

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0906,
2 21 August 2017.]

3 MJ [COL POHL]: The commission is called to order. Trial
4 Counsel, who is here today representing the United States.

5 CP [BG MARTINS]: Good morning, Your Honor. Present for
6 the United States are Brigadier General Mark Martins;
7 Mr. Robert Swann; Mr. Ed Ryan; Mr. Clay Trivett; Ms. Nicole
8 Tate; and Major Chris Dykstra. At counsel table as well are
9 chief paralegal Dale Cox, and paralegals Mr. Rudolph Gibbs and
10 Mr. Pascual Tavaréz.

11 Also in the courtroom are Donald Fuhr, Nicole Taylor
12 and Matthew Pezzulo of the Federal Bureau of Investigation.
13 These proceedings are being transmitted by closed circuit
14 transmission to locations in the continental United States
15 pursuant to the commission's order.

16 MJ [COL POHL]: Thank you.

17 Mr. Nevin.

18 LDC [MR. NEVIN]: Your Honor, David Nevin. Major -- oh,
19 excuse me, Lieutenant Colonel Poteet and Ms. Leboeuf,
20 Mr. Sowards, and Mr. Mohammad is present.

21 MJ [COL POHL]: Ms. Bormann.

22 LDC [MS. BORMANN]: Judge, myself, Edwin Perry, Brian
23 Brady, Major Matthew Seeger, and Mr. bin'Attash is present.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Mr. Harrington.

2 LDC [MR. HARRINGTON]: Judge, in addition to me, Alaina
3 Wichner, Mr. Christopher Lanks, and Mr. Binalshibh is present.

4 MJ [COL POHL]: Thank you.

5 Mr. Connell.

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

7 MJ [COL POHL]: Good morning.

8 LDC [MR. CONNELL]: James Connell; Lieutenant Colonel
9 Thomas Sterling of the United States; Ms. Alka Pradhan on
10 behalf of Mr. al Baluchi.

11 MJ [COL POHL]: Mr. Ruiz.

12 LDC [MR. RUIZ]: Judge, Ms. Suzanne Lachelier; major
13 Joseph Wilkinson; Lieutenant Commander David Furry; and
14 Mr. Sean Gleason and myself are present on behalf of Mr. Al
15 Hawsawi.

16 MJ [COL POHL]: Commander Furry, you are new. Please put
17 your detailing qualifications on the record.

18 DC [LCDR FURRY]: Sir, my name is Lieutenant Commander
19 David Furry, Judge Advocate General's Corps, United States
20 Navy. I have been detailed by Brigadier General Baker, the
21 Chief Defense Counsel, as shown in my detailing memorandum in
22 AE 004Y. I am qualified and certified under Article 27(b) and
23 sworn under Article 42(a) of the Uniform Code of Military

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Justice and also qualified and certified under Rules 502 and
2 503 of the Rules for Military Commissions. I have not acted
3 in any manner that might tend to disqualify me in this
4 proceeding.

5 MJ [COL POHL]: Thank you.

6 DC [LCDR FURRY]: Yes, sir.

7 MJ [COL POHL]: As is the practice on the first session,
8 of a hearing week or weeks, I'm going to go over with each of
9 the accused their rights to be present and the option they
10 have to waive their presence.

11 This is directed to all of the accused. You have the
12 right to be present during all sessions of the commission. If
13 you request to absent yourself from any session, such absence
14 must be voluntary and of your own free will. Your voluntary
15 absence from any session of the commission is an unequivocal
16 waiver of the right to be present during this session. Your
17 absence from any session may negatively affect the
18 presentation of the defense in many ways.

19 Your failure to meet and cooperate with your defense
20 counsel may also negatively affect the presentation of your
21 case.

22 Under certain circumstances your attendance at a
23 session can be compelled regardless of your personal desires

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 not to be present. Regardless of your voluntary waiver to
2 attend a particular session of a commission, you have the
3 right to decide to attend any subsequent session. If you
4 decide not to attend the morning session, but wish to attend
5 the afternoon session, you must inform the guard force of your
6 desires. Assuming there is enough time to arrange
7 transportation, you will be allowed to attend the afternoon
8 session. You will be informed of the time and date of the
9 commission session prior to the session to afford you to the
10 opportunity to decide whether you wish to attend that session.

11 Mr. Mohammad, do you understand what I just told you?

12 ACC [MR. MOHAMMAD]: Yes.

13 MJ [COL POHL]: Mr. bin'Attash, do you understand what I
14 just told you?

15 ACC [MR. BIN'ATTASH]: Yes, but I would like to put my
16 objection about the attorneys on the record.

17 MJ [COL POHL]: Okay. I'll give you that opportunity.

18 Mr. Binalshibh, do you understand what I just told
19 you?

20 ACC [MR. BINALSHIBH]: [Microphone button not pushed; no
21 audio.]

22 MJ [COL POHL]: Okay. I heard him say "yes, I
23 understand," in English.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Ali, do you understand what I just told you?

2 ACC [MR. AZIZ ALI]: [Microphone button not pushed; no
3 audio.]

4 MJ [COL POHL]: I'm sorry? Yes? Okay. Thank you.

5 And Mr. Hawsawi, did you understand what I just told
6 you?

7 ACC [MR. AL HAWSAWI]: Yes.

8 MJ [COL POHL]: Mr. bin'Attash, you are given an
9 opportunity to make a short statement. Go ahead.

10 ACC [MR. BIN'ATTASH]: In regards to my situation with the
11 attorneys and the dilemma that we are in. The situation until
12 now is as-is and there is no way out for both sides.

13 As for me, I tried everything I could, and I have met
14 with one of the attorneys on the team. It's not on the
15 court's record. We are still in the same place. General
16 Baker is -- he continues to offer solutions, but none of them
17 is practical, and they all serve the interests of the
18 attorneys in the first place. I have been hurt a lot from
19 Cheryl and the attorneys with her, and especially myself. And
20 it is a mental pain or hurt, harm.

21 I started believing that I am dealing with FBI
22 interrogators or investigators, and I still object to her
23 presence on the team. That's all I have.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Thank you, Mr. bin'Attash.

2 Before we begin, the commission would like to express
3 its condolences on the passing of Dr. Scharlette Holdman, a
4 mitigation specialist for Mr. Mohammad's team. Although I
5 never met her, anyone who touches death penalty litigation
6 knows her reputation and her contributions to the field. I'm
7 sure she will be missed.

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

9 MJ [COL POHL]: Right before we started, my staff got an
10 e-mail. There's an issue with the computers for Ms. Bormann
11 and her team.

12 LDC [MS. BORMANN]: When the staff arrived today in our
13 trailer, we have a total of six workstations for five lawyers
14 and a variety of paralegals and other staff here. We try and
15 rotate them, but the lawyers' computers have to remain the
16 lawyers' computers because we have to save documents on our
17 desktop when we are preparing. All four lawyers' computers
18 were out this morning; the entire workstations, not just the
19 computers themselves, but everything. We suspect it's
20 electricity, but I can't tell you that. They're supposed to
21 have backup batteries that allow us to access them. Those
22 were beeping nonstop the entire time I was in the office this
23 morning and they don't work. So we have no access to any of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the documents on our desktops, any of the preparation that we
2 did yesterday and the day before. No access to e-mails and no
3 access to the O: drive, which is where we have to store all of
4 our materials.

5 We had two working workstations, one of -- both of
6 which are assigned to paralegals, so they were frantically
7 trying to pull anything that got filed in the last day or so
8 so that -- as you know, we don't have a network here in the
9 courtroom. So we have to either bring pieces of paper in that
10 are printed and they're in all of these binders. So they were
11 doing that, which I give them kudos, but we couldn't -- the
12 lawyers, the four of us sitting back here, couldn't access any
13 of our materials.

14 We tried -- our lead paralegal tried desperately to
15 get somebody to service the issue, and it involved actually
16 people coming to Ms. Lachelier in the office next door. They
17 didn't seem to understand what the issue was. She relayed to
18 my paralegal that they had to call a different number, so we
19 called that number and as of when we came here at 5 minutes of
20 9:00, nothing was working still. So that's the situation that
21 we're in.

22 MJ [COL POHL]: To your knowledge, have the IT people, the
23 appropriate IT people, been notified as of now?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: They have been, but it's not an IT
2 issue, because they can't even turn anything on. So it's a
3 facilities issue. It is a ----

4 MJ [COL POHL]: Okay. Let me rephrase my question, then.
5 Have the facility people been notified?

6 LDC [MS. BORMANN]: Yes, absolutely. A couple of
7 different agencies.

8 MJ [COL POHL]: And they're working on it?

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

10 MJ [COL POHL]: You don't know.

11 LDC [MS. BORMANN]: We don't know, because we haven't
12 gotten a response back. Nobody has shown up to our office.
13 Nobody has. It's been sort of like pass the football. When
14 we all came in here at five minutes of 9:00, nothing had been
15 done.

16 MJ [COL POHL]: Okay.

17 LDC [MS. BORMANN]: They have been told. Counsel for
18 Mr. Hawsawi said they filed something that has been rejected.
19 Something else has been filed. I don't know what e-mails are
20 in my in-box regarding -- from the prosecution regarding any
21 discovery matters.

22 MJ [COL POHL]: The only thing that we received,
23 Mr. Hawsawi -- Mr. Ruiz's request that Mr. Hawsawi not be here

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 today. That's rejected for a separate reason. You're talking
2 about that one? That one was rejected for a separate reason.

3 LDC [MS. BORMANN]: I haven't seen that one.

4 MJ [COL POHL]: But you have hard copies of everything up
5 until yesterday.

6 LDC [MS. BORMANN]: Well, I have hard copies of everything
7 that went to my paralegals. Unfortunately, the trial
8 judiciary has taken a position lately that they will only copy
9 myself and Major Seeger on certain materials, so I can't tell
10 you -- we can't tell you any of those materials have been sent
11 to us in the last day or so, and I can't tell you if the
12 prosecution has done so and I can't tell you if any witnesses
13 have done so or any experts whose expertise was sought in
14 preparation for these hearings because we don't have access to
15 a computer, which is why I asked.

16 MJ [COL POHL]: But you had it up until yesterday.

17 LDC [MS. BORMANN]: We had it up till yesterday.

18 MJ [COL POHL]: Overnight.

19 LDC [MS. BORMANN]: Overnight. Yeah, from about 4:00 on.

20 MJ [COL POHL]: Here's what I'm going to suggest we do.
21 Well, not suggest, what we're going to do. There's a couple
22 of issues that just deal with Mr. Connell and then there's one
23 issue that just deals with Mr. Connell and Mr. Ruiz, which is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 502. I'm going to touch those because I don't think they
2 impact on you. And then we'll take a recess and see where
3 we're at before we go beyond those.

4 LDC [MS. BORMANN]: Thank you.

5 MJ [COL POHL]: Okay.

6 That being said, let's ----

7 LDC [MR. HARRINGTON]: Judge, just to supplement what
8 Ms. Bormann just said, we're in the room next door to her. We
9 lost power in our printers but ours is much less a problem
10 than hers.

11 MJ [COL POHL]: Okay. So although I called it an IT
12 issue, it's a power issue.

13 LDC [MR. HARRINGTON]: Seems to be.

14 MJ [COL POHL]: Let's see if we can get through a couple
15 of these things, like I said, and we'll take a recess and see
16 where we're at.

17 At the same time, Trial Counsel, we can close some of
18 these loops. Have you filed anything since yesterday? I
19 mean, she indicates you may not.

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

21 MJ [COL POHL]: And from my perspective, the only thing I
22 was aware of -- and I'm not always aware of anything, so I
23 will double-check -- was the Mr. Hawsawi pleading, which, like

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I said, was the only thing that I recall. But I will
2 double-check at the break to make sure there's nothing else
3 that has come in.

4 Mr. Harrington.

5 LDC [MR. HARRINGTON]: Judge, as I indicated in the 802
6 the other day, I'd like to put a statement on the record
7 regarding some issues on 152. I can do it now or at a later
8 time, whatever.

9 MJ [COL POHL]: Would it make more sense to do it when we
10 talk about 152? In fact, that would be something else we can
11 address, Mr. Harrington.

12 Let's do this. Kind of an order of march here which
13 is out of the order. 108, we'll discuss. We'll discuss 502
14 and then we'll discuss 152 and then we'll take the break.
15 Because none of those touch Ms. Bormann's team or
16 Mr. bin'Attash. Okay.

17 Now, Mr. Connell, you filed 108 requesting to use
18 some ICRC documents in a personal jurisdiction issue, and the
19 government apparently responded they don't oppose it, but
20 apparently they want to know what are you going to use them
21 for, or I'm not sure what their position is. Let me just ask
22 you this: What do you intend to use them for?

23 LDC [MR. CONNELL]: Sir, we laid out in the brief -- I can

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 approach.

2 Sir, we laid out in the brief, there are four uses
3 for the documents, sort of writ large. One is in the
4 formulation of questions. One is in the possible refreshment
5 of recollection if that becomes required. One is in the
6 examination of policy witnesses, and one is in argument.

7 We do not intend to display or quote from ICRC
8 documents. If for some currently unforeseen reason that
9 became necessary, we would advise the court and seek leave of
10 court.

11 MJ [COL POHL]: Okay. And these are related to the 502
12 issue?

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

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: I don't have anything else.

16 MJ [COL POHL]: Okay. Trial counsel.

17 CP [BG MARTINS]: Your Honor, we don't oppose that, and
18 in -- our pleadings were intended to just make sure we all
19 understand the rules of road. You seem to be fully cognizant
20 of what we filed.

21 We did want to bring the commission's attention to
22 the promulgation of 506(a) in January, which though it
23 essentially codifies what you've done in this commission, lays

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 out the government's position essentially on how these kinds
2 of things should unfold. As we get to, for instance, some of
3 the uses Mr. Connell spoke of ----

4 MJ [COL POHL]: Yeah.

5 CP [BG MARTINS]: ---- and there is an issue or he wants
6 to use something a bit more fully, we would like to follow
7 that approach in there, which we think is basically what you
8 have been doing.

9 MJ [COL POHL]: Okay.

10 CP [BG MARTINS]: That's our position.

11 MJ [COL POHL]: And understand, he's just talking about
12 the use of that. We're not talking about whether they're --
13 whether they're relevant or not relevant.

14 CP [BG MARTINS]: Right.

15 MJ [COL POHL]: That's a separate issue altogether. Okay.

16 CP [BG MARTINS]: Thank you, Your Honor.

17 MJ [COL POHL]: Okay, that brings us to 502.

18 And let's start with the smaller piece, which is
19 Mr. Ruiz's piece. To be clear, we're not litigating 502
20 today. We're setting it up to be litigated in the future.

21 DC [MAJ WILKINSON]: Understood, sir. Good morning.

22 MJ [COL POHL]: Good morning.

23 DC [MAJ WILKINSON]: With respect to litigating it in the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 future, our position is we want to go forward. We'd like to
2 go forward with an evidentiary hearing and a ruling on
3 Mr. Hawsawi's part of that motion, in which we could argue our
4 expert objections in October, have an evidentiary hearing in
5 December, with our expert and the government's expert, hear
6 argument then and then ask you, similarly to what we did in
7 488, for a ruling on our part of the motion with no prejudice
8 to anybody else's personal jurisdiction issues. We say that
9 because, I mean, of course, the first three teams have
10 unjoined because -- not because they're conceding personal
11 jurisdiction. They need more discovery in order to litigate
12 it.

13 MJ [COL POHL]: Okay.

14 DC [MAJ WILKINSON]: Our understanding from
15 Mr. al Baluchi's filings is that he needs more discovery in
16 order to be able to fully litigate the issue, and he should
17 have it.

18 MJ [COL POHL]: I'll let Mr. Connell speak for himself.

19 DC [MAJ WILKINSON]: Understood, sir.

20 MJ [COL POHL]: Let's just talk about your client and your
21 case.

22 DC [MAJ WILKINSON]: Yes, sir.

23 I mean, we were hoping before we would be having the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 evidentiary hearing this month with our witnesses, and then
2 ask for a ruling on that one.

3 Unfortunately, our expert is heavily committed in
4 October. Also, because July hearings were cancelled, and the
5 evidentiary hearing for this month was cancelled, neither the
6 government nor we has yet filed the expert summaries that are
7 due before -- 45 days before any evidentiary hearing actually
8 takes place.

9 Mr. al Hawsawi's been locked up for 14-and-a-half
10 years with no resolution to his case, no trial or hearing or
11 anything like that. This is an opportunity to do it.

12 We should like to move forward with a hearing.

13 MJ [COL POHL]: Let me ask you this: In your pleading you
14 refer to statements of Mr. Hawsawi you believe the government
15 is going to use to establish personal jurisdiction?

16 DC [MAJ WILKINSON]: Yes, sir.

17 MJ [COL POHL]: And there's a motion to suppress one of
18 those, correct?

19 DC [MAJ WILKINSON]: Yes, sir.

20 MJ [COL POHL]: That deals with ----

21 DC [MAJ WILKINSON]: (d)(10)(1).

22 MJ [COL POHL]: ---- (d)(10)(1). We're going to get to
23 that. Are there other statements that you're on notice that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the government is going to use that you object to them using?

2 DC [MAJ WILKINSON]: Yes, sir. We have objected to --
3 both the FBI and CSRT statements; however, we do not want to
4 delay a hearing on personal jurisdiction simply to -- simply
5 to wait until we can litigate suppression on those.

6

7 MJ [COL POHL]: So but I'm just ----

8 DC [MAJ WILKINSON]: Sure.

9 MJ [COL POHL]: I want to make it clear is that you're on
10 notice that the government is going to use statements against
11 your client.

12 DC [MAJ WILKINSON]: Yes, sir.

13 MJ [COL POHL]: Okay. And you're choosing not to file a
14 suppression motion now.

15 DC [MAJ WILKINSON]: That's correct, sir.

16 MJ [COL POHL]: Okay. So they can be used in the 502,
17 then.

18 DC [MAJ WILKINSON]: Yes, sir.

19 MJ [COL POHL]: You want to reserve the right if later on
20 you want to suppress them.

21 DC [MAJ WILKINSON]: Yes, sir. We still object to the
22 relevance of those statements but you'll have to look at the
23 statements for us to object to the basis.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You do -- on what basis? Relevance?

2 DC [MAJ WILKINSON]: Yes, sir.

3 MJ [COL POHL]: Your relief for purposes of 502, waiving
4 the suppression motion you have on them?

5 DC [MAJ WILKINSON]: Yes, sir, on -- only on purposes of
6 suppression. Yes, sir.

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

8 LDC [MR. RUIZ]: Judge, can we have a moment?

9 MJ [COL POHL]: Yes. Although this is one motion, because
10 it's so specific, Trial Counsel, you'll get an opportunity to
11 respond to Mr. Hawsawi's position and then you'll have an
12 opportunity to respond to Mr. Ali's position.

13 [Pause.]

14 DC [MAJ WILKINSON]: Pardon, sir. A couple of points that
15 I didn't clarify but should have.

16 The -- as we've said in 502Q, we are asking still
17 that with respect to those statements that we haven't yet
18 moved to suppress, that they remain under seal as they have
19 been before, as they are attachments to 119G so that
20 Mr. Hawsawi is not prejudiced by any public release of those
21 statements before we have a chance truly to litigate
22 suppression.

23 MJ [COL POHL]: Well, how are we going to litigate the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 motion if the government wants to introduce statements? Which
2 they do that ----

3 DC [MAJ WILKINSON]: If they're under seal, you can still
4 look at them, but then they're not released to the public the
5 way other things used in connection with the motion are.

6 MJ [COL POHL]: Is that the normal practice when the
7 government -- if defense moves to suppress a statement, we
8 keep the statement under seal during the litigation, and then
9 that's --

10 DC [MAJ WILKINSON]: Sir, you must remember, these
11 particular statements have been under seal since the
12 government introduced them in 119G.

13 MJ [COL POHL]: No, I understand that. But that's because
14 they haven't come up -- the way we do the filing here, that's
15 because they have not come up in court. You've not had an
16 opportunity to suppress them. But what you want me to do is
17 hold a suppression hearing and then keep part of the
18 suppression hearing from the -- closed to the public?

19 DC [MAJ WILKINSON]: Yes, sir, until such time as ----

20 MJ [COL POHL]: What's the legal basis for me to do that?

21 DC [MAJ WILKINSON]: I mean, simply that it is unfairly
22 prejudicial to Mr. Hawsawi to have these things released to
23 the public before we have got from the government everything

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 we need to perfect our suppression motions. So in the case of
2 suppression, this is not something that we have everything we
3 need and we're just choosing to wait.

4 It's a case ----

5 MJ [COL POHL]: You are -- you are choosing to wait.

6 DC [MAJ WILKINSON]: Yes, sir.

7 MJ [COL POHL]: Let's be fair about this. You're choosing
8 to do the jurisdictional issue before the suppression issue.
9 You're making that choice.

10 DC [MAJ WILKINSON]: But part of the reason that we're
11 doing that ----

12 MJ [COL POHL]: So don't ----

13 DC [MAJ WILKINSON]: We're waiting to complete discovery
14 from the government that we intend to use for the suppression.

15 MJ [COL POHL]: I understand that, but don't -- but that's
16 a choice -- a tactical decision you are making, not you know.
17 Normally, you would do it in the other order, or at least, I
18 would think, you would do suppressions and then when you want
19 evidence not to be used. I mean, you may run into the
20 situation here under your new theory -- rephrase that -- under
21 your approach, that I will take a statement and consider it
22 for the 502 issue, and then later on found out that statement
23 should have been suppressed and you waived the issue on the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 502 issue.

2 DC [MAJ WILKINSON]: But you mean ----

3 MJ [COL POHL]: That's what you guys are telling me you
4 want to do.

5 DC [MAJ WILKINSON]: But it's also possible under
6 the Rule 102 to have the statement for a limited purpose.
7 It's not a defiance of the rules.

8 MJ [COL POHL]: No. I'm not saying it is. I'm saying
9 it's a strategy that you're pursuing ----

10 DC [MAJ WILKINSON]: Yes, sir.

11 MJ [COL POHL]: You are the ones choosing to pursue this
12 strategy, so that's your decision.

13 DC [MAJ WILKINSON]: Yes, sir. But at the same time we
14 are asking as a matter of fairness to Mr. Hawsawi because in
15 this case firstly, it is obvious that the suppression issues
16 are there. We're simply waiting for further information from
17 the government.

18 MJ [COL POHL]: Suppression issues are not obvious to any
19 court until you file a suppression motion. The fact that you
20 are standing up there and saying there's issues there, I've
21 got that.

22 DC [MAJ WILKINSON]: Yes, sir.

23 MJ [COL POHL]: But under this -- I'll have to think long

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and hard that we're going to all of a sudden close part of
2 a -- of an open session, and what you've simply told me is I'm
3 not sure it meets any of the requirements for closing. I
4 mean, I'll certainly listen to it, but I'm just trying to
5 figure out what's your legal basis other than the possibility
6 it may -- I mean, that logic would entail closing quite a bit
7 of evidence in every case where, if got out, that somehow it
8 might prejudice the accused. True?

9 DC [MAJ WILKINSON]: Yes, sir, that is true. Although
10 it's also true that in most cases you don't have the kind of
11 delays that we've had here, and therefore, it would not be so
12 offensive to have to wait so long to litigate an issue like
13 personal jurisdiction.

14 MJ [COL POHL]: I'm not sure how those issues are
15 connected, but I'll take your word for it.

16 Okay. Anything further?

17 DC [MAJ WILKINSON]: One moment, sir.

18 MJ [COL POHL]: Sure.

19 [Pause.]

20 DC [MAJ WILKINSON]: Just a couple of things to add, sir.

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

22 DC [MAJ WILKINSON]: Right. Since we are, and I think you
23 can see the basic reasons behind it, objecting to the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 relevance of the document, then this whole question of
2 sealing, you know, anything only becomes relevant if you're
3 using them at all; that is, after finding that they're
4 relevant.

5 I should also say since what we're talking about is
6 an FBI statement that all in writing, and a CSRT transcript
7 that's all in writing, that from our point of view, if you
8 decide those things are relevant, we don't really need
9 witnesses like Agent Perkins or Captain Delury just to get up
10 and say that's the real transcript or that's the real ----

11 MJ [COL POHL]: You say you will stipulate to the
12 foundation?

13 DC [MAJ WILKINSON]: Yes, sir. For purposes of ----

14 MJ [COL POHL]: 502 only, I got it.

15 DC [MAJ WILKINSON]: Yes, sir. Exactly. That means no
16 part of a hearing would have to be sealed at all, just those
17 particular documents that are already sealed.

18 MJ [COL POHL]: Okay.

19 DC [MAJ WILKINSON]: You could read them and use them as
20 you saw fit.

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

22 DC [MAJ WILKINSON]: That's all, sir.

23 LDC [MR. RUIZ]: Judge, I'm sorry. Just one more thing.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DC [MAJ WILKINSON]: Oh. I beg your pardon, sir.

2 [Pause.]

3 DC [MAJ WILKINSON]: My last statement, sir.

4 MJ [COL POHL]: Don't make promises you can't keep, but go
5 ahead.

6 DC [MAJ WILKINSON]: Understood, sir.

7 That nothing I say is to be taken as a waiver of
8 suppression of these statements. That's all, sir. If you
9 consider them relevant and useful, read them and keep them
10 under seal. It's fine. We are not ----

11 MJ [COL POHL]: You're not -- what you're -- just so I'm
12 clear, I think I'm clear, is -- your position is for 502
13 purposes and 502 purposes only ----

14 DC [MAJ WILKINSON]: Yes, sir.

15 MJ [COL POHL]: ---- you are not moving to suppress the
16 statements, but you may move them at another time?

17 DC [MAJ WILKINSON]: Yes, sir.

18 MJ [COL POHL]: Got it.

19 DC [MAJ WILKINSON]: That's all, sir.

20 MJ [COL POHL]: Thank you.

21 Trial Counsel.

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

23 MJ [COL POHL]: Good morning.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MTC [MR. TRIVETT]: There's a lot to unpack, I think, in
2 the argument that was just made by counsel.

3 I want to first start a comparison between the two
4 different motions, because they're two different things.
5 Mr. Connell's motion is more of a traditional personal
6 jurisdiction challenge where he's challenging both the
7 existence of hostilities as well as the facts that his client
8 was an alien unlawful enemy belligerent in that he is arguing
9 that he didn't support the hostilities against the United
10 States, didn't materially support the hostilities against the
11 United States.

12 Mr. Hawsawi's motion is not truly a personal
13 jurisdiction motion. It's a subject matter jurisdiction
14 motion masquerading as a personal jurisdiction motion.
15 Ultimately, he continues to argue that the statements aren't
16 relevant because nothing that he said in the statements go to
17 the issue of whether or not hostilities existed. And his only
18 one witness that he's asked for, Professor Watts, is going to
19 come and give what we believe to be an improper legal
20 conclusion in his testimony that the United States can't be in
21 hostilities with al Qaeda, which we believe brings it back to
22 488, and we believe it brings it back to the instructions in
23 Nashiri that we should be entitled to prove that at trial

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 because it's also an element of the offense.

2 When we have the burden for jurisdiction, which we
3 believe we do at this point based on your rulings for both
4 Mr. Ali and Mr. Hawsawi, we're entitled to prove jurisdiction
5 as to all elements of jurisdiction. We're entitled to prove
6 that he was an alien, that he was an unprivileged enemy
7 belligerent, and we would establish that hostilities existed,
8 you know, despite our objection that we didn't believe we
9 needed to.

10 But it can't be that you challenge the jurisdiction
11 of the commission, and that ultimately you then seek to seal
12 all of the evidence that the prosecution intends to use to
13 establish that, in fact, you are an AUEB and that we have been
14 holding you unlawfully for the last 14 years and we can't
15 exercise proper criminal jurisdiction over you. That can't be
16 the standard.

17 We didn't choose to litigate this motion, they did.
18 And when they did, it comes with consequences; and one of the
19 consequences of that is that the world's finally going to hear
20 what it is that the government can establish through evidence
21 that you supported the 9/11 attacks.

22 So we would certainly be against ----

23 MJ [COL POHL]: Mr. Trivett, let me make sure it's clear

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 here.

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

3 MJ [COL POHL]: You've notified -- and I am only talking
4 about Mr. Hawsawi now; we will talk about Mr. Aziz Ali in due
5 course. You've notified them of statements, particular
6 statements, CSRT statements, FBI statements that you intend to
7 use for personal jurisdiction?

8 MTC [MR. TRIVETT]: Correct.

9 MJ [COL POHL]: I don't necessarily disagree with the
10 concept that we're dealing with hostilities twice here.

11 MTC [MR. TRIVETT]: I understand.

12 MJ [COL POHL]: But that ship has sailed.

13 MTC [MR. TRIVETT]: Yeah, I understand.

14 MJ [COL POHL]: So if I am to understand, your --
15 Mr. Hawsawi's position is at least on the CSRT statements and
16 the FBI statements, putting the sealing issue to the side, is
17 there's no need to call witnesses because they will stipulate
18 to the foundation.

19 MTC [MR. TRIVETT]: But I still believe they're objecting
20 to the relevancy of the statements. That was my
21 understanding.

22 MJ [COL POHL]: That's my understanding also. Is that
23 correct?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DC [MAJ WILKINSON]: Yes, sir.

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

3 So really the only issue we're at is, what?

4 MTC [MR. TRIVETT]: That's a good question, sir. We
5 have ----

6 MJ [COL POHL]: They've requested one witness. You, I
7 think, have six?

8 MTC [MR. TRIVETT]: We do, and --

9 MJ [COL POHL]: Maybe now four?

10 MTC [MR. TRIVETT]: And it may go down even further than
11 that. We're not going to call any witnesses that aren't on
12 the witness list.

13 MJ [COL POHL]: Okay.

14 MTC [MR. TRIVETT]: But I still don't see -- their
15 challenge still doesn't seem to be a factual challenge. We'll
16 establish hostilities factually, if necessary. We're capable
17 of doing that. We're willing to do that. I still don't see
18 their challenge as being that.

19 I don't know that they're disputing the '98 embassy
20 attacks, the '96 declaration of war, the '98 fatwa. I don't
21 think they're disputing any of that. I think it's an
22 assumption that even assuming that all of that happened and
23 even assuming that al Qaeda was responsible for all of that,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 it's still not hostilities under the law of war. That's how I
2 read their motion to be as I see as a legal motion. I don't
3 see that as a factual motion.

4 But that being said, if the commission sees that as a
5 factual issue, we'll establish those things.

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

7 MTC [MR. TRIVETT]: Okay.

8 MJ [COL POHL]: Anything further?

9 MTC [MR. TRIVETT]: Let me just check real quick, sir.

10 [Pause.]

11 MTC [MR. TRIVETT]: Ultimately, I think in order to make a
12 decision on the relevancy, we have to have better specificity
13 and clarity exactly what it is they're challenging. If they
14 are challenging the AUEB status writ large, then I don't think
15 an argument can be made that those statements aren't relevant.
16 If we're establishing only the existence of hostilities, I
17 think it's a different call. But ultimately, as the
18 government works, we don't have that luxury. We have to
19 establish all factors, if jurisdictional ----

20 MJ [COL POHL]: Right now. Right now, what you have is a
21 challenge to the personal jurisdiction.

22 MTC [MR. TRIVETT]: And ----

23 MJ [COL POHL]: And which has different elements to it.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

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

2 MJ [COL POHL]: If we wish to stipulate to certain
3 elements and, therefore, take it off the table, that's up to
4 them.

5 MTC [MR. TRIVETT]: Yes, sir. So at that point
6 absent ----

7 MJ [COL POHL]: No, I agree with you, Mr. Trivett.

8 MTC [MR. TRIVETT]: Okay.

9 MJ [COL POHL]: That the lay of the land is the burden is
10 on you to show it.

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

12 MJ [COL POHL]: And show all elements of it, including
13 he's an alien, for example.

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

15 MJ [COL POHL]: No, I got it. I got it. Again, if they
16 choose to stipulate away some of the elements -- let's just
17 take, for example, the fact that he's not an American citizen.
18 Again, I'm making no determination. Then I don't have to
19 prove that.

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

21 MJ [COL POHL]: That's between you and them.

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

23 MJ [COL POHL]: Not me.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MTC [MR. TRIVETT]: As of now, we plan on proving every
2 element by a preponderance of the evidence.

3 MJ [COL POHL]: Okay.

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

5 MJ [COL POHL]: Anything further?

6 DC [MAJ WILKINSON]: Not unless -- not unless you have
7 questions for us, sir.

8 MJ [COL POHL]: I don't. Okay, now let's go to Mr. Ali's
9 challenge.

10 Mr. Connell.

11 LDC [MR. CONNELL]: Sir, there's not a lot that I can say
12 today, but I just wanted to explain why there's not a lot that
13 I can say. I have put the details into footnotes on page 4 of
14 519D.

15 But boiled down, the last 11 pleadings that we have
16 attempted to make on these issues that we have -- have been
17 declined for filing, not because of any procedural reason but
18 because they implicate compartments that appear to be
19 problematic. So the direction to us has been to submit them
20 for classification review, and I have submitted them for
21 classification review.

22 MJ [COL POHL]: Let me ask you this before we get to 502
23 itself, because this is really a predicate to 502. You were

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 given, as I understand it, some documents from the government
2 with classification markings you were unfamiliar with.

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

4 MJ [COL POHL]: And when you tried to submit them to us --
5 we were all -- us, to the trial judiciary -- we had similar
6 unfamiliarity with them, and at this point we're trying to --
7 "we" is the wrong word. You've submitted them for some type
8 of review. I don't know who does this.

9 LDC [MR. CONNELL]: So, sir, that's correct. We've
10 submitted them for review through the process established in
11 AE 13BBBB, Protective Order #1, and supervised by the
12 convening authority and administered by the Office of Special
13 Security.

14 One thing I will make clear is that that process is
15 entirely a black box to us. We hand them to a person who is
16 responsible for coordinating the review and then we -- and
17 then some day they show up again.

18 MJ [COL POHL]: You've given them that information?

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

20 MJ [COL POHL]: When did you do that, Mr. Connell?

21 LDC [MR. CONNELL]: Sir, there are a number of different
22 dates. The most recent on or about 6 June 2017, we attempted
23 to file five motions and that was when we were -- that was

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 part of a long conversation with, you know, what are we going
2 to do, how are we going to handle this. Eventually we
3 submitted them for classification review on 27 June of 2017,
4 not because we were delaying but everybody involved was trying
5 to figure out what was going to happen.

6 MJ [COL POHL]: Let me ask you a question: What level are
7 these classified at? SECRET? TOP SECRET?

8 LDC [MR. CONNELL]: TOP SECRET-plus.

9 MJ [COL POHL]: And they've got the little markings on
10 them. I won't go into too much detail what the markings are.

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

12 MJ [COL POHL]: The markings are supposed to be related to
13 a particular program or ----

14 LDC [MR. CONNELL]: Compartment.

15 MJ [COL POHL]: ---- compartment. And you would think,
16 and you're just asking which program is this so I need to get
17 read on or I don't, the problem has been overcome by events or
18 by another program ----

19 LDC [MR. CONNELL]: Yes, sir. Some of them may have been
20 disestablished, we don't know.

21 MJ [COL POHL]: Now two months later, that's still where
22 you're at.

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

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: Let me say, sir, in fairness, that
3 that is not unusual. I went back in preparation for this and
4 looked at our classification review tracker. Some things stay
5 in classification review for years. I say that not as a -- I
6 just say for your situational awareness.

7 MJ [COL POHL]: Okay. So where does that put you today on
8 502? You need that stuff before you can proceed with 502?

9 LDC [MR. CONNELL]: Yes, sir. Five of the 11 documents
10 are 505 notices.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: But most significant of all, our reply
13 in which we set out our positions on all the things you
14 discussed today and a wide variety of things is the 11th
15 document in classification review.

16 MJ [COL POHL]: Okay. Let me, and I'll go -- I know we're
17 maybe a little ahead of myself here, in your pleadings, your
18 502 pleading, your witness request, a lot of them went to
19 voluntariness of statements.

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

21 MJ [COL POHL]: Okay. Do you intend to move to suppress
22 those?

23 LDC [MR. CONNELL]: The short answer to that is yes. The

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 long answer is that we -- the government has chosen at this
2 preliminary type hearing to introduce statements. So under
3 10 U.S.C. 948r and a variety of other authorities, in order
4 for the military commission to accept them, M.C.R.E. 304,
5 the -- I'm sorry, Rule for Military Commission 304, the
6 military commission has to find them voluntary and reliable.
7 So if the government intends to introduce the statements in
8 this personal jurisdiction hearing, which we understand that
9 they do, we intend to contest that voluntariness and
10 reliability.

11 MJ [COL POHL]: Isn't that a separate motion, though?

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

13 MJ [COL POHL]: Or it's not -- not separate in the sense
14 that you've not filed a standalone suppression motion on these
15 statements.

16 LDC [MR. CONNELL]: That's right, sir, which a standalone
17 suppression motion, as it's constructed under the rules, goes
18 to their use at trial. We intend to do so. But for this
19 hearing, if the government wants to use the statements at this
20 hearing, part of their burden is to demonstrate their
21 voluntariness and reliability, and we intend to contest those
22 elements.

23 I'm not making the government use the statements at

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the personal jurisdiction hearing. That's entirely their
2 choice.

3 MJ [COL POHL]: No, no. I'm just -- as I just told
4 Mr. Hawsawi's team. They don't speak for you. I know you
5 don't speak for the government.

6 LDC [MR. CONNELL]: That's right. But Mr. Trivett was
7 correct that evidentiary choices have consequences. One of
8 those consequences is if the government seeks to use
9 statements, they bear the burden of proving their
10 voluntariness and reliability.

11 MJ [COL POHL]: Just under general voluntariness.

12 LDC [MR. CONNELL]: But also under 948r and Rule 304.

13 MJ [COL POHL]: Let me ask the question I asked earlier:
14 If later on you file a suppression motion and I suppress them
15 on whatever grounds but don't do that under 502, have you ----

16 LDC [MR. CONNELL]: Fear of waiver is one of the things
17 driving our position.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: To me, it seems that if you allow
20 statements to go past unchallenged, one allows statements to
21 go past unchallenged, there is fear risk that someone at some
22 point would consider that to be a waiver, because the general
23 rule is one must assert one's rights at every opportunity. If

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 you sleep on your rights, then there are consequences for
2 that, too.

3 So, yes, if I understand where you're going with that
4 question, yes, if -- I think it could possibly, and I'm not
5 trying to mess with anybody else's strategy, but it could
6 possibly be problematic to allow statements to be introduced
7 without challenge.

8 Of course, factually, of course, it's our position
9 that the statements are not voluntary and reliable and there's
10 no reason why we would allow them to go past unchallenged.

11 MJ [COL POHL]: But if you made it now as a -- as a --
12 just standalone suppression motion, okay, and they were found
13 to be involuntary, could they be used still in the 502?

14 LDC [MR. CONNELL]: No, sir.

15 MJ [COL POHL]: But you're not choosing to do that as a
16 standalone motion.

17 LDC [MR. CONNELL]: Let me be clear.

18 MJ [COL POHL]: No, my problem ----

19 LDC [MR. CONNELL]: I understand exactly what you are
20 saying, and I understand what you are saying about voluntary
21 choices in litigation. So I want to be clear on this.

22 We did not ask for personal jurisdiction to be
23 litigated at this time. In fact, we opposed it. We filed a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 motion setting out our position that the government has told
2 us that additional hostilities discovery is coming. We know
3 the military commission has told us that we'll have an
4 opportunity to litigate the -- whether any additional
5 discovery on the RDI issues is necessary, and in the fullness
6 of time, and we're working our way through discovery as fast
7 as possible, in the fullness of time, we expect all of those
8 things to come about.

9 If I had been -- if I were the king, we would have
10 brought personal jurisdiction at a different time. It didn't
11 happen that way, and as you said, that ship has sailed.

12 The -- Mr. Hawsawi opposed our position on timing.
13 The military commission ruled, set a timetable, and we have
14 done everything possible to comply with that timetable. We
15 have dedicated all of our resources to this question.

16 MJ [COL POHL]: I understand, Mr. Connell. But just to be
17 clear, I mean, three of your colleagues here are choosing to
18 defer this issue.

19 LDC [MR. CONNELL]: At their own risk, sir. I choose not
20 to take that risk.

21 MJ [COL POHL]: But -- and that's what I'm trying to
22 understand. You seem to be saying is you're forced to
23 litigate it now but ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: I'm not saying that I'm forced.

2 MJ [COL POHL]: ---- but you don't want to. You

3 choose ----

4 LDC [MR. CONNELL]: I embrace the burden. You issued an
5 order and I'm complying.

6 MJ [COL POHL]: Okay. So where we're at now is -- well,
7 the two separate issues. You still got discovery issues.

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

9 MJ [COL POHL]: For want of a better term.

10 So we're not -- your issue isn't ripe now anyway to
11 litigate 502.

12 LDC [MR. CONNELL]: That's right. No, if you say litigate
13 502, we will go with what we have.

14 We are attempting -- I mean, five of those 11 motions
15 were motions to compel hostilities. I suspect, given the
16 scope of 502, that it will take -- you know, it's not going to
17 be done in a day, and as sometimes happens in the military
18 commission, sometimes we litigate discovery issues as they
19 arise.

20 So I'm not asking -- early in the process I stated my
21 position on timing. It was declined by government and
22 colleague and military commission, and I understand, I lost.
23 So I dealt with that loss and moved forward.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Do you feel you can fully litigate it
2 without these other -- this other discovery? I don't want to
3 put you in the position where you have to -- where -- and
4 again, I don't think I said this; if I did, let me clarify.

5 If you believe that you need additional discovery --
6 what we're talking about here is discovery you've actually
7 seen. All we're talking about is how you can use it, right?
8 I mean, you have seen these documents.

9 LDC [MR. CONNELL]: No, sir. Let's be clear.

10 MJ [COL POHL]: Okay. You've seen the markings on the
11 documents.

12 LDC [MR. CONNELL]: So the -- after we received two
13 tranches of hostilities discovery ----

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: --- which were the documents with the
16 problematic markings that we discussed, we filed a number of
17 follow-up discovery requests with the government saying, you
18 know, based on what we've seen, we believe these additional
19 documents exist. We believe that you over-redacted them,
20 et cetera. Ordinary course of discovery practice.

21 They have informed us that they have -- are working
22 on a more fulsome response, and we expect that at some point
23 in the future. But that's what I raised in 488-3, and the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 military commission, you know, of course ruled against me. I
2 understand. So I pushed forward with everything.

3 MJ [COL POHL]: Refresh my -- 488 was the subject matter
4 jurisdiction?

5 LDC [MR. CONNELL]: The subject matter version of this.

6 MJ [COL POHL]: Okay.

7 LDC [MR. CONNELL]: Our position was, look, there's a
8 hostilities discovery coming. This is a hostilities motion,
9 what we should be doing is waiting until we have the
10 discovery.

11 Mr. al Hawsawi's team, for their own perfectly sound
12 strategic reasons, did not want to wait.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: And so they opposed it. The
15 government somewhat opposed it, and the military commission
16 ruled against us, so we proceeded on 488.

17 MJ [COL POHL]: I got it.

18 LDC [MR. CONNELL]: We proceeded on 502 and that's how we
19 find ourselves where we are right now.

20 MJ [COL POHL]: But I just want to make it clear is that
21 this issue, what I'm calling the markings issue -- --

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

23 MJ [COL POHL]: ---- if you believe you need that, I mean,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 it's not going to force you -- I'm just saying.

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

3 MJ [COL POHL]: If you choose to proceed with what you
4 have, that's a choice you're making. If you are asking me for
5 time to until we resolve the other discover issue, that's your
6 choice to ask.

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

8 MJ [COL POHL]: But I'm saying I don't want to get into
9 the position here, which I thought I heard you might say, that
10 you're being forced to go forward without the -- without all
11 of the discovery you want or believe you're entitled to ----

12 LDC [MR. CONNELL]: I understand why it might sound like
13 that, and what I was trying to do, and perhaps poorly, is to
14 answer the question of why haven't we filed a motion to
15 suppress the use of statements at trial. That is because we
16 believe there is additional information and discovery
17 forthcoming.

18 MJ [COL POHL]: But if you're going to attack the
19 voluntariness of the statement at the 502 ----

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

21 MJ [COL POHL]: ---- wouldn't it be the same factual
22 predicate discovery that you would need?

23 LDC [MR. CONNELL]: We are prepared to go at the 502

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 hearing assuming that are your pleadings are allowed to be
2 filed eventually as classification issues are resolved. We
3 are prepared to go forward. What I would like -- would I like
4 to have more discovery? Certainly. Do I suspect as we go
5 along, the discovery will be produced as the government has
6 produced on a rolling basis? Yes.

7 MJ [COL POHL]: So fundamentally, I think we've got -- in
8 a twisted sort of way, we have gotten to the same position, is
9 your position is we need to resolve this marking issue
10 discovery.

11 LDC [MR. CONNELL]: True.

12 MJ [COL POHL]: And then you're ready to go forward on
13 502.

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

15 MJ [COL POHL]: Okay. Then let me slide back over here.
16 On the statement, the suppression of the statement itself, are
17 you essentially going to try to suppress it twice?

18 LDC [MR. CONNELL]: We are -- so perhaps the confusion is
19 around the word "suppress," which is a term of art. But in --
20 we'll oppose the admissibility and the weight of the
21 statements that the government intends to introduce at the
22 personal jurisdiction hearing.

23 The basis on which we will oppose their admissibility

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and weight is voluntariness and reliability, liability in
2 their various iterations constitutionally and statutorily.

3 MJ [COL POHL]: And then later on file a motion that it's
4 not voluntary.

5 LDC [MR. CONNELL]: Yes, sir. For -- that we will file a
6 motion -- there are a number of predicates for suppression.
7 There is presentation, that's Miranda, et cetera, et cetera.

8 MJ [COL POHL]: I got it. My concern is judicial economy.
9 It kind of sounds to me -- and tell me where I'm off base
10 here, is you're going to file a voluntariness use of the
11 statement -- I'm using the term "suppression," you can use
12 something else -- for 502, and then down the road you're going
13 to file a voluntariness challenge to the statement for any
14 other purpose. Aren't we litigating the same thing twice now?

15 LDC [MR. CONNELL]: If the government chooses to use -- at
16 the personal jurisdiction hearing, and I just heard the
17 government say it may reduce its number of witnesses. It has
18 strategic control over what -- how it satisfies its burden.

19 If the government chooses to attempt to introduce
20 statements, we can object to the admissibility of those
21 statements, and we can introduce evidence of our own to say
22 that the military commission should not give them the weight
23 that the government would like to because of their

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 unreliability.

2 When you say do I intend to file a motion to
3 suppress, no. But I have noticed witnesses.

4 MJ [COL POHL]: You now -- up until this point it
5 always -- there weren't voluntary and they're unreliable.

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

7 MJ [COL POHL]: Do you now just -- what you just said,
8 just simply was a weight issue which goes to the reliability
9 prong.

10 LDC [MR. CONNELL]: Well, I said admissibility and weight.

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

12 LDC [MR. CONNELL]: Admissibility is voluntariness and
13 weight is reliability.

14 MJ [COL POHL]: So but you believe you can attack both of
15 those ----

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

17 MJ [COL POHL]: ---- as part of the motion and then later
18 on attack it as a separate motion to suppress?

19 LDC [MR. CONNELL]: In the same way, if the government
20 introduces a document and I have an objection to it based on
21 relevance, because the government as the proponent of the
22 relevance has to demonstrate its reliability, any defendant
23 can object to the admissibility of the statement of any piece

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of evidence and then the military commission resolves the
2 objection.

3 MJ [COL POHL]: As an evidentiary objection.

4 LDC [MR. CONNELL]: As an evidentiary objection.

5 MJ [COL POHL]: But that's separate than a motion to
6 suppress.

7 LDC [MR. CONNELL]: Under the rule, there is a thing
8 called a motion to suppress, which addresses the use of
9 statements at trial. There's no separate rule that addresses
10 the use of statements in other contexts. But in this
11 context -- if the government chooses to attempt to introduce
12 these statements, we will oppose their admissibility on
13 voluntariness grounds. And by voluntariness, I mean, among
14 other things, 948r and 304, and we will attack the weight that
15 they should be given by the military commission.

16 MJ [COL POHL]: Okay. Thank you, Mr. Connell. Anything
17 further?

18 LDC [MR. CONNELL]: So just so I'm clear where we're
19 leaving it, the military commission intends to give us some
20 kind of guidance on how it intends to go forward and then we
21 will wait for ----

22 MJ [COL POHL]: I'm going to talk with the government
23 about this marking issue.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Sure.

2 MJ [COL POHL]: Because that appears to be ----

3 LDC [MR. CONNELL]: The current roadblock.

4 MJ [COL POHL]: That's a bump in your road.

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

6 MJ [COL POHL]: That's not in the other road.

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

8 MJ [COL POHL]: So since it ----

9 LDC [MR. CONNELL]: I see. I understand.

10 MJ [COL POHL]: Thank you.

11 LDC [MR. NEVIN]: Judge, can I be heard?

12 MJ [COL POHL]: Briefly, Mr. Nevin.

13 LDC [MR. NEVIN]: The military commission just made the

14 point that we are not joined to 502 at this point and I'm not

15 going to ask to speak to that, but as you made the point that

16 some of what is happening now has the potential to burden us

17 at a later time when the discovery is complete, and when we

18 feel we're in a position to go forward.

19 So not to the merits of 502, but to the procedure, I

20 take it that a statement that is affirmatively offered by the

21 government has the obligations -- comes with it the

22 obligations to make the demonstrations shown by 948r and by

23 the rule as well, and that's an affirmative obligation that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 falls to the government.

2 But there might be other grounds for suppress -- for
3 an invocation of the exclusionary rule, which is a
4 constitutional remedy. There might be other grounds for that
5 that would apply in an affirmative motion to suppress. And I
6 hear Mr. Connell saying that he's proceeding with one part of
7 this, but not the other, and I hear Mr. Hawsawi saying he's
8 not doing any of it.

9 So I just want to -- I think maybe what I want to do
10 is to ask you -- I assume that we would be able to take a
11 separate position on this matter because it doesn't go to the
12 merits of 502. It goes more to a procedural question that is
13 capable of repetition and appearing -- you know, becoming an
14 issue in other motions. And I just -- I call that to the
15 military commission's attention.

16 I also wanted to say that -- to call your attention
17 to the proposition, as I understand it, that there are
18 materials being discussed between the parties that trial
19 judiciary is not legally capable at this point of looking at
20 or receiving, and that's the reason that we are in the
21 position that we're in here today.

22 MJ [COL POHL]: Yeah. Just to clarify that point is
23 pleadings come to the court information security office, this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 particular pleadings and we have the same -- when I say "we,"
2 it's the ecumenical we, because I generally never see this
3 stuff until it gets through the process. In fact, that's why
4 I have a court information security office.

5 LDC [MR. NEVIN]: Right.

6 MJ [COL POHL]: I don't have to replace my computers as
7 often as some other people do. But the same issue came up
8 that they -- they, we, they weren't read onto the same program
9 and that's where -- that's how it got into my knowledge of it,
10 and again, it's only that indirect and so that's when it was
11 go figure this out. So that's ----

12 LDC [MR. NEVIN]: Right.

13 MJ [COL POHL]: We're not an OCA or anything else, but we
14 are -- just like your DS0, my CS0s are there to --

15 LDC [MR. NEVIN]: Sort this out.

16 MJ [COL POHL]: And then there's some type of discussion
17 with Mr. Connell and then it was finally said, go send it back
18 to the people who theoretically know what this means. It's
19 your basic -- I understand, these are -- you know, with five
20 accused there's always going to come to the issue, does it
21 apply to all five or only one. These are personal
22 jurisdiction issues, so whatever position that -- well,
23 Mr. Hawsawi's taken a position that's different from

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Connell's position, so I'm not imputing that to anybody
2 else's position, if that's kind of what you're asking me. And
3 if there's a suppression motion later on at a different basis,
4 so be it. They're not ----

5 LDC [MR. NEVIN]: Yeah. I understand. I take it we're
6 okay there, as I sit here somewhat nervously listening to this
7 discussion of this going forward at a time that I think -- it
8 seems to me it's premature. I don't think we should be here
9 on this, and I sort of hear Mr. Connell saying he's got one
10 foot on either side of the chasm there, and I'm over on one
11 side of it, and ----

12 MJ [COL POHL]: Well, three of you are on one side, he's
13 on both sides, and then Mr. Hawsawi is on the other side.

14 LDC [MR. NEVIN]: Mr. Hawsawi is over here.

15 MJ [COL POHL]: Quite frankly, I will wait until the
16 government says it. I think as of today's hearing,
17 Mr. Connell's probably going to be more on your side than
18 Mr. Hawsawi's side, but that's -- we'll see. And the way
19 we're going forward on this procedurally.

20 LDC [MR. NEVIN]: Yes, sir. But I -- just on the last
21 point, the question of the military commission's ability to
22 receive these pleadings, I just want to ask the military
23 commission to bear this in mind as we go forward on other

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 motions today.

2 Mr. Mohammad said to me yesterday, "I'm used to the
3 idea that they can kill me based on things I can't see, but
4 now it seems they want to kill me based on things the judge
5 can't see."

6 And I submit to you that this fact, the fact that you
7 are -- the fact that -- I say "you," and I mean the ecumenical
8 you, are unable to access some of these materials, even
9 temporarily, should bear on how we resolve other motions like
10 425 and like 133 and like 152, and I will say this is the --
11 425 is the motion to recuse arising out of the destruction of
12 the black site without notification and 133 is the
13 surveillance of attorney-client meeting rooms issues, and 152,
14 and I'm not speaking for -- I don't pretend to speak for
15 Mr. Binalshibh on this, but the -- those problems, and these
16 motions all have in them an element of trust because you
17 simply have to take reports from the government, which -- from
18 the prosecution, which in turn takes them from the prison and
19 relays them to you. And where there are these structural
20 impediments to your -- to the trial judiciary receiving this
21 kind of information, I think that's important to bear in mind
22 when we come to the resolution of those other motions.

23 And thank you for hearing me out.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Thank you.

2 Trial Counsel, do you want to be heard on
3 Mr. Connell's position on 502?

4 MTC [MR. TRIVETT]: Sir, I think the prosecution and
5 Mr. Connell are actually in agreement on the timing of the
6 jurisdictional hearing, at least in regard to Mr. Connell,
7 understanding that Mr. Hawsawi's is different and that he's
8 asked for a December date.

9 Ultimately, I think he said the ship has sailed and
10 we don't believe it has. Ultimately, in our filings, if we
11 were king for a day, what we would do is have them have all of
12 the discovery they believe they need for suppression. Then
13 move to a suppression hearing. After a conclusion on the
14 suppression hearing for the statements, we would then know
15 what evidence is available to us for both the jurisdictional
16 hearing and for the trial, and then we would proceed to a
17 jurisdictional hearing immediately prior to assembly of
18 members for the actual trial. That would be our preference.

19 It sounded like Mr. Connell would have preferred it
20 go that way as well for him. We're just reacting to the
21 judge's order on this. Jurisdictional challenges obviously
22 are of great concern to the prosecution whenever they're
23 raised, and we'll do whatever the judge says we'll do. But at

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 least in regard to Mr. Connell, we believe that the timing
2 aspect of it, and for judicial economy, should be much closer
3 to trial after he has all of the discovery that he needs.

4 MJ [COL POHL]: Let me ask you this. Although I might
5 take issue with Mr. Nevin's statement that somehow they're
6 going to -- this case is going to be adjudicated with evidence
7 that I don't see. I don't think that's really going to
8 happen. I don't see it right now.

9 But what's with this issue of a document being marked
10 with a -- with a program that nobody's aware of, and we take
11 two months just to find out whether or not -- I mean,
12 Mr. Nevin did make a good point. I mean, it's -- my office
13 rejected it because we don't know what the program is, and it
14 takes -- and I know -- I keep hearing this, and I -- people's
15 eyes always roll about why this takes so long, but this is
16 another example.

17 Isn't there -- I mean, maybe I'm naïve, but I thought
18 when documents are marked, that somebody keeps a record of
19 what the marking means, and it should be very easy to see
20 whether or not it's up to date or not, not take two months.
21 And what I'm being told by my CSOs is they're no closer now to
22 getting an answer. Because we need to get an answer, too.

23 If I need to be read on to an additional program, it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 needs to be done. We have an issue here on what should be
2 relatively simple. I'm not going to go into what it says on
3 the document. It never got to me. But now it takes two
4 months to know whether or not this is an active program and
5 what this document means and it came from you guys.

6 MTC [MR. TRIVETT]: It did.

7 MJ [COL POHL]: Then apparently you don't know where it
8 came from.

9 MTC [MR. TRIVETT]: We're ----

10 MJ [COL POHL]: Or do you?

11 MTC [MR. TRIVETT]: We're aware of where it came from and
12 got the relevant read-ons to review the discovery, and then we
13 provided the relevant discovery. Some of this is because
14 we're dealing with hostilities and we're dealing with al Qaeda
15 since 1995.

16 MJ [COL POHL]: Okay.

17 MTC [MR. TRIVETT]: Some of it, quite frankly, is 25 years
18 old, so a lot of times you have predecessor compartments that
19 we believe that the read-ons are sufficient for.

20 Some of the frustration from managing trial counsel
21 perspective on this is that we're walled off from whatever
22 they're putting through the review. Oftentimes we don't hear
23 what's going in the review until we're in court.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: I got it. I'm not -- I'm not asking you
2 necessarily to know that you just said something is you knew
3 what the documents were and you got the relevant read-ons.

4 MTC [MR. TRIVETT]: Then I believe we notified the defense
5 to get those.

6 MJ [COL POHL]: Yeah. Shouldn't -- and shouldn't somebody
7 else be getting the same read-ons?

8 MTC [MR. TRIVETT]: Yes, sir. I did not know that there
9 was any problem getting the read-on either from the judiciary
10 or from the defense. But it might be that they put it through
11 a classification review because they believed that they
12 already have the necessary read-on because it's just a
13 predecessor. And I'm in a blind area.

14 MJ [COL POHL]: I'll ask Mr. Connell another question in a
15 minute. I'm with you. You think it's just a matter of
16 read-ons.

17 MTC [MR. TRIVETT]: Read-ons or a determination that
18 you're already read on because it's a predecessor.

19 MJ [COL POHL]: Okay. Got it. Thank you.

20 MTC [MR. TRIVETT]: One other point on what Mr. Connell
21 said in his argument. When asked if he's going to move to
22 suppress the statements, he said, well, we're going to oppose
23 the admissibility of them so we're going to say that they

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 shouldn't be considered at all, and then we're going to --
2 we're also going to challenge the reliability of the
3 statements, but this isn't a suppression motion.

4 We believe it is. And we believe that for judicial
5 economy's sake, it should all be done at once. Whether or not
6 you should consider this motion or these statements for the
7 jurisdictional hearing or the trial, it's the same exact
8 factual predicate. I think the military judge picked up on
9 that. There would be no reason to have to call these
10 witnesses twice to try to establish that they're voluntary and
11 reliable statements, and we would ask that that all be moved
12 to after Mr. Connell has all of the discovery he believes he
13 needs in order to make that suppression hearing -- the
14 suppression motion.

15 Thank you, sir.

16 MJ [COL POHL]: Thank you.

17 Mr. Connell.

18 LDC [MR. CONNELL]: Your Honor, you had a specific
19 question, sir?

20 MJ [COL POHL]: Yeah, I do.

21 I'm going back to the marking issue. You got these
22 from the government?

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

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Did you go back to the government and ask
2 them what they meant?

3 LDC [MR. CONNELL]: We -- through ----

4 MJ [COL POHL]: This is coming to my mind. Yeah.

5 LDC [MR. CONNELL]: So I believe -- we're going to call
6 the markings A, B, C and D. Okay.

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: The A, marking A, has had multiple --
9 the same compartment has multiple names over time. All of
10 us -- it's an ACCM. All of us have discussed that ACCM
11 marking A before, and many of us have been read on. My
12 refresher read-on was in this courtroom.

13 Markings B, C and D, I don't know what they are.
14 They are -- the government is exactly right when marking A --
15 before they even provided us discovery with marking A, they
16 said, hey, you have been read on to marking A? If you
17 haven't, you know, you need to work the channels to get read
18 onto marking A, which we did. And some of the markings are
19 predecessors to the current version of marking A.

20 Marking B, C and D, however, I don't know what kind
21 of compartments they are. I don't know who ----

22 MJ [COL POHL]: But you got these documents from the
23 government.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: Did you ask them?

3 LDC [MR. CONNELL]: Yeah. We sent them discovery requests
4 about, hey, marking B is a name of a program. What is this
5 about?

6 MJ [COL POHL]: What response, if any, did you get?

7 LDC [MR. CONNELL]: They said they're working on it.

8 MJ [COL POHL]: Okay. Because I heard Mr. Trivett ----

9 LDC [MR. CONNELL]: We're working on it.

10 MJ [COL POHL]: ---- just say -- and this is where I never
11 understood this problem to begin with when I first became
12 aware of it. If these documents came from the government --
13 and I didn't know that at the time. I know it now, but if
14 they came from the government, this entity ----

15 LDC [MR. CONNELL]: Sure.

16 MJ [COL POHL]: ---- they must know what they're -- you
17 would assume that what read-ons or what they mean, but
18 apparently, I mean, I don't understand how they can sit there
19 and say on the one hand, we got the necessary read-ons and the
20 next hand say we're working on them to see what you got to
21 get. It seems to me it's very simple. Maybe I'm just slow on
22 this stuff. It is just a read-on issue is what I'm kind of
23 hearing.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: We can be more specific in a 505(h) on
2 this.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: But as I understood the problem,
5 there's the possibility that some of these compartments, B, C
6 or D, have been disestablished and the reason that the trial
7 judiciary asked me to get the classification review was to
8 find out do these compartments still exist. If so, what is
9 their current name so that they can seek a read-on for you or
10 for me or for whoever.

11 MJ [COL POHL]: That's where we are kind of at right now.

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

13 MJ [COL POHL]: Waiting for that to work through the
14 system. Got it.

15 LDC [MR. CONNELL]: The other observation I wanted to make
16 is we will comply with whatever scheduling or the -- however
17 you tell us to do things. In 502I, you told us to have a
18 witness list on a three-week turnaround. We put together a
19 witness list on a three-week turnaround. The government today
20 says we should do everything in a nice, orderly fashion, we
21 should get all of the discovery. That sounds ideal, but is
22 also the exact opposite of the government's briefed position
23 in 478 where they're asking for things like all legal motions

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to be filed ----

2 MJ [COL POHL]: Is that the trial conduct order?

3 LDC [MR. CONNELL]: Yes, sir. And which all legal motions
4 to be filed by the 22nd of September, all discovery
5 motions ----

6 MJ [COL POHL]: I understand, Mr. Connell.

7 LDC [MR. CONNELL]: You know, that idea does not lend
8 itself to an orderly production of all discovery, litigation
9 of discovery gaps and holes, and then bringing personal
10 jurisdiction challenge. The personal jurisdiction challenge
11 arose when it did. The military commission issued the orders
12 that it did. And using what we have, we are ready to go
13 forward once we can get our pleadings through classification
14 review and actually filed.

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

16 [Pause.]

17 LDC [MR. CONNELL]: Sir?

18 MJ [COL POHL]: Yes.

19 LDC [MR. CONNELL]: If you're looking for things that
20 involve only our team, I should also mention 279D.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: The transport van photos.

23 MJ [COL POHL]: I wasn't, but I will.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I'm just looking to see. There's no outstanding 502
2 notice, 505(g) notice for a 502, correct? You mentioned
3 earlier about we could discuss in a 505(h) but I'm not sure
4 there's ----

5 LDC [MR. CONNELL]: Right. Five of our documents that got
6 rejected from 505 notices.

7 MJ [COL POHL]: We get a little bit of a do-loop here.

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

9 MJ [COL POHL]: Until we know what they are, we could --

10 LDC [MR. CONNELL]: We could file a generic 505(g) notice.

11 MJ [COL POHL]: I don't know if we need to. It strikes to
12 me that the government is aware. You guys talk among
13 yourselves, but it strikes to me that the issue -- everybody
14 knows what the issue is and we may not need to go into a --
15 discuss the classified nature of the program itself.

16 LDC [MR. CONNELL]: All right, sir.

17 MJ [COL POHL]: If both sides believe that's a proper way
18 forward, we can discuss whether or not we can do it.

19 Okay. Just kind of the way ahead, and then I'm going
20 to hear from Mr. Harrington. Tomorrow will only be a
21 classified hearing, so there will be no public hearings
22 tomorrow, and then we will determine whether or not we need to
23 do a closed 806 classified session later in the week. We

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 discussed this at the 802 the other day. For planning
2 purposes, I'm going to go until about 1:00. Prayer time I
3 think is 1:00, so that will be our lunch break to let people
4 kind of know where we're going and then we'll see where we are
5 when we come back.

6 That being said, let me hear from Mr. Harrington and
7 we'll take a recess after that to see where we're at with the
8 computer issue.

9 Mr. Harrington.

10 LDC [MR. HARRINGTON]: Judge, as we indicated the other
11 day, there's still some outstanding discovery issues on 152,
12 but I want to bring to the court's attention, the last time we
13 were here, we discussed a possible procedure for alleviating
14 some of the problems here for everyone, and the court agreed
15 with our suggestion that we submit a proposed order for some
16 sort of a monitoring ombudsman investigation-type process.
17 And we have submitted that to the court and obviously it's
18 under your consideration right now.

19 But we -- since we were last in court, we have
20 another escalating situation where Mr. Binalshibh claims that
21 he has been subjected to this -- the continuing problems with
22 respect to noises and vibrations, and then that reaches a
23 point where he tries to get some relief, tries to make

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 complaints, does not get any positive response or even
2 negative response, and then it ends up escalating and then he
3 gets punished when he acts out in any way. And since the time
4 we've been in court, he's gone through a series of
5 disciplinary penalties which have totaled now -- he served 80
6 days of -- almost 88 days of these repeated disciplinary
7 infractions and penalties. And the penalties with apparently
8 the change in camp commander have escalated far beyond any
9 penalties that were ever imposed before for the same kind of
10 behavior.

11 So he gets put in disciplinary, which means he goes
12 to a different cell. And now in the cell that he's in, he has
13 this problem where either there's no air conditioning or if he
14 asks for the air conditioning, it's turned on and it's like
15 sub-degree temperature, and there's nothing in between. And
16 he is told that the system is all the same, it applies to
17 everybody, and, you know, you either have it on or you don't
18 have it on. But he continually goes through this cycle of
19 either extreme heat -- and obviously, this is the worst time
20 of year with the temperature and the humidity -- or the
21 freezing cold, and so that escalates things even more.

22 And even yesterday he came back from a visit and
23 asked the assistant watch commander to follow him into the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 cell and say, come in here and look at this, and the person
2 acknowledged that, you know, the temperature in the room
3 was -- was unbearable.

4 He obviously continually comes to me and asks me to
5 try to get some relief for him. I come to you and try to ask
6 you for relief. And I know you're trying to go through this
7 in an orderly procedure with 152 and trying to litigate it.
8 And we also recognize that there's certain limits that you
9 have which you have expressed before about what it is that you
10 can do. But these problems seriously affect our relationship
11 with him, which is something that's a concern for the court
12 because it affects our ability to represent him.

13 The inability to get any kind of relief from the camp
14 commander with respect to the punishments that are imposed or
15 even to be able to address this in any way just escalates the
16 problem for us. The court has limited, if any, contempt
17 proceedings with respect to this. You've issued an order
18 before. Mr. Binalshibh reports to us, as he has reported all
19 along, that that order is ignored. When he brings it to their
20 attention, they make remarks like, "Tell your lawyer about
21 it," and that the order is not being followed.

22 I know that they report to Mr. Swann, when he checks
23 on it, that "we are following the order." But this goes on

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and on, and it seems to me that the only effective action that
2 the court can take is to abate the proceedings if this
3 continues.

4 And we'd ask the court to consider even entering
5 another order following up on your first order, and for the
6 court to seriously consider and consider immediately looking
7 at this order that we have submitted to the court with respect
8 to some sort of process so that we can stop having this
9 continuing cycle of the escalation with him, us coming back to
10 you -- and when I say -- make comments about the relationship,
11 I'm not here trying to make the court say, "Harrington's
12 having a tough time dealing with this." I'm not part of this.
13 He's my client, and what I'm concerned about is him and his
14 ability to deal with me also, and the rest of our team, also
15 makes his life a lot better. That's all we're trying to get
16 is to get this into a smooth situation so that we can continue
17 in this case trying the case rather than coming before the
18 court time after time after time asking for this.

19 So we're asking from the court two types of relief:
20 Either another order to make them comply and an order to try
21 to set up a process to deal with this. And obviously, because
22 of the effect on the attorney-client relationship, we feel
23 that the court has the authority and the jurisdiction to do

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this.

2 Judge, I think you indicated -- did you have some
3 questions about 152 also or something?

4 MJ [COL POHL]: No, I got your order. I think you've --
5 or your requested order that you filed on the 15th of August.
6 I just -- I know the government didn't -- at least I don't
7 have a copy of a government response. I just kind of want to
8 hear their view about the proposed order.

9 LDC [MR. HARRINGTON]: We sent it to them back a month or
10 so again, we haven't heard a response.

11 MJ [COL POHL]: When you say opposing counsel, there
12 appears to be a concurrent filing. You served it on the 22nd
13 of June.

14 LDC [MR. HARRINGTON]: Right.

15 MJ [COL POHL]: I'll see what they have to say about it.
16 Thank you, Mr. Harrington.

17 I did kind of misspeak. I will do Mr. Connell's
18 motion before we -- 279, before we recess.

19 Mr. Trivett.

20 MTC [MR. TRIVETT]: The United States would like an
21 opportunity to fully respond to the motion. We haven't had
22 time to do that. We haven't filed a response yet, so we would
23 certainly like to do that. We will let you know that we

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 certainly oppose any further orders.

2 I had not actually seen that proposed order until
3 they filed it with the motion. I have -- if I've said it
4 once, I've said it a dozen times to all of the defense
5 counsel, that my mail.mil account is the only place you can
6 get me when I'm down in Guantanamo. It was sent to another
7 account. It was sent to an account that I only really see
8 when I'm in Guantanamo. Didn't see it; no follow-up on it.
9 We would have told them we oppose and we would have filed an
10 opposition and ask to still be able to do so.

11 MJ [COL POHL]: Okay. Got it.

12 MTC [MR. TRIVETT]: Thank you.

13 LDC [MR. HARRINGTON]: Judge, just to clarify, that
14 proposed order was sent to General Martins and Mr. Swann and
15 Mr. Trivett. If he didn't get it, certainly other people in
16 the office did.

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

18 Mr. Connell, 279.

19 LDC [MR. CONNELL]: Sir, 279 is in much the same posture
20 as the 108s. We rest on the brief, but we'll answer -- we'll
21 discuss anything that the government ----

22 MJ [COL POHL]: Just to be clear, for the record, what are
23 you requesting in 279?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Sir, in an earlier order in 279, you
2 granted us the ability to take photographs of the transport
3 vans that are used to move the detainees around. We did so
4 and when we submitted them for classification review under the
5 process you established, they came back marked FOUO. We
6 thought that that might be something of an -- the government
7 could at least implicate government information privilege, and
8 so the 506 process is not as cleanly written as the 505
9 process, so there's not really a 506 notice that we could
10 give. And our best understanding after reading 506 was that
11 we would file a motion for leave to use the information;
12 essentially, the transport vans photographs. It will be the
13 same situation. I won't display them. There's nothing to
14 quote from without specific leave of court if it were to come
15 up.

16 MJ [COL POHL]: This is the similar approach to 108 and
17 this is in support of 502.

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

19 MJ [COL POHL]: Got it.

20 Trial Counsel, response?

21 MTC [MR. TRIVETT]: Just to clarify for the commission,
22 sir, that the pictures of the van and all of its security
23 features are privileged and they can't be released to either

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the detainee or the public for reasons that should be obvious
2 to everyone.

3 If someone on Guantanamo was inclined to either help
4 one of these detainees to escape or try to harm them while
5 they're in transport to or from Camp VII, these pictures would
6 be of great assistance in their intelligence gathering, so
7 they're marked FOUO, not releasable to the public, not
8 releasable to the detainee. We successfully argued that these
9 should be privileged in our AE 014, which then became
10 Protective Order #2, and you've recognized the government
11 information privilege for that.

12 MJ [COL POHL]: So as I understand it, Mr. Connell doesn't
13 plan to display them.

14 MTC [MR. TRIVETT]: Right. It sounds like the use that he
15 just stated is completely consistent with our need to protect
16 it and his need to use it, so we don't object to that use that
17 way. It just wasn't clear, certainly, in the ----

18 MJ [COL POHL]: Okay.

19 MTC [MR. TRIVETT]: ---- motion that's how he intended to
20 use it.

21 MJ [COL POHL]: So this is similar to the 108 issue we
22 already discussed.

23 MTC [MR. TRIVETT]: Yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Got it.

2 MTC [MR. TRIVETT]: Just to clarify, in the event I
3 didn't -- he can't show that to the accused, either. This is
4 one of those unique documents that we've asserted government
5 information privilege over, not releasable to the detainee or
6 to the public, which makes it a little bit different than 108.

7 MJ [COL POHL]: Is that your understanding, Mr. Connell?

8 LDC [MR. CONNELL]: The documents are clearly marked NOT
9 RELEASABLE TO DETAINEE.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: If at any point I need relief from
12 that, I would bring it to the military commission.

13 MJ [COL POHL]: Okay.

14 Okay. We're about to take a break. Let's just kind
15 of see the way ahead.

16 I'm looking for any standalone motions here that
17 don't implicate Mr. bin'Attash, and I think 511 falls in that
18 category. 336 also appears to fall in that category.

19 But I will listen to everybody's view of -- if
20 there's anything else we can do while Mr. bin'Attash's team
21 has got its current power challenges. Also, we discussed the
22 502 or the 505(h) hearing tomorrow, and I think we went
23 through the whole list that's on the government's -- on 519C,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 excluding 502, 445, and 152LL, and adding to that 375N. So
2 just take a look at that. If there's ones we need to add or
3 subtract, we can discuss that later on. In the meantime,
4 we'll be at recess till -- are you cold, Mr. Nevin?

5 LDC [MR. NEVIN]: Yes.

6 MJ [COL POHL]: Okay. I just saw you shivering over
7 there. Let's see if we can turn the heat up a little bit.
8 Not too much, because then I know what happens on the other
9 side. But we'll be at recess until 1050. Commission is in
10 recess.

11 [The R.M.C. 803 session recessed at 1034, 21 August 2017.]

12 [END OF PAGE]

13

14

15

16

17

18

19

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT