want to come to the
13 commissions I asked him if he wanted to go to Echo II today.
14 He said, "Not this morning, but I'll go to Echo II this
15 afternoon."

16 Q. So he's going to his legal meeting this afternoon?

17 A. That's correct.

18 Q. All right. Any questions about the voluntariness of
19 his waiver in your mind?

20 A. None at all.

21 TC [MR. SWANN]: All right. Thank you. I have nothing
22 further, Judge.

23 MJ [COL POHL]: Any defense counsel wish to inquire?

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1 LDC [MR. CONNELL]: Your Honor, objection to anonymous
2 testimony.

3 MJ [COL POHL]: Okay. Objection is overruled.

4 Thank you for your testimony.

5 WIT: Thanks, Judge.

6 [The witness was excused.]

7 MJ [COL POHL]: I find that each detainee has knowingly
8 and voluntarily waived his right to be present today.

9 Okay. That brings us to 530. We were in the middle
10 of defense argument on that. Just to put people on notice, I
11 want to, when we get done with 530, revisit 523/524. I have
12 some questions about the way ahead on some of these issues.
13 Okay.

14 LDC [MR. NEVIN]: And, Your Honor, if I could ask that
15 after that we have a few minutes to talk about 530G, the
16 carve-out of 530 that relates ----

17 MJ [COL POHL]: Okay.

18 LDC [MR. NEVIN]: ---- to the seizure of legal materials.
19 Counsel and I have spoken, just a little bit of -- I can
20 explain it to you when the time comes ----

21 MJ [COL POHL]: Okay.

22 LDC [MR. NEVIN]: ---- so if you would.

23 MJ [COL POHL]: Really kind of concentrating right now on

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1 the 530 computer piece of it.

2 LDC [MR. NEVIN]: Yeah.

3 MJ [COL POHL]: And then I kind of mentally carved that
4 out. So what we'll do is we'll do the 530 computer piece, the
5 530 carve-out piece, the 523/524 issues that I have, and then
6 briefly talk about 478.

7 LDC [MR. NEVIN]: And just so we're clear, I'm just asking
8 to have -- to have a way-forward discussion.

9 MJ [COL POHL]: Sure.

10 LDC [MR. NEVIN]: I don't think we're in a position yet to
11 really present it to you in open session.

12 MJ [COL POHL]: Okay. That being said, does any other
13 defense counsel wish to be heard on 530? Mr. Harrington.

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

15 MJ [COL POHL]: Good morning.

16 LDC [MR. HARRINGTON]: Judge, Mr. Binalshibh is in a bit
17 of a different situation than the other four because he has
18 received and been using the newer computer, the 2016 computer.
19 And when that was negotiated and the providing of those
20 computers was made, there was a comprehensive protocol set up
21 for how the computers would be inspected and how they would be
22 delivered to the detainees. And there are checklists that --
23 of things that have to be disabled from the computer and

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1 things that cannot be used. And the computers are adjusted in
2 a way that they can't be used, including the use of the
3 Internet.

4 And since that time, there have been several times
5 where there have been problems with the computer and the
6 computer has been returned for adjustment, corrections, or
7 fixing. And this protocol goes back into place. And before
8 it's returned, it has to be approved by the convening
9 authority IT people. It's my understanding that JTF has
10 somebody there to observe when this happens. And once it's
11 certified by the convening authority, it comes back to
12 Mr. Binalshibh.

13 And I would note in what has been filed in this that
14 there is no allegation of anything that Mr. Binalshibh has
15 done in the conduct that's been alleged. And in fact, in the
16 materials that are part of the record here, there's actually
17 an exculpatory statement with respect to Mr. Binalshibh and
18 his involvement in this which was not mentioned by Mr. Ryan.
19 And so regardless of what the court decides to do with the
20 older computers, I think Mr. Binalshibh is in a different
21 situation in that there is no reason for his computer to be
22 deprived from him.

23 And it's been mentioned by the other counsel that we

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1 have relied on this system. And the way that we transfer
2 discovery to him for review is through the exchange of hard
3 drives, all of which has been approved, where we give him a
4 hard drive with materials on it and he keeps that and uses it.
5 He gives it back to us to add more things to it, all of which
6 is an approved system. But he has relied on it. We have
7 relied on it. He has done a lot of work to assist us in terms
8 of preparing outlines and working on projects and all sorts of
9 other things like that which now are lost because -- while we
10 get it back from him and we then are able to look at things
11 and download some things, this is a constant, ongoing process.
12 And all of that information is now frozen because of the
13 computers being stored with ----

14 MJ [COL POHL]: Is all the information on the hard drive?
15 Any attorney-client, work product, any communication, all the
16 discovery is on the removable hard drive?

17 LDC [MR. HARRINGTON]: There is -- it's a combination,
18 Judge. There's -- it's mixed. There's attorney-client
19 materials on the hard drive, there's discovery on the hard
20 drive.

21 MJ [COL POHL]: Okay.

22 LDC [MR. HARRINGTON]: Some of it is in his computer also.
23 I mean, the plan was to use the hard drive, the external hard

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1 drive as much as possible to keep the computer, basically the
2 memory in the computer free ----

3 MJ [COL POHL]: Yeah.

4 LDC [MR. HARRINGTON]: ---- so it wouldn't be
5 overburdened.

6 MJ [COL POHL]: Now, I wonder -- the reason I ask that
7 question is is that if the -- I don't know what the answer is
8 from the technical people. If all of the information is on
9 the hard drive and the hard drive itself was not examined, if
10 the government could meet its -- its goals by examining
11 everything else, then there would be no risk of disclosure of
12 attorney-client information to the government.

13 LDC [MR. HARRINGTON]: For him, Judge, I am sure that
14 there are some things ----

15 MJ [COL POHL]: That are on there.

16 LDC [MR. HARRINGTON]: --- on the computer that -- there
17 are things that are on the computer.

18 MJ [COL POHL]: Okay.

19 LDC [MR. HARRINGTON]: Right. It's not like a perfect
20 system where ----

21 MJ [COL POHL]: Okay.

22 LDC [MR. HARRINGTON]: ---- everything just on one.

23 MJ [COL POHL]: Okay. I just wanted to check on that.

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1 Okay. Go ahead, Mr. Harrington.

2 LDC [MR. HARRINGTON]: And, Judge, it leads to the -- the
3 practical problem going forward of how do we remedy the
4 situation if we don't get the computers back, which means we
5 give him printed copies of everything for him to use and --
6 which obviously creates all sorts of problems for storage of
7 the papers in the cells, which the guard force has struggled
8 with mightily. And they're always constantly trying to get
9 bins reduced and get things out of the cells because they
10 obviously clog the cells.

11 Plus the fact that when we meet with him and we try
12 to review certain points and that, it's much easier,
13 obviously, to have a computer where we can go to things right
14 away and find it and talk about it, as opposed to trying to
15 have masses or piles of paper that we have to talk about. And
16 especially if we want to bring paper with us to the meeting,
17 then we have to have it go through the privilege team and have
18 it all inspected again. So that the complications of it and
19 the time consumption of it are just -- are absolutely
20 enormous.

21 And, Judge, if you were to order his computer to go
22 back to him, we're still in the same situation that we would
23 have been if the computer had been broke. It still has to go

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1 through -- it can't go back to him without the convening
2 authority IT people looking at it and reviewing it and
3 certifying that it meets the checklist and the protocol that
4 they have. And that's what we're asking the court to do,
5 because there is no allegation against him, at least in this
6 record.

7 MJ [COL POHL]: Okay. Thank you.

8 LDC [MR. HARRINGTON]: Thank you.

9 MJ [COL POHL]: Mr. Ruiz? I'm sorry.

10 LDC [MR. HARRINGTON]: In the event that the court denies
11 that request, we would request that the computer and the hard
12 drives be returned to us to hold. And I'll tell you why. We
13 would represent to the court we would not adjust it or
14 anything like that. But it is vitally important for us to be
15 able to go through the hard drives and the computer in terms
16 of us protecting the attorney-client privilege and for us to
17 get a complete handle on what the stage is for each of the
18 projects that have been done and where it is.

19 MJ [COL POHL]: Okay.

20 LDC [MR. HARRINGTON]: All right.

21 MJ [COL POHL]: Thank you, Mr. Harrington.

22 Mr. Ruiz?

23 LDC [MR. RUIZ]: Judge, you've heard the -- I think what

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1 the essence of our position is a couple of times from me,
2 certainly back in October of 2017, earlier this week, and
3 again today. I will just reiterate what is at the heart of
4 the matter for Mr. al Hawsawi in his situation, is that you
5 have received absolutely zero evidence that gives you any
6 reasonable suspicion to think that Mr. al Hawsawi has done
7 anything inappropriate with the computer that was given to him
8 to assist in the defense of his case.

9 Now before you, you have essentially three pieces of
10 evidence, two handwritten notes and the so-called tool that
11 was pictured and submitted for your consideration. None of
12 those items of evidence, hard evidence, have anything to do
13 with Mr. al Hawsawi. All you really have on the record, aside
14 from that, aside -- for consideration on this issue is
15 Mr. Ryan's the-sky-is-falling, Chicken Little argument.
16 That's all it is, at least with respect to Mr. al Hawsawi.
17 There is nothing here.

18 You talked about this issue in two ways. Number one,
19 disciplinary matter where somebody misuses an instrumentality
20 of the defense that they've been provided as a privilege and
21 not necessarily as a right. Certainly under that analysis,
22 Mr. al Hawsawi should have his computer back. There's no
23 disciplinary infraction. The facility itself has not seen fit

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1 to discipline Mr. al Hawsawi for anything. So under that
2 analysis, that should fail.

3 I've listened to you carefully, and it sounded at
4 certain times like you were looking for a pragmatic solution
5 to the situation, one that balances the government's concerns,
6 unfounded as they are with respect to Mr. al Hawsawi, with the
7 rights of the accused in this instance.

8 I want to highlight a couple of points along those
9 lines, Judge. Mr. al Hawsawi is a pretrial detainee. He's
10 not a prisoner, as I've been told a number of times when we've
11 had a discussion in the public forum. There is a significant
12 legal difference between a pretrial detainee, where the
13 presumption of innocence presumably continues to apply -- be
14 it as it may in this particular context, it may be very well a
15 legal fiction. But in the context of the argument in this
16 court, it should have legal significance, in terms of how you
17 go about furthering an intrusion into an instrumentality of
18 Mr. al Hawsawi's defense, because that's what we're talking
19 about here.

20 We're not talking about a privacy interest in the
21 entire cell. We're talking about an interest in the
22 protection of legal materials, instrumentalities of his
23 defense, and an impact on the attorney-client relationship,

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1 which I think, at least listening to all of the arguments so
2 far, has not really been addressed and is at the heart of the
3 matter. So why a court needs to balance that privacy interest
4 and legal instrumentalities and things that Mr. al Hawsawi
5 uses essential to his defense because of the impact it has,
6 the degradation of the attorney-client relationship.

7 A lot of times I think that when we talk about that,
8 it's -- I feel like I'm failing to impress upon you the impact
9 that this kind of circumstance has on the attorney-client
10 relationship. The detrimental impact it has, Judge, is a loss
11 of faith. And to begin with, we didn't start with very much
12 faith in the system, which is necessary to build a
13 relationship with a person who's facing the death penalty and
14 whom I'm supposed to defend zealously and within the dictates
15 of ethics and law.

16 Every time something like this happens in
17 Mr. al Hawsawi's case, where he is subjected to a guilt by
18 association, where he is subjected to nothing more than
19 conjecture, and the type of case that the -- that the
20 prosecution wants to try at any opportunity, which is the
21 guilt by association, which is let's throw everything up at
22 the wall and hope that everything sticks.

23 They have three pieces of evidence that are discrete

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1 as to three people. But nevertheless, Mr. Ryan spent a great
2 deal of time using generalities, using comprehensive language,
3 asking what all these accused were up to. The answer is,
4 al Hawsawi is up to nothing. The question the court should be
5 asking of Mr. Ryan is, where is your evidence? His answer
6 will also be nothing with Mr. al Hawsawi.

7 In October of 2016, these computers were seized,
8 Judge. I would ask you to use reason here for a moment ----

9 MJ [COL POHL]: I'm sorry. October 2016?

10 LDC [MR. RUIZ]: I'm sorry. 2017.

11 MJ [COL POHL]: Okay. Go ahead.

12 LDC [MR. RUIZ]: These computers were seized. There have
13 been almost three months since that time where the prosecution
14 could have brought forth additional proof. Three months.
15 Now, I'll discuss in greater detail in the closed session how
16 they could have brought such forth -- such proof forth for
17 you.

18 But nevertheless, the point is, after three months,
19 there still is zero evidence. All Mr. Ryan has is an argument
20 about how T-Mobile's emergence on the island threatens our
21 national security. The most secure prison on the face of the
22 earth, heavily militarized base, isolated, access denied to
23 all but the very few and the very privileged to enter this

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1 facility. But yet the security of that facility is threatened
2 by T-Mobile's emergence on the island, a thin piece of wire,
3 and two bare-thread notes, none of which, by the way, have
4 anything to do with Mr. al Hawsawi.

5 And I would submit to you, Judge, that if we are
6 concerned about that and that is, in fact, a reasonable threat
7 to the security of Camp VII, they have a lot bigger problems,
8 and they really need to look at their security practices; they
9 really need to look at how they do counterintelligence; and
10 they really need to go back to the drawing board. Because if
11 this is what they're concerned about, honestly, we're all in a
12 lot of trouble if the United States cannot securely and safely
13 guard somebody under these circumstances and the emergence of
14 a cell phone carrier on the island threatens our national
15 security, which is the essence of Mr. Ryan's argument.

16 Judge, as I said, Mr. al Hawsawi is a pretrial
17 detainee with a presumption of innocence, and he has a privacy
18 expectation in his legal materials. And, you know, that is
19 actually derived from your order; I mean, not exclusively, but
20 in large part. Through the litigation of 018U, which has been
21 nonexistent in the argument -- in the arguments that you've
22 heard, you understood and you affirmed that legal materials in
23 Camp VII were to be afforded certain treatment, certain

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1 protections different from other instruments, other things in
2 Mr. al Hawsawi's cell: A legal bin, how it was to be
3 inspected; how it was to be looked at for contraband; what
4 balance was to be struck if anything that looked out of the
5 ordinary was to be found. There was a very carefully
6 delineated procedure, after months and months and lots of
7 litigation on this particular issue, how to treat the
8 accused's legal materials in Camp VII.

9 Your order speaks for itself, but quite frankly, the
10 only -- the only reasonable conclusion that I can draw from
11 the way this has been handled is that whenever it doesn't suit
12 Camp VII, whenever it doesn't suit the prosecution, they're
13 just not going to adhere by your rule. Whatever emergency
14 they want to claim will override the faithful application of a
15 rule, an order that we spent years -- and that's not
16 overstated -- you know, we spent years litigating this issue,
17 right?

18 MJ [COL POHL]: I -- I ----

19 LDC [MR. RUIZ]: So ----

20 MJ [COL POHL]: ---- recall the drill.

21 LDC [MR. RUIZ]: So to go back a little bit of the facts
22 of how this came out, I was completely unaware, as
23 Mr. al Hawsawi's counsel, that the search had even taken place

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1 or the seizure had taken place. Mr. al Hawsawi was unaware
2 that his computer had actually been seized because, contrary
3 to Mr. Ryan's assertions that they have the computer 24 hours
4 a day, false.

5 The computer isn't kept in Mr. al Hawsawi's or any
6 other detainee's cell 24 hours a day. It's removed. It is
7 also charged. If they ask for it, they can -- they can
8 receive the computer for their use for a period of time, but
9 it is controlled. So the assertion that they have their
10 computer and they're in their cell 24 hours a day is
11 absolutely false, based on fiction and not on fact, basically
12 like Mr. Ryan's entire argument.

13 So once I heard rumor that this has happened --
14 because that's how I found out about it; Mr. al Hawsawi wasn't
15 in court that day -- I went to the SJA and I said, "Did
16 Mr. al Hawsawi's computer get seized? Did any materials --
17 legal materials or otherwise get seized from his cell?" And
18 he equivocated, he avoided, he did not answer the question,
19 and he didn't say anything.

20 I went back to try and obtain additional information
21 from amongst different parties, having learned that there was,
22 in fact, some kind of search that implicated at least some of
23 the men in this room. I went back to the staff judge advocate

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1 again. It's not this gentleman who's here today -- it's a
2 different staff judge advocate -- and I said, "Listen, was
3 there a search and a seizure?" Again he equivocated, contrary
4 to your rule, Judge; which by the way, if you recall, says
5 that we are to be given notice of any seizure. Right? He
6 equivocated and ultimately conceded that it was the
7 prosecution who was going to be sending us a notice, right?
8 That's how your rule was applied in this instance.

9 That rule stands for the proposition that these
10 materials are to be treated differently, that there is a
11 different expectation as to how these materials are to be
12 looked at, seized, and searched; what kind of notice is to be
13 provided and what kind of protocols are going to be followed.
14 They were absolutely not followed in this case.

15 So, Judge, before you look to strike -- or extend a
16 pragmatic solution to Mr. al Hawsawi's computer, I would say,
17 what proof is there at all that there needs to be a seizure of
18 Mr. al Hawsawi's computer? And what I would say to you and I
19 guess the main point I'm making, Judge, is that there has to
20 be some proof. There has to be some reasonably articulated
21 suspicion that Mr. al Hawsawi's computer will bear the fruits
22 of some type of illegality.

23 And you have nothing. And the reason you have

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1 nothing is because Mr. Ryan and the prosecution have nothing
2 but conjecture, nothing but alarmist argument. I'll tip my
3 hat to him. He's put together a fairly well-spoken and argued
4 alarmist argument, but it is devoid of any meaning or of any
5 guts when it comes to Mr. al Hawsawi.

6 The impact on our relationship is real, Judge. And,
7 Judge, I will say that you have the power to act, as you do,
8 of course. Judge, you acted to protect interests in this
9 case, the integrity of these proceedings when you felt that it
10 was necessary, and you acted decisively when you did that. In
11 018U, you acted decisively. Now, their application of the
12 rule doesn't bear that they really take that rule seriously.
13 It hasn't.

14 You acted decisively when there was an issue about
15 transportation of the judiciary across the bay, to make sure
16 that whatever those concerns were were taken care of to ensure
17 the integrity of these proceedings.

18 I would submit to you, Judge, that the integrity of
19 these proceedings are very much at issue here. The unwanted
20 seizure of Mr. al Hawsawi's legal materials, of his computer,
21 is tantamount to seizing 20 of his legal bins with the
22 materials we spent years providing him for his review, for his
23 discussion, for his analysis, for us to have real discussions.

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1 When that is taken away and I have to go in and look at this
2 man and say, I know there is no evidence, I know I've asked
3 the court to address your issue right away, all I get is a
4 scoff, and do you expect something else from this system? And
5 can you blame him, Judge?

6 Maybe no one cares that it is a hindrance to the
7 attorney-client relationship. Maybe it doesn't matter that
8 much, I don't know. But what I can tell you is, Judge, that
9 it's a real, palpable, concrete impact on our attorney-client
10 relationship, on our ability to defend him, on his ability to
11 take part in these proceedings and participate; and most
12 importantly, without any reason, without any evidence, without
13 anything that supports what the prosecution is asking you to
14 do with respect to Mr. al Hawsawi; which is rope him in with
15 the rest of these men, put it in a procedure that I think, as
16 you articulated -- you asked the question, am I to hold the
17 sins of one against every other person? I would say no.

18 That's one of the battles we're waging, right?
19 Individualized justice. It's one of the reasons that, for
20 time after time after time I've sought to sever this case
21 because I'm really concerned about their willingness, their
22 desire at every opportunity to pursue this kind of
23 one-size-fits-all justice. They take every opportunity to do

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1 so. They've done it on this issue and they will do it again.

2 What I would ask you in this instance, along this
3 journey, to deliver individualized justice to Mr. al Hawsawi
4 on this issue, which is simply return his computer to him.
5 There is no evidence the man has done anything wrong. The
6 only evidence is he's followed all your rules. The only ones
7 who have not followed your rules are the JTF, the Staff Judge
8 Advocate's office, and the prosecution. And there ought to be
9 accountability on that end, Judge. Thank you.

10 MJ [COL POHL]: Thank you, Mr. Ruiz.

11 Ms. Bormann, do you wish to be heard?

12 LDC [MS. BORMANN]: Judge, we would direct you to review
13 530B, Bravo, and 530R. Those are our pleadings. We'd rest on
14 those. We would also adopt the arguments of all counsel
15 except the arguments that pertain to privilege. We believe
16 that Mr. Bin'Attash in the unique circumstances of this case
17 has a Sixth Amendment right to have a way to access discovery
18 and sort it in such a case where there's no legal library or
19 other access provided to him and where the discovery is so
20 voluminous.

21 With that, I'm done.

22 MJ [COL POHL]: Ms. Bormann, while you are up there, I
23 just want to raise a concern I have, and it's kind of a side

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1 issue. Apparently your team, pursuant to the rules -- and I
2 don't know who was involved so I don't want to get into the
3 eaches here, but I just want to tell you my concern is that,
4 as you know, we require that if you want to publish a
5 document, that it be submitted three days ahead of time so it
6 can be reviewed, for a lot of reasons, but anyway -- well,
7 apparently there was an issue of some kind. Again, I don't
8 like to get into the -- between my office and your office
9 resulting in your office submitting ----

10 LDC [MS. BORMANN]: The motions.

11 MJ [COL POHL]: ---- 695 pages for display.

12 LDC [MS. BORMANN]: The issue we have, Judge, is this ----

13 MJ [COL POHL]: Okay. Let me -- let me ----

14 LDC [MS. BORMANN]: Okay.

15 MJ [COL POHL]: Let me -- I -- if you want to display
16 documents, I expect a good faith issue to come in.

17 LDC [MS. BORMANN]: Sure.

18 MJ [COL POHL]: Okay. I find it hard to believe, since
19 you've displayed zero documents this session, that you
20 intended to display 695 documents, which amount to -- which
21 were all simply the motions that have been filed.

22 LDC [MS. BORMANN]: Let me explain the situation that we
23 have. So in previous -- prior to the new rule, we were

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1 permitted to take something from mc.mil, which had been
2 cleared for public release, and utilize it during argument. I
3 can't predict what the government is going to argue. We had
4 an argument set up, for instance, in 530 that we didn't cover
5 because it was covered by everybody else. So we had slides
6 prepared. We had a variety of things done and ready to go.
7 We didn't need to cover it because it would waste this court's
8 time to do so.

9 I can't predict with 100 percent certainty what we're
10 going to utilize, but it strikes me that the pleadings
11 themselves ought not to be subject to being barred from public
12 disclosure and being used in a courtroom if we find it
13 necessary to do so.

14 MJ [COL POHL]: But what you submit -- if you submit a
15 pleading, the entire pleading that there's no markings on it,
16 it has to be reviewed to verify that it is accurate.

17 LDC [MS. BORMANN]: Judge, I ----

18 MJ [COL POHL]: I can't, I mean ----

19 LDC [MS. BORMANN]: But those pleadings are already
20 cleared for public release. That's the thing that makes ----

21 MJ [COL POHL]: Where do you get the -- but as I
22 understand it, where do you get the pleadings from? Do you --
23 do you get them from the website that they just say they're

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1 cleared for public release?

2 LDC [MS. BORMANN]: Yes.

3 MJ [COL POHL]: Okay. And it says that on the pleading?

4 LDC [MS. BORMANN]: Well, I'm not sure that the ones we
5 sent ----

6 MJ [COL POHL]: Okay. I'm just telling you this: If you
7 submit a document for review, okay, even a prior pleading, if
8 it's not on the face of the document with something like a
9 Bates stamp, which means it's been reviewed, or some other
10 banner marking that it's been reviewed, it has to be reviewed
11 again. So I'm -- you know, I don't want to spend too much
12 time on this ----

13 LDC [MS. BORMANN]: I don't either.

14 MJ [COL POHL]: ---- but what I'm simply saying is, is I
15 find it hard to believe that you intended to argue to display
16 every single page of every single pleading that was coming in
17 here. But what I'm -- my impression is that, okay, Judge, you
18 got this rule. This is the way we're going to do it.

19 LDC [MS. BORMANN]: Sure.

20 MJ [COL POHL]: I don't want to ----

21 LDC [MS. BORMANN]: Okay.

22 MJ [COL POHL]: I'm just raising the issue with you. But
23 going forward, I want you to understand that everything that

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1 you submit has to be reviewed unless it on its face it's been
2 reviewed. So when you say it's just a pleading, it still has
3 to be reviewed again.

4 LDC [MS. BORMANN]: Judge, if something is printed off the
5 mc.mil website and it's released for public consumption, are
6 you telling me that doesn't need to be reviewed again?
7 Because then there's a complete misunderstanding.

8 MJ [COL POHL]: As long as -- if you make an affirmative
9 statement that this is an exact duplicate of what was on the
10 document, I just have -- we just have to know that. We don't
11 know where it comes from.

12 LDC [MS. BORMANN]: Okay. All right.

13 MJ [COL POHL]: That's my point.

14 LDC [MS. BORMANN]: All right. So there was a -- okay.
15 So there was a complete ----

16 MJ [COL POHL]: Yes.

17 LDC [MS. BORMANN]: ---- misunderstanding between your
18 office and my office then.

19 MJ [COL POHL]: Yes.

20 LDC [MS. BORMANN]: Because when we had this conversation,
21 and I was party to the e-mails, it was -- it was explained to
22 us that that wouldn't work. So that's where we were.

23 MJ [COL POHL]: What I'm saying is, if there was

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1 evidence -- and I'm not going to go through wherever it came
2 from. If you provide a document that you -- first of all,
3 it's got to be in good faith.

4 LDC [MS. BORMANN]: Of course.

5 MJ [COL POHL]: Okay. And understand this, just so
6 everybody understands. The review process, part of it is the
7 classification issue. That's part of it. But part of it is
8 also I want to see things ahead of time that are going to be
9 published.

10 LDC [MS. BORMANN]: Sure.

11 MJ [COL POHL]: And so, therefore, if there's an issue
12 that this comes up with, there's no right for publication. So
13 if we run into these kind of issues again, I'm just going
14 to -- and, quite frankly, I may have done it in this case, say
15 fine, you're going to overload the system; you're also
16 overloading the judge, and, therefore, we're not going to
17 publish it. So you've got to understand what we're talking
18 about here.

19 LDC [MS. BORMANN]: We don't want to overload anyone,
20 Judge.

21 MJ [COL POHL]: Okay.

22 LDC [MS. BORMANN]: Let me just explain to you, so the
23 people who have been dealing with this on the ground --

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1 because it's not me. I just received a note that said that
2 your staff e-mailed us and told us that even if it had been
3 marked FOR PUBLIC RELEASE, it still had to be reviewed. And
4 so we are stuck in a position where it -- I mean, I -- I now
5 understand that that is not the case.

6 MJ [COL POHL]: I'm telling ----

7 LDC [MS. BORMANN]: Got it.

8 MJ [COL POHL]: I'm telling you is, is that, is simply --
9 and I -- and, quite frankly, I'm not pleased that the response
10 from your staff was an attempt to overload the system. That's
11 my impression of it.

12 LDC [MS. BORMANN]: Well ----

13 MJ [COL POHL]: Because there's no way -- no way under any
14 theory that -- well, let me put it this way. Up until this
15 point, up until this incident, there's never been a need for
16 any of the defense counsel to file a publication -- a notice
17 that they intend -- they may use every single pleading
18 involved in the case. And all of a sudden when this issue
19 comes up, that's what I get from your team.

20 LDC [MS. BORMANN]: And that's because, Judge, up until
21 recently, we've been able to utilize the publicly released
22 things without having to have them reviewed. So there
23 obviously was a misunderstanding.

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1 MJ [COL POHL]: Understand. But I keep -- you're
2 confusing concepts here. I'm just simply saying, there may be
3 a misunderstanding. I think we've clarified it. The review
4 process, part of it is the classification part of it, and part
5 of it is me as the judge wanting to keep the court organized.
6 And so when you say, well, it's already out there, I want to
7 see what you intend to put up.

8 LDC [MS. BORMANN]: Okay.

9 MJ [COL POHL]: I don't think we need to beat this to
10 death.

11 LDC [MS. BORMANN]: I don't either.

12 MJ [COL POHL]: If we need to clarify the eaches, we can.
13 I'll go back to my guys, you go to your guys, but that's my
14 concern, okay?

15 LDC [MS. BORMANN]: Okay.

16 MJ [COL POHL]: Thank you. Mr. Ryan, anything further on
17 530?

18 TC [MR. RYAN]: Yes, sir. Good morning, Your Honor.

19 MJ [COL POHL]: Good morning.

20 TC [MR. RYAN]: Judge, returning to 530, as we left it
21 yesterday, my question still stands and it is unanswered:
22 What were they up to? Counsel for Mr. Mohammad says nothing,
23 denies it, all evidence to the contrary. And counsel for

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1 Mr. Ali ignores it completely.

2 MJ [COL POHL]: Mr. Ryan, how do you respond to
3 Mr. Connell's argument that you would need probable cause to
4 search these?

5 TC [MR. RYAN]: We do not, Judge. This was -- this is a
6 law of war detainee situation. Well, first point is, sir, to
7 look at that note and everything that happened with Mr. Ali,
8 the probable cause could be brought in on a truck, as far as
9 his use -- misuse of the laptop in violation of this
10 commission's order and a legitimate security concern for the
11 camp.

12 MJ [COL POHL]: What about the others?

13 TC [MR. RYAN]: And I'm ----

14 MJ [COL POHL]: No, I'm just saying -- this is kind of a
15 two-part question. I mean it's -- Mr. Connell says this is a
16 search, and therefore you need probable cause to authorize the
17 search. The seizure has obviously already been done. And my
18 question is, in a confinement concept or context, do the same
19 Fourth Amendment and the rights to counsel implications apply
20 to these computers as would to ----

21 TC [MR. RYAN]: No, sir, for many reasons, starting with
22 these were government -- government-purchased,
23 government-configured, government-handed-out-to-the-accused

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1 laptops. They don't own them.

2 As far as legitimate privacy concerns on them, I
3 don't dispute that there is -- they certainly have a right, as
4 it pertains to attorney-client privilege, to an expectation
5 that no guard can just walk in on any day's notice and start,
6 you know, scrolling down the files.

7 But as far as the ability of the guard force to
8 conduct a search based on reasonable circumstances, reasonable
9 suspicions, based on events within their control and within
10 their observation, that's something that clearly resides in a
11 detention facility, even if we were back in the States in a
12 pretrial posture.

13 Add into it we are here in this law of war detention
14 situation and the expectation of privacy is less, the needs of
15 the guard force are greater. And based on a reasonable degree
16 of suspicion, a search of the computer would not be
17 unreasonable under these circumstances. Add in the facts that
18 were on -- with the guard force at the time, and the search is
19 more than reasonable and could satisfy probable cause, proof
20 beyond a reasonable doubt ----

21 MJ [COL POHL]: Okay.

22 TC [MR. RYAN]: ---- whatever you want.

23 MJ [COL POHL]: Okay. You talked about Mr. Ali's

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1 computer. What about Mr. Hawsawi's computer?

2 TC [MR. RYAN]: Well, at this point there's been no search
3 of the computer.

4 MJ [COL POHL]: No, I know that. But I'm just -- I'm --
5 you said there's probable cause to search Mr. Ali's computer.
6 But what about Mr. Hawsawi's computer?

7 TC [MR. RYAN]: The search now, Judge, we come to the
8 court to ask, and we ask for it on a very limited basis, and
9 I'm going to go into all of the -- or we went into it to a
10 great degree yesterday, many of the facts surrounding it that
11 justified it as a whole or as -- specific cases. I will get
12 into -- because I know his argument is all about, it wasn't my
13 guy. I didn't do anything. I will get into why this has to
14 be considered as a group situation, sir.

15 MJ [COL POHL]: Go ahead.

16 TC [MR. RYAN]: Your Honor, counsel for Mr. Ali cited a
17 report yesterday from the Air Force group, and the report
18 dates back to 2010. And it was about the functionality of the
19 laptop way back at that time. To the extent a report from
20 2010 is relevant, there is nothing in that report and nothing
21 that was cited yesterday that shows it was not capable of
22 being hooked up to the Internet or being connected to the
23 Internet.

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1 It does -- the report -- the very brief page that was
2 shown does indicate that, at least at one time, even if it was
3 just for the sort of start-up operation, that the laptop was,
4 in fact, hooked to the Internet. There is not an indication
5 that the item known as the wireless card was present or was
6 not present, at least as far as I could find, and I went
7 through the whole report.

8 But here is the bottom line, sir. As far as this
9 laptop computer that has now been in existence all this time,
10 long since the date of this report, we do not know all of the
11 circumstances of what has happened to it in that time. Based
12 on the circumstances and the facts that have been put before
13 you, the only way we can be sure that it is not capable of
14 being hooked up to the Internet is to actually physically go
15 into it and look to see what hardware is present inside.

16 MJ [COL POHL]: I'm not a techie guy, but couldn't you
17 have done that when you gave him the computer, disabled its
18 wireless capability?

19 TC [MR. RYAN]: It certainly would be possible, yes, sir.

20 MJ [COL POHL]: No, I'm not saying possible. You --
21 you're telling -- and understand this, Mr. Ryan, I don't mean
22 to be -- well, it is what it is. Again, I'm not a techie guy,
23 but ----

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1 TC [MR. RYAN]: I understand, Judge.

2 MJ [COL POHL]: But I thought you could simply disable the
3 wireless capability and when they ----

4 TC [MR. RYAN]: There's very ----

5 MJ [COL POHL]: ---- when they gave them the computers,
6 why couldn't they just disable it at that time?

7 TC [MR. RYAN]: There's significant differences, Judge, in
8 the term disable and what that means. There are different
9 ways of doing it. One is a simple software move in which a
10 certain button is clicked and it's disabled. Another way is
11 to unconnect certain wires that may be present in the hard --
12 in the laptop. But those wires, of course, could then simply
13 be reconnected at another time ----

14 MJ [COL POHL]: Mr. Ryan ----

15 TC [MR. RYAN]: ---- and the final -- I'm sorry.

16 MJ [COL POHL]: Go ahead. No, go ahead.

17 TC [MR. RYAN]: The final way would be to remove actually
18 the wireless card. We do not know what is in there. Judge,
19 there have been far too many circumstances of things appearing
20 that shouldn't appear but suddenly show up.

21 I agree with Your Honor's point.

22 MJ [COL POHL]: Yeah, okay.

23 TC [MR. RYAN]: The way it should have been made

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1 absolutely certain is to remove the thing. And hopefully --
2 and now I'm getting into my tech knowledge, but solder
3 something or weld something.

4 MJ [COL POHL]: No, but I'm saying is if it takes a
5 wireless card ----

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

7 MJ [COL POHL]: ---- which is a hardware issue, you can't
8 stand up to me today -- or stand up there today and tell me
9 whether or not the wireless card was removed before they gave
10 them the computer?

11 TC [MR. RYAN]: I cannot.

12 MJ [COL POHL]: Okay.

13 TC [MR. RYAN]: And I have checked, with great seriousness
14 in my voice. For whatever the reasons were, Judge, it was not
15 done, and that is a significant -- significant concern. We
16 can look back and we can say what should have happened, but
17 the fact is where we are standing right now today, we cannot
18 say.

19 MJ [COL POHL]: Mr. Harrington indicates that when the
20 computers come out, they go through some type of tech review
21 at -- I'm not sure exactly by whom.

22 TC [MR. RYAN]: I believe he said the CA's office, Judge.

23 MJ [COL POHL]: The CA's office.

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1 TC [MR. RYAN]: I cannot speak to what they do and what
2 they don't do. And I can't speak to what they are looking
3 for, what they have been apprised of, what their notions of
4 security are, force protection, et cetera. Those aren't the
5 people that are in charge.

6 MJ [COL POHL]: I'm with you. Okay. Go ahead, Mr. Ryan.

7 TC [MR. RYAN]: Yes, sir. I don't disagree to a great
8 extent with what counsel for Mr. Ali explained about the
9 laptop in terms of the operating system that's within it. For
10 example, yesterday he showed you slides of -- that showed many
11 Microsoft software programs within the laptop that were loaded
12 on with the knowledge of all the parties. He made reference
13 to encryption capabilities being within several of those
14 Microsoft properties -- I'm sorry, programs.

15 He made reference to the whole BIOS system, which
16 does a great deal of running the computer. All of that was
17 what -- what he was reciting to you, sir, was the way the
18 computer, the laptop, was configured and returned to the
19 accused and the way everyone expected it was going to be used
20 and the programs on it that were to be used.

21 The problem with his argument, where it becomes
22 essentially useless to Your Honor, is because Mr. Ali, the
23 accused, wasn't using that laptop.

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1 He was the physical item, but he was running his own
2 little laptop within it somehow. Now, this is where it could
3 get way into the tech world that I don't want to go; but in
4 short, the system, the operating system that was in that
5 computer, he was bypassing and going somewhere else and
6 setting up his own.

7 MJ [COL POHL]: How do you know that?

8 TC [MR. RYAN]: I'll take his analogy, Judge, and I think
9 this -- I get it this way. He explained to you yesterday ----

10 MJ [COL POHL]: The light bulb?

11 TC [MR. RYAN]: Bingo.

12 MJ [COL POHL]: The light bulb?

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

14 MJ [COL POHL]: Okay. Go ahead.

15 TC [MR. RYAN]: Because I've changed a light bulb, and
16 actually made it work, so this one works.

17 Counsel's analogy was to say in a room you've got a
18 switch, you've got a circuit, you've got a socket, you've got
19 a light bulb. All of those things together, working together
20 produce the result you want. His room analogy is, in fact,
21 the government-paid-for, the government-configured, the
22 government-issued, and the military-commission-approved laptop
23 computer. That's the room.

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1 But the accused Ali was not only not in that room, he
2 was in a whole other house that he built himself. We know
3 nothing about that house. We know nothing about what he was
4 doing in there.

5 MJ [COL POHL]: Okay. Just so I'm clear here -- analogies
6 always kind of -- sometimes I'm struggling with them. But
7 just so I'm clear here, this -- his new house is the -- some
8 other operating system on his computer? Is that what -- is
9 that the house I'm ----

10 TC [MR. RYAN]: Here it is, sir. Yes, sir.

11 MJ [COL POHL]: And so just -- but you're inferring that
12 other house exists based on what ----

13 TC [MR. RYAN]: I'm not inferring it, sir. It's in the
14 document that was seized. That's what he's describing in
15 there.

16 MJ [COL POHL]: Okay. What he's describing, I got it.
17 Okay, okay. So ----

18 TC [MR. RYAN]: The laptop was configured in such a way
19 that the BIOS system would go to the Windows operating system
20 and it would stay there, and those were the programs
21 available.

22 MJ [COL POHL]: Right. Okay. I thought you were talking
23 about the computer itself. You're talking about the piece of

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1 paper combined with the -- I got it. Okay. Go ahead.

2 TC [MR. RYAN]: And from there, bypass the BIOS by
3 shorting it out -- and that word "short" I think will be
4 familiar to you when you go through the note -- to find his
5 own other operating system. And there is some suspicions as
6 to what that is, but I won't go further on it. And as to what
7 he was doing in this whole other system that nobody knows
8 about, no counsel has gotten up and said to you it had
9 anything to do with legitimate defense function. So my
10 question still stands.

11 Now, as to the issue of suspicion as to all
12 justifying the results, or the relief that the government is
13 requesting from Your Honor, in all of the camps and
14 specifically in Camp VII, there are a total of five laptops in
15 the hands of detainees. They're in the hands of not disparate
16 people from disparate places and different roles within
17 al Qaeda or Taliban or something else. They're in the hands
18 of these five individuals, all charged together as
19 co-conspirators in a horrible mass murder.

20 The evidence will show, and as you saw at the last
21 session the evidence does show, a good deal of
22 interconnectedness between these accused. Putting aside the
23 crime itself and coming into this courtroom, over the course

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1 of time, you have seen and others have seen that they act
2 often in unison. Your Honor went through the record with us a
3 few months ago to see how they all tried to plead guilty
4 together. Your Honor saw in the record how they all filed and
5 took credit for the attacks of 9/11 in the document known as
6 D-101, in which they speak with one voice.

7 And fast-forwarding, just to let you know that things
8 haven't changed, on Monday morning when there was a complaint
9 from Mr. -- from the accused Mohammad about the way he had
10 been searched, all four other accused voiced to Your Honor
11 something along the lines with "I join with my brother."

12 The direct evidence that has been put in front of
13 Your Honor indicates that three of the five, that we know,
14 that we caught, that we found, had conspired together to
15 violate 182K. We do not know how long the scheme was going
16 on. And we can't say how much I -- I do not dispute this from
17 counsel for Mr. al Hawsawi. We do not have that specific item
18 that shows Hawsawi's part of it or had something in his
19 possession. But this went on -- as I said, this was going on
20 for some period of time. We don't know how long. We don't
21 know to what extent they were all involved.

22 Now, the analysis should not be, Your Honor, is this
23 a conspiracy case where we're trying to prove guilt beyond a

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1 reasonable doubt. We're trying to show the reactions and the
2 reasonableness of the guard force and the Joint Defense Group
3 who are charged with securely detaining these men.

4 So for the evidence as to joint activity, I've laid
5 it out for you; but now this might be one of the more
6 important things I can say to you. We now know that the
7 knowledge exists on how to do this, whatever it is they were
8 doing, the question being unanswered. It exists within the
9 group of at least three of these five, and it exists in this
10 camp.

11 As a reasonable security measure -- even if it was
12 any facility housing any detainees, but as a reasonable
13 security measure, if one has the knowledge, we must assume
14 that all do. The knowledge on how to alter the laptops, how
15 to bypass the operating system, go create your own operating
16 system, can easily be passed. We've seen it, how it was done
17 in writing. It could easily be passed in terms of just
18 speaking to one another as well. This bell cannot be unrung.

19 The Joint Defense Group is responsible for every
20 minute of these mens' detention, and these events cause
21 enormous, enormous concern. And I ask Your Honor -- and you
22 have the difficult job of always balancing. I understand
23 that. But I ask Your Honor to take that into account. The

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1 Joint Defense Group, the people who have to worry about what
2 messages these men may be sending out to the world, feel it
3 would be dereliction of duty to let these laptops go back in
4 on the grounds that maybe this time they've really learned
5 their lesson.

6 The last thing I'll say to you, Judge, is this: We
7 must never underestimate these five men. They have a great
8 deal of time on their hands. As the seized document shows,
9 they have a tremendous degree of knowledge, and they have
10 enough hatred that at one time caused the death of almost
11 3,000 people.

12 Absent your questions, Judge.

13 MJ [COL POHL]: I have no questions.

14 TC [MR. RYAN]: Thank you, sir.

15 MJ [COL POHL]: Any other defense counsel wish to be
16 heard? Mr. Connell?

17 LDC [MR. CONNELL]: Sir, I have three points. I wondered
18 when we were going to hear something about the operating
19 system, given that that's what the government had said, not
20 anywhere in its papers, but on Monday that's what it said. So
21 let's just go with this theory for a moment and we'll work
22 with the analogy.

23 BIOS is the BIOS on any computer. We still have the

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1 circuit breaker in the garage. Mr. -- or, excuse me, the
2 government's position is that Mr. al Baluchi had the
3 capability to install some other operating system. The
4 operating system in the analogy is the light switch. It is
5 the thing that controls the interface between the user and the
6 computer.

7 We all -- since we have been doing this case, we have
8 been through two -- the DoD wide has been through two
9 operating system upgrades, from Windows 7 to Windows 8 and
10 from Windows 8 to Windows 10. I will leave it to the court to
11 say how much of a radical change, if at all, the difference
12 between having a secret light switch, a secret copy of
13 Windows 8, as opposed to Windows 7, would make to anything.

14 The second point that I want to make is that Mr. --
15 or, excuse me, the government just argued that we have no idea
16 what the convening authority thinks of security or anything
17 else. In fact, the government put that in, that checklist
18 into evidence at 530F, Attachment D. Now, the version that's
19 at 530F, Attachment D has an extra -- has an extra sentence at
20 the bottom because that was the version for the 2016 laptops.
21 But other than the final sentence at the bottom of 530F,
22 Attachment D, the checklist that was done for the 2008 laptops
23 and is done every time that it goes back into the camp is

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1 exactly the same, which involves review by defense IT with the
2 convening authority present and sign-off by the convening
3 authority. The -- and it includes making sure that the -- it
4 includes the wireless card itself, it includes the Bluetooth
5 card itself.

6 And I actually have -- I can put in the record if the
7 military commission wishes in a very short time -- I actually
8 have the disablement checklist which was provided to me for
9 the 2008 laptop for Mr. al Baluchi on which I noted that no
10 wireless card was present. But I know that that's not in
11 evidence at that point; but if that's something you're
12 interested in, we can definitely go there.

13 MJ [COL POHL]: Just a question. So this is the checklist
14 I think Mr. Harrington was referring to?

15 LDC [MR. CONNELL]: So that is the checklist for
16 Mr. Harrington's 2016 computer.

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: It is the same checklist that is used
19 for 2008, except for the last line.

20 MJ [COL POHL]: So if these were returned to your client,
21 they would have to go through this checklist again?

22 LDC [MR. CONNELL]: Yes.

23 MJ [COL POHL]: They would ----

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1 LDC [MR. CONNELL]: For Mr. al Baluchi, it would go
2 through that checklist, except for the last sentence.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: For Mr. Harrington, it would go
5 through that exact checklist.

6 MJ [COL POHL]: So they would have the ability to check to
7 see whether there was wireless hardware ----

8 LDC [MR. CONNELL]: Yes.

9 MJ [COL POHL]: ---- on the thing? Okay. I mean, it says
10 wireless ----

11 LDC [MR. CONNELL]: ---- card disabled.

12 MJ [COL POHL]: ---- network interface cards disabled.

13 LDC [MR. CONNELL]: Yes.

14 MJ [COL POHL]: I don't know whether that ----

15 LDC [MR. CONNELL]: I understand what you mean. I
16 understand the government's argument about what does
17 "disabled" mean.

18 MJ [COL POHL]: Yeah.

19 LDC [MR. CONNELL]: I can represent that when this went
20 through before, defense IT told me it is clearly disabled
21 because there's no card. But that's not in evidence and I'm
22 not testifying, so I get it.

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

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1 LDC [MR. CONNELL]: The ----
2 MJ [COL POHL]: But I'm saying is if they are
3 returned ----
4 LDC [MR. CONNELL]: It can be checked.
5 MJ [COL POHL]: ---- certainly the -- going through this
6 checklist, if for some reason the card is disabled but not
7 removed ----
8 LDC [MR. CONNELL]: Right.
9 MJ [COL POHL]: ---- they can just remove the wireless
10 hardware which would disable its hardware capability.
11 LDC [MR. CONNELL]: That's correct, sir.
12 MJ [COL POHL]: Wireless capability. Okay. Got it.
13 Thank you.
14 LDC [MR. CONNELL]: That's all I have.
15 MJ [COL POHL]: Thank you. Anything further?
16 Mr. Harrington.
17 LDC [MR. HARRINGTON]: Just a slight clarification, Judge.
18 Actually, that exhibit is 530F and it's Attachment C.
19 Attachment C is the agreement, and it's Attachment D to
20 Attachment C, which is the one -- I think you have it in front
21 of you.
22 MJ [COL POHL]: Yeah. The ----
23 LDC [MR. HARRINGTON]: It says Attachment D at the bottom,

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1 but it ----

2 MJ [COL POHL]: Yeah. I'm with you. But it's Military
3 Commission Defense Organization Client Laptop Disablement
4 Checklist?

5 LDC [MR. HARRINGTON]: Right.

6 MJ [COL POHL]: Okay. I got it.

7 LDC [MR. HARRINGTON]: Yeah. Thank you.

8 MJ [COL POHL]: Anything further? Mr. Ruiz?

9 LDC [MR. RUIZ]: May I just have one moment, Judge? I
10 need to locate a document.

11 MJ [COL POHL]: Sure. Mr. Nevin, Ms. Bormann, do you have
12 anything?

13 Go ahead, Mr. Nevin. Then Mr. Ruiz can go after
14 Mr. Nevin.

15 LDC [MR. NEVIN]: Yes, Your Honor. Thank you. I just
16 wanted to respond to several arguments that counsel made.
17 First, with respect to these being government property, and I
18 just submit to you that that is a red herring. There is an
19 expectation of privacy in these materials under the
20 circumstances.

21 Mr. Mohammad is also provided with yellow legal pads
22 that have his ISN number stamped at the bottom of them. Those
23 are government property also, but he clearly -- when he writes

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1 us a letter or writes notes about how he wants to proceed in
2 the case, they're clearly protected. So I don't think that's
3 a ground for deciding the case. I heard -- or the issue.

4 I heard counsel say to you that nothing -- there is
5 nothing that shows that the computers were not capable of
6 being -- there is nothing that shows that they were not
7 capable of being hooked up to the Internet. And it was said
8 sort of quickly, but I just wanted to call to the military
9 commission's attention that that inverts the burden of proof.

10 I have to say that yesterday I was operating under an
11 incorrect assumption as well. And when the discussion that
12 Mr. Connell had with you began, in which he had depicted a
13 wireless card, I thought we all understood that the wireless
14 cards were taken out. And there's just no way to access a
15 wireless signal without a wireless card; similarly with the
16 Bluetooth.

17 So I was thinking that the government was going to
18 come in and put an expert on the stand who was going to say,
19 well, if you take the screws and you line them all up in a row
20 on the desk and do something, you can turn it into a wireless
21 card somehow, something like that. And I'm being -- I mean,
22 I'm being somewhat facetious in saying it that way. But, you
23 know, is there some way -- and it really is sort of in the

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1 nature of like a common sense thing like a light bulb, that it
2 won't provide any light unless there's a bulb in the thing.
3 It's the same way with a wireless card.

4 And so I let that go by yesterday in terms of talking
5 about it because I thought we all understood that. And so
6 when I was there saying there's no evidence, they haven't
7 presented any evidence, I mean, that's really what I was
8 referring to. And I think -- I mean, I can -- it's the -- the
9 same thing -- we're in the same situation today, so I just
10 direct your attention to that.

11 And you asked wouldn't it have been possible to
12 disable the wireless capability; you asked Mr. Ryan that. And
13 I would just say again the answer to that clearly is yes. We
14 did it. These don't have wireless capability. These
15 computers don't have wireless capability. That was -- that
16 was how the whole thing was designed in the first place. That
17 was the big concern that was expressed. And that's what we
18 did in 2008-2009, and it's what we did again when we litigated
19 182 and 149. I mean, that's exactly what we did.

20 So there is no ability for these computers to access
21 the Internet, and -- and that's my argument. Thank you for
22 hearing me.

23 MJ [COL POHL]: Thank you. Mr. Ruiz, something further?

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1 LDC [MR. HARRINGTON]: Judge, is it possible for Major
2 Lanks to leave to do something?

3 MJ [COL POHL]: Sure. Go ahead, Major Lanks.
4 Mr. Ruiz?

5 LDC [MR. RUIZ]: Judge, I think I will state what I think
6 was obvious to you, but because of my own insecurity that it
7 may not have been, I will say it because it was obvious to me.
8 When you asked the question of Mr. Ryan, was there probable
9 cause for Mr. al Hawsawi, direct question, he didn't answer
10 it. He danced around it and moved on, said he would address
11 it later. Never did.

12 Mr. Ryan also indicated, Judge, that you must assume
13 that because one has knowledge, all must, too. And I would
14 direct your attention on that point, Judge, to 530E (MAH)
15 Attachment C, as well as 530 (Gov) Attachment C, which is the
16 communication that has been referenced. Mr. Ryan has
17 referenced the communication, the notes that were found. He's
18 talked about it in general terms of instructions on what to do
19 to the computers and how to do it. But what he has
20 conveniently not highlighted for the court in the same general
21 terms is that it actually also indicated who it would not be
22 circulated to.

23 The notes were intended to be kept in close hold and

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1 in limited circulation from other detainees by the -- by the
2 very essence of the communication. So this argument that
3 because one has knowledge, all must, too, is dealt a death
4 blow by its very statement and the very piece of evidence that
5 they choose to use. Again, facts don't seem to matter to
6 Mr. Ryan. They ought to matter to the court. And the fact
7 that you have before you is that you cannot assume that they
8 all had knowledge because the communication itself dissuades
9 you from that conclusion.

10 Judge, in terms of the question you asked about the
11 probable cause analysis, Mr. Ryan's initial response was they
12 were not going to answer it. He then moved on and said,
13 well -- the standard answer, which is, this is a law of war
14 facility, and therefore there is no expectation of any
15 privacy, equivocated on the privacy. But the reality here,
16 Judge, is that's why I spent some time during my argument
17 talking about the facts at matter in this analysis with
18 respect to Mr. al Hawsawi and that matter in this instance.

19 Judge, he is a pretrial detainee, and we've cited
20 some case law to this effect in our motion, Judge. Taylor v.
21 Sterrett at 532 F.2d 462 affirms the principle the pretrial
22 detainee -- when taking materials from pretrial detainees or
23 addressing pretrial detainees' rights, there must be

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1 heightened scrutiny applied, because it doesn't stop at the
2 prison's door.

3 There is also a very well-recognized distinction
4 between the analysis and the deprivation of rights, the
5 deprivation of materials from a post-conviction prisoner
6 versus a pretrial detainee who still has a presumption of
7 innocence, who is represented in ongoing criminal proceeding,
8 in capital proceeding, where heightened due process applies to
9 the matter of the evidence and the manner in which the
10 proceedings are carried out, and the degree of reliability
11 that ultimately must be achieved under these circumstances.

12 All of those facts, all of those factors weigh in
13 favor of having that probable cause analysis when you approach
14 this issue. He is a pretrial detainee. These were legal
15 materials and legal instrumentalities. I'm not talking about
16 searching under Mr. al Hawsawi's bed. I'm not necessarily
17 talking about searching the latrine, the bathroom, the cell in
18 its entirety. We are talking about a focused search, an
19 instrument of his very defense, and that matters in the
20 analysis when you talk about probable cause.

21 I understand why Mr. Ryan wants to just throw out a
22 general this is a law of war detention facility; these are the
23 worst of the worst, so there should be no expectation of

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1 privacy, no probable cause analysis, Judge. And that's why I
2 spent some time talking about 018U and the litigation of 018U
3 that is focused on the different treatment that is accorded to
4 Mr. al Hawsawi and other detainees' legal materials, how they
5 are to be searched, what they're to be searched for, what kind
6 of notice is to be provided.

7 That very essence creates that expectation that, even
8 in this context, not only we as lawyers expect that, but you
9 as the judge has commanded that of the guard force, that there
10 is a procedure in place for how to go about searching these
11 kinds of materials; that there is some kind of cause for doing
12 so. If Mr. Ryan's analysis holds, that there is no probable
13 cause analysis, no expectation whatsoever, then essentially
14 what they can do is open up the legal bin, they can discard
15 your order, and they can start looking through it because they
16 think that the emergency of the day, unrelated to anything
17 Mr. al Hawsawi has, requires that they can do that.

18 And the facts on the ground, the facts of litigation
19 in this case clearly dictate otherwise. Heightened due
20 process applies. Greater due process and reliability must be
21 accorded to a death penalty accused, Judge; and in this
22 instance, a pretrial detainee who presumably still has that
23 presumption of innocence.

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1 In this instance when you are addressing, when you
2 are looking at Mr. al Hawsawi's particular issue, there should
3 be a probable cause analysis, and it should be based on not
4 only your order but also what is, albeit -- I will tell the
5 court this, there is -- it is a diminished expectation in the
6 prison context, but that's not where we are. That's not where
7 this case is. It's not the -- the status and it's not where
8 we are in these proceedings.

9 For that reason, I'm asking you is to apply that
10 analysis to Mr. al Hawsawi's case and to return his laptop to
11 him as soon as possible. Because it does matter to us, it
12 matters to him, and it impacts our ability to effectively
13 represent him, and for him to participate in his defense,
14 Judge. Thank you.

15 MJ [COL POHL]: Thank you, Mr. Ruiz. Okay.

16 Mr. Nevin, you wanted to discuss briefly the 530
17 carve-out we're referring to?

18 LDC [MR. NEVIN]: Yes, sir. And just to tell you that
19 counsel advised me this morning that the assistant SJA who was
20 involved in the handling of the materials that are at issue is
21 going to be made available to me for an interview in a while.

22 MJ [COL POHL]: Okay.

23 LDC [MR. NEVIN]: And so we may be able to make some

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1 argument in a closed session or at least make part of our
2 argument, but my suspicion is we're probably going to need to
3 take this up in the next round of hearings.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: But that's -- that's what I know at this
6 point.

7 MJ [COL POHL]: Okay. And, of course, we've conflated
8 this with the 530 computer issue. Just -- just so I can keep
9 this track in my own mind, what is your -- what is the AE
10 number of your base motion that raises this issue?

11 LDC [MR. NEVIN]: 530G, like golf.

12 MJ [COL POHL]: Okay. Thank you.

13 TC [MR. SWANN]: Your Honor, our response is 530N.

14 MJ [COL POHL]: Okay.

15 LDC [MR. NEVIN]: Our reply is 530V, like Victor.

16 MJ [COL POHL]: Like Victor, okay, thank you. Sometimes
17 these things get together and I -- okay. Okay.

18 I've got some -- over the evening and today, I'm
19 looking at some things, and I just have some questions that
20 come back to the 523/524 issue. And this goes to the
21 government initially.

22 And I'm looking at 32 CFR 1905.2, which appears to be
23 the CIA Touhy regulation.

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1 CP [BG MARTINS]: I'm just grabbing my copy, Your Honor.

2 MJ [COL POHL]: Sure. And I'll give you guys -- would it
3 be better if we took a break so you can -- are you good?

4 CP [BG MARTINS]: I've got my file.

5 MJ [COL POHL]: Okay. I know I'm kind of raising this
6 without much notice. And I just have a few questions.
7 Hopefully there are only a few.

8 CP [BG MARTINS]: I'm just going to locate the precise
9 wording. Go ahead.

10 MJ [COL POHL]: Yeah. That is the Touhy reg for the CIA?
11 1905?

12 CP [BG MARTINS]: Right.

13 MJ [COL POHL]: Okay. And the first question was,
14 Mr. Connell said Touhy's triggered by a demand, okay? And
15 then in the definitions, it says, "A demand means any
16 subpoena, order, or other legal summons except garnishment."
17 So would Touhy be triggered by an interview?

18 CP [BG MARTINS]: I'm looking at -- he has -- he's sought
19 through 703 all of these three-digit unique functional ----

20 MJ [COL POHL]: No, I -- and this is -- I'm going to try
21 to move -- I'm just talking about generically here is, is
22 Touhy triggered? Because he raises in his argument by -- do
23 they have to give Touhy notice if they want to interview

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1 somebody? And there's a different issue altogether. I got
2 that. But I'm just ----

3 CP [BG MARTINS]: In the circumstances we have before us,
4 we think yes.

5 MJ [COL POHL]: And where do you read that in the reg?

6 CP [BG MARTINS]: Well, the legal -- 1905.2 is -- does
7 require a subpoena, order, other legal summons, and it is the
8 triggering item in the -- in the context here, it is a --
9 rather than a -- a demand of -- operative through that, it's
10 an attempt to gain discovery by doing something that itself is
11 protected, is an identity that's protected. And that's what's
12 being brought out in the ----

13 MJ [COL POHL]: I'm going to go to the identity issue in a
14 second because that's the second part of my inquiry here. But
15 let's take a -- where identity is not the issue. Let's take
16 Mr. Rodriguez, for example, okay?

17 If defense counsel was -- they apparently already
18 have, knocked on his door or called him up and say, I'd like
19 to interview you, okay, does that trigger -- would that
20 interview request trigger Touhy?

21 CP [BG MARTINS]: I think technically under that reg
22 provision you cited, no.

23 MJ [COL POHL]: Do you have another ----

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1 CP [BG MARTINS]: Is he someone who is subject to the
2 housekeeping provision and someone who has got information
3 that the agency is entitled to protect? We certainly say yes.

4 MJ [COL POHL]: Okay. But -- okay. You say technically
5 he wouldn't apply.

6 CP [BG MARTINS]: Well ----

7 MJ [COL POHL]: Well, don't I apply the rules as it's
8 written?

9 CP [BG MARTINS]: Well, Your Honor, look at the relief
10 he's asking for.

11 MJ [COL POHL]: No, no, no.

12 CP [BG MARTINS]: If you issue a ----

13 MJ [COL POHL]: General Martins, we're going to keep this
14 focused.

15 CP [BG MARTINS]: I concede that point. That's not a
16 demand. It's not a demand. I concede the point.

17 MJ [COL POHL]: Okay. It's not a demand, and therefore, a
18 request to interview somebody like Mr. Rodriguez does not
19 trigger the Touhy notification rules, correct?

20 CP [BG MARTINS]: It does not trigger it.

21 MJ [COL POHL]: Okay.

22 CP [BG MARTINS]: We've asked that they not seek anybody,
23 regardless of status, covert status. We've asked that.

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1 MJ [COL POHL]: Okay.

2 CP [BG MARTINS]: May I follow up with a point that I
3 believe is relevant?

4 MJ [COL POHL]: Sure. If it's relevant.

5 CP [BG MARTINS]: If the -- if you give them the relief
6 they're seeking, that's clearly a demand, right? I mean,
7 you're issuing now an order that we produce for interview --
8 no?

9 MJ [COL POHL]: No. No. General Martins, you and I are
10 agreeing on this.

11 CP [BG MARTINS]: Okay.

12 MJ [COL POHL]: If there were a court order, it meets the
13 definition.

14 CP [BG MARTINS]: Right.

15 MJ [COL POHL]: I'm not talking about a court order.

16 CP [BG MARTINS]: Okay.

17 MJ [COL POHL]: I know what the carve-out is.

18 CP [BG MARTINS]: I concede that point. I don't see why
19 that is of force here. We're seeking to protect
20 information ----

21 MJ [COL POHL]: Well, I'm coming back to your 6 September
22 letter.

23 CP [BG MARTINS]: Right.

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1 MJ [COL POHL]: It appears to be that -- that you're
2 applying this notice requirement on -- without asking for --
3 again, if the courts are involved, whether it's me or another
4 one, okay, I've got it. It meets -- but you appear to be --
5 am I misreading the 6 September 2016 -- or '17 guidance, or
6 whatever you want to call it, to the defense counsel that if
7 they request an interview, it essentially triggers the Touhy
8 requirement?

9 CP [BG MARTINS]: The force of that isn't relying purely
10 on Touhy. And that's why I iterated a number of operative
11 legal rules here. Touhy is not the only thing in this
12 picture.

13 MJ [COL POHL]: Okay.

14 CP [BG MARTINS]: We've got CIPA; we've got a very
15 important declaration we provided you; we've gotten requests
16 for substitutions approved related to identities. We're not
17 dealing with theoretical equities here, Your Honor.

18 MJ [COL POHL]: Okay.

19 CP [BG MARTINS]: And the mere seeking of interviews with
20 people and wandering up and ambushing people at the Piggly
21 Wiggly is a serious thing.

22 MJ [COL POHL]: Okay. Now, the defense is reading the
23 letter that if they were to attempt to interview people,

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1 they'd be subject to criminal sanctions of some kind. What
2 would be the criminal sanctions?

3 CP [BG MARTINS]: Your Honor, I stand by what's in the
4 reg. We're transmitting the kinds of consequences that can
5 result when, with all of the information they have, which
6 includes a lot of classified information, they then attempt
7 independently to go seek someone that still is subject to the
8 housekeeping statute and to the other things that the
9 departments and agencies of the United States have to protect
10 information that is not the personal property of the people
11 who gained it through an official capacity. And that's ----

12 MJ [COL POHL]: Okay. Let's ----

13 CP [BG MARTINS]: ---- that's what we're seeking to
14 protect here.

15 MJ [COL POHL]: Okay. Let's go down -- now let's go down
16 to the individuals who are identified by -- well, regardless
17 of whether they're identified or not. Defense counsel on
18 their own, or through discovery, decide they want to interview
19 an individual who is a CIA -- current CIA operative and
20 covered by the Identity Protection Act, okay? And they knock
21 on their door and they say I'm Mr. So-and-so or Ms. So-and-so,
22 I'm a defense counsel for Mr. So-and-so. I have a clearance,
23 this, this, this, and this.

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1 CP [BG MARTINS]: So they've gone against our letter. I
2 mean, they've gone against ----

3 MJ [COL POHL]: My question is -- let me finish, and we'll
4 come back to the letter part. And then they say, I'd like to
5 talk to you about your knowledge of the RDI program, okay?
6 Has that at that point violated any criminal statute?

7 CP [BG MARTINS]: Your Honor, I don't want to -- I'm not
8 prepared to go through an analysis of these people being
9 suspects of criminal activity. We ----

10 MJ [COL POHL]: No.

11 CP [BG MARTINS]: ---- provided a notice that we ----

12 MJ [COL POHL]: What I'm saying, you're threatening them
13 with criminal sanctions, aren't you, in your letter?

14 CP [BG MARTINS]: Well, it would get into prosecutions
15 under the Intelligence Identities Protection Act and so forth.
16 I mean, we provided important guidance; we cited to relevant
17 authorities in that letter that do apply; we strongly caution
18 against them doing that.

19 And, Your Honor, if you were to, we believe, abandon
20 386M and your rulings that protect classified information in
21 our identities-related requests, you've now removed important
22 protections in your own protective order, and we're in a
23 different place.

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1 MJ [COL POHL]: And if I do that ----

2 CP [BG MARTINS]: We have to look at different remedies

3 here. You're changing -- the rules have changed.

4 MJ [COL POHL]: And if I do that, you have your remedies.

5 CP [BG MARTINS]: We have remedies.

6 MJ [COL POHL]: Okay.

7 CP [BG MARTINS]: But I ----

8 MJ [COL POHL]: If I understand ----

9 CP [BG MARTINS]: ---- didn't think we were there because

10 of the protections you gave.

11 MJ [COL POHL]: We're not there. We're not anywhere yet.

12 I'm looking at the 6 September letter, '17, from

13 Mr. Groharing.

14 CP [BG MARTINS]: Got it right here.

15 MJ [COL POHL]: Okay. And except for the Touhy reference,

16 I see no legal authorities in here. Did I miss them?

17 CP [BG MARTINS]: Your Honor, you were asking me what the

18 criminal condition -- we were saying "should make no

19 independent attempt to locate or contact any current or former

20 employee or contractor."

21 MJ [COL POHL]: Let me just ask, what is your legal basis

22 to restrict that type of investigation?

23 CP [BG MARTINS]: Your Honor, I would go back to ----

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1 MJ [COL POHL]: The Identity Protection Act. I've heard
2 that one.

3 CP [BG MARTINS]: ---- The Identities Protection Act, and
4 then the things that we provided you -- we did provide some
5 things ex parte -- and the authorities in CIPA. The
6 protection of classified information isn't just about
7 documents; it's about information, and it goes to things that
8 people learn on the job ----

9 MJ [COL POHL]: Uh-huh.

10 CP [BG MARTINS]: ---- in an official capacity. And so
11 5 U.S.C. 301, important statutory authority, the housekeeping
12 statute, agencies and departments are expected to be able to
13 control the personnel that serve there and the -- and the
14 custody and protection of the information that they do for the
15 benefit of the American people. Important authority. The
16 Touhy v. Ragen, the whole range of decisions that we cite in
17 our 386 brief related to the nonabsolute nature of the ability
18 to get witnesses.

19 And then the way in which we're implementing it, it
20 is very measured. It allows them to get the information
21 they're entitled to. It has a centralization function that
22 departments are expected to be able to have, and particularly
23 the CIA. So that's the authority. The authority is laid out

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1 in our briefs.

2 MJ [COL POHL]: Okay. Let me ask you another question
3 then. So defense counsel have a classified summary of a --
4 from a person who observed something within the RDI program,
5 okay? And they've got to go through the government to
6 interview that person, just so I've got this right; and if
7 they want to call that person as a witness, they've got to
8 comply with Touhy.

9 CP [BG MARTINS]: Well, "go through" is not the term I
10 would use. They have to inform -- we have to be able to
11 inform the agency, and there's a process ----

12 MJ [COL POHL]: Okay.

13 CP [BG MARTINS]: ---- by which the agency will
14 communicate the desire to be interviewed to a person.

15 MJ [COL POHL]: Okay. Let's assume -- which I don't think
16 it will be surprising, but let's assume this person -- let's
17 say those procedural wickets are run ----

18 CP [BG MARTINS]: Uh-huh.

19 MJ [COL POHL]: ---- and the person says I'm not going to
20 talk to you.

21 CP [BG MARTINS]: And ----

22 MJ [COL POHL]: Because I want to move the interview, for
23 this question ----

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1 CP [BG MARTINS]: Okay.

2 MJ [COL POHL]: ---- I want to move the interview. So now
3 we come down to, well, I want to call this person at trial or
4 for preliminary matter. Is it the government's position that
5 the 505 summary is enough and they -- therefore, that would
6 preclude them from calling the witness ----

7 CP [BG MARTINS]: No.

8 MJ [COL POHL]: ---- based on the 505?

9 CP [BG MARTINS]: The 505 summary is definitely part of
10 the discussion when you determine whether we actually have to
11 have a witness sitting in the stand or coming in by VTC.

12 MJ [COL POHL]: Okay.

13 CP [BG MARTINS]: Because we then have to be able to offer
14 you substitutes. And we have to then focus on what is the
15 issue, what is it the commission has to decide, and whether
16 this is noncumulative, relevant, and actually helpful.

17 MJ [COL POHL]: Okay.

18 CP [BG MARTINS]: And you really have to -- we have to
19 then consider all that together with the sensitivity, the
20 equities, and see if we can't come up with an alternative
21 procedure.

22 MJ [COL POHL]: I just wanted to make sure I didn't
23 misunderstand you yesterday, that, that once they get the 505

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1 substitute, they're essentially done from pursuing of calling
2 witnesses ----

3 CP [BG MARTINS]: No.

4 MJ [COL POHL]: ---- based on the 505 substitute or any
5 other information.

6 CP [BG MARTINS]: No. But we can't force them to talk to
7 them in an interview setting. You can force a lot of things
8 in terms of, you know, compulsion to testify ----

9 MJ [COL POHL]: I know. I'm not talking about -- I'm just
10 saying the way ahead, that -- that, you know, when you give
11 discovery, the -- assuming the testimony is relevant, useful,
12 and noncumulative, the fact that you have a 505 summary, is it
13 the government's position that would not necessarily preclude
14 the defense from calling that person as an actual witness,
15 assuming the other burdens have been met?

16 CP [BG MARTINS]: No, it's not. But what often we quickly
17 go by all the time, because you're moving to different
18 hypotheticals, is we are prepared at that point to say, Your
19 Honor, take that as a substitute. I mean, we've -- and offer
20 it. And then they're in the decision process in Section 6.
21 And in the remedies that we have, there's a requirement for us
22 to look at that and say, is that substitute and that
23 alternative procedure an adequate way for them to make the

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1 point they're trying to make?

2 MJ [COL POHL]: Of course, the problem becomes there,
3 General Martins, is that because these witnesses are -- even
4 if you go through the -- I suspect will refuse to be
5 interviewed, the defense is left with a piece of paper of a
6 summary of, quite frankly, a summary because -- because the --
7 and in the sense that the cables are not -- you know, most of
8 them aren't, you know, transcriptions of stuff. They're other
9 stuff, but anyway -- and then they put the witness on the --
10 and then you're saying, well, the summary is good enough, they
11 don't need to have the witness. But they really don't know
12 what the witness will say ----

13 CP [BG MARTINS]: Ultimately ----

14 MJ [COL POHL]: --- or they'll flush it out.

15 CP [BG MARTINS]: Well, well, I mean, there are a number
16 of federal court cases that talk about the specific point,
17 about whether dry, desiccated, you know, statements really can
18 substitute for the vividness of the testimony in trial. And
19 the information is being protected, and the alternatives have
20 to be considered in terms of what -- what information goes to
21 what is noncumulative, relevant, and helpful, Your Honor.

22 You're ultimately going to ultimately decide this.

23 The statute sets up a process. I'm not at all saying these

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1 things substitute for all witnesses. I'm saying we have to
2 have an opportunity to provide you these alternatives and
3 really get down into, as you like to call it, the eaches of
4 each witness because it can't be a global, let's just bring
5 them all in and line them up ----

6 MJ [COL POHL]: Well, I understand. I understand.

7 CP [BG MARTINS]: ---- and start talking to them,
8 particularly when we're doing it in this inefficient way here
9 where it looks like we're going to have it three times. We're
10 going to do an alien unprivileged enemy belligerency
11 proceeding ----

12 MJ [COL POHL]: Let's not bring up 502 now.

13 CP [BG MARTINS]: Well, this motion is all about 502. 524
14 is -- relates to the witness request in 502.

15 MJ [COL POHL]: If you've got to do it three times, we'll
16 do it three times. I mean, it's just the process. But I'm
17 not saying we're going to do it three times, but I got it.
18 But that to me is -- if that's what's required, it's required;
19 if it's not required, it's not required. But I don't see
20 these two issues as connected in the sense that, well, because
21 we're going to do it three times, that would make the -- the
22 Touhy issue or the interview issue different. That's all I'm
23 saying.

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1 CP [BG MARTINS]: Well, no ----

2 MJ [COL POHL]: Go ahead.

3 CP [BG MARTINS]: ---- I mean, I think if we -- those
4 things go very much to whether or not the information is
5 protected. If they get three cracks at the apple and continue
6 to expand the scope of discovery in this way -- your question
7 to me yesterday, Your Honor, when I was up here was, you know,
8 aren't you thinking of providing a sequence or a time line?
9 Wouldn't that make it better? Or do we just have to bring in
10 100 witnesses?

11 I take note of those kinds of things because each one
12 of those types of decisions implicates these sensitive
13 equities, and I ----

14 MJ [COL POHL]: I understand.

15 CP [BG MARTINS]: ---- thought you were going to follow up
16 with some discussion of where we could go in the witness list.

17 In all of this discovery that you've seen, and a lot
18 of stuff you haven't seen that we've provided directly to
19 them, they have an enormous amount about what happened to
20 their client. And if they -- if they were to provide such a
21 time line to us and seek a statement of relevant facts,
22 concessions from us that that is for the purposes of this
23 alien unprivileged enemy belligerency hearing and

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1 jurisdictional determination what happened, absolutely willing
2 to entertain that and talk about it.

3 And the materials we provided were with a view to
4 that, that they could use that. We're not going to contest
5 it. Thank you, Your Honor.

6 MJ [COL POHL]: Thank you.

7 Mr. Connell, this may be -- I'm just trying to figure
8 out how you get there from here, but let me just throw it out
9 to you. You file a motion or implicitly request that we don't
10 apply Touhy to interviews. If I order the interviews, doesn't
11 that trigger Touhy then?

12 LDC [MR. CONNELL]: Yes. That's what I said yesterday.
13 Remember, I ----

14 MJ [COL POHL]: No, I just ----

15 LDC [MR. CONNELL]: Between the 29 witnesses and the other
16 witnesses ----

17 MJ [COL POHL]: Yeah.

18 LDC [MR. CONNELL]: ---- the 20 -- 502J triggers Touhy for
19 the 29 witnesses who were requested in 502J.

20 MJ [COL POHL]: How about the 523/'24?

21 LDC [MR. CONNELL]: The 523 initially was a request to
22 interview -- I mean, this whole idea of they're going to go
23 talk to them -- we did that seven months ago, we filed our

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1 request to interview those people, and we got crickets out of
2 it. So a -- the alternative relief that I suggested in 524
3 was to order interviews. If you order interviews, that
4 triggers Touhy. But Touhy has already been satisfied because
5 we provided the information -- all the information under 703
6 for these people in 502J, which under 386M satisfies Touhy,
7 so ----

8 MJ [COL POHL]: Do I have authority to order interviews?

9 LDC [MR. CONNELL]: Of current U.S. Government employees,
10 absolutely.

11 MJ [COL POHL]: And they can choose to be interviewed or
12 not interviewed?

13 LDC [MR. CONNELL]: No. You can order them to be
14 interviewed for current employees. Former employees, no.

15 MJ [COL POHL]: I'll have to think about that one, but let
16 me ask you another question. Yesterday -- and I don't know if
17 it was you or one of your colleagues -- it came up that you
18 were reading the 6 September letter as somehow threatening
19 criminal prosecutions if you do this on your own?

20 LDC [MR. CONNELL]: Yes, sir. I heard that confirmed
21 today.

22 MJ [COL POHL]: Okay. And to your knowledge, under what
23 statute would said criminal prosecution -- because there's

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1 nothing in there that says what statute it would be.

2 LDC [MR. CONNELL]: Probably the Espionage Act, extremely
3 broad authorities to prosecute anyone who has -- who does
4 anything, reveals any information damaging to the national --
5 any what they call national defense information, any
6 information which is concerned with the security of the
7 United States, is actually broader than classified information
8 in some cases. But it would probably be an Espionage Act
9 investigation -- prosecution, if I had to guess.

10 MJ [COL POHL]: Does the -- the Protected Identity Act
11 probably wouldn't apply.

12 LDC [MR. CONNELL]: I haven't studied that, sir. I can't
13 say.

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: I apologize. I can go look it up and
16 brief it, but ----

17 MJ [COL POHL]: No, no, I just -- whether it applies or
18 not, I'm not quite sure. I'm just looking at how it's worded
19 in the -- we're talking about the disclosure of it to
20 unclassified -- people who don't have -- who don't have the
21 appropriate clearances ----

22 LDC [MR. CONNELL]: Okay.

23 MJ [COL POHL]: ---- the way I'm reading it.

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1 LDC [MR. CONNELL]: That has not occurred.

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: But it has certainly occurred -- well,
4 maybe I should invoke my right to silence at this point.

5 MJ [COL POHL]: No, you don't need to.

6 LDC [MR. NEVIN]: Your Honor, may I request a comfort
7 break?

8 MJ [COL POHL]: I'm going to ask him one more question,
9 and then we'll take a break, okay?

10 You have piqued my interest about this authority that
11 you say I have that I'm not 100 percent sure I do have. So if
12 you could provide me authority ----

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

14 MJ [COL POHL]: ---- of where I can order a current
15 government employee -- and that would include anybody, include
16 soldiers ----

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

18 MJ [COL POHL]: ---- CIA personnel, anybody who ----

19 LDC [MR. CONNELL]: If they're current employees, yes.

20 MJ [COL POHL]: If they're a current U.S. Government
21 employee, I can order them to be interviewed?

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

23 MJ [COL POHL]: Even if they don't want to be?

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1 LDC [MR. CONNELL]: Well, they can -- their Fifth
2 Amendment -- if they have a right -- if they have a
3 Fifth Amendment privilege ----

4 MJ [COL POHL]: Forget the privilege part of it. I'm
5 saying is the government letter talks about, and my
6 experience, quite frankly, has been consistent with this, this
7 is why I'm raising the question ----

8 LDC [MR. CONNELL]: Yes.

9 MJ [COL POHL]: ---- is that the decision to be
10 interviewed at the end of the day is up to the interviewee to
11 decide whether or not he or she wishes to be interviewed.

12 LDC [MR. CONNELL]: Nongovernment employees, that's
13 exactly right. For government employees, you can order their
14 interview. So I'll brief it.

15 MJ [COL POHL]: Yes, please do. Just, again, it's piqued
16 my interest.

17 LDC [MR. CONNELL]: With due respect to ----

18 MJ [COL POHL]: Mr. Nevin's comfort break.

19 LDC [MR. CONNELL]: ---- Mr. Nevin's break, here's what I
20 just want to say. I know that this 524 issue sort of blew up
21 out of nowhere; but in another way, it is a long time coming.
22 What we have heard yesterday and today is the culmination of
23 a -- is the government being forced to articulate what it has

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1 long held, that there is no defense investigative function
2 that is allowed. And they can't defend it on Touhy basis.
3 The only thing that they can defend it on is general equities
4 of the United States.

5 What they said today is that the government would
6 rather have protected identities from -- protect identities
7 from investigation than have a criminal prosecution. That is
8 what they said today. Because a criminal prosecution
9 necessarily includes a defense, and the core defense function
10 is investigation. The position of the government today is
11 mutually exclusive with a military commission that is
12 adversarial in nature.

13 MJ [COL POHL]: Okay. Thank you. Again, I did bring
14 that -- Mr. Nevin, I understand your discomfort, but I think
15 it will take us one minute to do this. Oh, no.

16 With that look on your face, we'll take a recess for
17 ten minutes.

18 [The R.M.C. 803 session recessed at 1038, 11 January 2018.]

19 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1050,
2 11 January 2018.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties again are present except for Mr. Perry.

5 LDC [MS. BORMANN]: Yes, Judge. We ask that he be
6 excused. He has other work that he has to do.

7 MJ [COL POHL]: I just want to make sure that there's no
8 miscommunication, because sometimes when I'm up here, I'm not
9 sure -- I hear what I say, but I'm not sure what's heard is
10 what I say.

11 On the publication issue that we talked about, just
12 so it's clear, everything that you wish to publish must be
13 submitted, okay, regardless of whether it's already been
14 reviewed. If it has been previously reviewed and the document
15 itself has shown it's been reviewed, for example it's got OMC
16 website markings on it, that will expedite the review process,
17 but that does not relieve the counsel from submitting it
18 for -- to us in accordance with the rules.

19 So just so there's no misunderstanding here, that
20 it's not just that it's been reviewed; it's that it's already
21 been reviewed for classification issues. It's just that it
22 must be submitted according to rules even if it already has
23 been. But if it already has been reviewed on the face of the

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1 document, obviously that will expedite the review process, and
2 I expect counsel to only submit the documents that in good
3 faith they believe they will publish.

4 Is there any misunderstanding of that? Sometimes I
5 talk without the rules sitting in front of me. Mr. Connell.

6 LDC [MR. CONNELL]: Sir, I understand. That's actually
7 what I thought the rule was.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: And then I'm glad you clarified ----

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: ---- because I thought you had --
12 we've had -- the FOR PUBLIC RELEASE documents have been a bane
13 of the publication process.

14 MJ [COL POHL]: Uh-huh.

15 LDC [MR. CONNELL]: And the military commission has on
16 multiple occasions allowed the government to publish FOR
17 PUBLIC RELEASE documents and I have a list of every time
18 they've done it because it drives me crazy because we don't
19 get to.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: But here's the actual point that I
22 want to make. You did put the fear of God in me earlier
23 because we have upcoming the cross-examinations of Special

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1 Agents Fitzgerald and Perkins, and I had intended to submit
2 for sort of pre-review their -- their testimony that --
3 from -- that is released on the website of the
4 unofficial/unauthenticated transcript because, for obvious
5 reasons, I don't know which exact pages I'm going to need to
6 impeach with prior inconsistent statement, for example. But
7 also it's very helpful to the gallery to be able to follow
8 along with, you know, when you are referring to a particular
9 line number on a particular page. And that's a couple of
10 hundred pages of documents.

11 MJ [COL POHL]: Yeah, but let me -- let me ask you this,
12 Mr. Connell: On those -- I'm assuming on the -- and I don't
13 read the website very often ----

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

15 MJ [COL POHL]: Okay, I occasionally go back for the
16 transcripts for various things. But when you print off the
17 website a transcript -- let's say Mr. Fitzgerald's, okay?
18 Does it have redactions in it?

19 LDC [MR. CONNELL]: Yes. Sometimes, sir.

20 MJ [COL POHL]: Okay. Does it have markings on it?

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

22 MJ [COL POHL]: So if you wanted to have 200 pages, let's
23 say, of transcript that you wanted to submit it from the

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1 website version ----

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

3 MJ [COL POHL]: ---- you would submit -- and again, I know
4 we'll get pages that have -- probably have some redactions in
5 it, but at least every page would be marked FOR PUBLIC RELEASE
6 or whatever the markings are on it?

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: Pleadings get a lot more redactions
10 than transcripts do. They're fairly rare for transcripts.
11 But yes, they say UNCLASSIFIED//FOR PUBLIC RELEASE at the top
12 and the bottom.

13 MJ [COL POHL]: And that was kind of the point I was
14 making is, those still need to be submitted for -- and again,
15 part of it is for me.

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

17 MJ [COL POHL]: And -- but a review of that document that
18 on its face shows it has been reviewed, okay, would certainly
19 expedite the review process.

20 LDC [MR. CONNELL]: Would it be helpful -- and you can
21 give us an answer to this in writing at some later time, but
22 would it be helpful -- and I'm thinking of the Google slide,
23 right? Would it be helpful if there were some way that we can

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1 inform you this came from the website or something like that?

2 MJ [COL POHL]: Well, if you have a non ----

3 LDC [MR. CONNELL]: Because we can make representations
4 about the origins of some of this material.

5 MJ [COL POHL]: Well, yeah, and I -- and I don't think
6 there needs to be a -- the answer is is if you think it
7 will -- additional information will expedite the -- and again,
8 make sure we're clear here. I'm talking about the review
9 process, not the submission requirement.

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

11 MJ [COL POHL]: Okay. The review process, if -- rather
12 than submitting something like that and then -- because I
13 understand both parts on that one. I understand why
14 they're -- if something like that were to come up and you wish
15 to add a -- some type of explanatory note of some time saying
16 where you got it from to -- to assist the review process, I
17 don't think there's anything particularly wrong. I don't know
18 if that comes up very often or not, but you certainly have the
19 option to do that if you think it would review it, and then we
20 could go through a -- maybe expedite it.

21 I mean, does that make sense? I don't think there
22 needs to be a new rule on that, just ----

23 LDC [MR. CONNELL]: No, no, not a new rule, I just ----

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1 MJ [COL POHL]: Just kind of explanatory, if you ----

2 LDC [MR. CONNELL]: Just verifying the process. I just
3 wanted to get that ----

4 MJ [COL POHL]: Again, the process is it has to be
5 submitted; but if it's been previously reviewed on the
6 document, it will expedite the review process. But whether
7 it's been reviewed previously or not, still must be submitted.

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

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: I understand.

11 MJ [COL POHL]: Okay. Okay. That brings us to 478. And
12 the only thing I wanted to mention on that was, Defense, you
13 still have some outstanding, I think, replies, some of ----

14 LDC [MR. NEVIN]: Regarding 478?

15 MJ [COL POHL]: Yeah.

16 LDC [MR. NEVIN]: It's -- may I have a second?

17 MJ [COL POHL]: Sure.

18 LDC [MR. NEVIN]: It may have already been filed. If it
19 hasn't been, it will be shortly.

20 MJ [COL POHL]: Okay. I'll take a look at it. We've
21 already argued this, and Mr. Ryan has said at the 802 what are
22 we going to talk about 478; and if we're thinking about it, I
23 think the ball is really in my court at this point. So let

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1 me -- let me just take it, so we won't do anything more on
2 478. Okay.

3 That being said, that appears to be -- exhausts the
4 docket for the open -- that we are going to discuss in the
5 open session for this week. Anything we can add? Mr. Swann.

6 TC [MR. SWANN]: Your Honor, may I do just a
7 housekeeping ----

8 MJ [COL POHL]: Sure.

9 TC [MR. SWANN]: ---- thing?

10 530G had attached a declaration and a couple of
11 statements. When the -- when our filing, which is 530N, was
12 filed, they were in a classified form. Earlier this week
13 pursuant to your guidance, I went ahead and had those things
14 resubmitted through the proper authorities. They have come
15 back now in an UNCLASSIFIED//FOR PUBLIC RELEASE ----

16 MJ [COL POHL]: Okay.

17 TC [MR. SWANN]: ---- format. It's two statements and a
18 three-page declaration. I provided those to the court
19 reporter. I think they would like to mark them as 530, I
20 think, KK. And we'll just add those to the record. That way
21 when we're dealing with this issue at a future date, that
22 you'll have those.

23 MJ [COL POHL]: Okay. How would somebody know that the

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1 classified proceedings are now the unclassified, newly marked
2 exhibits? I'm saying -- let's say -- let's say this case is
3 still going on two months or three months from now, and I pull
4 this up and on my computer it says classified.

5 TC [MR. SWANN]: Right.

6 MJ [COL POHL]: And then I go down and it's unclassified.
7 What I'm saying is there's some -- something that would
8 indicate that there was a change in status? Because it's --
9 because the exhibits already are in the system as classified
10 aren't leaving the system, right?

11 TC [MR. SWANN]: Right.

12 MJ [COL POHL]: Do you understand my concern?

13 TC [MR. SWANN]: I understand. I mean, I could file
14 something that kind of would put the court on notice. I
15 thought by advising the court, I was telling the court exactly
16 what happened here.

17 MJ [COL POHL]: No. Just submit it. A notice is perfect.
18 Just put it in as a notice. Just a notice. I think a notice.
19 Just file a notice of what you just told me.

20 TC [MR. SWANN]: All right, sir, thank you.

21 MJ [COL POHL]: Just so there's an unclassified record of
22 this so we don't have a problem.

23 TC [MR. SWANN]: And I've provided those to the

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1 defense ----

2 MJ [COL POHL]: Okay.

3 TC [MR. SWANN]: ---- too.

4 MJ [COL POHL]: Okay. Okay. As far as the 806, I have on
5 my list 373 -- and again, these may be either the base motion,
6 may be the notice, may be whatever, but it's what we talked
7 about in ----

8 LDC [MR. CONNELL]: Yes, sir, they're the base motion.

9 MJ [COL POHL]: Okay. Three -- 373N, 375T, 445, 498, 512,
10 524, 530B, 530E, 530F, and 502J. Anybody have a different
11 list? Apparently not.

12 We have to switch out court reporters, and it is
13 close enough that we'll take a lunch. And we'll reconvene
14 with a classified session, which is a closed, classified
15 session at 12:30. Commission is in recess.

16 [The R.M.C. 803 session recessed at 1100, 11 January 2018.]

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