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1 [The R.M.C. 803 session was called to order at 0902,
2 22 October 2015.]

3 MJ [COL POHL]: The commission is called to order.

4 Trial Counsel, any changes in the prosecution team
5 since the last recess?

6 CP [BG MARTINS]: Your Honor, LN1 Passwater, paralegal, is
7 no longer here, but Vanessa P. Pichon is. Other than that, no
8 changes.

9 MJ [COL POHL]: Defense, any changes? Mr. Nevin?

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

11 MJ [COL POHL]: Ms. Bormann?

12 LDC [MS. BORMANN]: No changes at the table.

13 MJ [COL POHL]: Mr. Harrington?

14 LDC [MR. HARRINGTON]: No changes.

15 MJ [COL POHL]: Mr. Connell?

16 LDC [MR. CONNELL]: No, Your Honor.

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

18 LDC [MR. RUIZ]: None, Your Honor.

19 MJ [COL POHL]: Since we last met, just to put it on the
20 record, on Tuesday afternoon the defense filed a request that
21 the court conduct order addressing the issue of pro se
22 representation be translated into Arabic. The government did
23 not oppose that request.

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1 Due to the resources here, that task was to be
2 accomplished yesterday, and that's why we did not meet
3 yesterday, because the translators had a choice of either
4 doing that task or, if we're in court, they get involved here,
5 so they can't do two things at one time, which is the reason
6 why we did not have a session yesterday.

7 Has that been accomplished, General Martins?

8 CP [BG MARTINS]: Your Honor, it was translated and then
9 provided to the detainees at counsel's request last night. Is
10 that what you are asking?

11 MJ [COL POHL]: Yes.

12 CP [BG MARTINS]: Okay.

13 MJ [COL POHL]: Ms. Bormann, since this is primarily
14 focused on you and your client, has your client had an
15 opportunity to read it?

16 LDC [MS. BORMANN]: Yes.

17 MJ [COL POHL]: Now, before we get to the way ahead on
18 that, there is the issue about Mr. Connell's 505(g) notice and
19 a request for the government to conduct a 505(h) hearing on
20 said notice.

21 LDC [MS. BORMANN]: Judge, if I may be heard for just a
22 moment, and that is that we specifically join this. I know
23 that the trial conduct order says that, but I want to make it

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1 very clear that we all join this.

2 MJ [COL POHL]: Okay. And maybe I got a little bit
3 ahead -- okay.

4 Mr. Connell?

5 LDC [MR. CONNELL]: A couple of housekeeping matters,
6 Your Honor. The first one is I need to update the
7 certificate -- I mean the service on the 505 -- excuse me,
8 which is 380B. I have now provided a copy to the prosecution
9 and all defense -- the lead counsel for all defense teams
10 except Mr. Binalshibh's team.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: I still have the military commission's
13 copy and I am happy to tender it to the military commission
14 whenever directed to do so.

15 MJ [COL POHL]: Okay. Was that the classified ----

16 LDC [MR. CONNELL]: Yes.

17 MJ [COL POHL]: ---- notice itself?

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: Okay. Let's go ahead and do that and mark
20 it, and obviously if it is classified, it needs to stay ----

21 LDC [MR. CONNELL]: With the court's indulgence.

22 MJ [COL POHL]: Sure. Just to make it clear, this would
23 be the classified attachment to 30 -- 380B?

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1 LDC [MR. CONNELL]: Yes, sir. It's both the -- is the
2 body -- it is 380B itself that is classified in the special
3 compartment. The attachments are only SECRET/NOFORN, so this
4 is the full set.

5 MJ [COL POHL]: We will treat that as a separate exhibit
6 then.

7 LDC [MR. CONNELL]: Yes, it is 380B. Can I approach?

8 MJ [COL POHL]: Yes. You just said something, that it's
9 380. Is that in your hand what you consider 380B?

10 LDC [MR. CONNELL]: Yes, sir. Both the 380B itself and
11 Attachments B and C to 380B.

12 MJ [COL POHL]: So you are just filling out the 380B
13 that's already part of the record?

14 LDC [MR. CONNELL]: There is no -- the military commission
15 has never accepted 380B for filing.

16 MJ [COL POHL]: Got it. I just wanted to keep this filing
17 stuff clear. Thanks.

18 LDC [MR. CONNELL]: This is 380B.

19 MJ [COL POHL]: Give it to the court reporter, please.

20 LDC [MR. CONNELL]: Just so we are 100 percent clear, that
21 is the one that requires extra special handling.

22 MJ [COL POHL]: Got it.

23 LDC [MR. CONNELL]: Separate from that, Your Honor, last

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1 night the prosecution sent a letter to the defense, which is
2 on the same subject as 380B. I have prepared an additional
3 505 notice, and if I could have -- I would like to tender that
4 in court today. It is not classified -- it is classified, but
5 it does not require extra-special handling.

6 MJ [COL POHL]: You have served a copy of this on the
7 government?

8 LDC [MR. CONNELL]: I have given everyone a copy except
9 Mr. Binalshibh's team.

10 MJ [COL POHL]: That would be the next 380 -- what's the
11 next,.

12 [Conferred with the court reporter.] You are
13 correct, 380K.

14 LDC [MR. CONNELL]: May I approach?

15 MJ [COL POHL]: Sure.

16 LDC [MR. CONNELL]: Your Honor, my housekeeping matters
17 are done. I am happy to answer any questions about either of
18 those.

19 MJ [COL POHL]: I don't have any right now.

20 LDC [MR. CONNELL]: Thank you.

21 LDC [MR. NEVIN]: Your Honor, may I be heard?

22 MJ [COL POHL]: Sure.

23 LDC [MR. NEVIN]: Thank you. Just further on the

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1 housekeeping issues, it's implicit in what Mr. Connell just
2 said, but not explicit, that I and certain members of my team
3 signed the -- delivered copies of the signed -- of the signed
4 MOUs to the trial judiciary. Those were accompanied by a
5 statement of reservations, and I would like to have marked, as
6 the next exhibit in the AE series, a copy of our reservation
7 so that this is part of the record for whatever purposes it
8 may serve.

9 MJ [COL POHL]: The next one, AE 013 series, which -- I'm
10 not sure what it is. It's high, but -- okay. That's fine.

11 LDC [MR. NEVIN]: I believe it involves five letters at
12 this point.

13 MJ [COL POHL]: I believe it does too. That's why I am
14 saying. Fine. And I will note for the record that -- go
15 ahead, Mr. Nevin.

16 Ms. Bormann and Mr. Ruiz, your reservation, similar
17 to what Mr. Nevin just said, was not actually filed with the
18 commission?

19 LDC [MS. BORMANN]: That's correct, but at this point we
20 would be asking to do that. I obviously don't have it here.

21 MJ [COL POHL]: Okay. I just want to say to make it part
22 of the record.

23 LDC [MS. BORMANN]: We can file it electronically, the

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1 old-fashioned way.

2 MJ [COL POHL]: And the same, Mr. Ruiz?

3 LDC [MR. RUIZ]: We will do the same.

4 LDC [MR. NEVIN]: If the record will reflect, I served a
5 copy of this on the prosecution and on each of the defense
6 counsel.

7 MJ [COL POHL]: Mr. Harrington, that brings us to you.

8 LDC [MR. NEVIN]: Your Honor, just so the record is clear,
9 may I serve a copy of this on my client?

10 CP [BG MARTINS]: Your Honor, we haven't read it
11 completely. We are still going through it.

12 MJ [COL POHL]: As I sit here, I'm not going to give you
13 an advisory ruling. We will see what the government says, and
14 then we will go from there.

15 LDC [MR. NEVIN]: Okay.

16 MJ [COL POHL]: Mr. Harrington.

17 LDC [MS. BORMANN]: I'm sorry. Before we get to
18 Mr. Harrington -- I don't mean to interrupt Mr. Harrington.
19 But before we get there, I wasn't quite done. So if you will
20 bear with me for a moment.

21 MJ [COL POHL]: Okay.

22 LDC [MS. BORMANN]: I will be glad to share the podium
23 with Mr. Harrington.

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1 Mr. Connell provided you with a document that all
2 counsel for all of the detainees has seen, other than counsel
3 for Mr. Binalshibh, and we strongly request a hearing on the
4 admissibility of the information we were advised of yesterday.
5 It impacts my ability to do my job ethically.

6 MJ [COL POHL]: Okay. But isn't that what we will address
7 in the 505(h) hearing?

8 LDC [MS. BORMANN]: Before we get to anything further with
9 respect to a pro se colloquy, it's essential that this be
10 addressed.

11 MJ [COL POHL]: Ms. Bormann, it is -- my way ahead, it
12 seems to me, is we need to address things in the 505(h)
13 hearing in order to close the loop on the pro se request.

14 LDC [MS. BORMANN]: That's exactly my point. One more
15 point, and that is that my client has a series of questions
16 that he has been formulating for the commission, and he would
17 like to be able to utilize his laptop in order to organize
18 those questions.

19 I'm asking -- it's been provided by the government,
20 but we have been stalled in providing it to him because the
21 PRT refuses to review it, so we are now at a standstill. So
22 he is asking -- Mr. Bin'Attash is asking that that be provided
23 to him for use in court.

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1 MJ [COL POHL]: Where is it now, physically?

2 LDC [MS. BORMANN]: It is in our office.

3 MJ [COL POHL]: Ms. Bormann, that's a separate issue
4 altogether. I will come back to it. For now he can do what I
5 do in court, which is write on a piece of paper.

6 I'm not denying your motion, we will get to it, but I
7 don't want to get hung up on that type of issue at this time.
8 There is something more substantive we need to address. And
9 that's you, Mr. Harrington, and your team.

10 LDC [MR. HARRINGTON]: Judge, I assume that the issue you
11 are asking me about is our failure to sign the MOU, correct?

12 MJ [COL POHL]: Yes, Mr. Harrington.

13 LDC [MR. HARRINGTON]: Judge, this has been a very
14 difficult issue to work through with our client, and there has
15 been some impact of the 292 issues that have influenced this
16 issue as well.

17 At this point in time, Judge, Mr. Binalshibh has not
18 authorized anyone on our team to sign the MOU. And I
19 recognize that there are decisions within court proceedings,
20 some of which are reserved for an accused and some of which
21 are those that an attorney has to make.

22 This is -- obviously everybody keeps repeating it and
23 you have known it, this is a capital case, and one of the

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1 primary functions of defense counsel is to have a good and a
2 working relationship with their -- with the client, and
3 obviously the events of the past few days have highlighted the
4 difficulties that all of us have, and certainly that I have
5 with Mr. Binalshibh. But he is, at this point, adamant about
6 the fact that he does not want our teams to sign the MOU. I
7 will not state for the court what the reasons are because I
8 think that's really between he and I.

9 And my position is that I have a Hobson's choice of
10 facing the potential removal from the case based upon the
11 court's show-cause order or doing something that will probably
12 permanently alienate me from him in terms of a future
13 representation.

14 MJ [COL POHL]: Mr. Harrington, when you said the accused
15 has certain decisions that only the accused can make ----

16 LDC [MR. HARRINGTON]: Yes.

17 MJ [COL POHL]: ---- is this one of them?

18 LDC [MR. HARRINGTON]: That's the question, Judge.

19 MJ [COL POHL]: I mean, under your broad reading of
20 relation with the accused, it would strike to me there is not
21 the normal five we talked about. It would be anything he
22 seems to say.

23 Let me ask you this: You were given two options in

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1 the show-cause order.

2 LDC [MR. HARRINGTON]: Correct.

3 MJ [COL POHL]: Option number one was sign the MOU as is;
4 the option that was taken by four of the other five counsel.
5 Three of the other four wanted to preserve their objections,
6 which was fine with me. That's fine, but we have been
7 litigating this for three years now. It's nothing new.
8 Option two was tell me how you can defend your client without
9 access to classified information.

10 Now, you and Mr. Nevin initially chose option three,
11 which was to basically repeat putting on my document your
12 reservations, which was specifically not an option that I
13 provided to you. Okay. Mr. Nevin has apparently reconsidered
14 his position and has gone along with what two of the other --
15 two of the other teams have done. You have not.

16 So now we are at door two, which is how can you
17 represent your client without access to classified
18 information? And it is going to hit you right in the face
19 today, because unless you were to sign the MOU today, you and
20 your team would be excluded from the 505(h) hearing.

21 And so now explain to me how you can -- if you
22 believe that you cannot sign the MOU resulting in you not
23 getting classified information, how can you effectively

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1 represent your client?

2 LDC [MR. HARRINGTON]: I understand that, Judge, and it
3 goes to the underlying procedure here where the clients are
4 not allowed to get access to the classified information
5 and ----

6 MJ [COL POHL]: Mr. Harrington, I understand the defense
7 position on this. I have heard it for three years now, okay?
8 We are at the point where the commission has issued a ruling.
9 We are done litigating this. We are done saying that the
10 client can't get classified information, that's unfair,
11 Your Honor, reconsider. We are done.

12 LDC [MR. HARRINGTON]: I understand.

13 MJ [COL POHL]: That's what I am saying. So I know why we
14 are here. I have seen your objections. But today is the day
15 to decide.

16 Will you and your team sign the MOU as drafted
17 without amendments or not, and, if not, can you continue on
18 with this case and be -- effectively represent your client?
19 Those are the two questions that are currently before you.

20 LDC [MR. HARRINGTON]: I understand, Judge. My
21 suggestion, Judge, is that, given what the court has just said
22 and reemphasizing it, forcefully reemphasizing it,
23 Major Wichner and I be given an opportunity to talk to

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1 Mr. Binalshibh to talk about this issue and see if there is a
2 change in position, and, if not, we will advise the court. It
3 will not take very long.

4 MJ [COL POHL]: Okay. Thank you, Mr. Harrington. We will
5 do scheduling in a second.

6 Ms. Bormann? I'm sorry, you were behind Mr. Nevin.

7 LDC [MS. BORMANN]: Yes, Judge.

8 MJ [COL POHL]: How much -- do you need additional time to
9 discuss the pro se procedure with your client now,
10 understanding that until we get the 505(h) hearing done, it's
11 still subject to change?

12 LDC [MS. BORMANN]: So if I may take a brief moment.

13 MJ [COL POHL]: Yes.

14 [Pause.]

15 LDC [MS. BORMANN]: Mr. Bin'Attash has no additional
16 questions of me, unless, of course, there are issues that
17 arise in the 505 hearing. He was prepared, short of that, to
18 ask the commission a set of questions.

19 MJ [COL POHL]: Okay. But as I said, I would like to get
20 the whole thing tied up ----

21 LDC [MS. BORMANN]: Sure.

22 MJ [COL POHL]: ---- and then we will go to that.

23 LDC [MS. BORMANN]: Sure. I do have one issue that I need

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1 to address to the court because of my ethical duties. So
2 after being read on to the program yesterday and being advised
3 of 380B's content, I sought out some advice in the way of
4 ethical advice, because my job is to ----

5 MJ [COL POHL]: I understand that, Ms. Bormann, but is it
6 appropriate to discuss that in an open session?

7 LDC [MS. BORMANN]: Well, it is. This particular issue
8 is.

9 MJ [COL POHL]: Okay.

10 LDC [MS. BORMANN]: So in doing so, I contacted Brigadier
11 General Baker, the Chief Defense Counsel, and met with him
12 last night. Although I tried to have a conversation with him
13 regarding the position I am in now, I couldn't because he is
14 not read on to the program. And because of that, I am denied
15 and my client is denied the guidance of the Chief Defense
16 Counsel on this particular issue. And it's funny, because I
17 have never sought it before, but this is such an unusual
18 circumstance ----

19 MJ [COL POHL]: Okay.

20 LDC [MS. BORMANN]: ---- that I actually needed some
21 ethical guidance and some -- somebody to give me some ideas.
22 So I'm asking that he be read on to the program so he can
23 fulfill his statutory duties.

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

2 Trial Counsel, I have got two issues I want to
3 discuss with you before we give Mr. Harrington his last chance
4 to talk to his client.

5 Issue number one, just to put it on the record, at
6 the 802 yesterday Lieutenant Colonel Thomas requested the
7 commission authorize General Baker, who is the Chief Defense
8 Counsel, access to the program that people have been read on
9 today. I told Colonel Thomas at the 802 that I don't make
10 those kind of decisions at an 802, to raise the issue on the
11 record. I know he was going to, but Ms. Bormann did it first.
12 Okay.

13 Just on that issue, it strikes to me, consistent with
14 prior rulings of this commission, that access to classified
15 information is -- that the commission has authority to say who
16 gets access to it, is limited to parties of the commission.
17 However, that being said, that the -- and General Baker is --
18 both in practice and by his position, is not a party and
19 cannot be a party to this trial. Okay.

20 So that being said, and consistent with prior rulings
21 on this case to disclose to third parties, I do not believe I
22 have the authority to authorize that. Okay. That does not
23 mean that the government can't provide what classified

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1 information is to General Baker or whomever to enable them to
2 perform their duties.

3 Now, two questions, General Martins. Question number
4 one, do you agree with that basic framework?

5 CP [BG MARTINS]: Your Honor, I do. We are mindful of the
6 court's ruling. We agree that the parties are the ones who
7 should be getting information, sensitive classified
8 information in this matter, and that it should be limited to
9 parties.

10 We do note that the commission in 371 acknowledged a
11 need to know and an appropriateness of the Chief Defense
12 Counsel in that case to obtain some piece of the materials or,
13 you know, the pleadings, if you will, of that case -- or of
14 that motion.

15 So our position is that the general rule that it
16 ought to be limited to parties is necessary to keep the
17 integrity of your protective order and the process and that
18 there may be case-by-case situations in which he has a need to
19 know or a supervisory responsibility under the regulation
20 where having some access is appropriate.

21 We want to make sure we are onside with your rulings,
22 and we believe that case-related material ought to be done
23 with the judge's buy-in and so forth because it is your

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1 protective order, and that's how we are approaching this.

2 MJ [COL POHL]: That being said, whether it is -- about a
3 specific motion about a specific piece of classified
4 information to be given to specific third party, okay? As I
5 have stated before, my general rule is what I just said.

6 CP [BG MARTINS]: Correct.

7 MJ [COL POHL]: But of course it's the government who owns
8 the classified information in this case. It's the government
9 who, quite frankly, has the interest in the case.

10 So I guess I can frame it a different way: Under the
11 circumstances on this specific issue, does the government have
12 any objection to providing a read-on to General Baker on this
13 program?

14 CP [BG MARTINS]: May I have a moment to confer with
15 counsel?

16 MJ [COL POHL]: Sure.

17 LDC [MR. RUIZ]: Your Honor, after you get done with this
18 issue, I would like an opportunity to address the commission.

19 MJ [COL POHL]: Sure.

20 CP [BG MARTINS]: Your Honor, so we fully agree that the
21 government is the owner of the information and is the one
22 agreeing to release it. You have instituted a protective
23 order at our motion, and it requires an MOU to be signed, not

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1 a modified one, not one that's marked up, et cetera.

2 Our understanding, we are not aware that he has
3 signed such an MOU. Were he to comply with your protective
4 order, including the signing of an unmodified MOU, it's
5 unmodified, he is now in ----

6 MJ [COL POHL]: In talking to my CSO, I believe he has
7 complied with that, but we will confirm it.

8 CP [BG MARTINS]: We would like to have the notice
9 that your order requires for us to get from him that it is
10 authoritative, and in this particular circumstance, in light
11 of the context of the litigation, we believe providing him the
12 read-on to that compensatory control measure and then certain
13 information that pertains to the motion is appropriate.

14 MJ [COL POHL]: Okay. And understand, this is a narrow --
15 just so there is no misunderstanding here, it's a narrow
16 exception to the PO's general prohibition of disclosing it to
17 third parties based on the unique circumstances of his
18 position and the nature of this issue. Okay. Thank you.

19 Now, the other thing I wanted to ask the
20 government -- and I don't know whether you want to address
21 this, General Martins, or I believe Mr. Trivett. I am not
22 sure who is the government position on the show-cause order.

23 CP [BG MARTINS]: Yes. Okay. I will let Mr. Trivett.

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1 MDTC [MR. TRIVETT]: Good morning, sir.

2 MJ [COL POHL]: Okay. I just want to clarify that before
3 General Baker is read on to the program, I need to confirm
4 that he actually submitted a clean MOU. Since we have got a
5 stack of them, I have to confirm that. If it's not clean,
6 then obviously he will not be read on. If he submitted an
7 unclean one, he will need to submit a clean one to get on to
8 the program, and until that is done, I am not permitting him
9 to see the material.

10 Mr. Trivett, because I believe you are handling the
11 show-cause motion -- and I want to tie this up before we give
12 Mr. Harrington a chance to talk to his client. The show-cause
13 order in August, it stated, as I said earlier, two options for
14 the defense. Four of the five defense teams have complied
15 with option one. Option number two is if you don't do it, how
16 can you proceed effectively? And I explained to
17 Mr. Harrington where I think we are at with that.

18 I just want to make sure that the government -- given
19 the potential sanction for failure to comply, the government
20 adheres to its position that they only have those two options.

21 MDTC [MR. TRIVETT]: Yes, sir.

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

23 Mr. Ruiz.

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1 LDC [MR. RUIZ]: Your Honor, just a couple of matters that
2 are follow-ups from the 802, but also I think which are
3 relevant to the discussion about the program read-on that we
4 have been discussing on.

5 At the 802 yesterday, one of the issues that I raised
6 was that it was my position that members of my team, all of
7 whom are properly cleared, have the requisite read-ons and
8 have submitted the MOUs that satisfy the court's ruling,
9 should be read into that program. At the 802 we discussed,
10 because of timing and limitations that were inherent in
11 apparently the process, that the four detailed counsel from my
12 team would, in fact, receive that read-on, and that happened.

13 However, we -- I want to make clear that it is my
14 position that all members of my team who are properly cleared,
15 and they all are, and who have submitted the MOUs, which they
16 all have, should have access to this program. It is my
17 judgment, as the learned counsel on this case, that that is
18 necessary in order to be effectively able to take advantage of
19 all the resources that are part of Mr. Hawsawi's team.

20 I don't think that was clear at the 802, and I want
21 to make that request now; that is, that the commission, in
22 fact, direct that they be provided that briefing, including
23 our defense security officer, which, of course, is there to

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1 provide us with guidance on these issues.

2 MJ [COL POHL]: Okay. I understand, Mr. Ruiz. In the
3 effort to move this particular litigation along, I did not
4 push the government on their reasons why because, quite
5 frankly, I don't know what they are. I just wanted to move
6 this along.

7 But you are absolutely correct in that the normal
8 practice, my understanding is that all counsel and all members
9 of the defense team have equal access to classified
10 information and read-on programs. And if the government wants
11 exceptions to that, they have to explain to me why, and we
12 will go to that next.

13 LDC [MR. RUIZ]: That's what I'm not clear on, and I think
14 needs to be clear on the record.

15 MJ [COL POHL]: Absolutely. I agree.

16 LDC [MR. RUIZ]: Because we are going to be starting a
17 process where we have piecemeal access to information within a
18 defense team.

19 MJ [COL POHL]: I gotcha.

20 Trial Counsel? We are not going to litigate it now,
21 okay? But you are to file a pleading with the court of your
22 legal basis for limiting some members of the defense team to
23 various programs, as you have requested. I don't remember

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1 hearing one yesterday, and, again, like I said, in order to
2 move it along. So the normal briefing schedule will go
3 through, and then we will see where we are at, but you are
4 adding, in my view, a restriction on certain programs, and I
5 just need to know why.

6 CP [BG MARTINS]: Your Honor, I mean, if we can focus
7 this, it sounds like this is an in-court motion for access to
8 something.

9 MJ [COL POHL]: No, no, what it is is this: You have
10 taken a position on this particular program of not every
11 defense -- member of the defense team gets the read-on, okay?
12 Now, if that's not true, but that's ----

13 CP [BG MARTINS]: I think it is just inverting the
14 process. There is a process by which individuals receive
15 access to information. Not everybody across the government's
16 team or a defense team has all of the same read-ons.

17 MJ [COL POHL]: Is there any restrictions, up until this
18 program, that limited one member of the defense team who have
19 been cleared and signed the MOU from access to classified
20 information?

21 CP [BG MARTINS]: Your Honor, the basic rule is that just
22 having a clearance doesn't mean you have access. I would
23 ask -- Your Honor, we are happy to provide explanation, and I

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1 do welcome the commission's instinct here to ask for a
2 briefing schedule or a briefing of this.

3 MJ [COL POHL]: I mean, that's what we are talking about
4 here.

5 CP [BG MARTINS]: I don't want to be writing a motion or a
6 notice without understanding precisely what the rationale is
7 for everybody on the defense team to have ----

8 MJ [COL POHL]: Let me ask you this, then: Let's turn it
9 around. I understand need to know, clearances, MOUs,
10 read-ons. God, I know that, okay?

11 My point is this, is that up until yesterday, I was
12 unaware of any limitations within the defense team about
13 access to classified information without a specific showing --
14 and, again, I'm not sure we even have that. And, again, I
15 want to -- but my question is, you seem to be saying that
16 there is a need-to-know requirement on each program?

17 CP [BG MARTINS]: That's the law. That's the law,
18 Your Honor. So if he has access, if he wants to put it in
19 writing why he believes everybody on the team needs the same
20 access, he has had the read-on, he has the access, he can
21 articulate that, and then we can focus this. We just don't
22 want to file a notice that doesn't answer the question.

23 MJ [COL POHL]: Okay. My question then is this -- and

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1 perhaps I am confused, because clearly I am, is that when
2 counsel get their TS/SCI and their team gets their TS/SCI,
3 then they get read on. Everybody gets read on.

4 Does each member of the defense team then have to get
5 a specific need-to-know to justify the read-on? I am talking
6 about when this whole thing started.

7 CP [BG MARTINS]: For each -- Your Honor, for each -- and
8 we have previously litigated things where we have cited to
9 cases such as El-Mezain and others where each particular
10 program or special access, in this case a compensatory control
11 measure, requires a demonstration of a need to know, and then
12 just the fact that you have one doesn't mean it is all seasons
13 and you get all. That's just the way a government has to
14 control its information.

15 So we are happy to provide you explanations,
16 Your Honor.

17 MJ [COL POHL]: Okay.

18 CP [BG MARTINS]: We would request an individual who has
19 the access. Four of his team members now have it; they were
20 read on.

21 MJ [COL POHL]: I got it.

22 CP [BG MARTINS]: At the commission's request, we have
23 tried to accommodate it and believe that ----

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1 MJ [COL POHL]: My concern, General Martins, is that I can
2 see this issue coming up again and again and again. And so
3 all I want to know is -- and I am hearing what you are saying,
4 and we are not litigating this now. We are simply prepping
5 the battlefield of simply the government's position of how --
6 of what -- how there could be limitations within the defense
7 team who have all been cleared and signed the MOU to access
8 certain programs.

9 For example, under the current -- under this one,
10 Mr. Ruiz can talk about this with his fellow counsel, but he
11 can't have one of his clerks go write a pleading. Correct?

12 CP [BG MARTINS]: In the overnight sort of scenario we
13 were in to provide read-ons and get classification authorities
14 and so forth to understand it within the terms of their
15 authorities, four members of his team -- he could have chosen
16 whoever he wanted to deal with this limited issue of
17 Mr. Connell's ----

18 MJ [COL POHL]: Okay.

19 CP [BG MARTINS]: And, again, we are in the narrow issue
20 of what's sufficient for the colloquy ----

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

22 CP [BG MARTINS]: ---- a satisfactory colloquy of which
23 you have long had in the government's position. So we are in

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1 an area where access is governed by the law, and we are trying
2 to comply with the law.

3 We can provide a notice of general authorities on why
4 an access to a particular program doesn't mean, you know, it's
5 open to everybody with the same level of clearance. Is that
6 helpful?

7 MJ [COL POHL]: That's really what we are asking for, your
8 legal authority to limit access from cleared members of the
9 defense team on certain programs, okay?

10 CP [BG MARTINS]: We will frame the issue, Your Honor, and
11 provide a notice and then we will ----

12 MJ [COL POHL]: We will brief it. We will litigate it. I
13 just don't want this issue to come up again unless we are
14 clear of the way ahead.

15 CP [BG MARTINS]: It has come up before in the context of
16 classified information procedures, and we have cited to this
17 principle time and again, but in this sort of context we will
18 focus it, and we will provide you the authorities again.
19 Thank you.

20 LDC [MR. RUIZ]: Judge, this is, of course -- as you know,
21 this is the first time this specific issue has come up in
22 terms of attempting to limit certain members of the defense
23 team access to information. And I can tell you unequivocally

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1 that is a game-changer for me and for my analysis as learned
2 counsel on this case, and quite frankly, on my willingness to
3 continue on this case under these types of circumstances and
4 shifting rules.

5 I'm putting you on notice, Judge, and this court,
6 that this is a significant issue, because we have litigated,
7 as you said, the MOU for three years. We have gone through
8 just about every objection. We have raised all our objections
9 to it. And the understanding the entire time was that once
10 everybody signed the MOU, we would receive classified
11 information.

12 Now we are adding a new wrinkle to this, which is
13 apparently now the government gets to decide who within the
14 defense team has a need to know of this information. That
15 gives the government a direct reach into the defense and into
16 defense strategy as to who has and who needs to see this
17 information. That's our judgment as learned counsel and as
18 other counsel on this case, and can I tell you I don't see a
19 way that I could reconcile that kind of scenario within my
20 team.

21 I will tell you that as it stands right now, I
22 understand from Mr. Nevin that all of his team, all of the
23 members who were present here, at least yesterday, were read

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1 on to the program.

2 MJ [COL POHL]: Mr. Ruiz, you are arguing the motion.

3 LDC [MR. RUIZ]: I'm making a record.

4 MJ [COL POHL]: You are arguing the motion. Let them get
5 to it. I'll listen to this, but I am going to hear this
6 again, aren't I?

7 LDC [MR. RUIZ]: I am making a record now, Judge, because
8 I think it is important to make the record.

9 MJ [COL POHL]: You made a record already, though.

10 LDC [MR. RUIZ]: What we have now, going forward into this
11 505 hearing, is we have a disparity of access to resources.
12 One team has the entire team read on. We don't.

13 MJ [COL POHL]: The objection is noted. It's on the
14 record.

15 LDC [MR. RUIZ]: Right. I would also tell you that we
16 submitted three paralegals yesterday to be read on. Two were
17 read on, one wasn't read on. The information I received from
18 the prosecutors' representative was that they were trying to
19 limit the number of people who could have access to it.

20 I also understand that when the program was made
21 available to Mr. Ali's team, and Mr. Connell I think has more
22 information on this, it was made to all members of his team,
23 and the only reason certain members of his team were not able

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1 to get read on was because they couldn't make the appointment.

2 So we have -- what I see is right now Mr. Hawsawi's
3 team is at a disadvantage from a disparity of resources
4 because the government has chosen yesterday to limit access to
5 members of our team. And now I understand that the court
6 wants to litigate this later, but I have to address a 505
7 issue, and I have to litigate this issue today presumably with
8 four members of my team versus other teams who have seven
9 members of their team and their collective input and their
10 wisdom and their ability to carry out these tasks.

11 As I understand it, even though we are five
12 codefendants in this trial, we are independent teams, and we
13 are independently representing these men, and that's the
14 position that I am in right now. I do not think that it is an
15 equal position. I don't think that's fair, to ask my team to
16 move forward, litigate this issue and we will get to it later,
17 because the government has made a decision on no information
18 that our team should only have X number of people read on, but
19 Mr. Nevin's team should have all of his team read on,
20 Mr. Ali's team should have it available to all of his members.
21 And I'm not content to just kick the can down the road and
22 address this issue another day.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: Your Honor, I would like to address
2 the three issues that have come up since the last time I
3 spoke. The first one is that the military commission said
4 that three of the four teams who had signed the MOU had chosen
5 to preserve their objections. I think that was just
6 shorthand, but I just want the record to be completely clear
7 that when we litigated AE 013T long ago, the military
8 commission assured us that all our objections to the
9 protective order were preserved at that time.

10 MJ [COL POHL]: Mr. Connell, that's been my position from
11 the very start.

12 LDC [MR. CONNELL]: And mine, sir.

13 MJ [COL POHL]: When you file a motion and the motion is
14 overruled, the objection is preserved.

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

16 MJ [COL POHL]: We don't need to do it 15 times, but any
17 objection you have made has been preserved.

18 LDC [MR. CONNELL]: Thank you, sir.

19 The second item is that with respect to AE 013HHHH,
20 which was our motion to amend the protective order to permit
21 the government to give classified information, I understand
22 what the military commission said today about a limited
23 exception in this situation. I feel compelled to point out

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1 that our proposed language in 013 -- in HHHH was not mandatory
2 at all, but we were simply trying to create the possibility of
3 what the military commission was doing today.

4 I know the military commission ruled on 013HHHH
5 without oral argument, so maybe it wasn't completely clear,
6 but I'm not sure that the protective order, as it is written
7 right now, allows what the military commission has said today.
8 But the military commission is the arbiter of the protective
9 order, and if you say that's what happened, that's what
10 happened, but I may ask to revisit HHHH because this is
11 exactly the scenario I was envisioning.

12 MJ [COL POHL]: Refresh my memory. Who did you want me to
13 disclose things to in 013HHHH?

14 LDC [MR. CONNELL]: I wanted you to authorize the
15 disclosure of classified information to the Chief Defense
16 Counsel.

17 MJ [COL POHL]: Okay. And I denied that.

18 LDC [MR. CONNELL]: And it was a "may" language. We had
19 language that the parties "may disclose information."

20 MJ [COL POHL]: And you understand my general ruling is
21 the answer is no.

22 LDC [MR. CONNELL]: I read your general ruling, sir,
23 and ----

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1 MJ [COL POHL]: And the government asked -- and the
2 government, without objection, asked for an exception for the
3 narrow thing we are talking about, so -- and I am very
4 unlikely to amend the protective order, but if there is an
5 individual -- as we have done in other areas, if there are
6 individual requests for disclosure to third parties who are
7 nonparty to this commission, I will address them in the
8 fullness of time.

9 LDC [MR. CONNELL]: Yes, sir. On that point, let me show
10 to the government, I have an amended -- I believe the Second
11 Amended Memorandum of Understanding for General Baker.

12 MJ [COL POHL]: Okay. Just give it to the CS0 when you
13 are done with it. Mr. Connell, we will get back to that. I
14 don't want to -- that's not -- I don't want to spend any more
15 time on that than we have already done at this point in time.

16 LDC [MR. CONNELL]: I don't think it should require time.
17 I can just make it an appellate ----

18 MJ [COL POHL]: No, give it to the CS0, which is where the
19 MOU is supposed to go.

20 LDC [MR. CONNELL]: The last thing that I will say is with
21 respect to the read-on to the alternative compensatory control
22 measure. You know, I didn't pick this program off of a menu.
23 I was advised by the prosecution that I had the need to know

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1 it. I made contact with the focal point for the program. It
2 took months and months.

3 MJ [COL POHL]: Got it.

4 LDC [MR. CONNELL]: They made available a read-on to us,
5 and who got read on and who didn't was just a matter of who
6 was in Washington and who was TDY at that time with the
7 expectation that we would have a later -- a second briefing
8 for anybody who had missed it. It was not a matter at that
9 time of the government picking and choosing how many people
10 could be read on.

11 MJ [COL POHL]: Okay. Okay.

12 LDC [MR. CONNELL]: Thank you. May I approach the CSO?

13 MJ [COL POHL]: Sure. And that will be filed with the
14 other MOUs, however that is done. Okay.

15 What we are going to do is, Mr. Harrington, you have
16 got until 1030. We are going to recess until 1030, and at
17 that time it's door one or door two. Okay.

18 The commission is in recess.

19 [The R.M.C. 803 session recessed at 0945, 22 October 2015.]

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