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1 [The R.M.C. 803 session was called to order at 1613,
2 22 February 2016.]

3 MJ [COL POHL]: The commission is called to order. It
4 appears that all parties are again present that were present
5 when the commission recessed.

6 Mr. Connell.

7 LDC [MR. CONNELL]: Your Honor, Mr. al Baluchi is one of
8 those who has his laptop back and I have been involved with
9 all those steps of the process, so I have a pretty good
10 visibility on it, and the good news here is that I am here to
11 try to offer a fairly simple solution to the military
12 commission that I think will solve, basically, these problems.

13 All we need in an order is, number one, that there be
14 at least one working USB port on the computer. By that I
15 don't mean a jump drive, I just mean the little port on the
16 side of the computer that have been currently disabled. We
17 need one working USB port and we need an external CD/DVD
18 writer. And let me tell you why those two things will
19 basically be a good short-term fix for this.

20 Now, long term it's not going to work, right? These
21 computers are running Windows XP, which was created in 2001.
22 It is no longer supported by Microsoft. Government employees
23 are no longer allowed to use it. Acknowledged, there are a

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1 lot of problems, but there are long-term solutions that are in
2 the works, right? I know both sides and many people outside
3 of this courtroom are motivated to solve this problem and I
4 think there are long-term solutions that they are working on,
5 but a short-term solution is a working USB port and a working
6 CD/DVD writer. Here is how.

7 The first problem it would solve is the communication
8 problem. It means that if there will be discovery or a
9 proposed motion or something else that we need to get in to a
10 client, then we could just put it to the DVD -- and I will
11 talk about the PRT process in a moment -- but send it through
12 existing channels through existing structure that it can go to
13 the client and put on their laptop and they can work on it.

14 MJ [COL POHL]: Do they retain it?

15 LDC [MR. CONNELL]: Yes, which is what happens now. They
16 routinely ----

17 MJ [COL POHL]: Are they currently, whether it is related
18 to this or not, are they permitted to have CD or DVDs in their
19 cell?

20 LDC [MR. CONNELL]: Absolutely. There is a marking
21 protocol that the PRT is used to working with. Guards are
22 used to seeing DVDs. JTF-GTMO has given them a holder,
23 something to put their CDs and DVDs in. It is absolutely

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1 right now they are allowed to have CDs and DVDs.

2 MJ [COL POHL]: The USB port would be used to hook up the
3 DVDs?

4 LDC [MR. CONNELL]: You have to have something to plug the
5 CD/DVD writer into.

6 MJ [COL POHL]: Okay. The little bit I know about
7 computers, I got that one.

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

9 MJ [COL POHL]: Let me ask this. What would happen to
10 this writer, the external CD/DVD writer? Would it stay in the
11 cell or would it ----

12 LDC [MR. CONNELL]: That is up to JTF, I suspect, but I
13 suspect they would handle it like the other electronics, which
14 is the laptop, which is they have established certain hours
15 which the detainees are allowed to have the laptop and then
16 they take it away from them. There are certain hours when
17 people are allowed to have their laptops, certain time when
18 they are not allowed to have their laptops. That's not a
19 military commission order, that's a JTF policy.

20 MJ [COL POHL]: Why do you need an external one? Why not
21 just make the one that's inside work?

22 LDC [MR. CONNELL]: Because there is not one inside.

23 MJ [COL POHL]: Okay. That answers that.

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1 LDC [MR. CONNELL]: Yes. So if there was one inside, I
2 would say something different, but there is not one inside.

3 MJ [COL POHL]: So you'd simply give them DVD/CD writing
4 capability and the disks themselves would go through the
5 normal PRT process ----

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: ---- where they would open up the content
8 of said disk to ensure it is legal mail ----

9 LDC [MR. CONNELL]: Right, or OCRM.

10 MJ [COL POHL]: ---- or whatever category you put on it?

11 LDC [MR. CONNELL]: Yes.

12 MJ [COL POHL]: All right.

13 LDC [MR. CONNELL]: Let me go through what I see as the
14 other advantages of it just for a moment. It solves the
15 discovery problem. A fair amount of discovery is on video.
16 It solves that problem; when the prosecution provides us
17 video, we can provide them to the detainees.

18 It is a short-term fix to the printing problem. I
19 will tell you that in my humble opinion and from talking to
20 IT, I don't think using the current laptops we are ever going
21 to solve the printing problem because when Microsoft stops
22 supporting Windows XP, they stop producing drivers and drivers
23 are the programs that make the printer run. And so IT has not

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1 been able to make the printer run because the little program
2 that talks between the program -- between the computer and the
3 printer they are working on.

4 MJ [COL POHL]: In they put it on a CD and gave it to you,
5 you can take it and print it if need be?

6 LDC [MR. CONNELL]: Precisely.

7 MJ [COL POHL]: Of course, the more things on CD, the less
8 we would need legal bins.

9 LDC [MR. CONNELL]: That's right. We reduce the total
10 number of paper, the total amount of paper.

11 MJ [COL POHL]: I got it.

12 LDC [MR. CONNELL]: It's good. It's a win-win. It's
13 infrastructure that already exists. The PRT is already used
14 to doing this. There is already a property pass
15 infrastructure for dealing with electronics. There is one on
16 my computer. I think I see one on your computer. It avoids
17 putting the whole bottleneck, it puts the flow where it should
18 be. You know, Mr. Trivett mentioned the PRT. The current
19 process there is not really a place for the PRT in the
20 process, it's all being handled by IT, either defense and
21 Convening Authority IT at the moment, which there are very few
22 of them and this is not their main job, whereas if this
23 capability existed, the PRT is very used to handling DVDs or

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1 CDs that go from the attorneys to the detainees, whether they
2 be legal material or -- or whether they are discovery.

3 So I think that this is a solution that would make a
4 lot of the other problems irrelevant and would work pretty
5 well for the short term until long-term fixes can come about.

6 MJ [COL POHL]: Okay. Thank you. Any other defense
7 counsel want to be heard on this?

8 Ms. Bormann.

9 LDC [MS. BORMANN]: Mr. Bin'Attash is the other individual
10 who has taken possession of his laptop, and it is restricted,
11 incredibly restricted, in its use with respect to anything
12 having to do with discovery or motion practice between
13 Mr. Bin'Attash and his defense counsel. So for instance ----

14 MJ [COL POHL]: If it is restricted in that area, isn't
15 that the purpose of it?

16 LDC [MS. BORMANN]: That is the purpose of it. That's
17 exactly it. And so I think Mr. Connell has fashioned a
18 descent workaround for the time being, but one of the bigger
19 issues that we have is word processing software. So
20 Mr. Sowards I think meant to and intended to talk about
21 Microsoft Office suite, which has PowerPoint, Microsoft Word
22 and Excel as its base point. Those three software programs
23 were available to these men back in 2008 and 2009, and allowed

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1 them to take portions of their writing and put it in a fashion
2 that could easily be read and instruct motion writing with the
3 help of their counsel.

4 So instead of us bringing in literally tons of paper
5 every time we have to go meet with Mr. Bin'Attash or vice
6 versa, it would be very helpful if he could do some basic word
7 processing function and just pinpoint for us where he wants us
8 to go. And, you know, it's pretty germane to what's been
9 going on recently to point to the fact that if we could
10 streamline and expedite communications between defense counsel
11 and Mr. Bin'Attash, it would be helpful.

12 MJ [COL POHL]: Let me ask you another question which just
13 occurred to me. What language are these documents in?

14 LDC [MS. BORMANN]: Some of them are in Arabic. Some of
15 them are in English.

16 MJ [COL POHL]: And does the computer have the capability
17 to write in Arabic as well as English?

18 LDC [MS. BORMANN]: I don't know the answer to that
19 question.

20 LDC [MR. CONNELL]: I do.

21 LDC [MS. BORMANN]: And Mr. Mohammad says yes.

22 LDC [MR. CONNELL]: Yes, it's just a matter of a font
23 pack.

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1 LDC [MS. BORMANN]: Anything else?

2 MJ [COL POHL]: No, ma'am. Thank you. Anything else from
3 defense?

4 DDC [MAJ WICHNER]: Your Honor, we appreciate and also
5 agree with the other counsel on efforts to improve this, but
6 first off we mostly would highlight that the new laptops are
7 needed and I think General Baker has a request in to the
8 Convening Authority I think for funding for that.

9 MJ [COL POHL]: Let me ask you this. Correct me if I am
10 wrong because motions can come and motions go and sometimes my
11 memory is a little foggy. As I recall, this motion was for
12 the return of the laptops, not for new laptops. Correct? The
13 motion before me was to return what they had before, to put
14 them where they were.

15 CDC [MR. SOWARDS]: It is not a yes or no, I'm sorry,
16 Your Honor. 149 is for -- you are looking at me like that.
17 149 was for the return of the old laptops and then 182 was to
18 let them resume using what we thought of as current
19 write-enabled laptop computers as opposed to the e-readers,
20 and Your Honor said, in a sense, "I don't need to deal with
21 182, that's moot because I am now granting you the return of
22 the original laptops."

23 MJ [COL POHL]: Okay.

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1 CDC [MR. SOWARDS]: And that's what I was saying where
2 maybe you and I are on the same technological level. I
3 thought too getting computers they used in 2008 would be great
4 in 2013 at the time, but it's not the case.

5 MJ [COL POHL]: Thank you.

6 DDC [MAJ WICHNER]: I think what we are asking for is kind
7 of a return of a meaningful use of laptop capabilities,
8 because Mr. Binalshibh also has had his laptop returned to him
9 and I have had the lead in trying to make that helpful and
10 operable to him, but there have been many issues, most of
11 which starts from they are old laptops, and you have heard
12 arguments from other counsel, the software can't be updated
13 through the Internet.

14 The JTF's and our position was the defense would have
15 to provide an IT person for the servicing of the laptops and a
16 printer and so forth, but I have not been able to get
17 permanent access to Echo II where the printer is supposed to
18 be for our IT person. Their answer was you need to add them
19 to your meeting. Every time you go you can add them to your
20 meeting with your client, although he is supposed to service
21 the printer on an ongoing basis and we are not going to touch
22 it or do anything with it.

23 MJ [COL POHL]: Is there a dedicated printer for the

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1 defense use only?

2 DDC [MAJ WICHNER]: I think so, sir. I have not had eyes
3 on it.

4 MJ [COL POHL]: The idea is that when you have your
5 meeting with your client, that -- are you limited to how many
6 people you can come in with your client?

7 DDC [MAJ WICHNER]: I think we are. I think four or five.

8 MJ [COL POHL]: Whatever the number would be, one would
9 have to be the IT guy to work on the printer?

10 DDC [MAJ WICHNER]: Perhaps. I haven't tried to add him
11 as a fifth or sixth.

12 MJ [COL POHL]: I don't even want to ask this question,
13 but I am going to anyway. If you are in there with your
14 client, would not the IT guy have to have a TS/SCI clearance?

15 DDC [MAJ WICHNER]: I can -- I asked the government that.
16 I can tell you, I've tried this once. I was told a printer
17 was there at Echo II. So I had a few questions about that. I
18 said what classification level is the printer, because I know
19 the government probably would take the position of a number of
20 things the client would want us to print out, we would
21 presumptively need to perhaps courier back to our ELC office
22 and treat it at a certain classification level depending upon
23 what it is.

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1 I have not been given an answer as to that. I have
2 asked what are the automatic memory capabilities of the
3 printer because I am not an expert either, but I have been
4 told a lot of printers have the capability you print
5 something, you walk away and someone behind you can in essence
6 reprint what you just printed or it might be sitting in memory
7 somewhere in the machine. I have not been given an answer to
8 that capability.

9 But even before those issues, our IT personnel did
10 come out to camp, out to Echo II. I added them to the meeting
11 list per JTF and SJA's direction. They allowed him in and
12 access, but he did have to come out to -- I was meeting with
13 the client, he did have to come out to the meeting area where
14 we meet him, to the hut. I had to hand him the laptop to take
15 to the location of the printer and at that point he tried, he
16 said, well, let me just start with trying to load the printer
17 drivers and he was not able to do it and he thinks most likely
18 because of the issue with Windows XP not updating or so on and
19 so forth.

20 MJ [COL POHL]: I got it.

21 DDC [MAJ WICHNER]: So a better workaround to the whole
22 printer idea is an external hard drive and this goes to
23 enabling a port. I know Mr. Connell has a short-term solution

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1 of the DVDs or CDs going back and forth, but ultimately what
2 we would like, because that's going to end up being a lot more
3 CDs and DVDs, CDs, what we think is a better alternative is
4 the use of hard drives, and that way you don't have all these
5 DVDs, because the discovery -- the e-readers that have been
6 explained to you, they really don't -- at least
7 Mr. Binalshibh's doesn't work well at all.

8 MJ [COL POHL]: You can't download things on the C drive?
9 It has been a long time since I have seen an e-reader.

10 DDC [MAJ WICHNER]: No. Right.

11 MJ [COL POHL]: I'm just trying to figure out where you
12 are at now. You have got what I am told is a laptop computer,
13 you are calling an e-reader. Okay. You stick a CD in there,
14 stuff comes up. You can't download the CD on to the hard
15 drive of the current laptop?

16 DDC [MAJ WICHNER]: I honestly don't have -- so far
17 defense ----

18 MJ [COL POHL]: Mr. Connell, do you know the answer to
19 that?

20 LDC [MR. CONNELL]: I do, and you are talking about the
21 e-readers provided by the prosecution, right?

22 MJ [COL POHL]: The ones that apparently I ordered.

23 LDC [MR. CONNELL]: The ones you ordered, Mr. al Baluchi,

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1 can I hold ----

2 MJ [COL POHL]: I don't want a demonstration. I just want
3 an answer.

4 LDC [MR. CONNELL]: The ones you ordered are Tough Books.
5 They are different from e-readers provided by the prosecution.
6 The answer to your question for both the prosecution e-readers
7 and the defense laptops is right now you cannot because you
8 cannot put a disk in there and load something onto it because
9 the USB ----

10 MJ [COL POHL]: If you type on the document, can you
11 download your typing?

12 LDC [MR. CONNELL]: No, because that's why I asked for --
13 that's why ----

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

15 LDC [MR. CONNELL]: Right. No.

16 MJ [COL POHL]: XP sounds advanced to me, so bear with me,
17 Mr. Connell. I am just trying to understand your position and
18 then I think Mr. Trivett wants to be heard about something.

19 What you are telling me, if your client types
20 something on the Tough Book or the e-reader, how is it
21 preserved?

22 LDC [MR. CONNELL]: So it does have a C drive.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: Right. So right now it is saved to
2 the C drive. It can't come out and nothing from the outside,
3 except in certain circumstances ----

4 MJ [COL POHL]: In other words, he can download it to the
5 C drive ----

6 LDC [MR. CONNELL]: Save it to C.

7 MJ [COL POHL]: He can pull it up, but there is no way to
8 transfer the electronic data currently except through this
9 complicated printing process that Major Wichner is such a fan
10 of?

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

12 MJ [COL POHL]: Got it. I understand.

13 LDC [MR. CONNELL]: A USB port and a DVD writer would
14 solve the problem.

15 MJ [COL POHL]: Got it. Anything more, ma'am?

16 DDC [MAJ WICHNER]: I don't think so, Your Honor. Thank
17 you.

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

19 LDC [MR. RUIZ]: Your Honor.

20 MJ [COL POHL]: Sure.

21 LDC [MR. RUIZ]: Judge.

22 MJ [COL POHL]: Good afternoon, Mr. Ruiz.

23 LDC [MR. RUIZ]: Good afternoon. Judge, just a few

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1 points, and not to belabor any points that have already been
2 made. Mr. Hawsawi has not yet received his laptop or obtained
3 it. We are in the same position that if we had acceded to the
4 modifications that the prosecution wanted, he could have
5 received the laptop, but it was our estimation that to do that
6 would essentially be to accept something that becomes
7 functionally worthless and for that reason we have not
8 obtained it until we had an opportunity to discuss this issue
9 in court.

10 Your order, in our estimation, was not unclear, it
11 was not confusing, and I would indicate to you that this is
12 not the first time that the government has sought to modify an
13 order by injecting issues with the JTF. A similar issue
14 occurred when you ordered the visit of Camp VII and the
15 prosecution, working in conjunction with the JTF, inserted an
16 MOU requirement into that order. That was another example and
17 I would suggest to you that what has happened in this case is
18 nothing more than the prosecution's attempt to modify your
19 order.

20 Certainly when it was your view that some of the
21 defense teams had acted to modify one of your orders,
22 specifically in relation to the MOU, you issued a show order
23 cause because it was your estimation that the intention of

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1 your order was subverted based on additional language that was
2 inserted into the order. And while there has been no
3 additional language in this case that has actually physically
4 been inserted into the text of your order, the effect is the
5 same.

6 And I would suggest to you that not only are you
7 addressing the issue of the modification of your order, but
8 you are addressing the aftermath of that which is the
9 continued litigation because the prosecution has sought to
10 depart from the spirit of your order, which is simply to give
11 a computer back that was once in the possession of Mr. al
12 Hawsawi and once in the possession of these men that are
13 represented, and I think I heard it the very beginning of
14 Mr. Trivett's presentation, him to say that there were certain
15 problems that led to the seizure of these computers.

16 In fact, I think you said these were the very
17 problems that led to the seizure of the computers. I asked
18 counsel in the case who were around in 2008-2009 if in fact
19 there were any specific concerns or issues that were raised at
20 the time for the seizure of the computers, and the reality is
21 that the computers were taken back when the charges were
22 withdrawn in 2009, shortly after 2009, when you had the
23 executive order and subsequently the charges in this case were

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1 dropped. There was a decision, as I understand it, made at
2 that time that there was no further need for the computers to
3 be in the possession of Mr. al Hawsawi and his brothers in
4 this case and that's why the computers were retrieved.

5 I just wanted to make very clear, unless Mr. Trivett
6 wants to come back up here and state with more specificity if
7 in fact there were legitimate issues that were raised at that
8 time as to why these functionalities or the functionality of
9 the computer, including the USB ports and the access and the
10 ability to use CD-writing systems were now or are now being,
11 in this particular instance, taken away from this computer.

12 I want to be very clear that Mr. al Hawsawi's
13 position is in line with what Mr. Connell alluded to, which is
14 that this is a short-term fix, and a short-term fix in terms
15 of the ability that we have to communicate effectively in a
16 complex litigation case. And certainly this is not just a do
17 the accused get laptops and do they get laptops that have
18 bells and whistles issue, which has been portrayed in the past
19 and I know at some point in the history of this litigation
20 there were some public comments made along the line of why are
21 we litigating or why are we talking about Guantanamo
22 detainees, why do they have access to these laptops? I know
23 that was the subject of at least a couple of public

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1 discussions, some that gathered media attention and I believe
2 there may have also been some government representatives that
3 made an issue of it.

4 As has been clearly indicated in this case, General
5 Martins has a number of times talked about how this is a case
6 that includes an incredible amount of documents. Over 300,000
7 pages of discovery, as he has indicated, have been made
8 available, and this is an issue that goes directly to the
9 heart of our ability to effectively communicate and have
10 meaningful access and meaningful communication in a case of
11 this complexity.

12 And the reason this issue is so important is because
13 we basically have been given a useless piece of hardware. It
14 is not only now a battered-down, beaten-out and stripped-down
15 version of what a computer is, but it's also one that, as I
16 think Mr. Connell had alluded to, has a functionality from
17 2001. And if we know anything about computers, you don't have
18 to know that much about computers to know that the program you
19 buy today will be obsolete tomorrow. And so we are talking
20 about decades' worth of time that has been removed.

21 We definitely think that the short-term solution with
22 a USB port, with the external drive and the ability to use CDs
23 and DVDs is important.

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1 And you asked a question about DVDs. I don't think I
2 heard anybody allude to the fact that some of the discovery
3 that's been provided includes video files and includes DVDs
4 that need to be viewed by Mr. al Hawsawi during the course of
5 our meetings. So it's not an instance of wanting to watch the
6 weekly movie, but it's instead the ability to review discovery
7 that has been provided to us in that format in a way that we
8 can -- that we can do that and that he can provide information
9 and feedback to us as well.

10 In terms of the printer and the ability to print, as
11 I understand, I haven't seen it yet, but if that printer is
12 within the meeting room that we are in, there are certain
13 practical aspects of that that simply do not work, and that
14 has to do with the sizing and the spacing of the space that we
15 meet in along with additional noise that exists and the
16 ability to communicate in a way that doesn't interfere with
17 our communication.

18 So I would ask you to ask the government to do
19 exactly what you asked them to do to begin with, was to return
20 to them the computer as it was, with the functionality that
21 existed, so that we can at least use this old piece of
22 hardware to attempt to communicate and attempt to have
23 documents in a way that are more manageable than they

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1 currently exist.

2 Thank you.

3 MJ [COL POHL]: Thank you. Mr. Harrington, do you have
4 anything to add? Oh, no, you already got a chance. I'm
5 sorry. Okay.

6 Mr. Trivett, response?

7 MTC [MR. TRIVETT]: Very briefly, Your Honor. And just to
8 reiterate, the prosecution's initial position was that they
9 not receive any laptops at all. But because we never
10 litigated 182, if they were going to have a laptop, it would
11 have been the prosecution's preference, which sounds like it
12 would also be the defense's preference, that it be a new
13 laptop. I think there are difficulties right now with the age
14 of the old computers.

15 But that being said, the litigation of this took a
16 right turn. We were talking about whether or not we complied
17 with an order to turn back the Panasonic Tough Books, and it's
18 the prosecution's position we did.

19 Mr. Connell has referenced a bunch of proposals and
20 other counsel have referenced some of the problems that they
21 have been having with trying to utilize what we gave them
22 back. So what I would ask for is the court's indulgence for
23 us to supplement 182 to take back to the JTF-GTMO staff some

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1 of the proposals. I do know that General Baker was working
2 specifically with the SJA of JTF-GTMO to see whether or not
3 new computers would work and replace the old ones. So I would
4 just ask the opportunity to look into these new proposals that
5 came up for the first time; again, not part of the motion, not
6 something I was prepared necessarily to be able to respond to,
7 a lot of it was very technical, but I will work with the
8 defense counsel to see exactly what they are proposing, I will
9 take it back to JTF-GTMO. If they don't have any security
10 concerns, we don't, but if there are security concerns, I
11 would ask the opportunity to supplement that and then actually
12 argue and litigate 182, which is where a lot of these issues
13 would have come up.

14 MJ [COL POHL]: Okay. That's a good idea because I like
15 to see things get solved, but I don't want to just -- I don't
16 like Band-Aids.

17 MTC [MR. TRIVETT]: Sure.

18 MJ [COL POHL]: And what Mr. Connell proposes is simply a
19 Band-Aid, it is simply a Band-Aid for a computer that's that
20 old.

21 Okay. Here is what I want you to find out the answer
22 to, and I don't want to hear it costs too much. If they
23 need -- assuming they need laptop computers in order to

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1 properly defend themselves in a case which you have said has
2 all this, which everybody knows how much data there is here,
3 and there is always concern that there is too much in their
4 legal bins with paper, why can't they have a relatively recent
5 computer with relatively recent software -- and, again, I'm
6 not telling you how to break eggs, but I'm thinking about the
7 basic Office program -- and an ability to have a CD/DVD
8 writer-reader. And if there is a reason why they can't have
9 that, I need to know why, because it seems to me to move this
10 litigation along to give Mr. Connell's Band-Aid next year,
11 next month I'm going to say, well, that doesn't even work
12 anyway.

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

14 MJ [COL POHL]: So if we are going to give them a
15 computer, it means a functioning computer for the task at hand
16 that requires the ability to store information, it requires
17 the ability to read information. If there is a concern for
18 that, a security concern, I am certainly willing to listen.
19 So I am not making any judgments. I am not substituting my
20 judgment for the judgment of the commander down there.

21 But if they are allowed to keep CDs in their -- I was
22 assuming that they couldn't, that the CD issue was because
23 they were concerned about them keeping CDs, but apparently

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1 they are.

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

3 MJ [COL POHL]: So why can't they have a CD writer and the
4 normal PRT process for the things in and out. Okay?
5 Understand, I know I am talking to you, but we are really
6 talking to them. Well, somebody is going to have to pay for
7 the computers, and I know where that is coming from, but I am
8 simply saying we are trying to move this litigation along and
9 this strikes to me let's solve this once and for all of giving
10 them the appropriate computer which is just simply with -- the
11 modification amounts to nothing more than an electronic legal
12 bin to store and develop documents for their defense. Okay?

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

14 MJ [COL POHL]: Okay. You've got two weeks to give me an
15 answer to the status of that or more time.

16 Mr. Sowards.

17 CDC [MR. SOWARDS]: Thank you, Your Honor. I don't want
18 to interrupt with, as you say, peace breaking out and people
19 arriving at workable solutions. What I would ask the court to
20 do simply, and then I can explain my request if the court has
21 concerns about it, is pending whatever information we get from
22 Joint Task Force Guantanamo in the next two weeks, that
23 beginning now Mr. Mohammad get his original computer delivered

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1 to him at the camp in the condition it was when it was seized,
2 and my reasons for -- I will give you a highlight of my
3 reasons -- for that are two.

4 The practical sort of everyday reason is two weeks to
5 find out what the status is doesn't mean anything happens in
6 two weeks. When we leave the island, we don't come back until
7 April. Lots of things happen between now and then and the
8 situation continues to go.

9 The point that we were making, and Mr. Ruiz raised
10 it -- I wasn't trying to draw a comparison between us, between
11 the MOU and this situation. But the point we were raising is
12 that over a period of, you know, several -- a couple of years,
13 or a year and a half, we had the commission's thinking and its
14 clear expression of its intent what it wanted done for the
15 benefit of Mr. Mohammad in the preparation of his case, an
16 ability to consult with counsel.

17 What Mr. Trivett has just raised with you today at a
18 little before 5:00, picking up on the discussion here today,
19 is sort of an oral motion to reconsider one of your original
20 motions. All right? And as the court pointed out in its most
21 recent iteration of its order, the prosecution did not oppose
22 either 149 or the ultimate statement of the court's intent.

23 The reason it's important -- I'm sorry, the

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1 commission's intent.

2 The reason it's important that the commission enforce
3 its order and do so, which it can do without any concern at
4 all for guard force safety or security issue, all of those
5 issues were laid to rest back in the 16-month period between
6 2008 and 2010 that they had these computers. And when
7 Mr. Trivett says there were problems that arose with them
8 having the computers, the only problem was the Obama
9 administration couldn't decide which jurisdiction to bring
10 these cases in and so they dismissed the charges in the first
11 iteration of the military commission and that's why the
12 computers were taken away from them, because they were no
13 longer charged.

14 But this is part of a much better -- a much larger
15 issue, Your Honor, in the sense that -- and Ms. Bormann
16 touched upon this last Tuesday -- that our clients see us as
17 unable to do anything to defend or to protect them. And I
18 know that you are probably weary of hearing this connection,
19 but we're here to tell you that it is real and directly
20 related to what happened to them in the black sites and to the
21 government's statements to them that no matter what happens
22 after the black sites, there's no one who can protect them
23 from the government, not even a court. And every time we come

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1 to the commission and the commission says do something and the
2 government essentially says, no, we're not, and then that gets
3 litigated and watered down and negotiated and doesn't happen
4 and peters out over time, we live with the frustration of the
5 clients over that process and as directed at us.

6 And so what I am respectfully asking the court, which
7 is a pretty modest request, is to ask the government, pretty
8 please, to abide by the commission's order, the three orders
9 that it has issued and that pose no risk to anyone at Camp VII
10 while they're working out whatever particulars they are going
11 to work out. Because it's unfair to Mr. Mohammad, who has
12 stood by and waited to have vindication of his rights as
13 determined by the commission, while other defendants have had
14 to take broken laptops in violation of the commission's
15 order -- it's unfair to him to say wait a little longer. If
16 there is some brighter promise over yonder and the computers
17 come someday, we will all rejoice. But for the time being, he
18 is entitled to the computer that you have ordered three times.

19 MJ [COL POHL]: Well, of course, Mr. Sowards, I understand
20 what you are saying and the government is going to say we are
21 going to give it back to him with all the stuff disabled and
22 what you want is the stuff not disabled.

23 CDC [MR. SOWARDS]: What I want is for them to comply with

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1 your order. They said -- and that's the whole point. They
2 never said to you don't do it in 149 and when you were
3 contemplating of doing it in the context of 182 after you had
4 dismissed 182 as moot because you said give them back the
5 computers in 149, you didn't -- they didn't say, "Oh, wait a
6 minute, Your Honor, you can't do that, here are all these
7 security concerns." They didn't even respond. They said,
8 "You know, go ahead, tell us your thinking" and you said your
9 thinking was "I want these computers after the material has
10 been cleared by counsel to be redelivered to them to --
11 delivered to them out at the camp as is."

12 MJ [COL POHL]: For Mr. Mohammad, where are you in the
13 process?

14 CDC [MR. SOWARDS]: We are in the process of saying comply
15 with the judge's order, and they're saying we will comply with
16 the judge's order after we dismantle the computer, which is
17 not complying with the judge's order. So where we are at with
18 Mr. Mohammad is an impasse, which is why we brought a motion
19 saying make them comply with your order or take them off this
20 case and get someone who can obey your order and vindicate his
21 right to consult with counsel. And don't make us look bad
22 because we have told Mr. Mohammad hang on, for several
23 sessions since this motion has been filed, the judge is going

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1 to enforce his order.

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

3 Mr. Trivett, last word.

4 MTC [MR. TRIVETT]: We oppose the laptops going back in
5 any way other than the protocol until we work out our
6 supplements.

7 MJ [COL POHL]: Let me ask you this, because this visit --
8 this came up with the camp visit earlier as alluded to by
9 Mr. Ruiz earlier.

10 You can sit down.

11 CDC [MR. SOWARDS]: Thank you.

12 MJ [COL POHL]: Is when I -- I just want to get the
13 government's thinking on this. I issued 182G saying return
14 the computers.

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

16 MJ [COL POHL]: At that time I don't recall, and maybe I
17 missed it, the government saying, well, we will only do this
18 if all the other stuff is done and the protocols are followed.
19 Okay? I don't recall you saying that at the time. Did you?

20 MTC [MR. TRIVETT]: Did we say it right when we turned it
21 back to the defense?

22 MJ [COL POHL]: No, no. When we were litigating 182, did
23 you say -- as I recall, there was no opposition to returning

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1 them.

2 MTC [MR. TRIVETT]: No opposition to returning them, ever.

3 MJ [COL POHL]: And then later on you added these other
4 conditions to it.

5 MTC [MR. TRIVETT]: An intermediary step, there was an
6 opposition to having them go back to the accused. We always
7 opposed that.

8 MJ [COL POHL]: And that issue, you opposed it, you lost.

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

10 MJ [COL POHL]: But what I am saying is once the order
11 went out, then this protocol requirement came up, right?

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

13 MJ [COL POHL]: Okay. But you didn't come back to me and
14 say, "Oh, by the way, Your Honor, we need to modify the order
15 to comply with this protocol." You just said, "Defense, this
16 is what the judge meant."

17 MTC [MR. TRIVETT]: Right.

18 MJ [COL POHL]: I don't know why you said I gleaned
19 something I knew nothing about.

20 MTC [MR. TRIVETT]: We never took the position that you
21 meant something. The order was silent. And clearly ----

22 MJ [COL POHL]: Just so it is clear here, this is for
23 other stuff too.

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

2 MJ [COL POHL]: I issued an order saying return the
3 computers. Okay? Now, maybe I didn't issue the order telling
4 you what should be on the hard drive, what should be on the
5 soft drive, what should be -- what brand or anything else like
6 that. The question was, return their laptops and so, you
7 know, that's what it is. And you want to return the laptops
8 with certain conditions, and I don't -- and if you've got
9 legitimate reasons for that, I don't have a problem with that.

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

11 MJ [COL POHL]: Okay? If you said, "We can't do it until
12 this is done, and by the way, we will tell the judge this is
13 why we cannot comply meeting with the order," and then we
14 litigate whether these are reasonable.

15 Instead you say, "Defense, here are the conditions we
16 are going to give it to you," and then they have got to come
17 back to me and say, by the way, you are no longer complying
18 with the order. Did you consider you are complying with an
19 explicit order when you say, "The judge said give you X and we
20 are going to give you X, but we are now going to add this
21 other paragraph"? Isn't that what they -- one of the
22 objections the government had with the defense modifying the
23 MOU?

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1 MTC [MR. TRIVETT]: The MOU was a very specific order,
2 Your Honor.

3 MJ [COL POHL]: No. Okay. But I am saying -- if I said
4 give them back the computers and you said yes, but we are
5 going to disable all these functions, don't you think you at
6 least thought maybe that's not what the judge meant, that we
7 should tell them about it at least? Under the current policy,
8 what good are the computers to them?

9 MTC [MR. TRIVETT]: Under the current policy they have the
10 ability to review old discovery, they could put new discovery
11 on it, and they have Word functioning.

12 MJ [COL POHL]: How do they put new discovery on it if you
13 disable their CD functionality?

14 MTC [MR. TRIVETT]: As I tried to explain in the first
15 part of the argument ----

16 MJ [COL POHL]: Good. Please do.

17 MTC [MR. TRIVETT]: ---- if they surrender the laptops
18 back to their defense counsel, the defense counsel can get the
19 drives enabled, they can have it loaded up, then they can go
20 through, providing they are loading it up that the PRT has
21 decided already, they can get it loaded up, get it recertified
22 and it goes back in.

23 MJ [COL POHL]: Could you make it a more -- harder

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1 process?

2 MTC [MR. TRIVETT]: I am sure I could figure out a way,
3 sir.

4 MJ [COL POHL]: I am not encouraging it. Since we are
5 talking about Band-Aids, what about Mr. Connell's Band-Aid?

6 MTC [MR. TRIVETT]: That's one of the things I am going to
7 take back to the JTF. Again, the security concerns are their
8 legitimate penological concerns.

9 MJ [COL POHL]: You know, that's an expression I have
10 heard, I hear all the time, and I hear all sorts of
11 expressions all the time, and they don't mean anything unless
12 you tell me what those concerns are. For example, I thought
13 you had a concern about detainees having CDs and DVDs as just
14 a force protection issue in their cell.

15 MTC [MR. TRIVETT]: Right.

16 MJ [COL POHL]: Then you said legitimate penological
17 concerns, yeah, maybe it could be a weapon or whatever, but
18 apparently it's not. Okay. So when you say legitimate
19 penological concerns, you have to tell me what they are, not
20 just throw that out as a bumper sticker.

21 So, for example, you said legitimate penological
22 concerns about not having the ability to not have a CD writer
23 with them. What is that concern?

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1 MTC [MR. TRIVETT]: My understanding is that there is a
2 concern that there could be a fast dissemination of propaganda
3 outside of the camp, in digital form. That's my understanding
4 of the concern.

5 MJ [COL POHL]: Wouldn't the data in and out go through
6 the PRT process?

7 MTC [MR. TRIVETT]: Not out. Only in.

8 MJ [COL POHL]: So, okay. Okay. I'm learning. I got it.
9 And then so under the current procedure, it would be -- and
10 that's prevented how?

11 MTC [MR. TRIVETT]: Now it has to -- under the current
12 procedure ----

13 MJ [COL POHL]: I am talking about going out, not in. You
14 said in is not an issue. If we had a CD writer to bring stuff
15 in, if we could understand if it goes in, it can go out too.
16 I understand. I got it. You said currently as you told me
17 they review it, if they want to add something to the computer,
18 they give it to the defense counsel, the computer itself to
19 the defense counsel. The defense counsel then, what, provides
20 a disk to the PRT to review?

21 MTC [MR. TRIVETT]: Correct.

22 MJ [COL POHL]: Then they say it's mighty fine, they load
23 the disk, they download the disk?

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1 MTC [MR. TRIVETT]: Correct.

2 MJ [COL POHL]: Okay. Okay. And then they disable that
3 functionality and give it back to the detainee?

4 MTC [MR. TRIVETT]: Correct.

5 MJ [COL POHL]: Okay. And then if the detainee wants to
6 send something out to his attorney, how does that happen?

7 MTC [MR. TRIVETT]: The same way.

8 MJ [COL POHL]: So the detainee puts stuff on when he is
9 there without his attorney, says, okay, I am working on this
10 motion, whatever, puts it on there, then that laptop is given
11 to the attorney or to the review team?

12 MTC [MR. TRIVETT]: The attorney.

13 MJ [COL POHL]: The attorney, who then does what with it?

14 MTC [MR. TRIVETT]: He is governed by the written
15 privileged communications in AE 018.

16 MJ [COL POHL]: So there is no review of external device
17 to the attorney.

18 MTC [MR. TRIVETT]: Correct. I mean, the attorney is
19 under your order.

20 MJ [COL POHL]: I got that. And I'm not saying that they
21 won't, but I'm just trying to understand this because I am
22 trying to balance your penological interest with their
23 legitimate interests to prepare for trial. Okay? We get down

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1 into these weeds sometimes and you just have to do it.

2 You said we couldn't give them a CD because we are
3 concerned about what they brought out could be disseminated
4 too quickly.

5 MTC [MR. TRIVETT]: Correct. I mean, that's assuming --
6 there are other ways for things to get out other than through
7 their defense attorneys, and I think that's the concern. The
8 defense attorneys are bound by an order.

9 MJ [COL POHL]: Okay. So if you had a CD -- okay. So
10 what you are saying, if they had the ability to write CDs ----

11 MTC [MR. TRIVETT]: Right.

12 MJ [COL POHL]: ---- in their cell, they could put
13 whatever they want in there and then hand it to the next guy
14 over?

15 MTC [MR. TRIVETT]: There is always the possibility that
16 that can get out. Without impugning the integrity of the
17 defense, that's the concern ----

18 MJ [COL POHL]: I got it.

19 MTC [MR. TRIVETT]: ---- is that we can have direct
20 communications that are easily electronically disseminated,
21 which is, you know, subject to one of your other motions. You
22 are going to be hearing a similar issue in 018Y if we get to
23 it this week and the government's issues are articulated in

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1 that, but that's the concern. There is a propaganda concern
2 if there is a direct dissemination or they have the ability to
3 directly put something on to a disk that can later get out and
4 be disseminated.

5 MJ [COL POHL]: When you say "get out," you're ----

6 MTC [MR. TRIVETT]: Get out of the camp in some way to the
7 public.

8 Any other questions, sir?

9 MJ [COL POHL]: No, but I am going back to Mr. Sowards'
10 point. If there is confusion with what my order meant, before
11 you change it, you should let me know. I'm just simply saying
12 that. If you think there is a condition ----

13 MTC [MR. TRIVETT]: Understood, sir.

14 MJ [COL POHL]: Because the intent was what they had
15 before, they have now. You are telling me -- let me ask you a
16 question.

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

18 MJ [COL POHL]: I know Mr. Sowards wants to talk some
19 more, but that's okay.

20 Under the previous regime in '08-'09 when these
21 computers were no so antiquated, were all these computers
22 disabled then?

23 MTC [MR. TRIVETT]: My understanding is that they had

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1 CD/DVD writing capability. All of the other protocol I
2 believe was still part of it. Part of the issue, though,
3 is -- the prosecution -- these laptops weren't just put in
4 storage at Camp VII, they were seized by Air Force OSI. What
5 Air Force OSI might have done regarding Internet capability,
6 you know, whether the batteries could be changed, all of those
7 things, the prosecution wasn't aware of where they were in
8 that process. So we needed to work through a protocol.

9 I can't imagine that when the military -- if in fact
10 they still had Internet access, I can't imagine that the
11 military judge would have said, "I told you to give it back
12 exactly how it was from Air Force OSI, and if the Internet
13 capability happened to be turned on, oh, well, government,
14 that's on you, now they can search the web." That clearly
15 wasn't your intention.

16 MJ [COL POHL]: No, my intentions was to give it back to
17 them just as it was taken from them, not what OFI -- I don't
18 care what OFI -- OSI did with it.

19 MTC [MR. TRIVETT]: But the point is, we don't know what
20 was disabled and what wasn't, so a protocol needed to be put
21 in place.

22 MJ [COL POHL]: So what you're saying is that, just so I
23 understand ----

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

2 MJ [COL POHL]: ---- that when this case originally came
3 up in '08, that the JTF, for whatever reason, pursuant to I'm
4 assuming a court order, provided laptop capabilities to the
5 four men in this room and Mr. Bin'Attash, facing these serious
6 charges, and nobody knows what the capability they had at the
7 time, the laptops?

8 MTC [MR. TRIVETT]: We know specifically what we provided
9 them.

10 MJ [COL POHL]: Well, that's what I'm talking about.

11 MTC [MR. TRIVETT]: We know what we provided them. Part
12 of the concern was that a bunch of additional things were put
13 onto the laptops.

14 MJ [COL POHL]: I've got that, but what I'm simply saying
15 is you know -- again, I guess we are getting wrapped around
16 the concept of the actual laptops as opposed to capability.

17 MTC [MR. TRIVETT]: Correct.

18 MJ [COL POHL]: What I am saying is if they had a
19 capability back then for a CD-writing capability, and
20 apparently that wasn't a legitimate penological interest to
21 disable, but now it is ----

22 MTC [MR. TRIVETT]: And I think that's right. I think it
23 was part of past practices that they realized that this was a

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1 security concern that they had and that's what they wanted
2 added to the protocol. My understanding was that was all that
3 was added to the protocol.

4 MJ [COL POHL]: But going back to the order at the time,
5 it was to return the laptops and you don't believe implicitly
6 in there was return the laptops to them in the same condition
7 when they were taken from them?

8 MTC [MR. TRIVETT]: I think the order was -- the order was
9 silent on that.

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

11 Mr. Connell, we generally don't hear, you know,
12 multiple times from each counsel on a particular issue. I
13 will give you a little leeway on this one.

14 LDC [MR. CONNELL]: I just wanted to answer your question
15 which is I know 100 percent there was CD-writing capability in
16 2008-2009, because when the computer was delivered to my
17 offices, it was delivered with a whole bunch of disks that had
18 been written on the CD-writing capability at the time.

19 You know, the way that it worked is somebody would
20 bring in -- there is defense courier and if there was
21 material, they would bring it in and they would get loaded on
22 and if there was material going out, they would come out, and
23 I received all those disks in the process, so I know that they

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1 exist.

2 And the same thing is I also have a pretty good
3 vision of what OSI did with the computers because I went to
4 OSI and asked them and it seems to me these problems are
5 easily surmountable.

6 MJ [COL POHL]: Thank you.

7 LDC [MR. CONNELL]: Thanks.

8 MJ [COL POHL]: Last word, Mr. Sowards, on your issue that
9 was only going to take a little bit of time.

10 CDC [MR. SOWARDS]: I did say that was the non-scenic
11 route. I was predicting.

12 Yes, just to follow-up with a point Mr. Trivett
13 raised, and that is in the sequence of events, and this is the
14 frustration now I am feeling, is that I said before, all we
15 want is the judge and the commission to enforce the order he
16 has issued three times.

17 Mr. Trivett then tells you, as he did in 182I at
18 page 12, that nevertheless -- there have been three orders on
19 this -- the military judge's order on the laptop capabilities
20 is completely silent regarding what software and hardware is
21 required now on the seven-year-old Panasonic Tough Book
22 laptops. Okay? Because you said return the computers they
23 had in 2008-2009, they seize upon the fact that you didn't say

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1 return the computers they had in 2008, 2009 to include
2 everything that was on them and don't break any of the keys or
3 smash the screen. You were completely silent on that. So
4 that allows them then to -- what did they do? This is what
5 they do.

6 They tell you that in the meantime it has occurred to
7 security people that there are protocols that have to be
8 developed, but what they acknowledged in 182I on page 12 is
9 that the prosecution worked with J-T-F-G-T-M-0, GTM0, to
10 ensure the laptops could be returned to the accused with
11 security modifications, okay, that took into account the
12 legitimate safety and security concerns of the detention
13 facility.

14 So the point is -- and, again, and I'm sorry to
15 appear uncooperative, Your Honor. But to say to Mr. Trivett,
16 who is an experienced counsel, been in this case a number of
17 years, "When I write an order, when I issue a second order and
18 when I issue a third order, if you don't want to obey it,
19 please come back to me and ask for modification before you go
20 out and work with JTF-GTM0 to come up with a bunch of security
21 protocols that directly countermand my order."

22 We shouldn't have to say that and we shouldn't have
23 to tell Mr. Mohammad we are going to wait another gosh knows

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1 how long while they sort this out.

2 What you told them to do was return those laptops.
3 The only, only security concern they have been able to
4 articulate is not even a security concern, and that has to do
5 with the fear that the defendants, who have shown they are
6 "hell bent on spreading their propaganda" will have access to
7 laptops. So if we allow these individuals access to laptops
8 in the middle of a case where they are on trial for their
9 lives and working with their defense attorneys, the same
10 defendants who for 16 months, between September 2008 and
11 January of 2010, there was never one single question about
12 their activities compromising any legitimate concern of
13 Camp VII, those individuals are going to take time out from
14 the defense of their case and what are they going to do? Plan
15 an escape? Threaten the guards? Develop some way to take
16 over the world? No. They are going to prepare propaganda,
17 whatever that is, and what that is is anything with which the
18 prosecution doesn't agree, any idea or any philosophy or any
19 thought.

20 But there are countless cases, including Supreme
21 Court decisions, which we had occasion to present to the
22 commission in the context of what we've come to refer to as
23 the Obama letter motion, and that was the motion where the

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1 government got very exercised and suggested that -- wait for
2 it -- we were sending a letter to no one other than the
3 President of the United States, and they made the assertion
4 that the commander at Camp VII had the power to control
5 matters to preserve the security of the continental United
6 States, that's what his powers extended to, to include
7 preventing the President of the United States and only the
8 President of the United States from receiving "propaganda."

9 Now, that's the security concern that they are
10 fronting now to say they need time to go consult with their
11 friends again at JTF-GTMO to come up with some more security
12 protocols and litigate that into the next summer and next fall
13 and winter. All we are saying is that's fine, let them do it.
14 All we are saying is this time, today, tomorrow morning,
15 return that laptop to them because there is nothing on it that
16 harms them. And there was DVD capability. That's why your
17 original orders communicated the commission's thinking that it
18 wanted the laptops returned, including the supporting media.

19 So I would ask Your Honor not to delay any further.
20 It's not fair, and it's really disrupting our ability to
21 represent the client.

22 Thank you very much.

23 LDC [MR. RUIZ]: Judge, I would like to make just a couple

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1 of final points.

2 MJ [COL POHL]: Okay. Let's not repeat ourselves because
3 I am hearing the same arguments over and over again. If you
4 have something new, I will listen to it, but, Mr. Ruiz, you
5 are the last one I am going to hear on this. I've got it. Go
6 ahead.

7 LDC [MR. RUIZ]: Judge, I think do a pretty decent job
8 most of the time rebutting issues that haven't been raised and
9 one I want to make clear to you is this one.

10 Mr. Trivett's assertion that the computers went to
11 the Air Force OSI and that they have no idea what OSI may have
12 done to the computers is completely unsupportable, and here is
13 why. The prosecution gave us a discoverable packet that was
14 the forensic analysis of the OSI. Walter Ruiz didn't obtain
15 it; it was provided by the prosecution to us, regarding what
16 OSI had done to these computers.

17 So for Mr. Trivett to get up here today and say to
18 you that part of their concern is that they don't know what
19 may have been put on these computers by OSI, when they gave us
20 a discovery packet of the forensic analysis of OSI, belabors
21 any credibility, Judge, and what happens in this instance.

22 MTC [MR. TRIVETT]: Objection. He is misrepresenting
23 argument.

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1 MJ [COL POHL]: Objection overruled.

2 LDC [MR. RUIZ]: What happened in this case is very
3 simple, Judge. They didn't want the computers returned to
4 Mr. al Hawsawi and the co-defendants. You ordered that the
5 computers be returned and they said, "You know what? We will
6 give you the computers. We will break them and then you can
7 have them." That's what happened. It wasn't unclear. There
8 wasn't anything about that order that was subject to
9 interpretation.

10 MJ [COL POHL]: You are now repeating yourself.

11 LDC [MR. RUIZ]: That's what happened.

12 MJ [COL POHL]: Thank you. Okay. I'll take it under
13 advisement.

14 Mr. Harrington, did we get any movement or General
15 Martins?

16 CP [BG MARTINS]: Your Honor, I wanted to have the
17 opportunity to just state what we propose as an order of
18 motions.

19 MJ [COL POHL]: Hold that thought because that's kind of
20 what we're going to do next. I just kind of wanted to know
21 where I should put 152.

22 LDC [MR. HARRINGTON]: Judge, Mr. Trivett and I talked,
23 and there are two categories of witnesses. One is detainees

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1 and the other is guards, and what we are going to attempt to
2 do, because the guard force will be leaving before the next
3 hearings and we believe we understand what their testimony
4 would be, we will try to work out a stipulation as to what
5 their testimony might be.

6 MJ [COL POHL]: Okay.

7 LDC [MR. HARRINGTON]: And then there is one detainee
8 witness who wants to have his -- he has an attorney, he wants
9 his attorney present, so he would not be available to do it.
10 There is another detainee witness who does not have an
11 attorney who is willing to testify, and there is my client.

12 MJ [COL POHL]: Okay.

13 LDC [MR. HARRINGTON]: And depending upon what time the
14 court may have, and I realize the schedule is tight, we
15 propose that my client would testify; we would like to have
16 him testify this week. The other detainee ----

17 MJ [COL POHL]: If we can have time for it,
18 Mr. Harrington. There was a lot of things on the docket. We
19 may we able to consolidate all the testimony at one time. The
20 detainee testimony at one time it seems to me is -- but let's
21 see where we are at because that would take -- I mean, if we
22 got time, we can, but right now we have ----

23 LDC [MR. HARRINGTON]: I understand that.

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1 MJ [COL POHL]: ---- three more court days available this
2 week and ----

3 LDC [MR. HARRINGTON]: We understand that, Judge, but in
4 view of the issue ----

5 MJ [COL POHL]: No, it's been around for a while. I got
6 it.

7 LDC [MR. HARRINGTON]: ---- it is vitally important that
8 my client express himself before the court.

9 MJ [COL POHL]: I understand. Sure.

10 Okay. That being said, and again we will try to
11 find -- and, Mr. Harrington, just depending upon how much
12 notice you will need, realistically it will either be tomorrow
13 or Wednesday, because right now I can't guarantee anything for
14 Thursday -- well, Thursday is out and Friday may -- there are
15 other things that we have to address on Friday, so that's
16 okay.

17 Okay. General Martins, you indicated that you have a
18 proposed order of march here?

19 CP [BG MARTINS]: Your Honor, our view would be to deal
20 with the remaining 254 motions. So 254WW, which happens to be
21 the first item on your amended docket order, and then 254
22 proper, longstanding, attorney-client meetings, and subsequent
23 ones.

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1 MJ [COL POHL]: Yes. You know, my -- do we have any --
2 other than -- other than what we discussed today, is there any
3 outstanding 254 discovery issues?

4 LDC [MR. RUIZ]: Yes, Judge. We argued 254 discovery
5 issues at the last session where I asked ----

6 MJ [COL POHL]: The EEO complaint?

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

8 MJ [COL POHL]: Okay.

9 LDC [MR. RUIZ]: And assuming you haven't already denied
10 that unbeknownst to myself, we need to get a ruling for that
11 prior to 254WW ----

12 MJ [COL POHL]: I understand that.

13 LDC [MR. RUIZ]: ---- and be able to review that discovery
14 prior to any argument.

15 MJ [COL POHL]: I got it. I got it. Okay. Let me issue
16 the discovery rulings that I have got and then we will see
17 where we are at with -- obviously if there is still discovery
18 out there that's going to be ordered released, that we have to
19 address that. If -- all the discovery requests on 254 are in
20 and I will give a ruling.

21 Mr. Schwartz, you are now standing.

22 DDC [MR. SCHWARTZ]: One moment. Your Honor, in several
23 802s you have brought up 254 and it's been confusing, I think,

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1 what you have been referring to. We have 254Y ----

2 MJ [COL POHL]: I am talking about 254Y and its progeny.

3 DDC [MR. SCHWARTZ]: Right. Pre-254Y is completely
4 different. Access to counsel is completely different.

5 MJ [COL POHL]: I am talking about 254Y and its progeny.
6 I am talking about the female guards aspects of discovery
7 including the two UI motions. Okay? My understanding is that
8 all the discovery requests have been submitted and argued, the
9 motions to compel. I doubt I will give you a written ruling,
10 but I intend to issue some rulings on that this week and then
11 depending upon what those are will be where we can go, but we
12 maybe able to do it on Friday or not, but I don't want to
13 presuppose. I would think about the submissions. So
14 understanding that ----

15 CP [BG MARTINS]: To add on that, Your Honor, I was going
16 to say our position would be to -- if we get to the point
17 where all that's left is some portion in a classified session,
18 then take argument before then and then go into the 806 and
19 get to the point where you can get any testimony and then
20 classified argument.

21 MJ [COL POHL]: Yeah.

22 CP [BG MARTINS]: Because on Thursday, we are going to be
23 in a position where, you know, we may be unable to complete

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1 the longstanding 254 interim -- interim order.

2 MJ [COL POHL]: I'm with you. I understand, General
3 Martins, but, again ----

4 CP [BG MARTINS]: I realize you have to do discovery
5 rulings, but I'm giving you our preference.

6 MJ [COL POHL]: I understand.

7 CP [BG MARTINS]: And then because we would like to
8 address 397 as much as we can ----

9 MJ [COL POHL]: Okay.

10 CP [BG MARTINS]: ---- the AE 310 piece of that, ICRC
11 Bagram could be an unclassified piece of that we could do,
12 understanding that Thursday after we do what's on the front of
13 the burner for Thursday morning we could get to more 397
14 classified stuff, which we have already done 505(h)
15 discussions on.

16 MJ [COL POHL]: Yeah. I got it.

17 CP [BG MARTINS]: And then our preference is all of the
18 0018 series. So 018EE ----

19 MJ [COL POHL]: I got it. They are not all interrelated,
20 I've got it broken down into four separate categories, but I
21 am with you on that.

22 CP [BG MARTINS]: Then we would propose AE 390. In fact,
23 AE 390, if the commission is so disposed, the commission could

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1 do that before the 018s to get that done. So that's our
2 proposed order, Your Honor.

3 MJ [COL POHL]: Okay.

4 LDC [MR. RUIZ]: Judge, just one quick comment on 310.

5 MJ [COL POHL]: Sure. Uh-huh.

6 LDC [MR. RUIZ]: Is that we are not of the impression that
7 any of that argument can be made in an unclassified setting,
8 at least we don't think that we have any material that the
9 prosecution would want us to present to the public.

10 MJ [COL POHL]: Okay. We never had a 505(h) hearing on
11 it. Speaking of which, this goes with Mr. Connell and the
12 government, you both indicated that the information relating
13 to the transcript needed to be in a closed session. Do you
14 read the rule that requires a 505(h) hearing before a closure
15 under 806, or can I go straight to an 806 without a 505(h)
16 hearing if both sides agree?

17 LDC [MR. CONNELL]: I've never considered that question
18 before, Your Honor. Can I answer it in the morning?

19 MJ [COL POHL]: Sure. Hold on. Okay.

20 CP [BG MARTINS]: Our view on that is if you've made the
21 806 preliminary determinations, that it's -- 505(h) is ----

22 MJ [COL POHL]: I still have to make the written findings.
23 I just wanted to determine whether we needed to go through

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1 that. Okay.

2 Now, the 018 series is going to be a long, drawn-out
3 thing, so I've got that. The 310, take a look at it.

4 CP [BG MARTINS]: 310, which one?

5 MJ [COL POHL]: 310 you asked for, Mr. Ruiz says 310 is
6 essentially a classified motion.

7 LDC [MR. RUIZ]: Yes, Judge, and we gave notice but you
8 didn't get to that during the closed session.

9 MJ [COL POHL]: I know. I know. We didn't get after 195.

10 CP [BG MARTINS]: Your Honor, if I could correct something
11 I said. I apologize. I said 390. I meant 391 as another one
12 if we could fit it in. Rather than 390, 391 would be our
13 preference either before the 018 series or after it.

14 MJ [COL POHL]: So the government preference is 254, 391
15 and then the 018 series?

16 CP [BG MARTINS]: Well, 397 to the extent there is
17 anything unclassified you had talked about maybe wanting to
18 do. But if we are hearing that the ICRC piece is not
19 something we can do in open session, then 391 and then the 018
20 series.

21 MJ [COL POHL]: Okay. When I say "okay," I understand
22 your position.

23 Okay. Ms. Bormann?

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1 CP [BG MARTINS]: One last comment. In conferring with
2 Mr. Ryan, I think our preference is the 018s and then 391.

3 MJ [COL POHL]: Okay.

4 CP [BG MARTINS]: Thank you.

5 LDC [MS. BORMANN]: So we have one more to add into the
6 mix, and we believe that it should be heard in its entirety or
7 to the greatest extent possible this go-around. We started
8 it. It's one of the motions that subsumed sort of under 397.
9 When we were in the 505 hearing, we put off unclassified
10 argument on 112 and -- because it needed to happen in an open
11 session, and so we believe that we ought to be finishing the
12 argument on 112 and the unclassified argument on 397.

13 MJ [COL POHL]: Okay. Mr. Connell?

14 LDC [MR. CONNELL]: Your Honor, I would like to make a
15 pitch for 365, which is a predecessor to dealing with 373. So
16 if we could do 365 this time, then it would make us able to
17 deal with -- go forward on 373.

18 MJ [COL POHL]: Can we do that without a classified 505(h)
19 hearing?

20 LDC [MR. CONNELL]: So the only -- probably not.

21 MJ [COL POHL]: Hold -- hold that thought for a second.

22 [Pause.]

23 MJ [COL POHL]: There is something coming to you on that

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1 particular one that after you get it, see where you are at.

2 LDC [MR. CONNELL]: Very good, sir. Thank you.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: My second suggestion is 386, which are
5 the Touhy issues. If we could move forward on the Touhy
6 issues, that would let us do 350 in due course.

7 MJ [COL POHL]: Okay. Thank you for your input. This is
8 where we are going to start it. Since we already started
9 discussing it, we will finish the unclassified portions of 112
10 and 397 as necessary, so those will be next.

11 This is for tomorrow. We'll see how much we get
12 done. Mr. Harrington, I understand your concern. If we need
13 to take your client's testimony, that will be on Wednesday. I
14 understand that motion is going to have to be broken up no
15 matter what, correct?

16 LDC [MR. HARRINGTON]: [Microphone button not pushed; no
17 audio.]

18 MJ [COL POHL]: Like I said, this has been around a long
19 time and if he wants to be heard on it -- and, again, just to
20 make it clear, I know all the attorneys know this, but the
21 clients need to know this too, is he is free to testify on
22 issues that relate -- on facts and issues that relate to the
23 issue before me and nothing else. Okay. But just to let you

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1 know.

2 And then after that, I do want to address the Touhy
3 issue next and then we will start ----

4 LDC [MR. NEVIN]: Excuse me, Your Honor, after what?

5 MJ [COL POHL]: 112, 397, 386, then we will start the 018
6 series, and I doubt very much we'll get done with it, with the
7 understanding that on Wednesday, first thing, Mr. Harrington
8 will have an opportunity to present evidence on 152 just on
9 that one issue and we will deal -- and the other two detainees
10 will do that the next time because we can't do that now
11 anyway. And then we will start 018 after that and if we get
12 done with 018, then we will do 391 with the understanding that
13 254 is still out there, and once I issue rulings on what we
14 did today on 254, that may or may not be added to the docket
15 for argument on Friday. It's very unlikely that I would want
16 argument on Friday under any circumstances until we've
17 completed the 806 session on Thursday dealing with 254.

18 So no matter what -- I'm not telling you how I am
19 going to rule, but I am just saying I can see doing the closed
20 portion first and then the open portions second, and that's
21 all of 254. But again, either tomorrow or first thing
22 Wednesday, I'll give you at least an oral ruling on the
23 outstanding discovery and the motion for reconsideration.

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1 LDC [MR. NEVIN]: And, Your Honor, on Thursday the 806
2 would be all on 254.

3 MJ [COL POHL]: The 806 is what we discussed the other
4 day. It will be 254, it will be -- it will be 396, and then
5 the notices I sent out today should be 114, 114F and I believe
6 190, 191. I think those are the four I sent out.

7 The 112 is OBE because it no longer deals with
8 classified, and the same thing with 397, so those notices are
9 somewhat moot. And I believe that's how we ended up with 195
10 also. Is that correct, Mr. Connell, Zero Dark Thirty?

11 LDC [MR. CONNELL]: There is no further classified issues
12 with respect to 195.

13 MJ [COL POHL]: Okay. Tomorrow when we get done, we will
14 do the same procedure, so everybody knows where we are going
15 to. So tomorrow we will pick up the argument on 112, 397,
16 386, 018, 391. That's the road ahead, with the understanding
17 that Wednesday morning Mr. Harrington will be allowed to
18 present testimony from his client on 152, and wherever that
19 is, either we will pick up where we are left off and we will
20 see how much we can get done and how much we can get scheduled
21 Friday.

22 The commission is recessed until 0900 tomorrow.

23 [The R.M.C. 803 session recessed at 1725, 22 February 2016.]

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