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1 [The R.M.C. 803 session was called to order at 0907,
2 20 October 2015.]

3 MJ [COL POHL]: The commission is called to order. Trial
4 Counsel, is everyone present today who was present when the
5 commission last recessed?

6 CP [BG MARTINS]: Yes, Your Honor.

7 MJ [COL POHL]: Defense, any defense changes since
8 yesterday when we recessed either by going -- okay. All
9 parties are again present?

10 Mr. Harrington?

11 LDC [MR. HARRINGTON]: I wanted to clarify that issue I
12 brought up yesterday about one of my team members.

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

14 LDC [MR. HARRINGTON]: Judge, Commander Tri Nhan is part
15 of our team and there is a security clearance issue with him
16 right now. He is not here. He is still a member of the team,
17 but that's the reason he's not here.

18 MJ [COL POHL]: You are just accounting for his absence?

19 LDC [MR. HARRINGTON]: Sir?

20 MJ [COL POHL]: You are just accounting for his absence?

21 LDC [MR. HARRINGTON]: Yes.

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

23 LDC [MR. NEVIN]: Judge, could I just add that our

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1 translator, Masud Hasnain, has been told that he is not
2 allowed to have contact with Mr. Mohammad because of
3 something. We don't know what it is.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: He is not present.

6 MJ [COL POHL]: If that generates an issue, I am sure you
7 will raise it to me.

8 LDC [MR. NEVIN]: You may be sure of that, Your Honor.
9 Thank you.

10 MJ [COL POHL]: Subsequent to the hearing yesterday the
11 commission issued a trial conduct order, AE 380, which was a
12 proposed pro se advice, both general advice and specific
13 questions that would go to -- it's fashioned towards
14 Mr. Bin'Attash, but obviously would apply to any accused who
15 wished to go pro se.

16 Subsequently to that, I received a pleading from
17 Mr. Ali, 380A, and, Trial Counsel, I understand you have a --
18 which will be 380C -- suggested edits, for want of a better
19 term, to the trial conduct order.

20 CP [BG MARTINS]: Yes, Your Honor. To put it into
21 context, we gave it to the reporter for the next filing
22 designation this morning. It is -- we believe that the advice
23 you circulated in 380 is authoritative and sound. We merely

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1 had a few slight edits that made it more applicable to the
2 case. We have handed out copies to counsel, but they are
3 quite light.

4 MJ [COL POHL]: Would it be fair for me to then assume
5 that the government's position on the proposed trial conduct
6 order is contained in 380C?

7 CP [BG MARTINS]: It is, Your Honor.

8 MJ [COL POHL]: Mr. Connell, even though this involves
9 Mr. Bin'Attash, you filed a motion, so I'm going to let you
10 present your side first.

11 LDC [MR. CONNELL]: Thank you, sir. I am happy to do
12 that, but before I get to 380A I would like to take up the
13 question of 380B. 380B is a 505 notice that we prepared after
14 reading the transcript of yesterday's proceedings and reading
15 the trial conduct order.

16 The problem that I am facing is that 380B is
17 classified -- falls, as far as I can tell, within an ACCM, an
18 alternative compensatory control measure, that I have been
19 briefed into and the prosecution has been briefed into. But I
20 don't know who on trial judiciary has been briefed into it, so
21 I have not actually given the classified filing to the trial
22 judiciary yet.

23 MJ [COL POHL]: I don't believe -- I could be wrong, but I

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1 believe, talking to the court security officer, I have not
2 been briefed on it yet.

3 LDC [MR. CONNELL]: I gave the name of the ACCM to the
4 court security officer.

5 MJ [COL POHL]: For purposes of this motion let's put that
6 aside, and if we need to come back to it, we can, because I
7 want to discuss your unclassified pleading.

8 LDC [MR. CONNELL]: Right. If I could have just one
9 moment.

10 MJ [COL POHL]: Sure.

11 LDC [MR. CONNELL]: Sir, I am happy to talk about the
12 unclassified pleading 380A. I do want it to be clear that the
13 505 notice in 350B directly addresses issues that were in
14 controversy yesterday in respect to this, and I think I have
15 to ----

16 MJ [COL POHL]: When you gave your notice to the
17 government, did you summarize what the issues were with them?

18 LDC [MR. CONNELL]: Yes ----

19 MJ [COL POHL]: Let's see how this ----

20 LDC [MR. CONNELL]: ---- with specificity.

21 MJ [COL POHL]: Let's see how that develops because it is
22 a program I believe I have not yet been read on yet, so the
23 way forward on that, we will have to determine at a subsequent

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1 time. Soon hopefully. But let's just talk now about your
2 unclassified pleading.

3 LDC [MR. CONNELL]: Very good, Your Honor. There are two
4 fundamental objections that I see to the course of conduct
5 which is proposed in AE 380. And as the commission noted, it
6 is possible that some other defendant, including
7 Mr. al Baluchi at some point in the future, would seek to go
8 pro se, especially given the long litany of what I believe is
9 an approach of incentivizing pro se representation on the part
10 of the defendants to try to drive a wedge between them and
11 their attorneys. The record is littered with our pleadings on
12 that, and I won't repeat them, but I do cite them in the
13 brief.

14 The first problem is a McKaskle problem. McKaskle
15 says, and there is a lot of language out of 380 that is lifted
16 directly out of McKaskle, which I thought was appropriate.
17 But essentially McKaskle says that the test for whether a
18 hybrid form of representation satisfies Faretta or not is
19 whether the counsel is called on to speak in addition to the
20 defendant or is called upon to speak instead of the defendant.

21 In the situation in McKaskle, the standby counsel
22 made a number of arguments, and the pro se defendant didn't
23 like having his toes stepped on by the person making -- the

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1 standby counsel making arguments in addition to those that he,
2 the pro se defendant, wanted to make. But the Supreme Court
3 noted that the key difference was that there was no place
4 where the standby counsel was called upon to speak instead of
5 the defendant.

6 The problem with AE 380 is that it creates a form of
7 hybrid representation where on unclassified issues the pro se
8 defendant is counsel, and on classified issues the defense
9 attorney is counsel; that is, on classified issues, whether
10 that's reviewing classified discovery, litigating classified
11 motions, attending classified sessions, the counsel is called
12 upon to speak instead of the pro se defendant.

13 And it essentially divides the case into what I think
14 of as basically two-thirds for the defendant pro se and
15 one-third for the counsel on classified issues. Because I
16 went back and checked to see what sort of volumes are we
17 talking about. And obviously we are fairly early in the
18 discovery process, but already, at least to our team, who
19 signed the MOU in February of 2013, the prosecution has
20 produced 13,106 pages of classified discovery. I count that
21 there are 63 classified pleadings or attachments which have
22 been filed in this case, amounting to a total of 553 pages.

23 And with that level of involvement -- and you compare

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1 that to, say, In re Terrorist Bombing which the commission has
2 relied on before, the Second Circuit case, where there were
3 only four classified documents that were at issue, it's a much
4 different situation.

5 And AE 380 says that the unclassified information,
6 that the counsel would have to operate with the approval of
7 the pro se defendant. But there are some motions that are so
8 classified that the defendants don't even know their topic;
9 and I give as an example AE 191. AE 191, which is captioned
10 Motion to Compel Production of Information is captioned so
11 generically because I could not otherwise come up with an
12 unclassified name as required by the Rules of Court.

13 AE 052 filed by the government doesn't really have
14 any name at all. It is affectionately known as "The No Name
15 Motion." The defendant has no idea what the topics are, and
16 there is no way the pro se counsel can operate with the
17 meaningful approval -- excuse me, that counsel can operate
18 with the meaningful approval of the pro se defendant because
19 the pro se defendant doesn't even know what the topic of the
20 motion is.

21 MJ [COL POHL]: Mr. Connell, is it your position then that
22 an accused who decides to represent himself therefor has a
23 right to all classified information?

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1 LDC [MR. CONNELL]: So there are two cases which have
2 addressed this question. The first is the Fourth Circuit in
3 Moussaoui, and the second is a case called Subasic, which I
4 cited in the brief. In those two cases they charted a middle
5 path. And the middle path was not the access to all
6 classified discovery, but rather access to necessary
7 discovery.

8 And let me just point the commission to the relevant
9 language in Moussaoui where the Fourth Circuit notes that the
10 protective order did not preclude Moussaoui from ever having
11 access to material or exculpatory evidence. On the contrary,
12 Moussaoui would be given personal access to classified
13 information if such access should be determined by the court
14 to be necessary.

15 Subasic took a similar approach -- excuse me.
16 Subasic took a similar approach, saying the defendant will be
17 given access to classified information itself -- this a pro se
18 defendant -- only if it is material to his defense and no
19 substitution can be crafted, which is essentially the standard
20 in R.M.C. 703 and M.C.R.E. 505.

21 So the question that the military commissions posed
22 contains its own answer because I am saying a pro se defendant
23 has automatic access to all classified information, and the

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1 answer clearly to that has to be no. I, fully cleared defense
2 counsel, don't have access to all classified information. The
3 AE 073 and AE 156 are both examples of the military commission
4 crafting substitutions or redactions offered by the counsel.

5 MJ [COL POHL]: How does the pro se accused establish that
6 classified information is material to its defense and no
7 substitution can be crafted?

8 LDC [MR. CONNELL]: Essentially it would have to be the
9 same way that we do that, which is by guessing at holes, you
10 know. We don't always know what we don't know, but sometimes
11 we can see the outline of a shadow.

12 MJ [COL POHL]: No. Let's say it's a piece of
13 information, classified information, that in your professional
14 judgment as cleared counsel believe meets that test I just
15 said, okay? Doesn't Subasic say then that's the
16 responsibility of the standby counsel to explore that issue
17 and raise it to the court, and then the court decides whether
18 or not it needs to go to the accused, or a substitute can be
19 used or some other remedy?

20 LDC [MR. CONNELL]: Well, in fact ----

21 MJ [COL POHL]: Doesn't Subasic basically say that's the
22 rule of standby counsel, or one of the rules?

23 LDC [MR. CONNELL]: Yes, but that's what Moussaoui says as

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1 well. But that's the exact opposite of what AE 380 says. AE
2 380 says -- let me quote here with the court's indulgence, "In
3 addition, you will not be given access to classified materials
4 as you do not have the proper security clearance to review
5 such items." It continues with -- and that's relating to
6 Protective Order #1, classified information, of course.
7 Protective Order #2 is covered in the next sentence which is,
8 "Nor will you be given access to other sensitive documents I
9 find the disclosure of which would jeopardize public safety."
10 And we have been down this road once before.

11 MJ [COL POHL]: Let me ask you this. If I simply put a
12 sentence after the word "safety" consistent with Subasic
13 language, would that alleviate your fear?

14 LDC [MR. CONNELL]: Well, the second sentence about safety
15 is talking, as I read it, and you wrote it so you can correct
16 me, but it appears to refer to unclassified information which
17 presents force protection concerns, that is the restricted
18 discovery under Protective Order #2.

19 MJ [COL POHL]: Right.

20 LDC [MR. CONNELL]: The first sentence is about classified
21 information.

22 MJ [COL POHL]: Right.

23 LDC [MR. CONNELL]: And if the standard is the defendants

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1 can have access to -- or a pro se defendant can have access to
2 information which is material and for which no substitution
3 which places them in the same situation as they would be
4 otherwise, then that's essentially the same as 701 and 505,
5 and that's the law.

6 MJ [COL POHL]: Okay. It just tracks CIPA. I got you.

7 So back to my question then: If that was added to
8 that part of it -- again, it's a contingency, and when I am
9 advising a pro se defendant accused is, here is the barriers
10 you have to representing yourself.

11 LDC [MR. CONNELL]: Yes.

12 MJ [COL POHL]: And one of those barriers is you will not
13 have access to classified information.

14 LDC [MR. CONNELL]: Yes.

15 MJ [COL POHL]: Now, if I sit there and say except under
16 these narrow circumstances -- and I can certainly put that in,
17 it doesn't bother me, but those are narrow circumstances.

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: Okay. And that still will impact his
20 ability, because it's going to be a subcategory of discovery I
21 am assuming, maybe a very small subcategory. But if he were
22 to defend himself, there is a huge category of classified
23 discovery that he would not have access to, true, that doesn't

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1 meet that definition?

2 LDC [MR. CONNELL]: Well, if the prosecution gave it to
3 us, it is almost, by definition, material, because they are
4 not providing information that they did not consider material.
5 The substitution question is taken up by the court in the 505
6 process, so the court decides whether there is an adequate
7 substitute or not.

8 MJ [COL POHL]: So it is your position then that a pro se
9 defendant accused in this scenario is -- that every piece of
10 classified discovery is material to its defense and no
11 substitution can be crafted, and therefore every piece of
12 classified discovery would need to go through some type of
13 substitution process? Is that your position?

14 LDC [MR. CONNELL]: Could you ----

15 MJ [COL POHL]: I am just reading out of the case you are
16 citing.

17 LDC [MR. CONNELL]: Yes, but I don't fully understand what
18 it is -- the distinction that you are drawing. So I want to
19 track with you. So let me explain to you what my position is.

20 MJ [COL POHL]: Let me explain to you a distinction that
21 came to me. You get discovery of material in preparation of
22 your defense and you said you use material in that context,
23 that the government would not have given it to you if it were

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1 not material to the preparation of defense.

2 LDC [MR. CONNELL]: In general. There's some extraneous
3 information, but ----

4 MJ [COL POHL]: As a general rule. Okay. Is that the
5 same standard as Subasic says? It says here if material to
6 his defense. Is that the same standard as material to
7 preparation of his defense?

8 LDC [MR. CONNELL]: Yes. It's the same standard that's in
9 R.M.C. 701. It's the same standard that's used in Federal
10 Rule of Criminal Procedure 16. That's what "material" means.

11 MJ [COL POHL]: So it's your position then that all
12 classified discovery would have to go through this process to
13 be given to the -- and then to see that it is given to the
14 accused. That's your position?

15 LDC [MR. CONNELL]: My position ----

16 MJ [COL POHL]: You are equating ----

17 LDC [MR. CONNELL]: Absolutely, that all classified
18 discovery would have to be examined to see whether it meets
19 the standard of materiality and lack of adequate substitution.
20 Yes, that's absolutely my position.

21 MJ [COL POHL]: Wouldn't then the burden be on the standby
22 counsel to make that argument ab initio?

23 LDC [MR. CONNELL]: Yes. That does not solve the McKaskle

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1 problem, but yes, that is true.

2 MJ [COL POHL]: But what I'm saying -- so we are talking
3 about the breadth perhaps of this, but a simple statement that
4 it's material to the preparation of the defense or he would
5 not have gotten it, which is -- and therefore it's got to be
6 given to the accused would not be sufficient. Each piece
7 would have to be argued on its own merit.

8 LDC [MR. CONNELL]: Are you asking if Mr. al Baluchi were
9 pro se and I were appointed as standby counsel, would I
10 willy-nilly hand him classified information?

11 MJ [COL POHL]: No, no. I'm saying would you willy-nilly
12 hand -- I am using the term loosely based upon it's material
13 because the government gave it to me; therefore, go through
14 the Moussaoui analysis.

15 LDC [MR. CONNELL]: I think you could confidently expect
16 that whatever standard the commission expects, diligent
17 standby counsel will seek to have every piece of classified
18 information evaluated for materiality and adequate
19 substitution to provide to their pro se defendant.

20 MJ [COL POHL]: But would not that, if you follow that
21 road -- and what motions you file is always of course up to
22 you.

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

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1 MJ [COL POHL]: As I am sure you all are aware of.

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

3 MJ [COL POHL]: But that would not relieve you of the
4 burden to particularize the request of any piece of the
5 information, correct?

6 LDC [MR. CONNELL]: Sure. The more particular we are the
7 more persuasive we are. Every attorney knows that.

8 MJ [COL POHL]: You say the standard of Moussaoui and
9 Subasic, when it says material to his defense, you say that's
10 the same standard as the discovery standard, and the
11 government would not have given it to you if it didn't meet
12 that standard, okay? That's your argument, okay?

13 LDC [MR. CONNELL]: Yes, that is correct.

14 MJ [COL POHL]: But if you hand me -- if you say, okay,
15 Your Honor, this is material to the preparation of the defense
16 because the government gave it to us, without showing why this
17 particular piece of evidence is material to the preparation of
18 the defense, would that suffice?

19 LDC [MR. CONNELL]: Would it be very persuasive? Probably
20 not. Could it technically -- could you take that -- you know,
21 I guess you are asking me about the length of the pleading,
22 but could you take a one paragraph cover sheet and say, you
23 know, we think the following 104 pages are material, I

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1 wouldn't have very great hope for a positive response from the
2 military commission in that situation.

3 But yes, "materiality" is the same under R.M.C. 701,
4 Federal Rule of Criminal Procedure 16, and M.C.R.E. 505.
5 "Materiality" has the same meaning in all of those. And in
6 fact, you know, according to the commentary to M.C.R.E. 505,
7 the Yunis standard of helpfulness is actually stacked on top
8 of materiality. So we can actually feel fairly confident that
9 everything -- all the classified information we receive from
10 the prosecution is not only material, but is helpful in some
11 way to the defendant because of the Yunis standard.

12 MJ [COL POHL]: So the government's position to provide
13 you discovery means that they are now saying it's all material
14 to the preparation of the defense as defined ----

15 LDC [MR. CONNELL]: Certainly one can imagine a situation
16 in which, merely out of an abundance of caution, they said, "I
17 don't think this is material, but out of an abundance of
18 caution, I am going to provide it to the defense because there
19 is some argument if you chose this trial strategy, it could be
20 exculpatory under Brady," certainly I could understand that
21 situation.

22 If I understand what the military commission is
23 getting at, you are asking is there a 100 percent overlap

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1 between the universe of discovery that the prosecution
2 provides us and information which is material to the defense.
3 No, I don't think there is a 100 percent overlap. But I think
4 there is a pretty high correlation between those two,
5 something like a 90 percent overlap.

6 Having examined the 13,106 pages of classified
7 information that we have received, I do think there is a very
8 high correlation between production by the prosecution and
9 materiality to the defense.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: Now, all of that is talking about
12 discovery, the whole colloquy that we just had. You have to
13 then translate that idea into the McKaskle framework of does
14 the form of standby, or in this case hybrid -- both standby
15 and hybrid representation mean that the counsel speaks instead
16 of the defendant or speak merely in addition to the defendant.

17 And assuming that we get past the classified
18 discovery problem, which I think is surmountable, the next
19 inquiry is, well, what about when we have closed hearings. I
20 mean, a perfect example of it is I believe there needs to be a
21 hearing on 505 -- excuse me, 380B, the 505 notice I provided
22 this morning.

23 [Viewing monitor.] I was just checking in with the

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1 interpreters.

2 There has to be someone who argues that. And as I
3 understand the scheme which is laid out in AE 380, that person
4 would be standby counsel, in the same way that it's counsel
5 that has to argue on behalf of the defendants in closed
6 sessions now, which is what the military commission previously
7 decided.

8 The difference between a McKaskle-Faretta analysis of
9 that question and an In re Terrorist Bombing-Clark Second
10 Circuit analysis of that question, which is what the military
11 commission did before, is that McKaskle prohibits a scheme in
12 which the counsel speaks instead of the defendant.

13 MJ [COL POHL]: To whom?

14 LDC [MR. CONNELL]: To the court or to the jury. In fact,
15 it is very interesting in McKaskle -- we don't have a jury, of
16 course, but to the panel. Old habits die hard. McKaskle
17 interestingly draws a distinction between those two things.
18 It talks about advocacy outside of the jury and advocacy to
19 the jury and sets up different standards.

20 The standard that I have been referring to this
21 morning, the speaking instead of the defendant standard, is in
22 fact the standard for advocacy outside of the jury, advocacy
23 strictly to the court. I can point ----

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1 MJ [COL POHL]: So your position is on a closed hearing a
2 pro se accused is allowed to sit in and represent himself, is
3 that your position?

4 LDC [MR. CONNELL]: Not merely allowed, but mandated.

5 MJ [COL POHL]: Well ----

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: Well, how is that consistent with the fact
8 that in other classified matters it's standby counsel that
9 does it first? We just discussed it. Under that analysis,
10 how do you reconcile that analysis with the one we just
11 discussed, that standby counsel review classified information
12 and then present things to the commission if material to the
13 defense and if no substitute can be crafted so then can go to
14 the accused. That clearly contemplates a screening, for want
15 of a better term, function by standby counsel before
16 classified information goes to the accused. But when we have
17 a hearing, there is no screening, it's the uncleared accused
18 sitting there. That's your position?

19 LDC [MR. CONNELL]: Yes. The reason for that is the
20 distinction between carrying on outside of court, carrying out
21 attorney functions inside the court, and carrying out attorney
22 functions to the jury. There is a separate standard for panel
23 or jury. We are not really talking about that right now.

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1 What we are really talking about right now is the
2 distinction between things that can be done outside of the
3 court, preparing motions, doing research, interviewing
4 witnesses, reviewing discovery, et cetera, which is the
5 analysis that we just spent our time talking about.

6 This analysis, what I have moved on from there is
7 actual in-court advocacy. And what actual in-court advocacy
8 means in a pro se setting is that the pro se defendant has to
9 be able to speak for himself.

10 MJ [COL POHL]: In all jurisdictions.

11 LDC [MR. CONNELL]: No. McKaskle, purely procedural,
12 marking exhibits, in fact let me just pull up the exact
13 language.

14 MJ [COL POHL]: I read McKaskle. I know what it says.

15 LDC [MR. CONNELL]: There are purely ministerial duties
16 that can be assigned to the attorney. But when it comes down
17 to it, the operative, the holding of McKaskle, the operative
18 language is if standby counsel's participation over the
19 defendant's objection effectively allows counsel to speak
20 instead of the defendant on any matter of importance, the
21 Faretta right is eroded.

22 So the distinction I was just talking about is
23 matters of importance versus pure ministerial matters. And

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1 especially in this case the treatment of classified
2 information is clearly a matter of importance to the defense.

3 MJ [COL POHL]: Okay. So in your world, your
4 position ----

5 LDC [MR. CONNELL]: I wish it were my world. Could
6 have ----

7 MJ [COL POHL]: You have a pro se accused. Who files the
8 505(g) notice?

9 LDC [MR. CONNELL]: Well, the defendant doesn't have the
10 ability to file anything, which we haven't talked about the
11 factual impossibilities yet.

12 MJ [COL POHL]: I know, but that's not the question I
13 asked.

14 LDC [MR. CONNELL]: Sure.

15 MJ [COL POHL]: You have gone down this road about closed
16 hearings, and the closed hearings start with a 505(g) notice.
17 Who files that?

18 LDC [MR. CONNELL]: Properly, because a 505(g) notice is a
19 motion, it would be the pro se defendant. In the Guantanamo
20 situation, unless the court sets up some way to file things,
21 there is no way to file anything.

22 MJ [COL POHL]: Well, how can he file a 505(g) notice if
23 he doesn't have access to the classified information to begin

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1 with?

2 LDC [MR. CONNELL]: Well, what is laid out in 380 is that
3 on that sort of matter, when it is possible, counsel would
4 operate with the approval of the defendant, which I assume
5 means would brief -- give an unclassified summary of what the
6 discovery was. People will try to work it out.

7 MJ [COL POHL]: Doesn't Subasic simply say that's the
8 responsibility of standby counsel? Doesn't Subasic --
9 summarizing Moussaoui and summarizing the District Court
10 opinion, doesn't it say that it starts with standby counsel?
11 They filed in this case the CIPA filing and then when they are
12 done with it the court determines whether or not -- what's the
13 next stage. But you are saying we don't follow that, we go
14 straight to the accused?

15 LDC [MR. CONNELL]: Well, what AE 380 says in its current
16 format, which I agree with ----

17 MJ [COL POHL]: No. Let me ask you what Subasic says.

18 LDC [MR. CONNELL]: I'm sorry, I thought you were asking
19 me what the process was supposed to be.

20 MJ [COL POHL]: No, the way I read Subasic is it says
21 standby counsel prepares the CIPA information, the pleadings,
22 doesn't it?

23 LDC [MR. CONNELL]: Well, in reality what's going to have

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1 to happen is that counsel is going to have to prepare all the
2 pleadings. But what 380 says and what I think is right is
3 that is with the approval and direction of the client.

4 So in reality what would happen is that a pro se
5 defendant would say to their standby counsel please prepare a
6 505(g) notice on such and such topic, or please prepare a
7 motion on whatever other topic, or please attach whatever
8 information you may have, classified or otherwise, to this
9 motion that I have directed you to prepare, or don't. I don't
10 want you to ever file another 505(g) notice again. I'm opting
11 out of the whole classified process, never file it again.

12 Under the analysis of Subasic that you just gave,
13 then that would still be a standby counsel responsibility and
14 standby counsel could fly in the face of the wishes of the pro
15 se defendant. That's not the situation on matters of
16 importance. And a 505(g) notice is a matter of importance, in
17 my view.

18 So instead what the real situation is that the
19 defendant, pro se defendant, would direct the standby counsel
20 to take certain action, including the filing of the 505
21 notice. The standby action would comply ----

22 MJ [COL POHL]: Would the pro se accused at that time know
23 what the classified information was?

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1 LDC [MR. CONNELL]: In many situations they would know the
2 topic of the classified information. This is about ----

3 MJ [COL POHL]: I got it. I got it.

4 LDC [MR. CONNELL]: This is about whatever.

5 MJ [COL POHL]: You want to talk about -- that will be
6 coming from their personal knowledge or from wherever, either
7 from their personal experience or unclassified material they
8 have already been exposed to, but not from classified
9 information that was conveyed to them by the defense counsel.

10 LDC [MR. CONNELL]: Right. Yes.

11 MJ [COL POHL]: But the classified 505(g) notice would
12 have to come from standby counsel, would it not?

13 LDC [MR. CONNELL]: You mean the actual production of it?

14 MJ [COL POHL]: Yes.

15 LDC [MR. CONNELL]: Yes.

16 MJ [COL POHL]: And saying here is what it is.

17 LDC [MR. CONNELL]: But the operating authority would have
18 to be with the pro se defendant. You are allowed to file
19 that, you are not allowed to file that. And that's the
20 distinction I am drawing with one proffered analysis of
21 Subasic, which is that the analysis that I thought the
22 military commission was suggesting was that the filing of
23 505(g) notices is wholly within the control of standby

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1 counsel, and that's not the situation. The pro se defendant
2 can direct the filing or not filing.

3 MJ [COL POHL]: No. If you took it that way, I don't mean
4 it that way, because you are right, the pro se accused has the
5 right to choose what motions to file or not. I got that.

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: But I am just talking about how the
8 mechanics of what happens when it's a classified piece of
9 evidence that standby counsel is aware of, that standby
10 counsel wants to file a 505(g) notice and necessarily conduct
11 a 505(h) hearing before we close the court, if necessary, for
12 the substantive hearing itself. Those are the three steps,
13 okay? And you got to step three, and I was going back to step
14 one.

15 LDC [MR. CONNELL]: Okay. Here is how I see those three
16 steps taking place probably. I don't have a crystal ball any
17 more than anybody else, but this is what I think will happen.

18 Let's say the prosecution provides a piece of
19 classified information to standby counsel. It is on the topic
20 of ----

21 MJ [COL POHL]: Something.

22 LDC [MR. CONNELL]: Yes, X. But the topic itself is
23 unclassified. You know, there are really very few situations.

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1 MJ [COL POHL]: Okay. I am with you.

2 LDC [MR. CONNELL]: There are very few situations. There
3 are two I can think of where the subject itself is classified.
4 But generally, the subject is not classified. I've got
5 classified copies of your medical records, for example.

6 The standby counsel would probably say to the pro se
7 defendant I have received a piece of classified information
8 and I think it's material to your defense. I think it's
9 relevant to this motion that we have going on. In that
10 situation, going back to where we started, the pro se
11 defendant would probably say, all right, well, if you think
12 it's material, please submit a request to the court to be able
13 to show it to me. They would submit it to you. You would say
14 whether it was material or not, whether there is adequate
15 substitute or not, and it would be returned to them.

16 Assuming that you had said -- you had not approved
17 its distribution to the defendant in that situation, the
18 defendant would say, all right, what I would like you to do is
19 please file a 505(g) notice on that, right? The direction
20 comes from the defendant. The pro se counsel files the 505(g)
21 notice, and at that point the defense counsel has not spoken
22 for, instead of the defendant in any way.

23 But once we get to the closed hearing, then there is

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1 no longer a feedback mechanism, there is no longer a way for
2 the pro se defendant to say ----

3 MJ [COL POHL]: Which closed hearing are you talking
4 about, the 505(h) hearing or the closed hearing?

5 LDC [MR. CONNELL]: I am actually talking about both, but
6 we can start with the 505(h) hearing.

7 MJ [COL POHL]: Let's start with that. At that point,
8 once the hearing is started, we have a piece of classified
9 evidence that the commission has ruled does not go to the
10 accused.

11 LDC [MR. CONNELL]: Yes, I am with you.

12 MJ [COL POHL]: Okay. Then we have a 505(h) hearing to
13 meet the standards to see whether or not we need to have a
14 closed hearing down the road.

15 LDC [MR. CONNELL]: Yes.

16 MJ [COL POHL]: You say the accused has the right to be
17 there if he represents himself.

18 LDC [MR. CONNELL]: If he represents himself, yes, because
19 in matters of importance the defendant must speak for
20 themselves as opposed to have an attorney thrust upon them,
21 which they have said they don't want.

22 MJ [COL POHL]: Under that scenario then, as we get to
23 that point that the commission has ruled that this classified

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1 information does not go to the accused, and then you just told
2 me regardless of that ruling we conduct a 505(h) hearing where
3 the exact same evidence goes to the accused. Is that not a
4 conundrum?

5 LDC [MR. CONNELL]: Yes. I suspect what the -- I mean,
6 listen, this is an ugly situation. I am not trying to tell
7 you that anything about this is simple or efficient or
8 elegant. This is a terrible situation, and I would counsel
9 against anybody going pro se. But they have a right to do so
10 under Faretta, under 10 U.S.C. 949a, and if they do, they have
11 a right to speak for themselves, and that includes -- now, you
12 might do that, conduct that 505(h) hearing in such a way as
13 that it essentially becomes a theory of defense. All right,
14 defendant -- which is the way that we did it in AE 073 and
15 AE 156. There are analogs to this process.

16 In AE 073 and AE 156 the prosecution said I intend to
17 seek substitutions. I won't tell you the topic of the
18 substitutions, you have to guess. The military commission in
19 AE 073E and AE 156E gave us permission to submit theories of
20 defense which the commission would consider. I suspect that a
21 505(h) hearing in this situation would work much the same,
22 that you would have to say to the defendant, all right, there
23 has been a request for use of classified information.

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1 Everybody knows that its topic is medical records, but -- or
2 whatever, but you can't see the information. What do you want
3 me to know in making my decision for the 505(h)? And the
4 defendant, pro se defendant, would give you whatever
5 information they thought was relevant, and then you would
6 rule.

7 MJ [COL POHL]: How can he do that? Medical records are
8 easy, but how could he do that with anything that's a little
9 more complicated than the medical records? I mean, you know
10 we have gone through these topics, and I don't want to go
11 through topics because I'm afraid we will cross the line, but
12 you know, some of these topics are very fact specific. That's
13 why it's a closed hearing. That's why only people with
14 clearances are allowed to be there at the 505(h) hearing and
15 to say give me your theory of defense and then good-bye, and
16 now we are going to talk about what we are going to talk
17 about?

18 If he is representing himself -- if you say -- my
19 understanding, I am getting this from your argument, is in
20 essence when he goes pro se he is just like you in terms of
21 representation or rights, and you would never accept that,
22 saying, okay, Mr. Connell, give me your theory of defense, now
23 you leave.

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1 LDC [MR. CONNELL]: Your Honor, I was forced to in 073 and
2 156, because it was just done on paper instead of in a
3 hearing. Yes, that is unfair. I am delighted to go on the
4 record to say that is an unfair process, but it's the process
5 that's used for substitutions under M.C.R.E. 505(f) and it is
6 the process which, apparently in the 949p series, the Congress
7 has decided is acceptable. I don't think that it is, and I
8 don't think it's acceptable in a situation with a pro se
9 defendant either, but if you are asking me with analogs to
10 current commissions practice how it would work, that is how it
11 would work.

12 MJ [COL POHL]: But then we are not discussing classified
13 information in a 505(h) hearing as long as the pro se accused
14 is here, correct?

15 LDC [MR. CONNELL]: Well, I don't see how -- say that one
16 more time.

17 MJ [COL POHL]: What I am saying is, is under your work
18 around, just so I understand it ----

19 LDC [MR. CONNELL]: Yes.

20 MJ [COL POHL]: ---- we get a 505(g) notice from the
21 standby counsel after discussing it generically with his
22 client or her client, without disclosing the classified
23 information to the client. Then we have a 505(h) hearing,

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1 which is a closed session, with the pro se accused sitting
2 there. And as long as he is there we discuss unclassified
3 matters only, and then he can add whatever he wishes to add.
4 Then he is excused when we discuss classified matters. Is
5 that your procedure?

6 LDC [MR. CONNELL]: In fact, a procedure like that is
7 already contemplated in M.C.R.E. 505, because 505 can provide
8 for -- has additional -- a 505(h) hearing is not automatically
9 closed. It has additional requirements in the invocation of
10 government classified information privilege, affidavits,
11 proper declaration, that have to be filed before closing.

12 So it's possible to have an unclosed 505(h)
13 hearing ----

14 MJ [COL POHL]: Is it?

15 LDC [MR. CONNELL]: ---- and more so, it is possible to
16 have a partially closed 505(h) hearing.

17 MJ [COL POHL]: If it is unclassified information, why
18 would the hearing be closed at all?

19 LDC [MR. CONNELL]: Well, Protective Order #2 Category of
20 restricted discovery ----

21 MJ [COL POHL]: Let's assume it's not covered by either of
22 the POs, because now you are saying, you somehow think a
23 505(h) hearing, we discuss unclassified stuff in it. Now, I

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1 agree that the nature of discussions a lot of times lead to
2 unclassified because it's contextual, I got that, but that's
3 determined -- understand that's just a preliminary matter to
4 determine whether or not the hearing itself is closed when we
5 get to the issue, correct?

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: That's just a first step. And if the
8 information to be discussed is unclassified, how can you close
9 the hearing under -- let me find the rule here -- under the
10 closed hearing rule?

11 LDC [MR. CONNELL]: Well, I will tell you ----

12 MJ [COL POHL]: Did I miss something?

13 LDC [MR. CONNELL]: Yes. There are other reasons to
14 close -- there are other rules -- they are not springing to my
15 brain, but the rule on child witnesses, for example, allows
16 closing of a hearing. The Special Review Team had filed a
17 292TTTT under seal. I prepared a request that the SRT might
18 ask to have that closed.

19 In February we ordered -- we argued a request by the
20 Special Review Team to hold a closed hearing that excluded
21 defense counsel, other than independent counsel for
22 Mr. Binalshibh. That was not on a classified topic. You
23 know, it is not hard to imagine a closed hearing that deals

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1 with unclassified topic. It is also not hard to imagine
2 a ----

3 MJ [COL POHL]: Yes, but there has got to be specific
4 findings under Rule 806 to close the hearing.

5 LDC [MR. CONNELL]: Yes.

6 MJ [COL POHL]: Okay?

7 LDC [MR. CONNELL]: Believe me, I opposed the SRT request
8 with everything I had.

9 MJ [COL POHL]: I got it. But what you are telling me is
10 if the accused wants to hear about -- discuss unclassified
11 material, as a default it's an open hearing, isn't it?

12 LDC [MR. CONNELL]: In most situations yes, which is fine
13 with me.

14 MJ [COL POHL]: But what I am saying is you started out
15 with the 505(g) notice, we talked about that.

16 LDC [MR. CONNELL]: Right.

17 MJ [COL POHL]: A 505(h) hearing, we talked about that,
18 and that's a predicate procedure before we close it under 806.
19 We can never get to an 806 if it is unclassified, would we?
20 We might under certain circumstances, I got it. But as a
21 generic reason, the default is a public trial. Right?

22 LDC [MR. CONNELL]: Absolutely. And in fact, really one
23 could divide step two into 2A and 2B, although we haven't

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1 actually done that. Every time, in every 505(h) demand I have
2 filed and every time that the prosecution has filed under seal
3 without an order of the court authorizing to do that, I have
4 opposed the closing of the military commission system and
5 pointed out that the prosecution is not following the proper
6 procedures for the closing of that materials, including that
7 they have to adopt the least restrictive means under Press
8 Enterprise for the closing of a hearing.

9 So it's absolute -- I mean, we are a little far
10 afield, but I think the fundamental point is that, is it
11 possible to have a partially closed 505(h) hearing, certainly
12 it is.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: In fact, the last time that we had a
15 505(h) hearing in December of 2013, I stood up here and argued
16 for 20 minutes about why the military commission should have
17 the 505(h) hearing but not close it, and my arguments were
18 overruled. But it is certainly within the realm of
19 possibility and supported by M.C.R.E. 505 procedure.

20 MJ [COL POHL]: Why would we have an open 505(h) hearing?
21 I mean, I know how they can sometimes evolve into them, I've
22 got that, because it is hard to predict how they would
23 definitely close. But why would I have an open 505(h) hearing

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1 ab initio? Why would I start that way?

2 LDC [MR. CONNELL]: Well, one reason you might start that
3 way, if the government had not filed the proper declaration
4 for closing the hearing, you would not have the choice. You
5 would not have the opportunity to under 505 to hold a closed
6 505(h) hearing. You would rather have to follow the 806
7 standard and the Press Enterprise standard.

8 MJ [COL POHL]: What I am saying is if there is a 505(h)
9 hearing, by definition it involved classified information,
10 correct?

11 LDC [MR. CONNELL]: Yes. There is ----

12 MJ [COL POHL]: Okay. By definition doesn't it have to
13 start closed?

14 LDC [MR. CONNELL]: No, it doesn't have to start closed
15 any more than a 506 (sic) hearing.

16 MJ [COL POHL]: How can I start a hearing involving
17 classified information in an open session when I know it's
18 classified information?

19 LDC [MR. CONNELL]: Dear Mr. Prosecutor, the defense has
20 given 505(g) notice of certain information. For example,
21 related to AE 052. They claim that it is not classified. Is
22 it actually classified? Mr. Prosecutor might respond I have
23 gone back and I have checked with the OCA. It is no longer

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1 classified if indeed it ever was. We have had our 505(h)
2 hearing. Carry on, Counsel.

3 MJ [COL POHL]: Okay. I have to be careful how I ask you
4 questions because I end up asking you a question could you
5 envision a scenario where this would happen, and you are very
6 good about envisioning those.

7 LDC [MR. CONNELL]: You invoke my fertile imagination.

8 MJ [COL POHL]: You are good at that. I understand that.
9 In that unlikely scenario, I got you, but you gave a 505(g)
10 notice and the government said it isn't classified, so we
11 would never have the situation.

12 LDC [MR. CONNELL]: That's a different situation.

13 MJ [COL POHL]: That's a different situation. Let's move
14 on, if you have anything further to say.

15 LDC [MR. CONNELL]: Sure. All that taken into account,
16 the question is who makes the decisions. And what McKaskle
17 says is that letting defense counsel speak in addition to the
18 pro se defendant, as long as they don't cause prejudice to the
19 pro se defendant, is fine. That's what McKaskle held.

20 MJ [COL POHL]: What do you mean "in addition to"? Let's
21 say scenario-wise -- which I said I wasn't going to do, but I
22 will try it anyway.

23 LDC [MR. CONNELL]: It's tempting.

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1 MJ [COL POHL]: A witness testifies and the pro se accused
2 does the initial cross-examination. Does "in addition to"
3 mean that another counsel from the learned counsel, the
4 detailed counsel gets to then cross-examine that witness?

5 LDC [MR. CONNELL]: That's the discretion of the court.
6 What they were actually reviewing in McKaskle was that the
7 court had allowed that to be done after the pro se defendant
8 had asked questions of the witness, the standby counsel was
9 allowed to ask questions of the witness.

10 And the question which was actually before the court
11 in McKaskle is, does that second cross-examination interfere
12 with the Faretta rights of the pro se.

13 MJ [COL POHL]: But the Faretta ----

14 LDC [MR. CONNELL]: So that doesn't mean -- I do want to
15 answer the question, which is that that doesn't by any means
16 mandate that the court allow the standby counsel to ask
17 questions, but it doesn't prohibit the court from doing so
18 either.

19 MJ [COL POHL]: But as 380 currently states, it is that
20 the same rules would apply to the pro se accused as to
21 counsel.

22 LDC [MR. CONNELL]: Including the one witness one lawyer
23 rules, which makes sense to me. That's entirely within your

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1 discretion.

2 MJ [COL POHL]: Okay. But this whole hearing today is to
3 discuss what rights the accused has and does not have.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: And that's one of the things that is clear
6 what the current practice is, and it's unlikely to be deviated
7 from simply because he is a pro se accused. Go ahead.

8 LDC [MR. CONNELL]: Yes. And it makes complete sense that
9 the court would admonish him of that.

10 MJ [COL POHL]: Go ahead.

11 LDC [MR. CONNELL]: Because the cases are entirely
12 consistent with human experience that pro se representation is
13 almost always a bad idea and, for many reasons, and the one
14 you just articulated is one of about a hundred thousand
15 reasons why it's a bad idea.

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: In Guantanamo, however, it is an
18 especially bad idea because it is essentially impossible.
19 There are many logistical obstacles to pro se representation
20 by a person in Guantanamo that are not faced by pro se
21 defendants in other forums, whether they be federal or state
22 or courts-martial.

23 Some of those are legal. For example, we have

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1 already discussed AE 014H, Protective Order #2, which anything
2 that the prosecution designates as sensitive discovery
3 materials cannot be reviewed by the defendant. Some of those
4 are -- another legal example is that AE 018U defines a
5 number -- the written communications order defines a number of
6 topics as contraband but allows a defense counsel to make a
7 certification that some items defined as contraband are
8 otherwise material to the defense and so should be provided.

9 That would be -- you could change AE 018U of course,
10 but under -- as it is currently written, all of those
11 contraband -- informational contraband topics, including the
12 history of the war on terrorism would not be available to a
13 defendant.

14 Many of -- the defendant would continue to have at
15 least some of his statements classified regarding torture
16 under AE 013DDD [sic], the Third Amended Protective Order #1,
17 but then there are a number of other logistical issues too.
18 The defendant doesn't have any privacy. There is no law
19 library that he could go to, in addition to a place to go look
20 for legal materials, there is no desk that he could go to and
21 work at. If the military commission ordered a deposition,
22 that would by definition be in the United States, and the
23 defendant could not participate in that.

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1 The prosecution is fond of using pseudonyms for its
2 witnesses, including the witnesses who are scheduled to
3 testify in AE 254Y, and the defendant would not be able to
4 know the names of those witnesses or any research about them.

5 MJ [COL POHL]: Does defense counsel get to know the names
6 of those witnesses?

7 LDC [MR. CONNELL]: Yes.

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

9 LDC [MR. CONNELL]: The defendant would not be able to
10 review much of the video or audio discovery, would not be able
11 to review the computer file discovery at all. We have at
12 least two terabytes of computer files that could not -- he
13 just simply doesn't have any way that he could review that
14 discovery, regardless of its classification.

15 And he would continue to be subject to extremely
16 harsh conditions of confinement, including long-term solitary
17 confinement, seizures of -- daily intrusive seizures of his
18 legal material, the controlled chaos strategy of changing the
19 rules all the time, and the denial of rehabilitation services
20 for their torture.

21 There are a number of things that the military
22 commission cannot today advise the defendant as to whether he
23 would face these problems or not because they are simply not

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1 yet decided.

2 In AE 182, the computer motion ----

3 MJ [COL POHL]: Mr. Connell, I read your motion on that.
4 Isn't that true of any Faretta inquiry, would be that you
5 can't anticipate every single change, every motion going
6 forward? I mean, you can't.

7 LDC [MR. CONNELL]: Absolutely.

8 MJ [COL POHL]: And we are not working off a blank slate
9 here. We have been doing this for three years plus.

10 LDC [MR. CONNELL]: Right.

11 MJ [COL POHL]: So you say because he does not know how
12 the motions, the result would be, he does not know -- he can't
13 make a knowing request to be pro se.

14 LDC [MR. CONNELL]: That's not my argument at all. That
15 may have been Ms. Bormann's argument. My argument is
16 logistically pro se representations at Guantanamo is
17 impossible. And the distinction between the two categories
18 that you just established ----

19 MJ [COL POHL]: No, excuse me, I was only addressing your
20 last point that there are unresolved issues.

21 LDC [MR. CONNELL]: Right.

22 MJ [COL POHL]: And my point is there are always going to
23 be unresolved issues until the date of adjournment.

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1 LDC [MR. CONNELL]: Absolutely. But the distinction here
2 is between, if you will forgive me, unknown unknowns and known
3 unknowns, and in this case we have quite a few known unknowns.

4 It is not a situation of hey, nobody can see the
5 future, nobody knows everything that's going to happen. There
6 are a number of points of known undecided rules. The most
7 important -- they are all listed in the brief. But the most
8 important of those is there is a very severe and --
9 disagreement between the parties on what does AE 018U mean,
10 the optional review by JTF.

11 The defense says that's an optional procedure which
12 is largely superseded by Section 4 of AE 013DDD, the third
13 amended protective order, where the prosecution says it is
14 mandatory that all communications need to go through the JTF
15 if they are not ultimately intended for counsel.

16 In a trial context that sounds highly technical and
17 dry, and really who cares? But in a trial context that has
18 massive complications. For a pro se defendant, that means can
19 he reach out and find witnesses? For defense counsel, it
20 means are they going to be investigated for reaching out to
21 witnesses. That one known unknown is really the basis for so
22 much of the controversy that we have had over the last two
23 years between the prosecution and the defense and between the

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1 FBI and the defense and between other government agencies and
2 the defense. So yes, there are always unknown unknowns, but
3 in this situation there are huge known unknowns.

4 I don't have anything further.

5 MJ [COL POHL]: Ms. Bormann, do you wish to be heard?

6 LDC [MS. BORMANN]: Thank you. First, let me just say
7 that yesterday ended very badly. This morning when I spoke
8 with Mr. Bin'Attash, I was informed that after his statements,
9 that he felt forced to do things and that everything he did
10 here was involuntary. He was taken back to the holding cell
11 in this particular courtroom under your jurisdiction and the
12 air conditioning temperature had been turned down so low that
13 he began suffering from hypothermia.

14 When he asked the guard force to please raise the
15 temperature, which has been their normal procedure going back
16 three years, the guard force absolutely refused to do so.
17 Mr. Bin'Attash began experiencing hypothermia, which brought
18 him back to his torture.

19 I'm going to ask this court to direct the guards not
20 to punish my client.

21 MJ [COL POHL]: Ms. Bormann, of course they shouldn't
22 punish your client.

23 LDC [MS. BORMANN]: Right.

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1 MJ [COL POHL]: I mean, that's ----

2 LDC [MS. BORMANN]: Right.

3 MJ [COL POHL]: Having been in the military for a number
4 of years, one of the things that -- and I don't mean to make
5 light of the questions, is controlling temperature seems to be
6 a continuing issue. But if it's fixable, Trial Counsel ----

7 LDC [MS. BORMANN]: There is a thermostat directly there
8 that I can access.

9 MJ [COL POHL]: If there is an issue there, raise it to
10 them and get it fixed.

11 LDC [MS. BORMANN]: Ironically they raised it in the other
12 holding cells, just Mr. Bin'Attash's ----

13 MJ [COL POHL]: As a threshold, I get a lot of these
14 things, emergency motions and things like that that by the
15 time I get them I don't have time to rule on them.

16 All I can say is -- like the other day there was an
17 issue about access to the detainees. By the time I ruled on
18 it would have been today or yesterday. My strong
19 encouragement, if you have that type of issue, raise it to the
20 government. The government, either fix it or say it's a
21 nonissue. And when we talk about it in court if I have to be
22 more aggressive on it, I can.

23 But if you are asking me to order people not to

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1 punish people arbitrarily, because I am not going to get into
2 the discipline that's necessarily in a detention facility, but
3 we are talking about arbitrary punishment here, but if you are
4 asking me to tell them not to do that, my answer to you is
5 don't do that. If it comes up, first step to stop it
6 immediately would be to go to the prosecution. If that's not
7 satisfactory, then you come to me and I will do the best I can
8 to be responsive. But a lot of times by the time I get it,
9 like I say, it's overcome by events.

10 LDC [MS. BORMANN]: It is an unfortunate event that it
11 affects my client's ability to make decisions, informed
12 decisions, voluntary decisions. So I appreciate the court's
13 remarks, but it is a continuing problem.

14 At 5:00 p.m. last night I received the trial conduct
15 order, and I was involved in other meetings at the time. I
16 had it printed off, and then I reviewed it.

17 This morning the paralegals for Mr. Bin'Attash
18 requested that it be releasable to him because, of course,
19 under the court's orders Mr. Bin'Attash could not review the
20 trial conduct order until the prosecution released it to him.
21 That occurred at 8:45 this morning. Mr. Bin'Attash at this
22 point has not yet seen the trial conduct order. It was
23 delivered by our paralegal just prior to the courtroom

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1 beginning this morning.

2 MJ [COL POHL]: Ms. Bormann, I did not anticipate just
3 going forward -- because I think I know where you are going
4 forward on this. I did not anticipate to sit here and say we
5 are going to decide immediately. I wanted to have an
6 opportunity for counsel to give me input, and I want you to
7 have an opportunity to discuss it with your client before we
8 go any further. I know how it's worded that I am going to go
9 right into talking to him about it.

10 LDC [MS. BORMANN]: Yes. He is terrified of that.

11 MJ [COL POHL]: His fear can be abated, because I do not
12 intend to do that until you have had time to discuss it with
13 him. And there may be slight modifications based on your
14 input and Mr. Connell's input and based on trial counsel's
15 input, although the essences will probably just remain the
16 same.

17 LDC [MS. BORMANN]: I also received this morning 380C, and
18 that's the government's proposed modifications. I have not
19 had an opportunity to review those.

20 MJ [COL POHL]: You will have time.

21 LDC [MS. BORMANN]: Ultimately what I am asking for is
22 time to have the trial conduct order translated for my
23 client -- because, of course, he speaks some English because

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1 he has been in American custody since 2003, but when it comes
2 to legal terms and when it comes to understanding a legal
3 system that is completely foreign to him, both literally and
4 figuratively speaking, it becomes much more important to have
5 an accurate translation done.

6 We have been attempting to do that. That's why the
7 translator is here in court today.

8 MJ [COL POHL]: Yes.

9 LDC [MS. BORMANN]: But it's going to take some time.

10 MJ [COL POHL]: But you would use your translator with you
11 sitting there as you go through it with him.

12 LDC [MS. BORMANN]: And answer various questions.

13 MJ [COL POHL]: It's an iterative process. If you need
14 time for that, you will have it.

15 LDC [MS. BORMANN]: We do need time for all of that.

16 At this point until I discuss with Mr. Bin'Attash all
17 of the filings that -- Mr. Connell's filing also was not
18 marked releasable to Mr. Bin'Attash until this morning.

19 MJ [COL POHL]: Okay.

20 LDC [MS. BORMANN]: So until I have an opportunity to
21 confer with Mr. Bin'Attash on all of the filings that have
22 been released to him this morning, I'm not in a position to
23 comment, other than to say that we do join Mr. Connell's

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1 motion. But I don't have anything further at this point until
2 I speak with Mr. Bin'Attash.

3 MJ [COL POHL]: Okay. Thank you. Any other defense
4 counsel want to be heard at this time? Mr. Nevin?

5 LDC [MR. NEVIN]: Yes. Thank you, Your Honor. Two
6 things.

7 First, I have also gone through 380, as the
8 government did, with line edits, and I don't know how the
9 military commission wants to take those or hear those.

10 MJ [COL POHL]: Do you have it in hard copy?

11 LDC [MR. NEVIN]: A very rough hard copy.

12 MJ [COL POHL]: I got a rough hard copy from the
13 government. If you want to submit that, as long as it's clear
14 to me -- for this particular issue, because that's probably a
15 better way to do it rather than filing a motion, getting
16 everything through it.

17 If you can provide a hard copy of that to the
18 government and to the court reporter, it will be marked as the
19 next exhibit, and I will consider it along with the ----

20 LDC [MR. NEVIN]: I will do that. The other point I
21 wanted to make is this. When I read Faretta last night I was
22 surprised, and I remembered that Faretta not only provides the
23 opportunity for an individual to represent himself, it also

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1 forbids -- it speaks also of forbidding the government from
2 imposing a lawyer on a person against his or her will, and
3 that's why part of the language that's quoted from Faretta in
4 the response that was drafted last night refers to the star
5 chamber, that being the only place where you are required to
6 have a lawyer, and a lawyer was imposed on you.

7 And it's part of the reason -- in understanding the
8 history of the Sixth Amendment. It is -- it is part of the
9 reason that the Sixth Amendment reads the way it does, and
10 that's why the language is in Faretta that says a lawyer in
11 this situation could be an assistant but not a master. And
12 the problem with the classified information problem is that
13 inevitably the lawyer is going to become a master and not an
14 assistant.

15 And this connects -- as I know the military
16 commission has seen, this connects to this entire issue we
17 have been arguing about in 013, and why the commission ordered
18 me to show cause why I shouldn't be removed from the case.

19 And this is an argument that I have made to the
20 commission on several occasions, and I'm not proposing to make
21 it again now, except to say this: When we talk about these
22 accommodations that are made in order to make this process
23 work, where so much of it is occurring in secret, we are

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1 really getting ourselves -- we are really backing ourselves
2 into the problem that Mr. Ruiz raises in his motion,
3 suggesting that the case can't go forward in a way that's
4 consistent with national security.

5 At some point if we are going to have a fair
6 proceeding that is consistent with Faretta, when we are
7 talking about, when we are talking about pro se representation
8 on the one hand, or that's consistent with ideas of due
9 process and the effective assistance of counsel, if we are
10 talking about a defendant who is represented by counsel, at
11 some point the government has to fish or cut bait about
12 providing everything that has to be provided to the defense in
13 order for it to be a real defense, in order for it to be a
14 real case.

15 And the rules have always imagined that situations
16 would arise where that couldn't happen, in other words, where
17 information, in order for the case to be fair, would have to
18 be turned over to the defense. And yet the government -- and
19 now when I say the government, I mean an original
20 classification authority within the government, would say no,
21 that's not consistent with the national security for those
22 lawyers to have that, it's not consistent with national
23 security for that defendant to have that.

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1 Now, what we are doing is we are trying to find a way
2 to bend over backwards and to reach back behind us and do a
3 very unnatural thing in order to make it possible for this
4 case to go forward. But what CIPA envisioned and what the
5 CIPA conferees recognized was that there would be situations
6 just like the one we are dealing with now, and that's where
7 the military commission enters the picture in this sifting and
8 sorting process, because it anticipates that you are going to
9 look at the material that the government gives you and that
10 there is going to come a time where you are going to say this
11 has to be given to the defense in order for there to be a fair
12 trial. We can't have a fair trial unless the defendant is
13 aware of this.

14 And the government is then going to be put in the
15 position of saying, all right, I'll either -- we will either
16 give it to the defendant or we will take your sanctions, and
17 we know that the sanctions could include up to dismissal of
18 the case. But there are many, many lesser sanctions that
19 could be imposed as well if the government refused to turn the
20 information over.

21 But we have imagined a situation in which you can
22 tell counsel, who then doesn't tell the defendant, and that
23 that in some way satisfies this obligation of fairness that's

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1 imposed under due process, under the Fifth and Sixth
2 Amendments, and the Eighth Amendment as well.

3 And the whole point of our arguing this issue over
4 all these months and the whole reason that we balked with
5 the -- and I know we are going to get into this later, so I am
6 not going to get into it in detail. But the whole reason we
7 balked over some of these issues was our concern about them
8 being fully preserved, because we believe that in this, right
9 here -- standing right here now we have our hands on the live
10 wire of this case, one of them anyway, and this is a place at
11 which this case goes forward or not, and it has to go forward
12 in a fair way, and this implicates the question of whether it
13 can or not, because when you have ----

14 MJ [COL POHL]: Mr. Nevin, your discussion about
15 classified evidence going to the accused and everything else,
16 that's straight out of CIPA. I've got it, okay?

17 LDC [MR. NEVIN]: Yes.

18 MJ [COL POHL]: If the commission orders evidence go to
19 the accused, the government says we are not going to do it,
20 there is a remedy. I have got all that. But we are not at
21 that point.

22 LDC [MR. NEVIN]: Well ----

23 MJ [COL POHL]: We are at that theoretical point, but it's

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1 got to be a piece of classified evidence that gets us to the
2 actual, as you say the live wire. At this point it's simply a
3 theoretical, but I understand what ----

4 LDC [MR. NEVIN]: Then maybe we are standing around
5 watching some sparks flying out of the socket in the wall as
6 opposed to actually touching it. But my point is this is it,
7 and when you have a pro se defendant as opposed to a defendant
8 who is represented, you get the thing presented in the most
9 stark way possible, because he -- in this case it's a he, this
10 defendant, he cannot be made to be a servant. He has to be a
11 master. That's what Faretta says. The language is right
12 there in black and white.

13 MJ [COL POHL]: So do you -- is it your position then -- I
14 know this has been your position on 013 about -- and I don't
15 want to talk about 013 in any depth right now because we are
16 going to get to it, hopefully.

17 But is it your position then that regardless of
18 whether -- the current status that a pro se accused has a
19 right to see all classified evidence?

20 LDC [MR. NEVIN]: No. My position is that classified
21 evidence would come to you and that you would look at it and
22 say -- and it would come in the form of a substitution. In
23 other words, I'm assuming you would see the original and you

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1 would see a proposed substitution, and you would say no,
2 that's not enough, or you would say, yes, that is enough. But
3 then after you say yes, that's enough, that would go to the
4 accused.

5 MJ [COL POHL]: And this would come from the government to
6 the commission?

7 LDC [MR. NEVIN]: Yes.

8 MJ [COL POHL]: And there would be no input or
9 responsibility of the defense counsel to establish why it's
10 material to a fair trial?

11 LDC [MR. NEVIN]: Well, as opposed to 156 and 073.

12 MJ [COL POHL]: I am not talking about 156 or 073. I am
13 talking about what we are talking about.

14 LDC [MR. NEVIN]: Yes, sir, but that is what happens with
15 156 and 073. It's the same thing that ----

16 MJ [COL POHL]: What I am saying is under the pro se
17 procedure, when they talk about classified evidence going to a
18 pro se defendant, it talks about -- it's got to be a showing
19 that it's material to a fair trial of that defendant.

20 LDC [MR. NEVIN]: Yes.

21 MJ [COL POHL]: Okay. And in the cases, it specifically
22 puts that burden on standby counsel, doesn't it?

23 LDC [MR. NEVIN]: Yes, sir, I understand, but, Your

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1 Honor ----

2 MJ [COL POHL]: And I talked about this to Mr. Connell, I
3 just want to understand your position. Are you saying that it
4 is simply a trial counsel straight to the judge with no input
5 from the defense to show a responsibility that it's material
6 to its defense?

7 LDC [MR. NEVIN]: Well, yes, but I guess my point is --
8 the reason I raise 156 and 073, what input did you get from us
9 aside from the statement of a defense -- which is I recognize
10 my team took you up on or hasn't yet, but aside from a general
11 statement from a defense, what input did you get? I mean, we
12 asked you to say, look, we have security clearances, show us
13 what you are giving to the military judge so we can say no,
14 no, that paragraph shouldn't be marked out. We weren't given
15 that right.

16 We weren't given that opportunity. We have no more
17 ability, aside from being lawyers, trained lawyers and trying
18 to imagine and being trained and standing up here and making
19 an argument as opposed to not, we have no more ability to
20 argue that to you than Mr. Mohammad does. It's all a matter
21 of the imagination.

22 MJ [COL POHL]: You think that's analogous to the
23 procedures in Subasic and Moussaoui, not analogous, it's the

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1 same, that under those two AEs, the government requested not
2 to give it to the defense. What we are talking about
3 here ----

4 LDC [MR. NEVIN]: Yeah.

5 MJ [COL POHL]: ---- is stuff that has been given to you.
6 I'm talking about classified discovery that's been given to
7 cleared counsel, okay? And that's -- Subasic talks about it,
8 Moussaoui talks about it, and then you come -- one way would
9 be you come to me and say this is material to his defense, and
10 then if we go through the substitution is inadequate, and then
11 I rule from there, and if it is material and classified and
12 the government doesn't want to give it up, we go down the
13 remedy road we talked about earlier.

14 LDC [MR. NEVIN]: Right.

15 MJ [COL POHL]: But isn't there a filtering or at least an
16 advocate position that you need to take with regards to this
17 classified evidence, whether it's material to the
18 preparation -- excuse me, material to a fair trial of the
19 accused?

20 LDC [MR. NEVIN]: Well, I am aware that some federal
21 courts have allowed -- at least have allowed defense counsel
22 to participate in exactly that kind of closed-door process by
23 which this gets sorted out, and I think that that is an

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1 option. I mean, we've made the point to you that this kind of
2 blanket assumption that everyone has made, that the cleared
3 counsel rule is something that's been approved by the federal
4 courts is actually not correct.

5 I don't want to ----

6 MJ [COL POHL]: Yeah, let's not ----

7 LDC [MR. NEVIN]: I don't want to go there again. But
8 this is -- I really mainly wanted to draw the military
9 commission's attention to the proposition that this is another
10 instance of this same problem and ask you to think of it in
11 that way. Thank you, Your Honor.

12 MJ [COL POHL]: Mr. Harrington, Mr. Ruiz, do you want to
13 be heard?

14 LDC [MR. HARRINGTON]: No, Your Honor.

15 MJ [COL POHL]: Mr. Ruiz?

16 LDC [MR. RUIZ]: No, Judge.

17 MJ [COL POHL]: Okay. Because there has not been, except
18 for Mr. Connell, pleadings in this thing, I'm going to give
19 the Trial Counsel, if you want another opportunity to talk you
20 can, but with the understanding that if you do, then each
21 defense counsel will also have an opportunity to talk. I am
22 just talking about now, not -- okay. And I see a negative
23 response from General Martins. Okay.

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1 Here is the way ahead. As I explained to Ms. Bormann
2 and as I said yesterday, this is a critical issue. I think
3 it's really critical for Mr. Bin'Attash and the rest of the
4 accused -- and I'll just note for the record, because I didn't
5 say it earlier, that all accused have been here today -- that
6 we can't rush through this.

7 I'm going to make some amendments to the order. I
8 will -- most of the government amendments, requested
9 amendments will be adopted because they are, quite frankly,
10 just stylistic changes. I will add a clause consistent with
11 Subasic, as I discussed with Mr. Connell. Mr. Nevin, if you
12 wish to submit something to me, you can.

13 I'm just telling you this now, that the basic
14 framework is going to be altered just like that, to give you
15 an opportunity, Ms. Bormann, to discuss what you have now, and
16 then as soon as I get that done, I will get you a copy of the
17 amended version, to kind of tell you where my thinking is
18 going. I need to get Mr. Nevin's version and then see what it
19 is, but those are probably the only changes there will be.

20 And just so it is clear in your mind, when I talked
21 about the change that Mr. Connell is talking about, something
22 along the line out of Subasic that would apply the exceptions
23 to the classified material.

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1 LDC [MS. BORMANN]: So as I understand it, what you would
2 be doing is qualifying the complete bar of the discoverability
3 of classified information to ----

4 MJ [COL POHL]: Yes, saying here is a potential exception
5 consistent with Subasic and Moussaoui.

6 LDC [MS. BORMANN]: Right.

7 MJ [COL POHL]: Mr. Connell?

8 LDC [MR. CONNELL]: Your Honor, I want it to be clear that
9 I object to the military commission ruling without hearing my
10 classified argument that I want to file in 350B. I am
11 concerned about the state of the record in 350B.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: I would ask leave of court to submit
14 the document that was sealed ----

15 MJ [COL POHL]: Let me say this. 350B, I have not seen
16 it, I don't know what it is.

17 LDC [MR. CONNELL]: 380B. My mistake.

18 MJ [COL POHL]: Okay. 380B. For the record, your thing
19 is currently preserved. Understand, I may go forward on this
20 issue without it, but it's hard for me to know what it is
21 without knowing what it is, and how you discuss with the
22 government, because I'm not going to -- [conferred with court
23 security officer]. We need to clarify my status being read on

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1 to that program. So your objection is preserved. Got it.

2 LDC [MR. CONNELL]: Your Honor, could I double-wrap the
3 document and submit it to the trial judiciary to be kept in a
4 safe? You don't have a copy of it for the record right now,
5 is one of my concerns.

6 MJ [COL POHL]: We will get to it when we get to it, but I
7 don't want to take custody of a document I'm not authorized to
8 read.

9 LDC [MR. CONNELL]: I understand.

10 MJ [COL POHL]: Ms. Bormann?

11 LDC [MS. BORMANN]: I also want to clarify I don't know
12 what 380B is, and I don't know that particular ----

13 MJ [COL POHL]: It's my understanding -- Mr. Connell, it
14 is my understanding this is a program you have been read on to
15 but none of the other defense counsel have; is that correct?

16 LDC [MR. CONNELL]: Your Honor, I and some members of my
17 team have been read on it. To my knowledge, none of the other
18 defense counsel have been read on to this program.

19 LDC [MS. BORMANN]: Respecting Mr. Connell as I do, he
20 would not be filing pleadings with you if they weren't
21 relevant to this particular matter. So I'm going to be asking
22 that if, in fact, it is material to my argument and to
23 Mr. Bin'Attash's preservation of his right to go pro se, that

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1 all counsel who are properly cleared be read on to it.
2 Because if I have to make an argument -- if I have to inform
3 the court about Mr. Bin'Attash's rights, we should all be
4 apprised of the relevant material.

5 Beyond that, I clearly haven't argued on any of these
6 issues because I am put into a bit of a conflictual situation
7 without having actually spoken to Mr. Bin'Attash about the
8 content of all of the material now tendered. So I
9 specifically reserve the right to make whatever arguments I
10 need to make and whatever filings I believe need to be made
11 after speaking with Mr. Bin'Attash.

12 MJ [COL POHL]: Yes, Ms. Bormann, you will have an
13 opportunity. My idea today was to kind of shape the
14 battlefield, because this has come up.

15 LDC [MS. BORMANN]: Thank you.

16 MJ [COL POHL]: Mr. Ruiz?

17 LDC [MR. RUIZ]: Judge, I just wanted to indicate that I
18 know you talked about receiving some amendments from
19 Mr. Nevin. We may also provide the court with some input on
20 that document. The issue that we had is we have been having
21 problems with our team e-mail. For that reason I never
22 received the pleading. I learned about it this morning.
23 Members of my team did not either.

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1 So we just wanted to alert the court that we are
2 still digesting it and would at least like to make you aware
3 that we may be submitting some proposals.

4 MJ [COL POHL]: Okay. Can you submit it by 1300?

5 LDC [MR. RUIZ]: I think that's enough time, Your Honor.
6 Thank you.

7 MJ [COL POHL]: Mr. Nevin, 1300 work for you?

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

9 MJ [COL POHL]: Here is what I am going to do. As I said
10 earlier, I am going to make some amendments right now based on
11 what I got. I will consider the input from Mr. Nevin and
12 Mr. Ruiz to see whether those need to be made or not. I think
13 everybody has got the gist of where this is going to go, at
14 least enough that tomorrow we can discuss it with
15 Mr. Bin'Attash, and that's what we will do tomorrow at 0900.

16 Commission is in recess until 0900 unless there are
17 other issues to take up.

18 Mr. Nevin?

19 LDC [MR. NEVIN]: Just the ----

20 MJ [COL POHL]: Obviously you guys need to talk to your
21 clients. You guys can stay here to talk to your clients until
22 1600 like yesterday.

23 General Martins?

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1 CP [BG MARTINS]: Yes, Your Honor.

2 MJ [COL POHL]: The same procedure as we followed
3 yesterday. Okay.

4 The commission is in recess.

5 [The R.M.C. 803 session recessed at 1027, 20 October 2015.]

6 [END OF PAGE]

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