

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1038,
2 12 October 2016.]

3 MJ [COL POHL]: Commission is called to order. General
4 Martins.

5 CP [BG MARTINS]: Your Honor, all members of the
6 prosecution are present except for Mr. Ryan. He was -- he has
7 to do some business back in our trailer.

8 MJ [COL POHL]: Okay.

9 CP [BG MARTINS]: I was hoping he could be excused to come
10 in about 15 minutes.

11 MJ [COL POHL]: Sure. He can come in whenever.

12 CP [BG MARTINS]: Thank you.

13 MJ [COL POHL]: That brings us to 449. Mr. Connell.

14 LDC [MR. NEVIN]: Your Honor, could I say Ms. Leboeuf is
15 not in the courtroom at this time.

16 MJ [COL POHL]: Thank you, Mr. Nevin. Go ahead.

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

18 MJ [COL POHL]: Good morning.

19 LDC [MR. CONNELL]: In July of this year, the military
20 commission raised a question in argument on the request for
21 some witnesses, and the military commission explained that it
22 did not believe that it had the power to require civilians to
23 come to Guantanamo Bay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 That, obviously, was not an opinion that was just
2 made up by the military commission, but is expressed instead
3 in Regulation for Trial by Military Commission Section 13-5.b.

4 The right to present witnesses at a trial is the core
5 of the right to present a defense. The Supreme Court has made
6 that clear again and again in a long string of cases about the
7 compulsory process clause, a core component of the
8 Sixth Amendment. In fact, the right to present witnesses and
9 the corresponding confrontation right, which is in some ways
10 the flipside of the requirement of live presence of witnesses,
11 is the feature which distinguishes the American and British
12 common law tradition from the inquisitional tradition of
13 continental Europe.

14 Congress got it right. In Title 10 United States
15 Code 949j(a)(2)(A), the Congress provided that process issued
16 in military commissions under this chapter to compel witnesses
17 to appear and testify, and to compel the production of other
18 evidence, in (A) says, "shall be similar to that which the
19 courts of the United States having criminal jurisdiction may
20 lawfully issue," and, (B), "shall run to any place where the
21 United States shall have jurisdiction thereof."

22 The Secretary of Defense, however, got it wrong in
23 Regulation for Trial by Military Commission Section 13-5.b,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 which I would like to put on the screen, if I could have
2 access to the document camera.

3 MJ [COL POHL]: Go ahead.

4 LDC [MR. CONNELL]: Thank you.

5 The Secretary of Defense issued a regulation which is
6 contrary to the language of 10 U.S.C. 949j. In subsection b,
7 the Secretary of Defense stated that "A civilian may not be
8 compelled by subpoena to leave the United States and travel to
9 a foreign country; therefore, a subpoena issued to a civilian
10 to testify at Guantanamo Bay may not be enforced in the United
11 States."

12 It then goes on to provide an alternative to
13 compulsory process which is audio video -- excuse me,
14 videoconference testimony which we're going to discuss the
15 adequacy of in a moment.

16 That's all I need from the document camera.

17 MJ [COL POHL]: So, Mr. Connell, do you have any case
18 authority for the proposition that a civilian has been
19 ordered, subpoenaed to appear in any type of proceeding
20 outside the United States and forced to travel from the United
21 States to the foreign location?

22 LDC [MR. CONNELL]: You know, in fact, the ----

23 MJ [COL POHL]: I understand how you're reading the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 statute. I'm just trying to figure out is, is despite perhaps
2 its wording, is there any example of where you could enforce
3 such a subpoena?

4 LDC [MR. CONNELL]: So there have been some -- there was a
5 trial in the United States District Court for Berlin in 1979
6 where there -- left over from World War II, there was the
7 authority of the ambassador to Germany to convene a court
8 under the laws of the United States in a foreign area.

9 And so there was a person who was accused of a
10 terrorist act, who had forced a plane to land in Berlin. And
11 under that situation, the ambassador to Germany exercised a
12 power which had gone dormant for the last 35 years or so and
13 convened a United States District Court for Berlin.

14 In that situation, the -- there was an initial
15 question, which is the one which is addressed in the published
16 decision, the court decided that the Constitution of the
17 United States applied in the United States District Court for
18 Berlin, even though it's the only case that it had ever heard.
19 The defendant's name was Tiede, T-I-E-D-E.

20 So they were going to have a jury trial, even though
21 Germany didn't have jury trials. They decided they had to
22 have a jury trial there in Berlin, and they went ahead and
23 they actually had a trial.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So in that situation, the actual published opinion
2 addresses the Sixth Amendment requirement to jury trial as
3 opposed to the Sixth Amendment requirement to compulsory
4 process, but in actual fact, witnesses were called in a common
5 law U.S. District Court-style trial outside the United States
6 in Berlin.

7 So that's the one historical example that I have of
8 witnesses being brought to a trial that was being conducted
9 outside the United States. Obviously, it's a very unusual
10 situation in a nonmilitary ----

11 MJ [COL POHL]: Were any of these witnesses involuntarily
12 brought from the United States?

13 LDC [MR. CONNELL]: I don't have the information.

14 MJ [COL POHL]: Okay. Because it's not unusual for
15 courts-martial in Germany, you send out invitational travel
16 orders.

17 LDC [MR. CONNELL]: Yes.

18 MJ [COL POHL]: Really, the question is enforceability of
19 subpoenas of people who don't want to come.

20 LDC [MR. CONNELL]: Right. And that's our situation, of
21 course, because we know there are some people, Mr. Rodriguez,
22 for example, who does not wish to travel to Guantanamo to
23 testify. And it's going to come up again and again and again,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 which -- and it in fact already has come up with respect to
2 the ICRC witness, which is why I thought under the court's
3 reasoning in AE 057 where we had asked for guidance on the
4 application of the Constitution, now is the time to bring this
5 motion.

6 The -- but no, I don't have -- I mean, it's so
7 unusual, I don't have a case where I know that there was an
8 involuntary witness who was compelled to travel outside the
9 United States. However, the wording of -- if the United
10 States -- if the United States District Court, for example,
11 were to convene in Guantanamo like it had convened in Berlin,
12 it would clearly have authority under Title 28 to bring
13 witnesses to testify with it. In fact -- in front of it.

14 In fact, under 28 U.S.C. -- excuse me -- 1728, I
15 believe, the United States can even reach outside of the
16 United States and compel people not within the jurisdiction of
17 the United States to come and testify. I'm sorry. 1783, not
18 1782.

19 Which actually, let's move there now. There's actual
20 reference to 28 U.S.C. 1783, the subpoena for foreign
21 witnesses, in Rule for Military Commission (e)(2)(E), which
22 provides that essentially, if we need a foreign witness, we
23 can proceed under 28 U.S.C. 1783.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The Secretary of Defense got that wrong as well
2 because it's fairly well established that an Article I court
3 like -- it's completely well established nor a court-martial,
4 and I would argue for a military commission as well, is not a,
5 quote, court of the United States within the meaning of
6 28 U.S.C. 451. And 28 U.S.C. 1783 only allows courts of the
7 United States to extend foreign subpoenas.

8 Now, the reason -- although ----

9 MJ [COL POHL]: How do you enforce a foreign subpoena? I
10 mean, that's what we're talking about here. I mean, what
11 we're really talking about here is somebody who doesn't want
12 to come. If you ask somebody to come and say sure, give me
13 the invitational travel orders, and they get on a plane and
14 come to Guantanamo, or whatever it is. But you're saying
15 while there is a procedure in a district court to subpoena
16 somebody from a foreign to come to the United States to
17 testify.

18 LDC [MR. CONNELL]: Absolutely that's true.

19 MJ [COL POHL]: How is that subpoena enforced if the
20 person says I'm not coming?

21 LDC [MR. CONNELL]: There is a contempt proceeding in the
22 United States. There are many cases like this. Since the
23 early 1800s this has been the process.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: How does that get the person into district
2 court?

3 LDC [MR. CONNELL]: Well, in some situations, depending on
4 what the situation is, their property is attached and they're
5 otherwise, you know, encouraged to submit to the jurisdiction.

6 MJ [COL POHL]: But I mean, there's no -- I mean, if a
7 person is subpoenaed within the United States to come to a
8 thing and they don't show up, you send the Marshals Service
9 out to get them, right?

10 LDC [MR. CONNELL]: Sure.

11 MJ [COL POHL]: But there's no Marshals Service that goes
12 to a foreign country.

13 LDC [MR. CONNELL]: There's a consular service. The
14 consular -- the consul goes and serves them and then there's a
15 contempt proceeding in the United States, which is not ----

16 MJ [COL POHL]: This is a citizen of a foreign country?

17 LDC [MR. CONNELL]: No, sir, a U.S. citizen.

18 MJ [COL POHL]: U.S. citizen. Okay. Got it.

19 LDC [MR. CONNELL]: 28 U.S.C. 1783 only reaches U.S.
20 citizens who owe an allegiance to the United States, including
21 to follow its laws, including commands to appear in courts.

22 The -- but that is not available to the military
23 commission. United States v. Daniels at 48 CMR 655, a C.M.A.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 case from 1974, held that a court-martial is not a court of
2 the United States within the meaning of Title 28, and we know
3 that that reasoning applies to the military commission because
4 the language of 949j itself. 949j(a)(2)(A) says that "A
5 military commission shall have a similar power -- shall be
6 similar to that which courts of the United States having
7 criminal jurisdiction have." So clearly Congress was
8 following the definition of courts of the United States in 28
9 U.S.C. 451 and comparing it to military commissions just like
10 courts-martial.

11 The -- so essentially the -- under the way that this
12 regulation is written, the Secretary of Defense has provided
13 that the defense doesn't have the power to compel a witness to
14 appear at Guantanamo from the United States, or a U.S. citizen
15 from anywhere else in the world.

16 So that brings us to the question of the substitute
17 that they set up. And the government doesn't argue that VTC
18 is an adequate substitute, but it seems an obvious answer and
19 it's what the Secretary of Defense had in mind, so I want to
20 address it.

21 There was a plan about 14 years ago to amend Federal
22 Rule of Criminal Procedure 26, which is the rule that has to
23 do with subpoenaing witnesses, to be like -- or the appearance

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of witnesses, excuse me, not -- subpoenaing them is
2 under Rule 17 -- to be like Federal Rule of Civil
3 Procedure 43, because Federal Rule of Civil Procedure 43
4 allows VTC testimony, whereas Federal Rule of Criminal
5 Procedure 26 does not.

6 This was presented to the Supreme Court of the United
7 States. And the Supreme Court of the United States rejected
8 it, saying that the -- in an opinion written by Justice Scalia
9 who said words to the effect that, "Virtual presence may be
10 good enough for virtual justice, but is not good enough for
11 real justice."

12 The military courts -- and there's a long footnote
13 citing a number of cases in the briefs -- have repeatedly held
14 that the live -- the compulsory process clause and its
15 court-martial equivalent guaranteed the live presence of
16 witnesses, even though for convenience and with the agreements
17 of the parties, video teleconference can be used.

18 So the question is where does this go. And I think
19 that the way that the Secretary of Defense has written this
20 regulation renders the military commissions to be structurally
21 unconstitutional. There are really two cases which bear on
22 this question. Neither of them is controlling, I agree, but
23 there's so few cases that I think that they're valuable.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The first of those is United States v. Daniels. Now,
2 the Secretary of Defense cites Bennett in the -- in the
3 regulation, and -- or in the Regulation for Trial by Military
4 Commission. And Bennett says, in fact, what the Secretary of
5 Defense said it says. But Bennett, in turn, was based on
6 United States v. Daniels, the citation for which is
7 48 CMR 655, C.M.A. case from 1974, where there was a
8 Belgian -- there was a trial, a court-martial, being held in
9 Belgium, and there was a Belgian witness who could not --
10 Belgian witness who could not, under the understanding of the
11 court-martial at the time, could not be compelled to come and
12 testify. The defense wanted them to come and testify. They
13 could not come and testify, and so the Court of Military
14 Appeals reversed the conviction saying that if you can't bring
15 witnesses, then you're not really having a fair trial.

16 A similar situation, interestingly, came up in a
17 post-World War II case in the District of D.C., and that was
18 in Gillars, G-I-L-L-A-R-S, v. United States at 182 F.2d 962, a
19 D.C. Circuit case from 1950, where there was a German witness
20 who ultimately did -- for a long time refused to come to the
21 trial, but because the crime had been committed in Germany,
22 this was a person who had been involved in propaganda efforts
23 for the Nazis who was captured after World War II. Because

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the person was a civilian, they were brought back to the
2 United States to the District of D.C. for trial, but the
3 witnesses of course, were all in Germany.

4 And the D.C. Circuit said ultimately there was no
5 error because the person voluntarily appeared, however noted
6 the serious constitutional difficulties which would be
7 presented if the military -- if the court in that case did not
8 have the authority to subpoena witnesses.

9 Now, the government doesn't really argue with any of
10 that analysis, but they do make a number of arguments that I
11 want to address. The first is they make an Article III
12 argument under the case in controversy requirement of
13 Article III.

14 There is significant reason to doubt the application
15 of the Article III case in controversy requirement to a
16 military commission because, of course, the military
17 commission is constituted under Article I, and not under
18 Article III; however, there are some examples, like in the
19 Court of Veterans Claims where the -- where Article I
20 courts -- thank you. I'm slowing down.

21 MJ [COL POHL]: Go ahead.

22 LDC [MR. CONNELL]: Article I courts have as a prudential
23 matter elected to follow Article III jurisprudence on case in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 controversy requirement. But the case in controversy -- case
2 and controversy requirements are not equivalent. The
3 controversy requirement, which was actually cited by the
4 military commission in AE 057C, applies only to civil cases.

5 The case controversy is the one that governs criminal
6 cases. And, in fact, there is a case out of the Second
7 Circuit which addresses pretrial challenges to structural
8 elements of novel evidentiary schemes, and that case is
9 Quinones, spelled Q-U-I-N-O-N-E-S.

10 The reason why there's an analogy in the federal
11 court is because of the federal Death Penalty Act. The
12 federal Death Penalty Act does establish a novel evidentiary
13 scheme for sentencing which reduces the application of the --
14 of the hearsay rules and other rules with respect to both
15 sides in a federal death penalty sentencing, and the question
16 of whether the Sixth Amendment confrontation clause frequently
17 comes up in federal court or other constitutionality of that
18 death penalty statute.

19 What the Quinones court held was that it's perfectly
20 appropriate to challenge a federal death penalty -- the
21 federal Death Penalty Act even though it's not technically
22 ripe because the person has not yet been convicted, is not yet
23 eligible for death because there is a legal dispute between

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the parties, and there's sufficient adversity to satisfy the
2 separation of powers concerns which are contained within
3 Article III case in controversy requirement.

4 In fact, we've already seen that exact reasoning come
5 into play in this case, in AE 036E, which was the government's
6 motion to clarify and amend its witness procedure. On these
7 questions of how do witnesses get to Guantanamo and who can
8 bring them, the government already considered that to be a
9 sufficiently ripe question, that even if there was not a
10 sufficient -- a specific witness request which was at issue,
11 that was appropriate for decision by the military commission.

12 The military commission did rule in AE 036G on the
13 government's motion to clarify and amend the witness
14 procedure.

15 In fact, also going to the ripeness question, the
16 military commission has already referred to this exact issue
17 in this military commission, not to mention the Nashiri
18 military commission has taken up. But in this military
19 commission, the military commission has already referred to
20 its inability to summon witnesses to Guantanamo in oral
21 argument and reasoning on the ICRC issues. And that is found
22 in the record at 27 July 2016, and the transcript pages are, I
23 think, 13244, but I seem to be missing a digit. I can get

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 back to you on that.

2 MJ [COL POHL]: You don't need to. I remember what I
3 said.

4 LDC [MR. CONNELL]: You remember. Okay.

5 The second argument that the government makes is one
6 about constitutional avoidance. And constitutional avoidance
7 doctrine, of course, does not mean that one avoids
8 constitutional issues altogether. What it says is that you
9 have two bases for making a decision, one statutory and one
10 constitutional, you avoid the constitutional question by
11 deciding the statutory question first.

12 If you applied that reasoning here, then the correct
13 analysis would be to find that the regulation, which is --
14 doesn't even have the force of the statute, right? It's
15 enacted not by Congress, but by the Secretary of Defense, is
16 invalid under the statute, which was enacted by Congress ----

17 MJ [COL POHL]: Doesn't 949j(a) give the Secretary of
18 Defense the authority to promulgate the regulation?

19 LDC [MR. CONNELL]: Yes, not inconsistent with these --
20 with the statute, though.

21 MJ [COL POHL]: Let me see, but that's -- no, I understand
22 that, but then you have right below that the provision you
23 talk about, and you don't think that that somehow is a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 congressional intent, that he is to determine how to implement
2 the guidance they give you?

3 What I'm saying is they say, relating -- we tell the
4 Secretary of Defense, you promulgate regulations for
5 production of witnesses, and then they have the subparagraphs
6 you talked about.

7 LDC [MR. CONNELL]: Right.

8 MJ [COL POHL]: You're reading them a certain way. You're
9 saying that when they promulgated the regulation, even though
10 he had the authority to do that, he had to read them -- he had
11 to promulgate it consistent with the subparagraphs, and he did
12 not do such.

13 LDC [MR. CONNELL]: That is exactly right. That is our
14 argument.

15 MJ [COL POHL]: All right.

16 LDC [MR. CONNELL]: It is separate from, for example, our
17 argument in 386B, which is a challenge under the housekeeping
18 statute whether the CIA had authority to promulgate
19 regulations about former employees of the CIA for Touhy
20 purposes. That was a -- that was a regulatory authorization
21 argument.

22 This is not a regulatory authorization argument.
23 This is a -- is the regulation consistent with the statute

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that is within the scope of the authority that Congress
2 granted, or does it instead conflict with the statute.

3 And the only reason why I bring this up at all is to
4 deal with the question of the constitutional avoidance
5 doctrine. So if the government is correct that the
6 constitutional avoidance doctrine has any application here at
7 all, it is that the statutory question of is the regulation
8 consistent with 949j, that question should be decided first,
9 that statutory question, before you reach the constitutional
10 question. That's all the constitutional avoidance doctrine
11 says.

12 The third argument ----

13 MJ [COL POHL]: While we're talking about ripeness, does
14 it make any difference that -- which witnesses we're talking
15 about here? By that I mean witnesses on an interlocutory
16 matter as opposed to merit witnesses.

17 LDC [MR. CONNELL]: That's an interesting question. The
18 compulsory process clause is primarily a trial right. It has
19 been implemented in the -- and so virtually all of the Supreme
20 Court cases which talk about the compulsory process clause
21 talk about it in a trial context as opposed to a pretrial
22 context.

23 Now, I think that it is fair to say, however, that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the -- each body which has implemented the compulsory process
2 clause has treated it as equally applicable to the pretrial
3 context as to the trial context. And let me give you a couple
4 of examples.

5 In Federal Rule for Criminal Procedure 17, for
6 example, which is the regulatory -- it's referred by Congress
7 to the Supreme Court and then the Supreme Court accepts them,
8 so it has the blessing of two branches, the -- there's no
9 difference between pretrial and trial subpoena power. That's
10 equally true in 949j where the -- where Congress provided for
11 subpoena power and reasonable access to evidence and
12 witnesses, not drawing a distinction between pretrial and
13 trial.

14 So the place where I'm going with all of this is, I
15 do being a knowledge that the Supreme Court cases largely
16 address the trial context and not the pretrial context, but
17 there is a -- there is a substantial practice that supports
18 the idea that compulsory process clause extends to pretrial
19 matters as well as trial matters.

20 And let me give you a third example while I'm
21 thinking of them, which is there are certain pretrial matters
22 which are constitutionally required. Perfect example of that
23 is Jackson v. Denno, D-E-N-N-O. And in Jackson v. Denno, the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Supreme Court held that there is a constitutional requirement
2 for a pretrial determination of the voluntariness of
3 statements.

4 And so it would not make any sense for the -- it
5 would be radically inconsistent for there to be a
6 constitutional right to pretrial hearings at which one did not
7 have a constitutional right to compel the appearance of
8 witnesses.

9 MJ [COL POHL]: Now, but just -- isn't part of this
10 embedded in the confrontation clause, demeanor of witnesses,
11 that the fact-finder needs to see in person?

12 LDC [MR. CONNELL]: So ----

13 MJ [COL POHL]: I mean, doesn't your argument -- and does
14 that apply as much to interlocutory matters?

15 LDC [MR. CONNELL]: It does in some cases, and it is -- I
16 completely agree that the compulsory process clause and the
17 confrontation clause are sort of mirror images of each other.
18 The Sixth Amendment is unusual in that way. There's a right
19 to counsel and there's a right not to counsel. There's a
20 right to bring witnesses and there's a right to confront the
21 witnesses against you.

22 The -- that doesn't, however, take away -- the
23 significance of that is the reasoning of the cases about why

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 video teleconference -- we cited the Hernandez case in the
2 briefs, for example -- why video teleconference doesn't
3 satisfy the need for in-person live presentation of testimony,
4 applies equally to both.

5 The reasons why we need -- you need to be able to see
6 our witnesses and determine -- and assess their credibility
7 are the same reasons that you and the defendants need to see
8 the witnesses that the -- that the government calls and be
9 able to cross-examine them.

10 That -- in most pretrial matters -- and obviously on
11 many occasions we've consented to VTC, right? We could have
12 made a confrontation clause argument, but in many situations
13 it doesn't matter, and we could -- and we can consent to VTC.
14 We did so yesterday. There was no objection to the two
15 captains who testified because, yeah, it worked perfectly
16 well. That's not going to be the situation in many, many
17 situations.

18 And if we assert the right to confrontation or if we
19 assert the right to compulsory process, then the Constitution
20 demands that those persons be present in court, both so that
21 the finder of fact can assess their testimony and, in the
22 purposes of the confrontation clause, so the defendants can
23 have live in-person confrontation of the witness.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The third argument that the government makes -- and
2 it doesn't make it completely. It sort of dangles it out
3 there -- is whether the compulsory process clause and the
4 Sixth Amendment apply at Guantanamo at all. I think it's
5 important to note that as in AE 057, the government doesn't
6 actually argue that the compulsory process clause doesn't
7 apply. It just says that we don't have any cases applying the
8 compulsory process clause at Guantanamo.

9 The compulsory process clause, however, clearly does
10 apply at Guantanamo and falls squarely within the reasoning of
11 Boumediene. In Boumediene, of course, the Supreme Court held
12 that Guantanamo is within the constant jurisdiction -- that's
13 a quote -- of the United States, and that constitutional
14 rights apply at Guantanamo unless they are impracticable or
15 anomalous.

16 The right to compulsory process is not impracticable
17 or anomalous at Guantanamo. For one reason we can assess that
18 is that there is at least an expressed intent to provide a
19 fair trial. And the Supreme Court has time and time again
20 talked about the right to compel witnesses to be basic to a
21 fair trial.

22 Furthermore, Congress thought that it was not
23 impractical and anomalous. 949j uses the word "shall" in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 codifying the Sixth Amendment right to right to compulsory
2 process at Guantanamo, obviously for use in a military
3 commission.

4 And then finally a number of the witnesses who
5 testified before Congress in 2009 before the enactment of the
6 military commissions of 2009, and not to mention senators,
7 said that they believed that the Military Commissions Act of
8 2009 would provide compulsory process.

9 In fact, in the Nashiri case, which -- the most
10 recent Nashiri case cited by the government, where the
11 D.C. Circuit assumed a number of procedural safeguards, they
12 made a note that Nashiri had not actually challenged the --
13 either fairness of the proceeding or the existence of
14 procedural safeguards, but they assumed what those procedural
15 safeguards, which are familiar from a regular government
16 litany of procedural safeguards that protect the defendant.
17 And they thought that Nashiri would have the, quote, right to
18 call witnesses before the military commission; whereas, if the
19 regulation had been brought to their attention, they would see
20 that that was not, in fact, true.

21 MJ [COL POHL]: Well, it depends, of course, how you
22 interpret the word before. You're saying before ----

23 LDC [MR. CONNELL]: Before?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You said "right to call witnesses before
2 military commission." You say "before" means physical
3 presence.

4 LDC [MR. CONNELL]: Yes, that's right.

5 MJ [COL POHL]: As opposed to before being a VTC.

6 LDC [MR. CONNELL]: That's right. Yes. That's exactly
7 correct. It is our position that the Sixth Amendment does not
8 allow VTC as a substitution for compulsory process. In the
9 words of the military cases, the live presence of the
10 witnesses, or confrontation, as Maryland v. Craig says, in
11 most -- in almost all situations except for very rare
12 situations for confrontation laws.

13 The last argument that the government makes is based
14 in the text of Rule for Military Commission 907, which gives
15 three examples of when dismissal would be illustrative. I
16 think that that argument is disposed of by
17 United States v. Fulton, 55 MJ 88, a C.A.A.F. case from 2001,
18 which holds that a similarly worded court-martial rule, Rule
19 for Court-Martial 907, is merely illustrative and doesn't
20 limit the power of the military commission to dismiss for
21 various problems in the trial, in that case, illegal pretrial
22 punishment, but here the structural limit on the ability of
23 the military commission to summon witnesses to appear live.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So you have basically two arguments. One
2 is under the statute is there the right to compulsory process
3 here.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: And simply implement the statute
6 notwithstanding the regulation.

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: But if you take the government's position
9 that the regulation is correct that you cannot compel such --
10 you don't have compulsory process of witnesses, then that's a
11 structural failure that requires dismissal.

12 LDC [MR. CONNELL]: That's correct, sir.

13 MJ [COL POHL]: So it's one or the other.

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

15 MJ [COL POHL]: If I -- if a witness -- let's assume your
16 reading of the statute is correct.

17 LDC [MR. CONNELL]: I'll do that, sir.

18 MJ [COL POHL]: And let's just make that a hypothetical
19 assumption. And a witness doesn't want to come, how would the
20 witness come here involuntarily?

21 LDC [MR. CONNELL]: So it would be the situation ----

22 MJ [COL POHL]: Is the U.S. Marshals Service going to go
23 pick him or her up and put him on a plane and come with him to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Guantanamo?

2 LDC [MR. CONNELL]: Well, interestingly, that's what the
3 regulation contemplates with respect to foreign witness,
4 right? It would have to be that way. So for us to proceed
5 under 28 U.S.C. 1783, the way that one proceeds under
6 28 U.S.C. 1783 is that you go to a federal court and you have
7 a contempt hearing, jurisdiction being granted to the federal
8 court by that element of Title 28 itself.

9 And so essentially, that is what we would have to do,
10 I believe, is that you would issue an order for them to
11 appear, but the contempt power would have to -- probably have
12 to go through a district court just like it does under 1783.

13 That's actually the way -- so I know that we usually
14 talk about federal courts, but that's the way it always works
15 in state courts. So in state courts under the Uniform Act to
16 Secure Witnesses, the -- let's say that my office is in
17 Fairfax County, Virginia, and I want the witness from across
18 the river in Montgomery County, Maryland, which has happened
19 to me hundreds of times, probably.

20 What you -- Virginia doesn't have any authority to
21 issue subpoenas in Maryland, and so unless the person
22 consents, which happens sometimes, right? It's a reasonable
23 analogy to here. What you have to do instead is you get an

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 order -- I'm slowing down.

2 In that situation, you get an order from a Virginia
3 court. You have it certified. They have this great triple
4 certification procedure that I love, that the clerk signs it,
5 and then the judge signs saying that's the clerk's signature,
6 and then the clerk signs saying that's the judge's signature.
7 But that's just an interesting carryover from common law
8 times, I think.

9 But then you take that certified order from a circuit
10 court in Virginia and you take it over to the circuit court in
11 Maryland and you present it to them. They open a special case
12 which is In re -- whatever the witness' name is, In re Jones,
13 and then you have to appear in court in Maryland to show --
14 that person has to appear and show cause why they should not
15 respond to the subpoena in Virginia.

16 So the procedure that I think we would actually
17 follow here has a lot of analogies, both in federal courts
18 under 1783, and in state courts under the Uniform Act to
19 Secure Witnesses.

20 MJ [COL POHL]: Does the ----

21 LDC [MR. CONNELL]: It sounds cumbersome, and it is, but
22 that's the way it has to be done.

23 MJ [COL POHL]: Does the U.S. Marshals Service have

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 authority to involuntarily take somebody from outside the
2 United States and deliver them somewhere else?

3 LDC [MR. CONNELL]: You mean like to attach the body?

4 MJ [COL POHL]: Well, I'm saying how do you get the
5 witness here? That's my whole point. In federal court, if a
6 person doesn't show, the Marshals go round them up, right?

7 LDC [MR. CONNELL]: I've never had a witness bodily
8 brought into ----

9 MJ [COL POHL]: But, I mean, don't they have the authority
10 to do that?

11 LDC [MR. CONNELL]: Sure.

12 MJ [COL POHL]: In court-martial practice in the states
13 there's a similar kind of procedure involving the Marshals
14 Service with a writ of attachment and other things.

15 LDC [MR. CONNELL]: Sure.

16 MJ [COL POHL]: So I'm saying at this point -- you're
17 saying the witness has to show. The district court has
18 physical authority over the witness.

19 LDC [MR. CONNELL]: Right.

20 MJ [COL POHL]: How does the witness get involuntarily
21 from Washington, D.C., to Guantanamo Bay, if not escorted by
22 the Marshals Service?

23 LDC [MR. CONNELL]: Right. In that situation -- so in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that extreme situation, yes, the Marshals Service would have
2 authority to bring them to Guantanamo. The way that we know
3 that is that the limitation on U.S. Marshals Service authority
4 is not the geographical boundaries of the 50 states and the
5 District of Columbia. If the -- you know, there's a
6 U.S. District Court in Guam, for example, and they could take
7 them to Guam, which is a territory of the United States.

8 What the reasoning of Boumediene is, drawing on the
9 insular cases, the cases that dealt with the islands, is that
10 Guantanamo is within the constant jurisdiction of the United
11 States. And so the question for the U.S. Marshals Service is
12 not where in the world am I allowed to travel. The question
13 for the U.S. Marshals Service is where is the jurisdiction of
14 the United States to which I can convey a person. And so
15 under the actual holding of Boumediene, Guantanamo would
16 qualify for that.

17 Now, whether -- you know, Bagram or Ramstein or
18 someplace else would, I don't know. But you do know from the
19 United States Supreme Court that Guantanamo ----

20 MJ [COL POHL]: Despite that expansive language out of
21 Boumediene, they also carefully said this was only addressing
22 the suspension clause. I mean, they have a lot of language in
23 there that would seem to be very expansive.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Well, they are the Supreme Court.

2 MJ [COL POHL]: What?

3 LDC [MR. CONNELL]: They are the Supreme Court.

4 MJ [COL POHL]: I know. They're allowed to do that. I'm
5 certainly not criticizing them. I'm just saying -- I'm
6 looking at the opinion and what it says, it's in 2008, and
7 they said this expansive language, and since then they have
8 done absolutely zero as far as I can see to clarify or expand
9 the holding beyond the expansion clause.

10 LDC [MR. CONNELL]: The question that we -- when one is
11 looking at expansive language, right, there's a rule of
12 reading cases that tells us how to look at that language,
13 which is the obiter dicta rule. Sorry, interpreters. Obiter
14 dicta means extra words or something like that. The -- and
15 that is, is the language, expansive or otherwise, involved in
16 the reasoning of the court, or is it some sort of random
17 aside.

18 And the determination under the insular cases that
19 the -- that Guantanamo was part of the jurisdiction of the
20 United States is in fact a -- is part of the reasoning that
21 gets them to the suspension clause, right? Only the
22 suspension clause was before them because it was the MCA
23 jurisdiction stripping provision that they were dealing with.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Since that time no military commission case has made
2 it to appeal in the Supreme Court, and so they've had no
3 opportunity to look at other clauses. You know, the
4 D.C. Circuit has dealt with the ex post facto clause, of
5 course. But the D.C. Circuit has not given us the benefit of
6 its wisdom in Bahlu after all this time, so we still don't
7 know the final answer there. But the -- no case has made it
8 to the Supreme Court that would allow it to assess some
9 other clause ----

10 MJ [COL POHL]: So if you read the language, you are
11 reading it, it would appear to say that the Constitution does
12 apply to Guantanamo unless there's a good reason why it
13 doesn't?

14 LDC [MR. CONNELL]: That is precisely our position, Your
15 Honor.

16 MJ [COL POHL]: So that would permeate other arguments,
17 not just on this issue, but what I'm going to hear next, but
18 other ----

19 LDC [MR. CONNELL]: Right.

20 MJ [COL POHL]: ---- but other ----

21 LDC [MR. CONNELL]: Well, I tried to make that argument in
22 a broad way in 057 ----

23 MJ [COL POHL]: I know.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: ---- and my efforts were not rewarded.

2 MJ [COL POHL]: They were considered.

3 LDC [MR. CONNELL]: Thank you, Your Honor.

4 MJ [COL POHL]: Anything further?

5 LDC [MR. CONNELL]: No, thank you.

6 MJ [COL POHL]: Thank you.

7 Trial Counsel.

8 I'm sorry, does any other defense counsel want to be
9 heard on this motion? Apparently not.

10 General Martins.

11 CP [BG MARTINS]: Your Honor, good morning.

12 MJ [COL POHL]: Good morning.

13 CP [BG MARTINS]: We oppose the defense motion because
14 this motion to dismiss all charges and specifications is not a
15 proper procedural vehicle for the relief they seek -- and I'll
16 get to that argument a bit more in a moment. The defense
17 counsel referred to it as a Rule 907 argument -- and also
18 because it does still invite you to issue an advisory opinion
19 on a broad constitutional question absent precise facts. And
20 so I'll discuss both of those, and then I'll talk to the
21 Daniels case and the Bennett case, two cases mentioned by
22 counsel, certainly answer any questions before resting at this
23 point.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So the first argument that we would maintain is --
2 provides the wise approach for the commission to take, is that
3 a motion -- a pretrial motion to dismiss all charges and
4 specifications is just improperly styled at this point. We
5 don't have a situation that really fits Rule for Military
6 Commission 907. A pretrial motion to dismiss is a request
7 under Rule 907 to terminate proceedings as to one or more
8 charges and specifications that is capable of resolution
9 without trial of the general issue.

10 And Rule 907 gives us some good examples of that. It
11 does use the word "include," but those examples that it gives
12 are important and valuable. There are nonwaivable grounds,
13 such as a motion to dismiss for lack of jurisdiction of the
14 court. There are -- other examples of that are failure to
15 state an offense, if something in the charges fails to state
16 an offense.

17 A permissible ground includes that the charges were
18 brought, but the government failed to meet the speedy trial
19 requirements of Rule for Military Commission 707. Or that the
20 accused was previously tried for the same charges and
21 offenses, or that he was pardoned. Those are waivable
22 grounds. And then the rule also points out certain
23 permissible grounds, such as that the charges are

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 multiplicitious or confusing.

2 Those are instructive, Your Honor. I would not -- I
3 don't claim that they're exhaustive, but they're instructive
4 because they point out the proper way in which a motion
5 seeking drastic relief, such as dismissal of all charges and
6 specifications, is properly capable of resolution.

7 Rule 905 instructs that we have to take a request for
8 relief at its substance, not its form. And what we really
9 have here is a motion seeking presence, compulsive presence of
10 somebody in this courtroom. And there's a way to do that
11 under Rule 905, a motion to compel the production of a
12 witness, and that helps style and shape the particular issue
13 before the commission.

14 And that's important in this case because of the
15 second essential argument I'm going to make, which is you
16 still are being presented with a request to make a broad
17 constitutional ruling. I guess as a backstop, counsel is
18 asking you to make a broad statutory ruling. But you're asked
19 to make a ruling absent precise facts on which to base it.

20 It is an essential of how a court should decide a
21 dispute of any kind, and this goes to an 1885 case of the
22 Supreme Court. It's an essential of how you decide any case,
23 that you anchor it to specific facts.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 We do believe that applies to these proceedings. We
2 cite to the Liverpool Steamship Company v. Emigration
3 Commissioners for the proposition that a court or judge should
4 never anticipate a question of constitutional law in advance
5 of the necessity of deciding it, and that also a court or
6 judge should never formulate a rule, a constitutional rule,
7 broader than the precise facts to which it's applied.

8 You've got some examples that counsel pointed out in
9 his reply in 449, instances of interlocutory matters in which
10 he says witnesses have not yet been produced. Well, Your
11 Honor, we would urge the decision to pick one. Let's look at
12 a particular example and have counsel make his constitutional
13 argument in that vein, and then you then have a concrete
14 situation.

15 The very discussion you had with counsel showed that
16 we're never really anchored to a specific set of facts, very
17 important for you ----

18 MJ [COL POHL]: Basically, let's use the example of
19 Mr. Rodriguez.

20 CP [BG MARTINS]: The special rapporteur. I think this is
21 424, I think.

22 MJ [COL POHL]: No, that's Mr. Mendez. I'm talking about
23 Rodriguez, the CIA.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: Rodriguez. Okay.

2 MJ [COL POHL]: Let's assume the defense wants him, and so
3 in that situation I'm not going to come unless you subpoena me
4 and then I'm not going to come anyway because you can't make
5 me. At that point, that's when this issue would be ripe, when
6 we have a ----

7 CP [BG MARTINS]: I think we've got to go through the
8 steps in the rules.

9 MJ [COL POHL]: So meaning all of the steps about that
10 he's a necessary and relevant witness. We've gone through all
11 of those steps.

12 CP [BG MARTINS]: Okay.

13 MJ [COL POHL]: And they say we want him here in person.
14 And at that point ----

15 CP [BG MARTINS]: Is this an interlocutory issue or a
16 trial issue?

17 MJ [COL POHL]: We'll start with interlocutory issue.
18 Trial issues, that's a different ball of wax. But I'm just
19 saying ----

20 CP [BG MARTINS]: Are you assuming ----

21 MJ [COL POHL]: ---- from your point of view, that's when
22 the issue would be ripe to decide?

23 CP [BG MARTINS]: I need more information. And I think

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that -- I think that the whole body of jurisprudence on how
2 you do compulsory process questions ----

3 MJ [COL POHL]: I'm not understanding your ripeness
4 argument.

5 CP [BG MARTINS]: Let me ask you more questions on what
6 the hypothetical is.

7 MJ [COL POHL]: Okay.

8 CP [BG MARTINS]: Have we agreed to produce him to a
9 two-way video teleconference ----

10 MJ [COL POHL]: Let's say I ordered his production.

11 CP [BG MARTINS]: Okay.

12 MJ [COL POHL]: Let's say I ordered his production, so
13 we've gone through all of those steps. Ordered his
14 production, he has refused to come here voluntarily, and the
15 government has proffered, well, he can be involuntarily gone
16 to the United States anyway, so that's not an issue.

17 CP [BG MARTINS]: Okay.

18 MJ [COL POHL]: So I'm just saying at that point that's
19 when the issue would be ripe to be decided.

20 CP [BG MARTINS]: I believe you may decide that it's ripe
21 based on the footnote in their reply, which then listed a
22 bunch of interlocutory questions. It's the -- the situation
23 you've just given is not yet ripe. We have not yet been told

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 we have got to produce.

2 MJ [COL POHL]: No, I'm just trying to say -- you're
3 saying ----

4 CP [BG MARTINS]: I understand.

5 MJ [COL POHL]: ---- don't decide now because it's not
6 ripe. When do you think it would be ripe? When we have a
7 particular witness?

8 CP [BG MARTINS]: Yeah. That's right. I think that --
9 going to my first argument, that's when you're going to have a
10 motion for appropriate relief under Rule 905 where the relief
11 is why you're going to produce the witness or abate.

12 MJ [COL POHL]: Okay.

13 CP [BG MARTINS]: So then now you say, at this point, we
14 would be arguing fulsomely that you've got a constitutional
15 procedure here that is providing compulsory process under the
16 statute and the rules, you would have to -- if the defense
17 does not agree to his production at the VTC site as being in
18 satisfaction of the accused right, you would then have to
19 weigh under Rule 703 all probative factors. And those would
20 include the need for the witness, the remote and unique
21 circumstances of the forum, of the location of the forum, and
22 then other logistical questions. But all probative factors
23 you'd have to take into account. So then you would have a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ripe situation. You'd be weighing those. You'd have a
2 lay-down of what testimony they're seeking from him. You'd
3 have a proffer of that. We would have litigated. Then you're
4 going to have a ripe question. You don't have that here.

5 Now, he's made reference to denials of witnesses and
6 so forth. I mean, a little bit of background. We're in
7 interlocutory matters. Some 30 witnesses have testified.
8 There have been more than 85 hours of testimony here. We've
9 granted some without your involvement. You've compelled some.
10 There's a process here.

11 And we would submit at that point we would be
12 arguing, with the benefit of a concrete set of facts, that the
13 statute is constitutional, that we've constitutionally
14 implemented it, and we would be drawing upon things such as --
15 you cited Boumediene and counsel cited Boumediene. We'd be
16 talking about Hamdan, the 2006 Hamdan v. Rumsfeld case in
17 which the Supreme Court specifically took up questions of the
18 process that was present in that version of military
19 commissions.

20 So you had the Supreme Court describing -- and I
21 would recommend if you look in Section 6 or part 6 of that --
22 the majority's opinion of Hamdan, you will see the discussion
23 of the -- of witnesses and the ability of an accused to get

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 witnesses as well as the confrontation right, which we'll be
2 talking about in a moment.

3 But the court talks about that and then eventually
4 decides the court doesn't have the authority to proceed
5 because those procedures are not uniform with those in
6 courts-martial. It's essentially a violation of Article 36.

7 And yet what happens after 2006? You have Congress
8 passing, for these purposes, the Military Commissions Act of
9 2009. There's a dialogue between the branches. Hamdan
10 decides that that framework -- under that framework the
11 commission lacked the authority to proceed. They pointed out
12 more than the issues related to getting witnesses, of course.
13 They talked about the nature of the judge, the appellate
14 structure and all of that. But, importantly, they did discuss
15 this. Congress provides a comprehensive, intricate statute of
16 protections.

17 You're no longer in the Hamdan situation. Justice
18 Kennedy's opinion makes clear that we were at -- under the
19 Youngstown analysis, the President was at his lowest ebb of
20 power because he was actually in contradiction to Article 36,
21 contradiction to Congress.

22 We're now very clearly -- with this statute, with the
23 authority of the President to implement the statute, we're at

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the branch -- the elected branch of government's highest
2 power, at its maximum. And here we have alien unprivileged
3 enemy belligerents appropriately being held in this system.
4 They're getting compulsory process under that statute. They
5 have many recourses within the process, and they can seek to
6 get that particular witness that you're mentioning. Once we
7 tee it up in a very precise way, we are confident that this
8 structure is giving every bit of that right to the accused.

9 I'd like to talk to Daniels and Bennett, and then I
10 guess I'll talk to Gillars, too. These are three cases that I
11 believe that the defense is misusing.

12 So Daniels is actually a case taking place in
13 Belgium. The witness being sought was a female dependent of a
14 servicemember, and what -- the court in that case did in fact
15 decide that the witness was needed and essential, and directed
16 that it would have to be abated unless she were produced.

17 In that case the court did -- in a concurring
18 opinion, the court did cite to Title 28 U.S.C. Section 1783,
19 which allows for a U.S. citizen on foreign soil to be
20 produced, if a district court designates a person or body that
21 that individual should be compelled to appear before.

22 That's a different case than the hypothetical you
23 gave me. It does give a district court the ability to tell a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 U.S. citizen, in that case a female dependent of a
2 servicemember, to have gone to a court-martial to testify, and
3 that was the Court of Military Appeals at the time stating
4 that.

5 So it did say it was a cumbersome process, but
6 because it was there, the government's ability to try to get
7 the witness was part of the process that the judge should have
8 weighed. It didn't involve a video teleconferencing option.
9 If it had, Your Honor, you're familiar, as we all are who
10 practice in courts-martial, that there is that distinction
11 between interlocutory matters and trial matters in the
12 court-martial Rule 703 among the factors that you're to
13 consider.

14 So Daniels doesn't stand for what Mr. Connell is
15 saying that it stands for. It certainly doesn't point to the
16 invalidation of a scheme of production of witnesses that we
17 have here.

18 United States v. Bennett, this is in the Philippines.
19 I do believe it's the controlling case. It's the case cited
20 in the rules for Regulation for Trial by Military Commission,
21 and Bennett does instruct that there wouldn't be power to
22 bring a U.S. citizen.

23 In that case, it was a law enforcement officer who

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 was being sought to testify in the Philippines in a
2 court-martial, and he had already gone back to the U.S., and
3 they couldn't -- the court ruled and explored the authorities
4 for why somebody could be brought overseas and ruled that the
5 court-martial wouldn't be able to get him, compel him to go to
6 the Philippines. You didn't have a Section 1783 statute to be
7 one of the things that you weighed what the military judge
8 would have had to weigh.

9 Interestingly, in Bennett, as it turned out at trial,
10 the witness was cumulative. There wasn't a denial at the end.
11 And it really points to the importance of having a very
12 specific, concrete case in which a witness is being sought and
13 certain testimony is being sought, important to confine the
14 findings and the relief provided by the court to that.

15 Let me just briefly go to Gillars. Defense counsel
16 apparently scanned all of the D.C. Circuit cases to try to
17 find something that was near on point. Gillars is a U.S.
18 citizen who goes to Germany. She appears in propaganda tapes,
19 propaganda programs for the Germans during the war. Gets
20 tried. Her case reaches the D.C. Circuit in 1950, and
21 she's convicted of one of the counts of treason.

22 Importantly, in that case, though, German witnesses
23 that she sought wound up being -- appearing. So it really is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 dicta, and, again, it certainly doesn't stand for this
2 proposition that the scheme or the approach that we have in
3 our regulation and in our statute is unconstitutional.

4 MJ [COL POHL]: How do you address his argument about the
5 difference between the statute and the regulation, that the
6 statute provides for compulsory process, but the regulation is
7 improperly implementing the statute?

8 CP [BG MARTINS]: We don't really see -- we don't see the
9 statute as appreciably different from Article 46 of the UCMJ.
10 We have the same framework in the military commissions as we
11 have in the UCMJ. The UCMJ, we have Article 46. There's some
12 slight differences in words. There are -- is a reference to
13 Article III that you won't see in -- that you will see in 949j
14 that you won't see in Article 46. But the process we have for
15 courts-martial is constitutional.

16 If he's -- so we would say we have a lawful
17 implementation of 949j. You pointed yourself to paragraph (a)
18 of 949j, which gives very express authority to the Secretary
19 to provide, you know, this reasonable opportunity to obtain
20 witnesses and evidence through regulations the Secretary
21 makes. Again, President and Congress at their highest power
22 prosecuting a war and being given those constitutional powers
23 to do that in the way that they need to.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 We're dealing with testimony that can be far-flung.
2 You know, we're dealing with hostile, armed group that is
3 doing things all around the globe. Evidence can be in lots of
4 different places. Congress and the President, in the
5 making -- or the President, in the making of those regulations
6 through the Secretary, ought to be taking those things into
7 consideration.

8 And you, then, are given the authority in Rule 703 to
9 weigh all probative factors. Really have to start with what's
10 the need for the witness, what is the witness going to do, and
11 is the method of getting the testimony before the finder of
12 fact compliant with that and adequate to provide that right.

13 MJ [COL POHL]: Now, Mr. Connell mentioned about the
14 ability to force a witness to appear in Guam. Is that an
15 analogous situation?

16 CP [BG MARTINS]: U.S. territory? We'd have to look at
17 the authority. There is a difference in U.S. territories.
18 And in fact when you look at Bennett -- I would refer you to
19 Bennett -- there's a thoughtful and learned discussion of the
20 authority to compel a U.S. citizen to appear anywhere in the
21 courts of our sovereign country and ----

22 MJ [COL POHL]: Do you ----

23 CP [BG MARTINS]: There's a distinction.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You would distinguish a territory from the
2 status of Guantanamo Bay?

3 CP [BG MARTINS]: Yes. Yes, we'd distinguish it.

4 And I don't believe Boumediene undermines that for
5 the reasons you were pointing to. That's the nonsuspension
6 clause of the Constitution, very specific set of facts
7 relating to habeas and access to courts, and -- you know, a
8 very specific set of facts.

9 But in Bennett, which I think is learned and
10 instructive on this point, Your Honor, there is a distinction
11 drawn between requiring a U.S. citizen to come back from
12 overseas to testify, and there's discussion in there about how
13 a sovereign could require that, and if they don't come, could
14 take appropriate actions against the person, because being a
15 citizen implies the agreement to provide the courts and the
16 people all of the evidence they may have.

17 Whereas forcing someone to go overseas has -- there
18 are problems in just the in personam jurisdiction of a court
19 being extended extraterritorially that are not present in the
20 other situation, and also you run into the right of the
21 individual for freedom of movement and just freedom to be
22 where they want to be. Compelling someone to go against their
23 will outside the U.S. is a factor that's not present in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 requiring them or under penalty of some kind, to come back.

2 So there's some very important distinctions in
3 Bennett that I think are worthwhile and there is a
4 discussion -- I believe there's a mention in there of
5 territories, U.S. or territory, compelling someone to go to a
6 territory of a sovereign is distinguishable from going to
7 foreign soil.

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

9 Mr. Connell, anything further?

10 LDC [MR. CONNELL]: I don't have anything further.

11 MJ [COL POHL]: Okay. That brings us to 447.

12 LDC [MR. CONNELL]: Your Honor, I've previously provided
13 to the parties a copy of 447C. I've previously given a copy
14 to the court security officer. I would ask permission to
15 display these slides to the gallery and the public.

16 And, like yesterday, I would ask permission to
17 provide these slides to the public. They were all marked FOUO
18 even though it's entirely public information which is
19 contained within them. But I also understand your ruling from
20 yesterday.

21 MJ [COL POHL]: Okay. Just be clear is -- so the
22 government knows what I'm asking here is, who's marking the
23 slides and what's their authority to mark them FOUO? Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Should be a simple answer, but I've found we don't have many
2 simple answers.

3 Mr. Connell.

4 LDC [MR. CONNELL]: Yes, sir. May we have the feed from
5 Table 4.

6 MJ [COL POHL]: Put it on the overhead.

7 LDC [MR. CONNELL]: Apparently the electrons take longer
8 to get to that screen than ----

9 MJ [COL POHL]: It's a bigger screen.

10 LDC [MR. CONNELL]: Bigger screen.

11 So in many ways 447 is the flipside of the question
12 presented in 449, although the statutory authority goes the
13 opposite way in 447. Congress got it right in 449 on
14 compulsory process, and they got it wrong in 447 on
15 confrontation. I'll explore that in a little more detail in a
16 moment.

17 The question of the application of the
18 Sixth Amendment first came up in AE 057, but it came up later
19 in July, also in a separate question from the military
20 commission, which was, did Congress intend to comply with
21 Crawford v. Washington? Did it intend to comply with the
22 confrontation clause of the Sixth Amendment?

23 And I answered at that time my position that Congress

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 did not intend to comply with the Sixth Amendment on the
2 confrontation clause, and so the issue was clearly ready to be
3 discussed, and so that's why we filed AE 447.

4 So the congressional authorization for Military
5 Commission Rule of Evidence 803 appears in 10 U.S.C.
6 Section 949a(b)(3)(D), which is kind of a mess of a statutory
7 application, but it is an authorization for the Secretary of
8 Defense to create a rule saying that, essentially, the
9 government does not have to comply with the confrontation
10 clause by setting up a new hearsay exception, sort of a
11 super-residual exception. There is, of course, a residual
12 exception under Military Rule of Evidence 807 just like under
13 Federal Rule of Evidence 807, but this is sort of -- way more
14 expansive than that.

15 Taking up that invitation, the Secretary of Defense
16 enacted Military Commission Rule of Evidence 803. And
17 Military Commission Rule of Evidence 803(a) says that the
18 Military Rules of Evidence apply, like there are not really
19 free-standing hearsay rules in the Military Commission Rule of
20 Evidence. They say instead that the Military Rules of
21 Evidence apply. But then there's this extra addition to the
22 hearsay jurisprudence of the military commission, which is
23 M.C.R.E. 803(b), which sets up an additional entirely new

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 hearsay exception.

2 The slides are a little bit out of order here. I
3 moved this one up to make it more clear. This is 803(b), and
4 you will see that to admit hearsay in this situation, after
5 taking account of the variety of the statement -- of the
6 taking of the statement, the military commission must assess
7 essentially relevance, which is Roman numeral I and Roman
8 numeral II, evidence of that material fact and evidence of
9 that fact.

10 And Roman numeral III sets up an expanded notion of
11 availability, which is rather than incorporating the
12 unavailability jurisprudence in the federal rules and the
13 military rules, the Secretary of Defense at Congress'
14 invitation set up the idea that direct testimony from the
15 witness is not available as a practical matter, taking into
16 consideration their location which is almost certainly not in
17 Guantanamo, and other factors.

18 And then there is Roman Category IV is essentially a
19 discretionary interest of justice determination to be made by
20 the military judge.

21 This sets up a number of problems. The first is
22 essentially this is -- this rule is an attempt to overrule
23 Crawford v. Washington with respect to the military

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 commissions. It has a return to the standard which had
2 previously been in effect in Ohio v. Roberts regarding
3 assessment of indicia of reliability, equivalent guarantees of
4 trustworthiness, et cetera.

5 Those determinations are subjected to judicial
6 discretion, excuse me, under a catch-all exception which
7 additionally profits from the government's point of view from
8 an expanded definition of unavailability.

9 However, what the United States Supreme Court held in
10 Crawford v. Washington is that reliability is not the
11 question, reliability writ large, but reliability tested in a
12 particular manner, in the crucible of cross-examination.

13 The court in Crawford explained that you can no more
14 dispense with the requirement of cross-examination because
15 information is reliable than you can dispense with a jury
16 trial because the defendant is guilty.

17 The Supreme Court talked about -- called ideas of
18 reliability to be amorphous and said that it was fundamentally
19 at odds with the right of confrontation.

20 So what does that -- what does that mean for us here,
21 right? That's the Crawford rule, but what does it mean with
22 respect to a Military Commission Rule of Evidence 803(b)? So
23 what it means is that the statute, the authorizing statute,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 949a(b)(3)(D), and Military Commission Rule of Evidence 803(b)
2 are facially unconstitutional.

3 Now, in this situation unlike -- not exactly like
4 449, there's a Supreme Court case with an almost identical
5 situation from an analytical point of view, which is that
6 shortly after -- in the late '60s shortly after
7 Miranda v. Arizona decided, Congress tried to overall
8 Miranda v. Arizona in 18 U.S.C. 3501. And everyone
9 acknowledged that it was an attempt to overrule Miranda, it
10 went unacknowledged.

11 Nobody basically paid any attention to it for a long
12 time until a judge in my district, the Eastern District of
13 Virginia got hold of it and held that 3501 did, in fact,
14 overrule Miranda and that the standards of 3501, a statute,
15 would control over the standards of Miranda v. Arizona, a
16 constitutional or, they thought, quasi-constitutional
17 decision.

18 So that case was decided by the United States Supreme
19 Court in United States v. Dickerson. And essentially the
20 United States v. Dickerson held that Congress cannot overrule
21 a constitutional rule, and that Miranda was a constitutional
22 rule. The analogy here is pretty plain. The same thing that
23 Congress tried to do in 3501 is what they tried to do in 949a,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 which is to overrule a constitutional rule that they didn't
2 like, Crawford v. Washington in this situation.

3 There are a number of other examples of facial
4 unconstitutionality that the courts have dealt with outside of
5 the First Amendment and abortion context. Those two contexts
6 clearly have an overbreadth doctrine that doesn't apply in
7 criminal situations, but facial unconstitutionality challenges
8 are still authored, Dickerson being one of them.

9 But Johnson v. United States, which was decided in
10 2015, and held the residual clause of the Armed Career
11 Criminal Act to be unconstitutional is echoing throughout the
12 federal courts, hundreds and hundreds of cases right now in
13 the federal courts, dealing with the question of finding a
14 statute facially -- a criminal statute facially
15 unconstitutional, which the Supreme Court did.

16 Another example which had big repercussions at the
17 time was United States v. Lopez, where the United States
18 Supreme Court held that a gun statute violated the commerce
19 clause, another example of a facial constitutionality
20 challenge outside the First Amendment and abortion context.
21 So our challenge here is a facial challenge to this statute
22 and this rule.

23 So last -- the government makes many of the same

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 arguments or really some of the same arguments. They made
2 more arguments in 449, which might be why we went there first.
3 But their primary argument is a ripeness argument, a case in
4 controversy clause argument here.

5 We already talked about the distinction between an
6 Article I and an Article III court for the case in controversy
7 requirement. But, you know, I think one thing that is really
8 important is the Quinones case that I talked about from the
9 Second Circuit, which holds that pretrial challenges to novel
10 evidentiary statutes are ripe pretrial was actually applied by
11 a district court in a case that's exceptionally similar to
12 this one, which was United States v. Haynes at
13 269 F. Supp. 2d 970 from the Western District of Tennessee in
14 2003, where the court held that a pretrial challenge to 18
15 U.S.C. 3593(c), which tried to exempt federal sentencing from
16 the confrontation clause -- it was pre-Crawford but still
17 there was a confrontation clause requirement -- that that
18 challenge specifically was ripe pretrial.

19 And the government doesn't do anything to try to
20 address the actual cases from ripeness in the -- you know, in
21 this century that address these exact kind of challenges. But
22 the idea that this sort of challenge is not ripe has already
23 been rejected by the federal courts.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And there's no case on the other side. There's -- of
2 all of the cases that have dealt with these novel evidentiary
3 frameworks, all of them have held them subject to challenge,
4 and none of them have ever held that it's not ripe to
5 challenge a novel evidentiary framework.

6 And the ----

7 MJ [COL POHL]: Isn't that probably the result that even
8 if the court were to rule they weren't ripe at one point, they
9 would probably address it later in the same proceeding when it
10 was ripe?

11 LDC [MR. CONNELL]: Yes. I suppose that's true.

12 MJ [COL POHL]: I mean, it's the issue -- I suspect the
13 defense wouldn't let the issue go away. They just said -- for
14 example, let's say I buy the ripeness argument that you've got
15 to ask for a witness that's been ordered produced before we
16 get compulsory process. I suspect, although you may disagree
17 that it was -- with the ripeness rulings, that very soon we
18 would have a ripe issue under that definition.

19 LDC [MR. CONNELL]: Right. And that's -- I completely
20 agree with what you just said, which has two important
21 implications. The first one is that its implication for the
22 publication of decisions by district courts.

23 So take that Haynes decision for example. In the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Haynes decision it was not that -- so unlike Quinones which is
2 addressing an interlocutory appeal and the -- where the
3 government wanted to say that something wasn't ripe, yes, that
4 could have happened later, but for a district court, they're
5 publishing decisions as they go along on a rolling basis,
6 which means that the fact that if they had -- if the judge had
7 ruled that something was not ripe and then dealt with it
8 later, in that intervening time, they would still publish an
9 opinion addressing that, which is what happened in Haynes.

10 The second important implication of what you just
11 said is that, yes, the specific applications are coming, and
12 the reasoning of Quinones and Haynes and all of those other
13 cases that address the same situation, is the same situation
14 that we have here, is that there is a concrete, legal dispute
15 between adverse parties, which is all that the case
16 controversy requires in a -- in a criminal case.

17 And the fact is we need to note because, as you say,
18 these questions are coming down the pike very soon, and we
19 need to know for our investigation. We need to know for our
20 decision-making. We need to know for our consultation with
21 the client. We need to know for our strategy. Because the
22 government has a view of what it thinks is going to happen
23 supported in this statute and this rule, and -- but we don't

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 know.

2 There's uncertainty for the defense, and that's the
3 reasoning of Quinones. Certainly, the defense needs to know
4 for making its strategic decisions in a capital case about, is
5 it going to be able to confront the witnesses, or is the
6 government going to be able to call -- introduce information
7 which would otherwise violate Crawford and the confrontation
8 clause simply by operation of statute.

9 MJ [COL POHL]: But as opposed to the compulsory process
10 issue which obviously can talk about witnesses being produced
11 at an interlocutory matter, does the hearsay issue have the
12 same weight, for want of a better term, on interlocutory
13 matters? Aren't we really talking about ----

14 LDC [MR. CONNELL]: That's right. The -- I think it ----

15 MJ [COL POHL]: We're really talking about hearsay on a
16 case on the merits.

17 LDC [MR. CONNELL]: Right. I'm doing it off the top of my
18 head, but I think it's 803(a) that says that the rules of
19 evidence don't apply to interlocutory matters in the -- in the
20 military commissions.

21 So normally there's not a hearsay rule anyway in
22 military commissions, but ----

23 MJ [COL POHL]: Uh-huh.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: ---- it's critically important at
2 trial, and for planning purposes it's critically important at
3 the sentencing phase as well, which is what all of these cases
4 are addressing. Because in capital cases, you know, often the
5 sentencing phase is an important focus of effort. It's a
6 reason why Congress, for example, provided learned counsel to
7 address people who had been through sentencing phases before
8 and could address those.

9 So yes, I do agree that unlike the compulsory process
10 clause, there's a much more significant pretrial/trial
11 distinction that has to be made, but the same rule applies in
12 federal court.

13 The federal court rule equally says, and I think it's
14 104(a) in the Federal Rules of Evidence, says that the federal
15 rule -- that the rules of evidence don't apply in pretrial
16 matters in federal court, and the -- so the reasoning of these
17 cases like Quinones and Haynes is equally applicable when
18 we're talking about this situation where there's no hearsay
19 rule in pretrial situation and there is a hearsay rule in a
20 trial situation.

21 MJ [COL POHL]: Go ahead.

22 LDC [MR. CONNELL]: That's it. That's all I have.

23 MJ [COL POHL]: Okay. Thank you. Well, let me ask you,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 you -- put back a slide. Although it's a minor part of your
2 argument, although I always consider everything you say ----

3 LDC [MR. CONNELL]: No doubt.

4 MJ [COL POHL]: ---- do you see a big distinction between
5 the definition of unavailability in the UCMJ as opposed to the
6 military commission?

7 LDC [MR. CONNELL]: Yes. Absolutely. The UCMJ definition
8 of unavailability is primarily about can the person be
9 compelled to testify. Can they be brought. And that's where
10 the intersection between the compulsory process clause issues
11 that a person cannot be brought to Guantanamo, that's where it
12 intersects so completely with the confrontation clause problem
13 and I'm very happy that you brought that up.

14 Because take, for example, a person who is outside
15 the jurisdiction of subpoena power, all right? So let's say a
16 person who is in Cambodia, a non-U.S. citizen who is in
17 Cambodia. That person is legally unavailable. Not just
18 factually unavailable, but legally unavailable because they
19 are beyond the power of the court to subpoena them.

20 If the Regulation for Trial by Military Commission
21 13-5.a remains in place, then every person who is not
22 outside -- every person who is outside the Guantanamo Bay
23 becomes unavailability legally even under the definition in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the -- under the UCMJ.

2 Now, what the definition -- what the 803(b)
3 definition does is makes that even broader. It's no longer
4 talking about legal unavailability. It's now talking about
5 discretionary factual unavailability, given the unique
6 military factors, given the physical location of the
7 witnesses. It introduces an entirely new discretionary
8 factor-based analysis of unavailability that doesn't exist
9 under the UCMJ or under the Federal Rules of Evidence.

10 MJ [COL POHL]: And, again, I'm not sure it's the gravamen
11 of your argument, but it would seem that if you look at
12 Military Rule of Evidence 804 ----

13 LDC [MR. CONNELL]: Can I grab my book, Your Honor?

14 MJ [COL POHL]: Sure. I'm back into the -- I'm in the
15 Manual for Courts-Martial now. So that's your book, that's --
16 under Military Rule of Evidence 804(a), it says definition of
17 unavailability.

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: Okay. Why don't you borrow -- General
20 Martins, why don't you give him that book because I'm going to
21 refer to another provision that's going to be in that book.
22 That may not be the one.

23 CP [BG MARTINS]: He has a copy here.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: No, but I'm going to refer back to the
2 UCMJ article in a second. That's why he's going to need both.

3 LDC [MR. CONNELL]: Okay.

4 MJ [COL POHL]: But if you go down there to 6, it says is
5 unavailable within the meaning of Article 49(d)(2).

6 LDC [MR. CONNELL]: All right.

7 MJ [COL POHL]: That's why you need the other book. Then
8 if you go to the UCMJ and look at Article 49(a)(2), it's on
9 page A2-14, if you're in the same volume I've got. Now,
10 again, it's under the deposition -- it's under the deposition
11 article, but it does talk about unavailability.

12 LDC [MR. CONNELL]: All right. I'm with you.

13 MJ [COL POHL]: 49(d)(2), a lot of those reasons would
14 appear to be similar although not identical to what we're
15 talking about in the military commission rule.

16 LDC [MR. CONNELL]: All right. So this language ----

17 MJ [COL POHL]: Again, I know it's not the major part of
18 your argument. Got it.

19 LDC [MR. CONNELL]: I'm familiar with this language.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: I do habeas.

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: 849 -- this Article 49 definition in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Article 49(d)(1) is taken from Federal Rule of Civil
2 Procedure 26.

3 MJ [COL POHL]: No, I'm in (d)(2).

4 LDC [MR. CONNELL]: (d)(2). Oh. Oh, I'm sorry.

5 MJ [COL POHL]: I'm in (d)(2). I'm not in (d)(1).

6 LDC [MR. CONNELL]: (d)(2) being death, age, sickness,
7 bodily injury, infirmity, et cetera.

8 MJ [COL POHL]: It does talk ----

9 LDC [MR. CONNELL]: Unable to or refuses?

10 MJ [COL POHL]: It does talk about military necessity and
11 other things. And arguably, although different terms, it
12 would appear that it's not, one could argue it's not that much
13 different.

14 LDC [MR. CONNELL]: You know what this situation calls
15 for, Your Honor? Circles.

16 MJ [COL POHL]: No, it doesn't. Again, I know it's not
17 the gravamen of your argument. I just thought that was
18 illustrative.

19 LDC [MR. CONNELL]: I see your point. I'll plot out the
20 Venn diagram and see what the overlap is and what it's not.

21 MJ [COL POHL]: Thank you.

22 Trial Counsel.

23 LDC [MR. CONNELL]: We can kill the feed from Table 4.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Just to kind of stick a nail in something
2 I think a nail is already in, unlike the other slides,
3 Mr. Ryan, since you appear to be the stuckee on this FOUO
4 issue, there does not appear to be an FOUO document inside
5 these. That doesn't mean it couldn't be derived from them, I
6 got that, but just going forward. General Martins.

7 CP [BG MARTINS]: Your Honor, this is even more unripe,
8 given that in 449C you actually had some references to some
9 interlocutory matter witnesses. Here you really have an
10 invitation to construe the Sixth Amendment compulsory -- or
11 the confrontation clause, and so we differ with the defense
12 and request that you deny the motion.

13 Don't take this invitation to construe a
14 constitutional provision in the abstract. There's a process
15 here. There's no prejudice. As you said in your ruling on
16 Appellate Exhibit 057, which was an invitation to issue a
17 broad constitutional ruling, you said that the parties weren't
18 prejudiced by the process that we have here, and we would say
19 that's particularly true as well in this hearsay provision
20 context.

21 The statute states that parties have to have a fair
22 opportunity to meet the evidence, have to be given a fair
23 opportunity. They have to be given notice in advance, and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 then we'll have a specific context in which to weigh these
2 different factors that you've got to weigh.

3 I want to talk a little bit about Crawford. So
4 you've got -- let me back up here. You've got my -- our basic
5 argument is again anchored in Rule 907. You've got a motion
6 to dismiss all charges and specifications and it is not yet
7 properly capable of resolution. We believe that's a very
8 sound and wise approach in which to deny the motion at this
9 point.

10 And then we would again cite to Liverpool Steamship
11 Company. That's just an important aspect here that still has
12 not been met. They still have not pointed to what is, in
13 substance, an effort to exclude evidence at trial. That's
14 what they're asking to do. And you will -- they have a way to
15 get that remedy. And at that point, we can also look at the
16 constitutional question.

17 He speaks of Crawford and Dickerson. I want to talk
18 to those. Crawford, certainly an important ruling, and it
19 points to the Constitution and the confrontation clause,
20 making a distinction between testimonial and nontestimonial
21 statements. And stating that even if under Ohio v. Roberts,
22 we all -- at least I grew up under Ohio v. Roberts,
23 admissibility of statements -- if you could meet the standard

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of Ohio v. Roberts, unavailable witness and then indicia of
2 reliability, either a firmly rooted hearsay exception or a
3 particularized guarantee of trustworthiness standard of the
4 confrontation clause, even if it doesn't strictly meet the
5 wording of the clause of confronting witnesses against him.

6 I'll let the bell go.

7 So Crawford says no, witnesses means testimonial.
8 Witnesses in the confrontation clause means testimonial. And
9 if it's a testimonial statement, then there has to have been
10 either a prior ability to cross-examine or the person's got to
11 be at trial to be cross-examined, the person who uttered the
12 statement, the declarant.

13 And importantly, Justice Scalia, in the court's
14 opinion, seems his preferred definition of a testimonial
15 statement is "extrajudicial statements contained in formalized
16 testimonial materials such as affidavits, depositions, prior
17 testimony or confessions."

18 So Crawford says if you have one of these types of
19 testimonial statements, a formalized statement that -- with a
20 view toward prosecution, that kind of statement has to be
21 confronted with cross-examination, where there has to have
22 been an opportunity, even if it meets that Ohio v. Roberts
23 test.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 But Crawford -- very importantly, Your Honor, even
2 Crawford, a very strong, strict construction type of opinion,
3 says that exceptions at the time of the founding are not
4 proscribed by the confrontation clause. It gives a couple of
5 important examples.

6 One is in footnote 6 of Crawford, the dying
7 declaration. So you could have -- and this was at the time of
8 the framers. If there was a dying declaration that was
9 testimonial, made to a cop and recorded in some fashion
10 contemporaneously, that that -- the framers, even though that
11 doesn't strictly comply with the text of the Constitution, the
12 framers -- that would be admissible. That would not be
13 violative of the Constitution.

14 Another example that the court says in Crawford is
15 the doctrine of -- the forfeiture by wrongdoing. I'm sorry,
16 they cite to the Reynolds case, forfeiture by wrongdoing. In
17 that case, you had a witness who was not allowing various
18 subpoenas to get served in his wrongdoing, contributed to the
19 court deciding -- contributed to the court in Crawford
20 deciding that the framers allowed a forfeiture by wrongdoing
21 doctrine to mean that out-of-court statements, testimonial
22 out-of-court statements even were not proscribed.

23 MJ [COL POHL]: Let me go back to your initial point about

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ripeness.

2 If the defense is preparing the case and they have a
3 statement from a witness who is -- let's say a witness repeats
4 a conversation that he had with one of the accused. The
5 witness then tells that to a military member, for want of a
6 better term, okay, and the military member will be the witness
7 to repeat the hearsay statement, okay.

8 CP [BG MARTINS]: Government witness or defense witness?

9 MJ [COL POHL]: Well, let's say government witness, okay?
10 I mean, this is a nonissue. The government's going to comply
11 with Crawford. I mean, I don't -- I mean, you have an option
12 to do that, obviously, too.

13 CP [BG MARTINS]: Again, I just want to take issue with
14 this notion of comply with Crawford, not comply with Crawford.
15 We are completely consistent with Crawford, but we believe the
16 statute may not require something that is a testimonial ----

17 MJ [COL POHL]: No, I agree. We had this discussion on
18 the death certificates, where you weren't relying on this
19 expansive provision of the hearsay rule. This comes under the
20 normal Crawford analysis.

21 What I'm just saying is on the ripeness issue is,
22 defense in preparing their case, do they need to know what
23 statements you're going to be offering them and in the rubric

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of how they're going to come in?

2 CP [BG MARTINS]: They need to be given the notice that's
3 required under the statute. They have to get a fair
4 opportunity to meet the statement, so ----

5 MJ [COL POHL]: Okay. Let me ----

6 CP [BG MARTINS]: Proponent of the evidence. It sounds
7 like you're saying we're the proponent. Again, really
8 important to have a specific set of facts here. It weighs on
9 everything in this thing.

10 MJ [COL POHL]: I got it.

11 CP [BG MARTINS]: The proponent of the evidence makes
12 known to the adverse party sufficiently in advance to provide
13 the adverse party with a fair opportunity to meet the
14 evidence.

15 MJ [COL POHL]: Now, that would be the point that you
16 would say the issue is no longer -- the issue is ripe for
17 discussion?

18 CP [BG MARTINS]: Yes. Then you get a rule, a 905 rule to
19 suppress evidence or rule for advanced ruling on admissibility
20 of evidence. You have a real context.

21 MJ [COL POHL]: Okay. When do you anticipate giving them
22 that notice?

23 CP [BG MARTINS]: Sufficiently in advance to enable them

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to meet the evidence.

2 And we're -- we gave you a notice on the 30th of
3 September that we had -- we were in compliance with your
4 ruling in 397F and with our other discovery obligations. We
5 intend at an appropriate point to either renew or ask you
6 for -- renew Appellate Exhibit 175 or whatever filing
7 designation you give us ----

8 MJ [COL POHL]: 175, the trial conduct order.

9 CP [BG MARTINS]: Yes.

10 MJ [COL POHL]: That would be the time you would have a
11 date.

12 CP [BG MARTINS]: Yes. That's an appropriate milestone
13 under our statute.

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

15 CP [BG MARTINS]: So Crawford v. Washington, where an
16 exception to the confrontation right was recognized at the
17 time of the founding, you have compliance with the clause.

18 I won't state again the analysis I gave you under
19 Hamdan, but that's very important here, too. And if you do a
20 word search in the Hamdan opinion for witnesses, this is what
21 will pop up, all of the places that I think are relevant to
22 the dialogue that's now occurred between the legislative -- on
23 the Executive Branch and the Legislative Branch.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 You don't -- you not only have discussion of the
2 hearsay rule. This was one of the most significant
3 discussions arguably in Hamdan, was related to hearsay. And
4 what did the court hang -- where did the court hang their
5 reasoning, put their reasoning? It was that you didn't have
6 that dialogue between the branches to enable the Executive to
7 depart from Article 36, absent a showing of impracticability.

8 So you are now again at the highest point of the
9 power of the two elected branches, the branches that have the
10 national security responsibility. And that's very important.
11 So the Hamdan dialogue between the branches rationale
12 certainly makes this statute constitutional.

13 And if Your Honor were to do this, you know,
14 conceptual experiment of at the time of the framers, what
15 would they have thought of a military commission trying an
16 unprivileged belligerent for violations of the law of war, do
17 you think they would have analyzed it as precisely as Crawford
18 has analyzed it or would they more have analogized it to a
19 dying declaration situation, even a testimonial dying
20 declaration or to a forfeiture by wrongdoing situation?

21 Here you have alleged crimes taking place overseas.
22 Why are they overseas? They're overseas because that's the
23 way this conspiracy to attack civilians, conspiracy to murder

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 innocents across boundaries -- that's how they chose to
2 perpetrate it.

3 A specific set of facts could highlight the evidence
4 that is being sought to be brought in, what were those
5 operational and intelligence factors, how did they play out in
6 this. And you could -- we submit you could properly exercise
7 your authorities under the statute and consider all of these
8 appropriate factors.

9 In Boumediene, this is a case that you all were
10 discussing in 449, Justice Kennedy construes
11 Johnson v. Eisentrager, which is a military commission of
12 China-based Germans following World War II, and he's
13 determining whether Johnson v. Eisentrager should govern the
14 case of a detainee in Guantanamo. And pivotal in his
15 reasoning was that they had had a military commission trial,
16 and he actually comments on the procedures. He said it was an
17 adversarial proceeding in which these China-based Germans were
18 convicted for continuing to fight after Germany had
19 surrendered.

20 And he refers to the trial, the rules of evidence in
21 Eisentrager. The Supreme Court is contemplating that trial
22 saying it was satisfactory, and that was the basis for their
23 detention when they filed for habeas corpus from Germany, when

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 they were sent back to Germany and they were still in
2 confinement. You had a rule in that case issued by the
3 convening authority in Nanking, China, that allowed for
4 admissibility of all evidence probative to a reasonable
5 person.

6 So if it were unconstitutional as late as
7 Johnson v. Eisentrager for a military court -- and, again,
8 that's a much more expansive regime of hearsay. That's not
9 what's at issue here, but if the motion is asking you to rule
10 the whole thing unconstitutional, that should be some
11 reflection of how the framers might have looked at this
12 statute.

13 Subject to your questions.

14 MJ [COL POHL]: I don't have anything. Thank you.

15 Mr. Connell.

16 LDC [MR. CONNELL]: So a few points.

17 The first one is the government brings up the issue,
18 the testimonial requirement from Crawford, which is absolutely
19 correct. I completely agree with it.

20 May we have the feed from Table 4, please?

21 The problem with the government's argument is that
22 803(b) contemplates testimonial evidence. The prefatory
23 clause in 803(b) makes it clear that we're not talking

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 about -- that we are talking about the exact sort of
2 information which is -- which is testimonial.

3 Because in addition to the four elements that I had
4 talked about in my initial argument, it provides that the
5 military judge, after taking into account all of the
6 circumstances surrounding the taking of the statement -- so
7 we're talking about a statement here -- including the degree
8 to which the statement is corroborated, the indicia of
9 reliability within the statement itself, and whether the will
10 of the declarant, the declarant, was overborne makes the four
11 determinations.

12 So clearly what 803(b) is talking about is statements
13 of declarants, that is -- and 803(b) makes exactly the mistake
14 that Crawford criticized, which is taking the very factors
15 that make a statement testimonial into account in making it a
16 decision, a discretionary decision as to reliability.

17 MJ [COL POHL]: Of course, there's been a lot of
18 post-Crawford litigation on what is testimonial and what is
19 not.

20 LDC [MR. CONNELL]: Yes, and the one thing which is
21 100 percent clear out of that litigation is that what's
22 contemplated here in 803(b), statements of declarants,
23 where -- are the core of testimony, right? I mean, that's

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 what most of the litigation has been about.

2 MJ [COL POHL]: But hasn't there been kind of a trend, for
3 want of a better term, that if the statement is made to a
4 non-law-enforcement officer, they look at it a little
5 differently? I mean ----

6 LDC [MR. CONNELL]: Yes, I agree with that.

7 MJ [COL POHL]: I understand Clark, for example, it's a
8 statement to the teacher who has to report it.

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: The question is whether or not that's
11 testimonial, and they -- it seems like they're drifting away
12 from what looked like a clear rule of what's testimonial to
13 a -- who's the statement made to makes a big difference.

14 LDC [MR. CONNELL]: I don't disagree with that, but the
15 sort of information that we're talking about here, statements
16 by declarants in a situation where their will might be
17 overborne is the remaining core of Crawford, even if there is
18 some nibbling away at the edges.

19 You can kill the feed from Table 4.

20 The second point that I want to make is the
21 government, for reasons that weren't 100 percent clear to me,
22 brought up the Hamdan analysis, but -- and the discussion of
23 hearsay in Hamdan.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 You know, that might support some other point of
2 theirs, I'm not sure, but it doesn't do them much good on the
3 ripeness of the hearsay challenge issue because Hamdan was not
4 a post-trial case in the Supreme Court. It was one which was
5 interrupted during voir dire, and the situation was not that
6 they were addressing hearsay in a -- of a particular witness
7 in a particular context, but rather, the framework which
8 governs the admission of evidence, which is the exact same
9 thing that we're talking about here.

10 The same usual comes up with -- the government's
11 argument regarding Eisentrager suffers from the same problem.
12 The distinction between Eisentrager and Boumediene was the
13 physical location of the witnesses, the fact that they were in
14 China; whereas the analysis of Boumediene was about the
15 physical location of the occupied territory at Guantanamo.
16 The naval station at Guantanamo is part of the constant
17 jurisdiction of the United States, whereas China was not. So
18 that position does a lot more damage to the government's --
19 that case does a lot more damage to the government's position
20 on this motion than otherwise.

21 The last observation I want to make is what the
22 government began with, is about your ruling in 087C -- excuse
23 me, 057C.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 In July of 2012, we came to the military commission
2 filing AE 057 and asked for -- to find out what the rules
3 were. Does the government -- does the Constitution govern.
4 How are we going to know. How are we going to litigate that
5 question. In January of 2013, the military commission ruled
6 as it did, that we were going to take that up on a
7 case-by-case basis. That's the military commission's ruling,
8 and we have done our best to comply with it.

9 But at some point in our trial preparation, and this
10 is the reasoning of Quinones and its progeny. At some point
11 in our trial preparation, we have to know what the rules are.
12 I suggest that now is the time. This is a perfectly concrete
13 facial challenge to a statute and two different regulations in
14 447 and 449, and the time has come for us to know what the
15 rules are.

16 Thank you.

17 MJ [COL POHL]: Thank you, Mr. Connell.

18 General Martins, anything further?

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

20 MJ [COL POHL]: Okay. That brings us to, we're going to
21 begin the motions to compel. And just to remind everybody,
22 the way ahead today was 254, 330/419, 409, 432, 335 and 434.
23 So let's start ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [MR. SWANN]: I think you said 254. That's the female
2 guard issue. And we're done ----

3 LDC [MR. CONNELL]: You meant 284.

4 MJ [COL POHL]: I meant 284. We're not at 254. Thank
5 you.

6 So let's begin with 284, then. Mr. Schwartz.

7 DC [MR. SCHWARTZ]: Just a moment, Your Honor. Good
8 afternoon, Your Honor.

9 MJ [COL POHL]: Good afternoon.

10 DC [MR. SCHWARTZ]: 254.

11 MJ [COL POHL]: I'm sorry, 284.

12 DC [MR. SCHWARTZ]: I'm just kidding, sir.

13 MJ [COL POHL]: Don't confuse me.

14 DC [MR. SCHWARTZ]: Quick housekeeping on 284. This
15 motion was filed in 2014 originally. We've since learned
16 classified information that impacts the argument on 284. When
17 I first caught that, it appeared that we could talk around it
18 and that I could reference a very small piece of classified
19 information. Looking at it last night, I don't think we can.

20 It's what we have is two sentences that exist in
21 attachments to the original filing. They're not classified.
22 It's not a spill. It's just they -- they impact on classified
23 information that we later learned.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And so before ending the record on this issue, we'd
2 ask for some method to just raise those to your attention. I
3 don't want to try to talk around it here because I just don't
4 think I can without causing a problem. So essentially I think
5 what is required here is a 505 notice.

6 MJ [COL POHL]: Okay. Have you filed a 505 notice?

7 DC [MR. SCHWARTZ]: No, there's no 505 notice on this ----

8 MJ [COL POHL]: Okay.

9 DC [MR. SCHWARTZ]: ---- in the record.

10 MJ [COL POHL]: So if you do it, then we'll address it at
11 that time.

12 DC [MR. SCHWARTZ]: Would you like to do the unclassified
13 portion of this today or wait?

14 MJ [COL POHL]: Let's go ahead and do the unclassified
15 portion.

16 DC [MR. SCHWARTZ]: Okay. And it might -- it might
17 cause ----

18 MJ [COL POHL]: If you're not comfortable doing it, if you
19 want to do the 505 first, we can, and then come back to it.
20 It's probably purely a legal issue.

21 DC [MR. SCHWARTZ]: I'm comfortable. It's a minor point.
22 It will probably hit you like a ton of bricks when you see it.
23 I just don't want to reference it at all in connection with

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 505 because that raises an issue.

2 MJ [COL POHL]: Okay. It's going to hit me like a ton of
3 bricks meaning it's very dispositive or ----

4 DC [MR. SCHWARTZ]: Yes, sir. That's right. It's an
5 important component of your decision on the materiality
6 of ----

7 MJ [COL POHL]: Okay. We'll do the 505 portion first and
8 then we'll do the unclassified portion. That way I'll have
9 the ton of bricks in my head when I'm hearing your argument,
10 okay?

11 DC [MR. SCHWARTZ]: Sounds good.

12 MJ [COL POHL]: That brings us to 330/419.

13 Go ahead.

14 ADDC [LTC WILLIAMS]: Good afternoon, Your Honor.

15 MJ [COL POHL]: Good afternoon.

16 ADDC [LTC WILLIAMS]: Lieutenant Colonel Williams for
17 Mr. Hawsawi.

18 You get what you get, and you don't get upset. That
19 is essentially what the government has told us regarding our
20 request for very material, very relevant medical records for
21 the time that Mr. al Hawsawi was in CIA custody from 2003 to
22 2006.

23 While that answer may be something that my

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 eight-year-old son has heard many times in his elementary
2 school career, that is not something that we often hear as
3 defense counsel, especially in a capital case where the
4 government is trying to impose the death penalty and kill
5 Mr. al Hawsawi. You get what you get, and you don't get upset
6 is simply not enough in this case.

7 In AE 419 we are asking for complete, unredacted
8 medical records of Mr. al Hawsawi during his time in
9 confinement between 2003 and 2006, when he was a
10 now-acknowledged torture victim in the torture program that
11 was run by the CIA.

12 What we have received from the government are
13 summaries that were provided to Your Honor in April of 2014
14 before much of the information regarding Mr. al Hawsawi's time
15 between 2003 and 2006, in fact all of it or any reference to
16 it, was in fact declassified.

17 What we have are summaries that Your Honor received
18 and that Your Honor indicated were sufficient in this April of
19 2014 for then classified information regarding
20 Mr. al Hawsawi's medical treatment and care from 2003 to 2006.
21 And, Your Honor, we submit to you that is not sufficient to
22 comply with the government's obligation to provide us with
23 discovery in this case that is material and relevant to defend

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. al Hawsawi.

2 Your Honor, we began asking for this material, for
3 medical records, unredacted and complete, going back to the
4 time that he was taken into custody in 2003, since August of
5 2013. Over three years ago we asked for this information. We
6 asked for it again in September of 2016, and we were told at
7 that time by the government that they would not provide it to
8 us because we had not signed a memorandum of understanding.

9 I'm not quite sure what the memorandum of
10 understanding would have to do with many of the records that
11 would be involved in a case like this, the medical records,
12 but we took the government at their word. And when we finally
13 did receive information that was summarized in June of 2015,
14 it was clear that it was inadequate.

15 I cannot imagine certain medical records would ever
16 be deemed to be classified, those records being laboratory
17 reports that simply give you the value of things in a person's
18 blood or urine, blood cell counts, white and red blood cell
19 counts. I cannot see how that would ever be classified.
20 However, that is the claim that the government is making or
21 had made.

22 Information about Mr. al Hawsawi's medical treatment
23 during this period of time is crucial to us being able to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 investigate and look at his treatment between 2003 and 2006,
2 and it will be critical for us to be able to produce this
3 evidence and to do any further investigation that is necessary
4 to show how he was confined during this period of time and to
5 investigate his torture further.

6 The Rules for Military Commission Rule 701(c)(1)
7 indicate that the government is responsible for turning over
8 to us everything that is material to the preparation of the
9 defense in this case.

10 Supreme Court capital case law requires that the
11 records during this period of time be produced for us to be
12 able to have all relevant information regarding this period of
13 time regarding his imprisonment. This information is
14 necessary under Skipper and the other case law that is
15 outlined in our brief to show not only his conditions of
16 confinement, but his medical condition and what in fact caused
17 some of the injuries that we now know he suffers from still
18 today.

19 Again, Your Honor, you were provided at some time
20 before April of 2014 with classified information to be
21 summarized and summaries of that classified information which
22 you approved in April of 2014. What we now know, based on the
23 release of the Senate Select Committee for Intelligence Report

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 on torture that was issued in December of 2014, is that at
2 least some of the ailments that Mr. al Hawsawi has today,
3 medical conditions that he has today may, in fact, be related
4 to his time in CIA custody.

5 We do know from the summaries that we received from
6 the government in June of 2015 -- which the summaries
7 themselves have now been declassified and were provided to us
8 in an unclassified fashion, we do know that when he was taken
9 into custody, from all indications he was a healthy young
10 male. We do know this. We do know that some of the first
11 reports and records that we have on Mr. al Hawsawi indicate
12 that rectal exams done on him were normal.

13 What we know from the torture report is that
14 Mr. al Hawsawi was subjected to sodomy, subjected to what is
15 called rectal exams with excessive force. We do know that
16 Mr. al Hawsawi suffers from prolapsing hemorrhoids and anal
17 fissures and was diagnosed with that as early as 2003.

18 We know that this healthy young male back in 2003 now
19 has neck injuries, disc injury and pain. We know this man who
20 was healthy, a healthy young male in 2003, suffers from
21 hearing loss and tinnitus, back pain, joint pain,
22 gastrointestinal issues; that this healthy young man has had
23 blood in his urine since July of 2014; and, in fact, at some

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 point between 2003 and 2006 became diagnosed with hepatitis C.

2 These are all things that must be explored, and we
3 are requesting his complete and unredacted medical records so
4 we can do our job as defense counsel to thoroughly examine
5 this information and make a determination about not only his
6 medical history, but the cause of those injuries.

7 It's important to note that 2014 was not something
8 that the government gave us, right? This is something that
9 the Senate Select Committee on Intelligence released, not the
10 prosecution. We received no information from them about a
11 possible cause for an ailment that Mr. al Hawsawi's having
12 surgery for on Friday.

13 We had no information from the government on this
14 until the Senate released the report in 2014. We could not
15 speak of the fact that he was the victim of torture during his
16 time in custody until December of 2014.

17 Your Honor, I think that it's important to note that
18 when it was determined that this information was going to be
19 declassified and released in the Senate report, the government
20 could have said, hey, Judge, Your Honor, we need to take
21 another look at these records, because after the Senate report
22 95 percent of those summaries that they gave you became
23 unclassified. 174 out of 183 pages became declassified.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 They could have said, Judge, we need to take another
2 look. Maybe if 95 percent of the records that we gave you,
3 the summaries that we gave you are unclassified, maybe 95
4 percent of those underlying medical records should have been
5 declassified.

6 The government could have said that, but they didn't.
7 They said you get what you get, and you don't get upset. Take
8 it. We gave it to you back in April of 2014. Judge, we gave
9 it to the defense counsel in 2015, the same summaries that you
10 reviewed before the release of the Senate Select Committee
11 report. You get what you get, and you don't get upset.

12 The government on its own accord said -- could have
13 said, hey, we want to send these back for another review. We
14 want to send these back through whoever is going to look at
15 these for classification review, and then on our own --
16 because we have a discovery obligation to provide this
17 material, on our own we will allow the defense counsel to have
18 the material, relevant information that is here. But that
19 wasn't done. They said you get what you get, and you don't
20 get upset.

21 And, Judge, they could have asked you, Judge, Your
22 Honor, please take another look at these summaries, because
23 maybe now you will find that they are not adequate anymore.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Maybe you will find now that this information has become
2 public, and the defense counsel should be privy to the medical
3 records that support the injuries that he sustained.

4 They could have said, Judge, now, hey, please, Your
5 Honor, take a look at these medical records because you might
6 not think these summaries are sufficient, these now 95 percent
7 unclassified summaries are sufficient to provide the defense
8 counsel what they need and what they're entitled to. But they
9 didn't. Again, they said you get what you get, and you don't
10 get enough -- or you don't get upset.

11 I cannot fathom that there are not incredibly
12 important records in these medical reports that are going to
13 provide us with a wealth of additional information. And the
14 fact that 95 percent of the summaries are now unclassified, I
15 would ask Your Honor to take notice that perhaps now the
16 underlying material can also be considered for
17 declassification and release to defense counsel.

18 Perhaps what the government provided to us -- or
19 provided to you in April of 2014 at that time was what they
20 could do, was all that they had authority to do. Perhaps that
21 is the case, but I submit to you, Judge, that now that is not
22 the case and that their obligation is ongoing and continuous.
23 And to tell us that's it, we're not going to do it, we're not

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 going to take another look, this is it, you get it, and you
2 don't get upset, is wholly unacceptable and does not comply
3 with their discovery obligations.

4 I beg the court's indulgence.

5 LDC [MR. RUIZ]: Judge, we need a moment.

6 MJ [COL POHL]: Sure. Go ahead.

7 [Pause.]

8 ADDC [LTC WILLIAMS]: Your Honor, there are a number of
9 other points that I would like to make, and I'm not going to
10 request that this be published to the galley [sic], but I am
11 going to ask that this be marked as an exhibit, and I would
12 request that perhaps I be able to come back after lunch to
13 finish argument.

14 MJ [COL POHL]: Sure.

15 ADDC [LTC WILLIAMS]: Thank you.

16 MJ [COL POHL]: Sure to the second part. I'm not saying
17 sure to what you want marked until I see what it is.

18 ADDC [LTC WILLIAMS]: Yes, Your Honor. May I approach?

19 MJ [COL POHL]: Sure.

20 [Conferred with courtroom personnel.]

21 Is this the redacted IG investigation?

22 ADDC [LTC WILLIAMS]: Yes, sir, Your Honor. What this is
23 is a disposition memorandum from the investigation, the IG

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 investigation that was done in 2004. This memorandum was --
2 in this version was released or approved for release on the
3 CIA's FOIA reading room on June 10 of 2016. This
4 memorandum ----

5 MJ [COL POHL]: Okay. So ----

6 ADDC [LTC WILLIAMS]: ---- mentions Mr. al Hawsawi's name
7 75 times in 22 pages.

8 MJ [COL POHL]: Just to be clear, these are FOIA
9 redactions?

10 ADDC [LTC WILLIAMS]: Yes, sir.

11 MJ [COL POHL]: Okay. You want to be heard about this?

12 ADDC [LTC WILLIAMS]: Yes, sir.

13 MJ [COL POHL]: You have more you want to add?

14 ADDC [LTC WILLIAMS]: Yes, sir.

15 MJ [COL POHL]: Okay. We'll break for lunch and you can
16 have more you want to add.

17 The commission is in recess until 1400. Carry on.

18 [The R.M.C. 803 session recessed at 1244, 12 October 2016.]

19 [END OF PAGE]

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT