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1 [The R.M.C. 803 session was called to order at 1528, 31 May
2 2016.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present. Mr. Sowards is not in the
5 courtroom, along with Major Poteet is not in the courtroom,
6 but, Mr. Nevin, you are ready to proceed without them present?

7 LDC [MR. NEVIN]: Yes, Your Honor.

8 MJ [COL POHL]: Mr. Connell.

9 LDC [MR. CONNELL]: Your Honor, I'm sorry to disappoint,
10 but over the break the government pointed out to me that
11 there's 505 notices with respect to 118.

12 MJ [COL POHL]: Okay. Does that mean the whole argument
13 is classified, or potentially?

14 LDC [MR. CONNELL]: The two pieces of it that are left.

15 MJ [COL POHL]: Okay. And, again, in the spirit of
16 optimism, perhaps not realism, we'll add that one to the
17 505(h) hearing tomorrow.

18 Mr. Trivett, you are standing.

19 MTC [MR. TRIVETT]: Yes, sir. I have a logistical update
20 for the court on pending witnesses and the ACCM read-on issue.

21 So a read-on to the ACCM has been scheduled for all
22 approved defense team members at 7:15 a.m. in this courtroom
23 on Thursday.

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1 So I also talked to JTF-GTMO for the witness requests
2 for the two witnesses on Thursday, and I spoke to Mr. Ruiz,
3 and he communicated a defense counsel desire to meet with
4 their clients before court. So what we're going to ask the
5 court to do is after the 7:15 read-on, give an additional hour
6 before the beginning of the commission, and push that until
7 10:00. That's when JTF-GTMO says they can have the witness
8 ready. They don't intend to bring the witness with the other
9 accused. So they prefer to bring the accused and go and
10 retrieve the other witness.

11 MJ [COL POHL]: Okay.

12 MTC [MR. TRIVETT]: The second witness, they could be
13 prepared to have him on standby 1400 on Thursday for the
14 second witness. And the 0900 witness on Friday, with the VTC,
15 has been confirmed.

16 MJ [COL POHL]: Okay.

17 So the plan is on Thursday we'll start at 1000 ----

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

19 MJ [COL POHL]: ---- with the first witness, at 1400 with
20 the second witness, and understand that if we -- if the first
21 witness doesn't take that much time we'll pick up other
22 business. Okay. Got it. Okay.

23 The next one is going to be 133, but that's

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1 Mr. Sowards's motion. We'll wait on that one, Mr. Nevin.

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

3 MJ [COL POHL]: 206?

4 LDC [MR. NEVIN]: That's one that won't take much time
5 because we've been overtaken by events on it. Our
6 understanding is that the JTF-GTMO is no longer conducting
7 those daily cell searches, and so I think that motion has been
8 rendered moot.

9 MJ [COL POHL]: Okay. Based on your representations I'll
10 consider it moot, but, of course, if the facts change,
11 Mr. Nevin, you are free to re-raise the issue.

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

13 MJ [COL POHL]: We talked about 362E. That's yours,
14 Mr. Connell, about modifying the scheduling order.

15 LDC [MR. CONNELL]: Sir, this question is also somewhat
16 overtaken by events. When the -- when I filed the motion we
17 had 11 weeks of hearings scheduled for 2016. I know why we
18 had 11 weeks of hearings scheduled for 2016, because in
19 mid-2015 when the order came out we had no idea if we were
20 going to be done with the 292 problem or, you know, or what
21 the situation was.

22 And so 292 was, thankfully, resolved. We're able to
23 continue moving forward, all of which is a good thing. And so

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1 I raised 362E to have a conversation about what the
2 appropriate number of weeks of hearing is.

3 It should be completely obvious, you tell us to be
4 here, we're here. It's your decision. It's entirely in your
5 discretion; you decide when to schedule things.

6 Now, with the cancellation of the April hearing, that
7 11 weeks of hearing for 2016 went to nine weeks of hearing for
8 2016. Not in the way that any of us would have liked, I'm
9 sure, particularly because it was the, it was very difficult
10 to reorient, right? There were things that we could do, but
11 we couldn't ----

12 MJ [COL POHL]: I understand.

13 LDC [MR. CONNELL]: ---- investigate, do travel,
14 et cetera, et cetera. But now we're down to nine weeks of
15 hearings in 2016, and my articulated view is that I think
16 eight weeks of hearings, scheduled every other month, is the
17 appropriate pattern. It was the pattern that has worked, at
18 least in my mind, whether it actually has worked that way.

19 Now there has also been a subsequent modification to
20 the schedule, which I'll be honest that I don't, I don't know
21 what happened. And if the military commission is in a
22 position to enlighten us, that would be great, but the August
23 hearing has been moved to September.

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1 MJ [COL POHL]: Yes, and I have had two objections to
2 that, one I've already ruled on, the other one I'm looking at.

3 LDC [MR. CONNELL]: Okay. I'm not actually objecting. I
4 just didn't -- I don't know what happened, right? We
5 were ----

6 MJ [COL POHL]: I know.

7 LDC [MR. CONNELL]: Okay.

8 MJ [COL POHL]: I know.

9 LDC [MR. CONNELL]: The ----

10 MJ [COL POHL]: I don't always run all my scheduling
11 decisions by you guys ahead of time; I understand that. I'll
12 give you a chance. I just let you know that the CY 17
13 schedule will be put out this week.

14 LDC [MR. CONNELL]: Okay.

15 MJ [COL POHL]: And you'll get a chance to respond to it.

16 LDC [MR. CONNELL]: Great.

17 MJ [COL POHL]: My idea, to let you know my philosophy, we
18 had gotten behind between 292 and 254C.

19 LDC [MR. CONNELL]: Gotten behind.

20 MJ [COL POHL]: We spent a lot of time, and my view is if
21 I put out a calendar, I mean, like today we're getting through
22 a lot more motions today than we have gotten through in a long
23 time and it turns out that we don't need two full weeks, then

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1 it's easier for me to take it back than it is to try to get --
2 to add.

3 LDC [MR. CONNELL]: Right.

4 MJ [COL POHL]: It's always easier to subtract than add.

5 LDC [MR. CONNELL]: That's true.

6 MJ [COL POHL]: So I set the schedule out. Basically for
7 next year it will be two weeks, one week, two weeks rough and
8 dirty, with the understanding that events may change and we
9 may use a week for something else. I set it out this way just
10 to let you know so you guys have, as best I can do, a chance a
11 year out of scheduling this stuff.

12 Now, again, this August thing, there's a change in
13 that. I've got that. And if it doesn't work, then I've got
14 the objections to it. I've got it. I understand, and
15 understand when I do it change it, it causes some hardship.
16 And if it causes something that I think is irreconcilable
17 hardship, I'll adjust accordingly.

18 But I put these things out -- for example, in June
19 you will have the CY 17 schedule to let you have some
20 definition of when we will go for sure, and I use that
21 term ----

22 LDC [MR. CONNELL]: Loosely.

23 MJ [COL POHL]: ---- in the context of what it is, and

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1 then you can plan around the other dates. And then if I
2 change something, like I did the August hearing, and it won't
3 work, I'll certainly consider the reasons why it won't work
4 and not force a change that puts you off. That's why -- so
5 the plan is a robust schedule out there. And normally if
6 we -- depending where we go, instead of a two-week session
7 we'll do a one-week session depending on the amount of
8 business.

9 LDC [MR. CONNELL]: Sure.

10 MJ [COL POHL]: I just found I can't -- it's very
11 difficult to add; it's not very difficult to subtract.

12 LDC [MR. CONNELL]: So I'm going to take this opportunity
13 to give you my views, for whatever those may be worth.

14 I had three suggestions in 362E, one of which was
15 overtaken by events relating to April. My third suggestion,
16 moving the December hearing, I understand is objected to by
17 one of my colleagues, and I understand why it's not going to
18 happen.

19 The second one, the second option, if the military
20 commission is considering an adjustment to the calendar year
21 2016 schedule, I think the July hearing is an excellent
22 candidate for adjustment. It's a terrible time. It
23 interferes with, not with my vacation, because my vacation is

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1 planned around it, but we have a lot of staff, we have a lot
2 of people who work. It's traditionally a time when the
3 government comes into something of a lull.

4 I'm not saying that you should schedule around
5 people's vacations. Right. My position could be lampooned
6 here, but it is realistic in that we are -- I am a leader and
7 I'm responsible for an awful lot of people of course and, and
8 if the military commission is considering changes, I think the
9 July hearing is a good candidate for paring down or dropping.

10 If I had my druthers, we would continue at the --
11 we're having a June hearing. We would continue at the
12 even-numbered months, that we would go in August and we would
13 go in October and we would go in December.

14 That's a pattern that works well for the extensive
15 foreign overseas travel that we do. It's a pattern that
16 people can plan around, and it's a pattern that I like. I
17 will weigh in when I see the calendar year '17 schedule, but I
18 think it's one that has worked for the parties, and you now
19 have my views.

20 MJ [COL POHL]: Okay. Mr. Connell, I appreciate that.

21 One concern we cancel July, and there's already
22 problems with September, that means we wouldn't go from June
23 until October.

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1 LDC [MR. CONNELL]: The reason why I led with -- I didn't
2 know what the August problem was.

3 MJ [COL POHL]: Yeah. Well.

4 LDC [MR. CONNELL]: But it's a problem. I'll just accept
5 it as a given that there's a problem.

6 MJ [COL POHL]: It's a problem. Okay. So I understand
7 that. And although some people don't believe this, I
8 understand there are holidays. I understand there are long
9 weekends. More importantly, I understand the need to do our
10 jobs and get this -- for me to move this case along.

11 LDC [MR. CONNELL]: Of course.

12 MJ [COL POHL]: So sometimes that's going to happen. But
13 I appreciate your thing about, the July thing. One of the
14 things we've also done is, of course, we have, we have
15 deliberately not gone through Ramadan.

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

17 MJ [COL POHL]: So that goes in your even-month theory of
18 Ramadan hurts because this year we're in an even month of
19 Ramadan this time around. But understand, I will consider
20 that.

21 LDC [MR. CONNELL]: Yes.

22 MJ [COL POHL]: And, again, I understand there are a lot
23 of moving pieces. It's just hard to get all of the moving

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1 pieces in the same place at the same time that would make
2 everybody happy.

3 LDC [MR. CONNELL]: I understand, sir. Thank you.

4 MJ [COL POHL]: Okay.

5 Trial Counsel, do you want to be heard on 362?

6 TC [MR. SWANN]: Just that the government thinks that the
7 schedule that you updated about three weeks ago is the
8 schedule that we ought to proceed on through the end of the
9 year.

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

11 LDC [MR. RUIZ]: Your Honor, I think Mr. Connell alluded
12 to my position on 362. I don't know that you need to hear
13 more from me, but I did have a conflict with that December
14 request.

15 MJ [COL POHL]: I know.

16 LDC [MR. RUIZ]: Okay. Just want to make sure it was
17 clear on my behalf.

18 MJ [COL POHL]: No. And I've seen and considered your
19 conflict, and I think I sent you an answer on it; or if you've
20 not gotten it, you should have.

21 LDC [MR. RUIZ]: No, Judge, I'm sorry. I'm referring to
22 the December request on this motion.

23 MJ [COL POHL]: Yeah.

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1 LDC [MR. RUIZ]: I know that the September motion you've
2 ruled on.

3 MJ [COL POHL]: Yeah.

4 LDC [MR. RUIZ]: That's not what I was referring to.

5 MJ [COL POHL]: I'll just tell you, and I'll tell
6 everybody right now, is that the September issue is still out
7 there, okay, because of Mr. Nevin's motion. I'm thinking
8 about that.

9 LDC [MR. RUIZ]: Yes, sir. I was ----

10 MJ [COL POHL]: Different than yours. The December. I'll
11 just tell you right now, I don't intend to change the schedule
12 for the rest of CY 16, with the possible exception of
13 cancelling the September hearing. And I may ----

14 LDC [MR. RUIZ]: Your Honor, all I will say about the
15 September issue, because it's not a motion to reconsider, is
16 if you can address that issue as quickly as possible, it would
17 certainly help me with the planning of what I have to do.

18 MJ [COL POHL]: Okay. I understand.

19 LDC [MR. RUIZ]: That be would helpful.

20 MJ [COL POHL]: No, I understand your issue, and I
21 understand Mr. Nevin's issue, and we'll get it out as quickly
22 as we can. Okay.

23 Now, Mr. Sowards, while you were gone Mr. Nevin said

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1 you were going to be the 133 guy. Was that accurate?

2 CDC [MR. SOWARDS]: Yeah. [Microphone button not pushed;
3 no audio].

4 MJ [COL POHL]: You got volunteered. Please.

5 CDC [MR. SOWARDS]: Good afternoon, Your Honor.

6 MJ [COL POHL]: Good afternoon.

7 CDC [MR. SOWARDS]: Sorry to begin these discussions by
8 alluding to an outstanding discovery motion, but actually in
9 this case, as I consulted with Mr. Connell about it, it
10 appears that what we were waiting for on AE 133 was a ruling
11 on Mr. Mohammad's motion for reconsideration of 133II, or
12 double India, as some folks say, which was the denial of
13 actually Mr. Connell's motion for discovery AE 133N.

14 MJ [COL POHL]: What number is your reconsideration
15 motion?

16 CDC [MR. SOWARDS]: I'm sorry, sir?

17 MJ [COL POHL]: What number is your reconsideration
18 motion?

19 CDC [MR. SOWARDS]: The reconsideration motion was 133JJ.

20 MJ [COL POHL]: Okay.

21 CDC [MR. SOWARDS]: And that that was filed 18 October
22 2013, following the court's order on the original discovery
23 motion. That order was filed by the commission on 23

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1 September 2013.

2 And I can address some of the specifics of the issues
3 that are involved in that discovery order, if the commission
4 wishes, just to explain to it how integral it is to any
5 outstanding issues on 133. And perhaps just by way of
6 background, and for the benefit of folks who have joined us
7 for the first time in the gallery and the folks at home,
8 overall, 133 was a motion brought as a number of events
9 converged back in, I believe it was January 2013, to alert the
10 defense counsel to the fact that there was fairly significant
11 evidence of governmental monitoring of private attorney-client
12 communications.

13 Those included the discovery of microphones that were
14 hidden in the ceiling of the interviews huts out at Echo II in
15 what appeared to be smoke detectors. And then somewhat
16 fortuitously on January 28th, I believe it was, Mr. Nevin was
17 to everyone -- but we recalled at the time with the exception
18 of the prosecution -- everyone else's surprise, was
19 interrupted when apparently individuals who were not in the
20 hearing facility activated a kill switch and the security
21 light in the mistaken belief that Mr. Nevin had ventured into
22 classified information territory.

23 Upon further investigation it turned out that all of

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1 the microphones scattered throughout the commission hearing
2 room collectively created what was called a sound field,
3 because all of the microphones were configured to be in the
4 "on" position picking up voices unless the button on the base
5 of the microphone was depressed. So rather than pushing it to
6 talk, you would push it if you didn't want something picked up
7 in the microphone.

8 With the assistance of the commission there was some
9 preliminary investigation into exactly what all of this was
10 doing here and how it was working. And it turned out -- and,
11 again, I appreciate the commission's acknowledgement that we
12 share the same level of technological expertise and interest,
13 but that -- as it was explained to -- for someone such as
14 myself to comprehend it, apparently there was something called
15 gated and pre-gated transmission and decibel volume pickup
16 levels.

17 The gated level being that that picks up normal
18 conversational volume and transmits that throughout the
19 commission hearing room. There was also the pre-gated level,
20 which apparently was picking up fairly subtle conversations
21 around the room. We then learned -- which would include
22 counsel speaking in what he or she thought was a confidential
23 manner with the client.

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1 We then learned that the mechanism that was installed
2 in the commission room as part of the -- what we thought would
3 be the normal, legitimate purposes of transmitting what we
4 were saying to court reporters and interpreters included
5 transmission to third-party, other governmental agencies,
6 feeds to them. And in one of the findings that the court --
7 that the commission made early on preliminary to the discovery
8 request was that the information had established that the OCA
9 in question was the CIA, and does receive pre-gated audio.

10 So we were somewhat concerned that as we sat here
11 conducting what we thought was private business, a lot of that
12 information was going to the CIA. Naturally, those of us
13 representing the clients with the unclassified information
14 about their previous incarceration had a similar concern about
15 the microphones in the interview rooms.

16 In response to all of this the commission initially
17 asked -- indicated that it would ask the government to produce
18 some witnesses to find out just what was going on in terms of
19 who had interrupted the proceedings in late January, and to
20 whom the pre-gated information was going from the courtroom.

21 Then upon reflection the commission decided, and this
22 was on January 28, 2013, and I'm referencing the transcripts
23 at 1445 through '46, and 1470 through '72, that the commission

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1 decided instead to make available to the defense any
2 audiovisual or security individuals with knowledge, sufficient
3 knowledge of the information to permit exploration of the
4 issue.

5 In response to that Mr. Connell, who is well known
6 for his technological prowess, produced a discovery motion
7 which asked for a number of things specific to tracking down
8 the capabilities of monitoring the courtroom and transmitting
9 the information to individuals that we didn't want to hear our
10 communications, and he asked for a number of, a number of
11 items, including the ability to ask the courtroom technology
12 staff the identity and location, other information, of any
13 other governmental agencies to which the information or
14 confidential discussions in the hearing room were being
15 transmitted.

16 Among the requests that Mr. Connell made was to have
17 updated schematics of the courtroom, for want of a better
18 term, wiring system, because the schematics that the
19 government provided to the defense lacked a lot of crucial
20 information, not the least of which was any indication of a
21 feed going to an individual not on the premises who would have
22 been responsible for hitting the kill switch on January 28,
23 2013. Excuse me.

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1 Mr. Connell mentioned and observed that, in fact, the
2 schematics did not even reflect the kill switch that's
3 available to Your Honor and to the commissions courtroom
4 security officer. So we believe that the diagrams and listing
5 of the information was woefully inadequate in that respect.

6 Mr. Connell also requested information regarding the
7 coding programs for the -- which controlled the switching of
8 digital data. And, again, this was something that Mr. Connell
9 described and people of my level of understanding had to
10 accept on faith. But the representation to the commission,
11 which was not refuted or disputed by the government, was to
12 the effect that the coding is the single-most important issue
13 in the audiovisual system, because it determines exactly what
14 audio feed the intelligence community representatives receive.

15 We then also, through Mr. Connell, asked to speak to
16 at the time -- I forget the name. It was the -- I'm sorry --
17 Maurice Elkins, who was, at the time, the head of the
18 audiovisual security system in the courtroom, and would have
19 been the person most knowledgeable about these issues. But
20 he, on the basis of his own invocation of being concerned that
21 the information was classified, declined to answer several
22 important questions about what changes had been made or not
23 made in the monitoring capabilities of outside agencies with

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1 respect to their ability to eavesdrop on individuals in the
2 commission hearing facility.

3 So together there were a number of issues that,
4 despite our understanding that we would have an opportunity to
5 gather information and be able to explore, we met what we
6 termed, and I believe fairly so, government stonewalling on a
7 very important issue. And so we moved the court to allow us
8 to have access to those sources of information.

9 And then in the court's order previously referenced,
10 the court -- or, I'm sorry, the commission denied the
11 discovery. And then the purpose of the motion for
12 reconsideration was to point out to the commission two
13 critical issues: One, that the commission's denial seems to
14 have been based on -- and this is based on the explicit
15 language in the order, was premised on the understanding that
16 we were seeking only information about the interruption and
17 the cause of the interruption by the other governmental
18 agency, whether it was the CIA or someone else, acting in
19 concert with them to get the feed. But we are asking only
20 about what caused the interruption on that specific day.

21 And so the motion for reconsideration in that regard
22 explained that, no, what we were actually interested in was
23 not only that, as kind of a secondary issue, but our primary

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1 issue was monitoring of the communications. And we invited
2 the commission's attention to the fact that in the original
3 motion Mr. Connell had pointed out that there had been
4 previous persistent efforts by the defense to discern whether
5 attorneys were subject to that sort of monitoring, even before
6 the events of January 28 came to our attention.

7 And then the other critical component of the motion
8 for reconsideration was to detail the specific items of
9 information, such as the request for coding and its
10 significance in determining who was listening to us and where
11 the information was going and how they were getting it, that
12 some of those items were, unfortunately, not mentioned in the
13 court's denial. So there was not only not an analysis of why
14 we wouldn't be entitled to that information but there was, in
15 fact, not a mention of it.

16 And I would just submit, Your Honor, as of course I'm
17 sure the commission recalls vividly, the scope of the issues
18 or the nature of the issues have to do with a very real basis,
19 we believe, for a concern that we were at that time, and
20 probably still are, subject to governmental monitoring. And
21 until we are able to perform our own due diligence and conduct
22 the sort of investigation that professionally responsible
23 attorneys would, we just simply cannot be comfortable that

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1 whenever we are speaking to our clients in whatever setting,
2 that we can engage in the type of frank exchange of
3 information that's necessary to prepare a case, any case, but
4 particularly a death-penalty case.

5 And we noted in our motion for reconsideration that
6 the commission itself had recognized and agreed that a
7 critical issue to us, in view of the information known at the
8 time, was what was going on outside the courtroom, who was
9 involved in doing it, and where the information was going.

10 And so at this point on this record, the only
11 substantive response we have from the government actually
12 relates to the microphones and apparent monitoring and
13 eavesdropping at Echo II in the interview huts. And as to
14 that what the state of the record shows is that the interview
15 huts did contain microphones, they were connected by wires to
16 a central control facility, which in turn had consoles that
17 were capable of monitoring and recording the conversations
18 there. And the government's response in the face of all of
19 that evidence was, it's true, the stuff is there, we can do
20 that, but we don't turn them on when the -- when the clients
21 and their attorneys are in those rooms.

22 And so far, we have to accept that answer. But I
23 believe, as Mr. Ruiz timely noted, we hear this a lot. And as

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1 attorneys charged with protecting our clients' lives, we
2 actually feel the need to get more information and maybe look
3 just beyond those governmental representations.

4 MJ [COL POHL]: Didn't we have a -- didn't a witness
5 testify that the capability was there but it wasn't used for
6 monitoring attorney-client?

7 CDC [MR. SOWARDS]: Sure. Sure.

8 MJ [COL POHL]: I mean, you want the government to prove a
9 negative. I'm just ----

10 CDC [MR. SOWARDS]: Sure. And in that particular context,
11 which is the -- another discovery motion that I think goes
12 beyond the scope of 13II[sic] -- I'm sorry, the order 13II --
13 is that with regard to that, there's a lot of information,
14 such as logs for monitoring the conversations, documentation,
15 maintenance logs. You know, it came up in the course of that
16 witness' testimony, and I forget whether that was Colonel
17 Bogdan or someone else.

18 MJ [COL POHL]: I believe it was Colonel Bogdan. But if
19 he says that it was never done, then he's going to say no logs
20 exist. So what do you want ----

21 CDC [MR. SOWARDS]: Let me say ----

22 MJ [COL POHL]: What do you want them to do, go rummaging
23 through their filing cabinets, see if you can find a log?

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1 CDC [MR. SOWARDS]: Absolutely. What you want to do is go
2 rummaging through their filing cabinets because the courts
3 recognize that the evidence of governmental misconduct is
4 usually found buried in the files of the government. It
5 doesn't come from government officials saying, yeah, you know,
6 you're right, we are monitoring you.

7 First, you know, again, just looking at it
8 objectively, if you walk into an interview room and you say,
9 what's that in the ceiling and someone says it's a microphone.
10 Who uses this interview room? You and your death-charged
11 client. Where does the microphone ----

12 MJ [COL POHL]: Interview room is used for -- we're
13 rehashing old ground here.

14 CDC [MR. SOWARDS]: Sure, sure.

15 MJ [COL POHL]: Aren't those interview rooms used for
16 other people, too?

17 CDC [MR. SOWARDS]: I'm sorry?

18 MJ [COL POHL]: Aren't they used for other people, too,
19 not just attorney-client?

20 CDC [MR. SOWARDS]: I think the only other team ----

21 MJ [COL POHL]: That's what the testimony said.

22 CDC [MR. SOWARDS]: No, the other people said who used the
23 interview rooms is the ICRC and they wisely leave the door

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1 open and make the guards sit out in the courtyard and look at
2 them because they're concerned about monitoring.

3 My point about all of this, Your Honor, is not to --
4 not to replot old ground, but to explain that there's -- there
5 are acres of ground out there that are indicated that should
6 be plowed. And, you know, we haven't been able to harness up,
7 not to carry that analogy too far, but, you know, we have --
8 we are given the spade and we'd like to do some digging. And
9 the commission invited us to do exactly that. And at least as
10 to 13 -- or 133N, we made some very specific requests to let
11 us look into this and that's been rejected. And I think, with
12 all due respect, we have explained to the commission why at
13 least that motion and those -- that requested discovery should
14 be reconsidered.

15 The point as to the -- what's going on or not going
16 on out at Echo II, because you mentioned Colonel Bogdan, and I
17 just think it's helpful for us to remember where we were when
18 the curtain came down on his testimony is that, yes, his
19 conclusory assurance to the commission was we don't use all of
20 that fancy equipment that's been installed, by the way, by J2
21 and is maintained by J2, which I understand is the code for
22 the intelligence branch of Joint Task Force-Guantanamo, we
23 don't use that, that just happens to be there, in case, you

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1 know, we want to do an interview with someone.

2 Nonetheless, what I believe Ms. Bormann's team laid
3 in the record was the fact that when a hurricane disabled the
4 cables to one of the banks of interview huts, all of the
5 interviews after that that were conducted until that -- the
6 connection to that -- that line of interview huts was
7 restored, all of the interviews were conducted in the
8 alternative branch, the alternative list.

9 You know, again, maybe there's something else to
10 explain that coincidence, but there are lots of indications
11 that even if it we were to, in despair, say, well, we're not
12 going to get anywhere trying to investigate this, still leaves
13 us in a very chilled condition in terms of risking the
14 disclosure of confidential and particularly sensitive
15 information and conversations with our client, either here or
16 at the camp.

17 So I would, again, just, you know, ask the
18 commission's pleasure. We can -- I think it makes more -- the
19 most sense to get a ruling on the motion to reconsider for the
20 discovery; if that's favorable, to let us pursue that
21 discovery; and then proceed further with the substantive
22 issues raised in 133 itself.

23 MJ [COL POHL]: Okay.

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1 CDC [MR. SOWARDS]: Thank you, sir.

2 MJ [COL POHL]: Thank you, Mr. Sowards.

3 Any other defense counsel wish to be heard on this?

4 LDC [MS. BORMANN]: I approach the lectern not to really
5 add anything to the argument, but to correct Mr. Sowards'
6 memory and Your Honor's.

7 So what we had was testimony of two witnesses
8 regarding the listening and whether or not they were listening
9 and recording. It was Colonel Bogdan who testified that in
10 his brief tenure there, because I believe he had had the
11 assignment for approximately seven months or so prior to his
12 testimony, he had not been aware of any, and that somebody had
13 informed him, and he wasn't sure who, that as far as that
14 person knew, they didn't know of anything. So there wasn't
15 like a deep delving in here. This was sort of hearsay, triple
16 hearsay.

17 The only time -- and that, of course, conflicted with
18 what Captain Welsh, the SJA, testified to at an earlier time
19 and that, in fact, it had been used during an interview that
20 he had walked in on. He had not been apprised of the
21 listening equipment before he accidentally stumbled upon the
22 recording of an interview between a detainee and somebody
23 else, and it was only then that he realized that there was the

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1 ability to do that. And, of course, Colonel Bogdan had not
2 been apprised of that.

3 So there appears to be significant missing factors.
4 And I also don't want to plow old ground, but I do want to
5 point out for the record that there are a lot of -- let's just
6 say the government is the unluckiest victim in the world here
7 because there's a whole lot of stuff that points to a history
8 of piercing the attorney-client privilege and we ought to be
9 able to explore that issue. Because if it, in fact, is and
10 was happening, it affects how we go forward in this case.

11 MJ [COL POHL]: Thank you.

12 I'll note for the record that Major Poteet has
13 rejoined us.

14 Mr. Connell.

15 LDC [MR. CONNELL]: Your Honor, there are two new
16 developments that justify reconsideration of your order in
17 133II as requested in 133JJ.

18 The first is the existence of the new schematics.
19 The -- in 133II, the commission denied access to updated
20 schematics on the basis that, quote, "the prosecution is not
21 required to create an updated schematic in response to the
22 defense discovery request if the 2011 schematic is the most
23 current," end quote.

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1 The military commission will recall, as Mr. Sowards
2 just related, that the 2011 schematic -- we never got any
3 testimony as to whether that was the most current or not, but
4 the -- that was the one that existed and was turned over and
5 did not reflect a number of actual, known features of this
6 courtroom, including the external monitoring by members of the
7 intelligence community.

8 However, that situation has changed. On 19 May --
9 excuse me -- on 12 May of 2014, the chief of the operations
10 department of the Office of Military Commissions notified all
11 the parties that additional work would be done on Courtroom
12 No. 2, to the audiovisual configuration. In response, on 19
13 May 2014, the military commission issued AE 133MM, and finding
14 as a fact that the Office of Military Commissions has
15 indicated that significant upgrade work must be done to
16 replace aging electronic systems within Courtroom No. 2.

17 Consistent with its prior order in AE 133H, the
18 military commission entered an order that said, I quote, the
19 military commission recognizes the need to upgrade the
20 electronic systems in Courtroom No. 2 and directs that all
21 changes be documented clearly, indicating both the existing
22 system and the changes made to the system. So ordered, 19th
23 day of May 2014."

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1 So the facts have changed. Assuming the accuracy of
2 the representation that the 2011 schematic was the most -- of
3 this courtroom in which we currently speak was the most
4 current as of 2013, in 2014 that changed. The military
5 commission ordered that the new schematic, which document the
6 changes to the courtroom and the document which the military
7 commission did not believe to exist in 2013 now clearly does
8 exist.

9 The second change in the circumstances that justifies
10 reconsideration of the court's prior order in AE 133II, was at
11 the time there was a materiality issue because the
12 relationship of the CIA to this courtroom and to the military
13 commission was not a matter that was being litigated in any
14 actual motion before the court. That is no longer the case.

15 In AE 386A, the military commission has under
16 consideration the question of whether the CIA is a party for
17 purposes of Touhy. In open court, I've advanced arguments as
18 to why the CIA should be considered a party. And if it is, in
19 fact, still participating in these proceedings by an owned
20 special monitoring, I don't mean monitoring that 40-second
21 delay that anyone can do, but if it has its own special
22 accommodations which are being made, clearly that would be
23 relevant to the arguments in 386A regarding whether the CIA

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1 has a relationship to the Office of the Chief Prosecutor.

2 So I think those are two -- both an important factual
3 and an important legal development since the military
4 commission's order in AE 133II justifying reconsideration.

5 Thank you.

6 MJ [COL POHL]: Thank you.

7 Anything other from the defense? Apparently not.

8 Prosecutors? Trial counsel?

9 TC [MR. RYAN]: Your Honor, I'm sure you remember well
10 when this all occurred. And as counsel -- counsels indicated,
11 it began in 2013, so now over three years ago. When it
12 happened, the commission, I think in an abundance of caution
13 and based upon strong requests from the defense, stopped
14 everything as it was happening in terms of the normal calendar
15 we were on. Time was given to consider events and defense
16 filed many motions, many requests. My memory of it, and from
17 what I can see from the paperwork, was we spent about two
18 weeks on the matter, both in allowing for investigation,
19 allowing for interviews, ultimately for calling of witnesses,
20 producing of discovery, et cetera.

21 My memory is that the witnesses included Captain
22 Welsh, Colonel Bogdan, and also Mr. Elkins, who testified at
23 some length, questioned by all counsel, and gave full

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1 testimony to the commission.

2 A few things, just to clarify one thing as far as
3 those Echo II interviews were concerned. I believe there was
4 testimony that at one time law enforcement interviews occurred
5 in those huts, hence the need for microphones at one time.
6 Colonel Bogdan was very clear that he was responsible and was
7 a senior officer with a great deal of experience as an MP,
8 testified that there was absolutely no monitoring going on,
9 and certainly during his time, none that he was aware of
10 beforehand, none that was ever explained to him, and that he
11 made sure all of his troops abided by the rules, especially
12 that concerning attorney-client restrictions.

13 Once again, we hear today what we heard back then,
14 which is there's an awful lot here that sounds bad. There's
15 an awful lot here that makes us suspicious. This commission,
16 having heard that once and gave great leeway to the defense,
17 at some point decided you have been given your opportunity,
18 you have done with it what you can, and we are now stopping
19 and moving on.

20 The commission, I believe very charitably, also to
21 give confidence to the parties, ordered certain changes be
22 made in the way things were done within the commissions, both
23 in the courtroom and out, at least one of which was that

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1 the -- there were restrictions on the red light and who could
2 turn it on. There were further restrictions that the
3 microphones in the courtroom went from being push to stop
4 talking, or stop being heard, to push when you want to be
5 heard. And lastly, there was orders concerning everything at
6 Echo II that had been in place from prior times but was no
7 longer used to be actually taken out so that there would be no
8 more concerns about that.

9 With all that said, Your Honor, I believe we have
10 plowed this ground extremely well, in extreme detail. We rest
11 on where we have been and all of the paper that has been filed
12 in this regard up until this point.

13 As far as the only new thing I heard, which is as
14 to -- from counsel in regard to 386A, the issue of whether the
15 CIA is a party to this proceeding, that was argued extensively
16 a few months ago. And I believe -- although it has not been
17 ruled upon, I believe Your Honor will remember that under the
18 law and in the facts of the case, it clearly is not.

19 Having said all of that, Judge, we have nothing
20 further.

21 MJ [COL POHL]: Thank you.

22 Defense, anything further? Mr. Sowards.

23 CDC [MR. SOWARDS]: Just to touch a few quick points that

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1 Mr. Ryan tried to make.

2 First, it should have been clear from our discussion
3 that Mr. Elkins did not testify fully. In fact, that was the
4 point of one of the requests from Mr. Connell's discovery
5 motion, was to direct him to answer several questions, crucial
6 questions as to which he voluntarily invoked the classified
7 information privilege.

8 So that's exactly the point, that while, you know,
9 the notion that we have been over this and over this and we
10 have done all sorts of things really is just a strategy of
11 sort of rope-a-dope. If we -- if the government stonewalls
12 and doesn't reveal information long enough, everybody suffers
13 fatigue, we get overtaken by events, there are things to fly
14 back for and do, and these things just kind of sink below the
15 surface. And I think that's the danger with 133.

16 Second point, Mr. Ryan said that the evidence
17 established that Echo II at one time was used by law
18 enforcement to conduct interviews and that would explain the
19 presence of the microphones and recording device. Well, yeah,
20 that would. And so that's why we were particularly alarmed
21 when we went out and conducted an inspection in January of
22 2013 and found that at that time the equipment was up and
23 running; and further, the testimony before the court was not

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1 only -- not only that coincidence about repairing the bank of
2 listening devices in the interview huts that had been disabled
3 by the hurricane, but the fact that they had been -- they had
4 previously been restored after people doing some maintenance
5 work had accidentally cut the feed or the line going from the
6 interview huts to the main control room.

7 So if these were relics from, you know, the FBI's
8 past or, you know, pre-Castro or the Civil War, the fact of
9 the matter was they were being maintained and repaired and
10 used. During our inspection -- well, with respect to Colonel
11 Bogdan testifying that all of his troops were told not to
12 monitor, the point is that, as I recall, Colonel Bogdan was in
13 charge of the Joint Detention Group, which is not the same as
14 J2, the intelligence group at Joint Task Force-Guantanamo.
15 And what we further learned is that it is J2 that
16 quote/unquote, owns the equipment that is out there. And when
17 we conducted that onsite inspection and saw that this
18 equipment was still up and running, we asked the young
19 enlisted guys there who were part of Colonel Bogdan's command
20 to tell us about this recording equipment and the consoles,
21 and they said, all we know is they tell us not to touch them.

22 Okay, so none of the information that Mr. Ryan has or
23 that's been presented to this commission up to this date

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1 should do anything but increase reasonable counsel or
2 reasonable person's suspicion about what's going on and
3 certainly is not enough to allay any professional based or
4 constitutionally based concerns about the confidentiality of
5 our communications with the clients, either here or at
6 Echo II.

7 Thank you.

8 MJ [COL POHL]: Thank you, Mr. Sowards.

9 Anything further? Okay. The commission will take
10 that under advisement. We're going to recess like we did
11 yesterday and then talk quickly about the 802s. And I know
12 it's approaching prayer time. The commission is hereby in
13 recess.

14 [The R.M.C. 803 session recessed at 1617, 31 May 2016.]

15 [END OF PAGE]

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