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1 [The R.M.C. 803 session was called to order at 0903,
2 8 January 2018.]

3 MJ [COL POHL]: The commission is called to order. Trial
4 Counsel, who is here on behalf of the United States?

5 CP [BG MARTINS]: Good morning, Your Honor. Present for
6 the United States are Brigadier General Mark Martins,
7 Mr. Robert Swann, Mr. Edward Ryan, Mr. Clay Trivett,
8 Ms. Nicole Tate, and Major Christopher Dykstra. Also present
9 at counsel table are paralegals Mr. Dale Cox, Mr. Rudolph
10 Gibbs, and Staff Sergeant Jeffery Furr. And also present in
11 the courtroom are Ghailan Stepho and Donald Fuhr of the
12 Federal Bureau of Investigation.

13 These proceedings are being transmitted by closed
14 circuit signal to locations in the continental United States
15 pursuant to the commission's order.

16 MJ [COL POHL]: Thank you. Commission will note that each
17 of the accused are present. Mr. Nevin, who is here on behalf
18 of Mr. Mohammad?

19 LDC [MR. NEVIN]: Right, Your Honor. David Nevin for
20 Mr. Mohammad. I'm -- I'm physically present, but there's some
21 restrictions on my ability to practice law here that I want to
22 bring to the military commission's attention at an appropriate
23 time.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. NEVIN]: And also, Lieutenant Colonel Poteet,
3 Ms. LeBoeuf, Mr. Sowards, Ms. Medina-Celestin. And you noted
4 that Mr. Mohammad is present. Thanks.

5 MJ [COL POHL]: Ms. Bormann?

6 LDC [MS. BORMANN]: Judge, present for Mr. Bin'Attash are
7 myself, Mr. Edwin Perry, Captain Brian Brady, and Major
8 Matthew Seeger.

9 MJ [COL POHL]: Thank you. Mr. Harrington?

10 LDC [MR. HARRINGTON]: Judge, in addition to myself on
11 behalf of Mr. Binalshibh, Ms. Alaina Wichner, and Major
12 Christopher Lanks.

13 MJ [COL POHL]: Thank you. Mr. Connell.

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

15 MJ [COL POHL]: Good morning.

16 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi are
17 myself, James Connell; Lieutenant Colonel Sterling Thomas of
18 the United States Air Force; Major Jason Wareham of the
19 United States Marine Corps. Ms. Alka Pradhan was excused by
20 the military commission.

21 MJ [COL POHL]: Okay. Mr. Ruiz.

22 LDC [MR. RUIZ]: Judge, myself, Ms. Suzanne Lachelier,
23 Major Joseph Wilkinson, Mr. Sean Gleason are here present on

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1 behalf of Mr. al Hawsawi.

2 MJ [COL POHL]: Thank you. Mr. Nevin, before we address
3 your issue, I need to talk to each of the accused about their
4 rights to be present and to waive that right.

5 So this is directed to each of the five accused.
6 You've heard this before, you're going to hear it again. You
7 have the right to be present during all sessions of the
8 commission. If you request to absent yourself from any
9 session, such absence must be voluntary and of your own free
10 will.

11 Your voluntary absence from any session of the
12 commission is an unequivocal waiver of the right to be present
13 during that session. Your absence from any session may
14 negatively affect the presentation of the defense in your
15 case. Your failure to meet with and cooperate with your
16 defense counsel may also negatively affect the presentation of
17 your case.

18 Under certain circumstances, your attendance at a
19 session can be compelled, regardless of your personal desire
20 not to be present. Regardless of your voluntary waiver to
21 attend a particular session of the commission, you have the
22 right at any time to decide to attend any subsequent session.
23 If you decide not to attend the morning session but wish to

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1 attend the afternoon session, you must notify the guard force
2 of your desires. Assuming there is enough time to arrange
3 transportation, you will then be allowed to attend the
4 afternoon session.

5 You will be informed of the time and date of each
6 commission session prior to the session to afford you the
7 opportunity to decide whether you wish to attend that session.

8 Mr. Mohammad, do you understand what I just explained
9 to you?

10 ACC [MR. MOHAMMAD]: Before I say yes, I would like for
11 Mr. Nevin to tell you something.

12 MJ [COL POHL]: No, it doesn't work that way. Just -- do
13 you understand what I'm saying? I'm going to give Mr. Nevin a
14 chance to talk, but I want to get this out of the way now. Do
15 you understand what I just told you about your right to be
16 present.

17 ACC [MR. MOHAMMAD]: **[Speaking in English]** Yes, I
18 understood. But we be under sexual harassment today for
19 search and coming here.

20 MJ [COL POHL]: Okay. And we'll talk about that.
21 Mr. Bin'Attash, do you understand what I just told you?

22 ACC [MR. BIN'ATTASH]: Yes, I do. And I join my brother,
23 Khalid Shaikh.

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1 MJ [COL POHL]: Thank you. Mr. Binalshibh?

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

4 MJ [COL POHL]: Okay. You need to push the button.

5 ACC [MR. BINALSHIBH]: I fully understand. And I am
6 joining my brothers for the -- what was going on today morning
7 at the Camp VII ----

8 MJ [COL POHL]: Okay.

9 ACC [MR. BINALSHIBH]: ---- sexual harassment search.

10 MJ [COL POHL]: Okay. Mr. Ali, do you understand what I
11 just told you?

12 ACC [MR. AZIZ ALI]: Yes. And I do join in regards to the
13 issue that was mentioned.

14 MJ [COL POHL]: Okay. And, Mr. al Hawsawi, do you
15 understand what I just explained to you about your right to be
16 present?

17 ACC [MR. AL HAWSAWI]: Yes. And I do join with the
18 brothers. And I also would like to leave now.

19 MJ [COL POHL]: Okay. Mr. Hawsawi, are you choosing to
20 voluntarily leave now?

21 [Pause.]

22 ACC [MR. AL HAWSAWI]: Yes, voluntarily.

23 MJ [COL POHL]: Okay. Then Mr. Hawsawi may be escorted

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1 back to the holding cells and then transported back to the
2 camp at -- when available.

3 [Pause.]

4 MJ [COL POHL]: Mr. Ruiz, does your client want to leave
5 now?

6 LDC [MR. RUIZ]: Yes, Judge.

7 MJ [COL POHL]: Okay. Go ahead and escort him out,
8 please.

9 [Judge Pohl conferred with courtroom personnel.]

10 MJ [COL POHL]: Forget this. How long will it take to get
11 him to be moved? 15 minutes? Okay. We're going to make this
12 easy.

13 The commission is in recess until Mr. Hawsawi is out
14 of the courtroom, then we'll pick up with Mr. Nevin's issue.
15 Commission is in recess.

16 [The R.M.C. 803 session recessed at 0911, 8 January 2018.]

17 [The R.M.C. 803 session was called to order at 0916,
18 8 January 2018.]

19 MJ [COL POHL]: The commission is called to order. All
20 parties are again present with the exception of Mr. Hawsawi,
21 who has voluntarily chosen to absent himself.

22 Mr. Nevin, you had an issue you wanted me to address.

23 LDC [MR. NEVIN]: That's right, Your Honor. Thank you.

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1 The problem that Mr. Mohammad referred to was that,
2 for the first time today, he and I believe other defendants as
3 well were subjected to a groin search before traveling to the
4 ELC this morning, which is invasive, violative of religious
5 principles, objectionable on a number of grounds. And he
6 nonetheless came to court this morning. But this is a problem
7 for his ability to come to court on a regular basis going
8 forward. He understands your rules, but this puts unnecessary
9 pressure on the right of access to the court and the right to
10 be present and the right to present a defense.

11 MJ [COL POHL]: Is this a change of procedure?

12 LDC [MR. NEVIN]: It is -- it is a change in procedure.
13 And ----

14 MJ [COL POHL]: The reason why I ask that, Mr. Nevin, and
15 of course I don't have the case sitting in front of me, but as
16 I recall, this type of issue came up before Judge Lamberth in
17 the district court, did it not? And he had one ruling that
18 subsequently the -- I believe the D.C. Circuit modified. I
19 mean, isn't -- I believe they were talking about groin
20 searches. Again, I don't have the case in front of me because
21 I had no idea this issue was coming up.

22 LDC [MR. NEVIN]: Yeah. And ----

23 MJ [COL POHL]: So that's why I kind of ask, is this a new

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1 procedure? Because apparently there was some litigation in
2 the D.C. Circuit.

3 LDC [MR. NEVIN]: I don't know the source of this. I
4 can't say authoritatively what the source of this is, but it
5 is part of a bigger pattern that has -- that presents itself,
6 recedes, presents itself again, and this has been going on for
7 a number of years.

8 But there have been a number of things recently. The
9 guard force has announced that there will be -- they're
10 expecting that there will be restrictions on communal prayer.
11 Mr. Mohammad was restricted from having access to his physical
12 legal materials. This is separate from the issue regarding
13 the seizure of the computer. But we're talking the physical
14 legal materials; he was not permitted to have access to those
15 for -- or only on very limited basis for some period of time.

16 This -- I will say we have some personal experience
17 with this. Some of it is reflected in 541, the meetings that
18 we had scheduled that were cancelled. There's been a
19 change -- and there have been a number of changes in the rules
20 that relate to our visiting as well. And also, I'm just
21 giving you a tip of the iceberg here with respect to what
22 Mr. Mohammad and, I think, the other defendants have been
23 experiencing.

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1 So whether this rule is coming from the JDG or the
2 OIC or the ops people or the SMO, I mean, there are
3 different -- there are different rules that present themselves
4 from day to day. And it's extremely dis -- there are two
5 things about it. First is, it's extremely disruptive to
6 Mr. Mohammad's ability to participate in these legal
7 proceedings. And I submit to you that it is an ongoing
8 pattern.

9 An early GTMO commander referred to it as controlled
10 chaos, that it was being done for the purpose of disrupting
11 the ability to participate in these proceedings. And that is
12 what's happening again. In fact, we have referred to it by an
13 acronym, CCR, constantly changing rules. And it presents a
14 gigantic problem in our ability to defend Mr. Mohammad and in
15 his ability to participate in the defense.

16 So this arises this morning also for me and some of
17 the other members of my team specifically, because the guard
18 force this morning wanted to search my bag. I carry things in
19 a backpack. And they said we want to search your bag. And I
20 said, well, I can't let you search my bag. It's ----

21 MJ [COL POHL]: Was that what you were referencing about
22 your ability to practice law?

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

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1 MJ [COL POHL]: Okay.

2 LDC [MR. NEVIN]: And so I said all right, I'll take it up
3 with the judge and I'll leave my stuff in the car. So I did.
4 So I -- this is what I have this morning.

5 MJ [COL POHL]: Okay. Okay. That's -- that I can solve.

6 Back to my first question though, is that is this the
7 first groin search your client has ever been exposed to?

8 LDC [MR. NEVIN]: You mean in the history of his time in
9 custody?

10 MJ [COL POHL]: No. Since he's been here after September
11 of 2006.

12 LDC [MR. NEVIN]: That's my understanding.

13 MJ [COL POHL]: Okay.

14 LDC [MR. NEVIN]: And I will say, Your Honor, if you -- if
15 you'll afford me a little time to discuss it in more detail.

16 MJ [COL POHL]: Sure.

17 LDC [MR. NEVIN]: This was something that was just brought
18 to my attention this morning, and I haven't had the
19 opportunity ----

20 MJ [COL POHL]: Yeah, I understand that.

21 LDC [MR. NEVIN]: ---- for extended discussion.

22 MJ [COL POHL]: And, of course, the government is in the
23 same position, as they had now idea this was going to come up,

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1 neither did I. Let's do this, Mr. Nevin. At least while
2 we're all here, we can address the issue and hopefully resolve
3 it on the groin search part of it.

4 LDC [MR. NEVIN]: Okay.

5 MJ [COL POHL]: Trial Counsel, can you have somebody look
6 into what the procedure is, whether it was changed, why it was
7 done, hopefully have a witness with competent authority to
8 explain why -- why it was done? I'm making no judgment on it.
9 I'm just saying is it standard practice? Is it something
10 unique?

11 And I understand one thing Mr. Nevin talks about, and
12 we've all experienced this here, is that we rotate guard
13 forces in and out, and they all have -- may have the best
14 intentions in the world, but that doesn't mean they all do
15 things the same way. So there is a certain amount of constant
16 change down here.

17 But my question -- or my point to you, Mr. Swann, is
18 simply let's get to the bottom of why allegedly a procedure is
19 instituted today that's not been used in the past.

20 TC [MR. SWANN]: Right, Your Honor. But the guard force
21 has been here for about four and a half months.

22 MJ [COL POHL]: Okay.

23 TC [MR. SWANN]: A different procedure was used this

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1 morning. They've gone back to the SOP rather than these
2 temporary standing orders that allowed certain -- to speed up
3 processes.

4 The case you're looking for, I think, is United
5 States v. Ghailani. The judge was Judge Kaplan in that case.
6 Mr. Ghailani refused to come to court because he refused
7 a cavity search and other such invasive searches. Judge
8 Kaplan said that's not stopping me from telling you to come to
9 court.

10 MJ [COL POHL]: That wasn't the case I was thinking of,
11 but ----

12 TC [MR. SWANN]: Well, the other case is a habeas case,
13 and that is Judge Lamberth. I think the case might be Odeh,
14 off the top of my head.

15 MJ [COL POHL]: That was the one I was thinking of. Yeah.
16 Okay. Okay. But just -- what you're saying is they did
17 change procedures today.

18 TC [MR. SWANN]: They went to the SOP instead of -- the
19 SOP does allow for a groin search.

20 MJ [COL POHL]: Does it allow or require?

21 TC [MR. SWANN]: It doesn't require anything. I mean,
22 obviously, the JDG commander can pretty much say we'll not
23 have it today. There were some changes. But this morning

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1 they were subjected to a modified groin search along the sides
2 of their legs and stuff, I believe, is what I'm told.

3 But I will have somebody ----

4 MJ [COL POHL]: Okay.

5 TC [MR. SWANN]: ---- more knowledgeable about it this
6 morning and tell me exactly what occurred, and we'll let the
7 court know.

8 MJ [COL POHL]: Okay. And then on the second issue as far
9 as defense counsel's private papers?

10 TC [MR. SWANN]: Well, I -- listen, they looked at my
11 papers this morning, too.

12 MJ [COL POHL]: I didn't ask ----

13 TC [MR. SWANN]: I don't know, sir.

14 MJ [COL POHL]: You work for the United States Government,
15 Mr. Swann. I don't really care about your papers.

16 TC [MR. SWANN]: I understand. I take no position that --
17 I don't know if that's been a past procedure. I do know
18 there's a heightened security, for a variety of reasons. I'll
19 look into that as well to see whether or not somebody ----

20 MJ [COL POHL]: Well, Mr. Nevin can't bring his backpack
21 with his papers in. What we're going to do now is -- and if
22 you wish to articulate and present evidence of why this more
23 intrusive search on the defense counsel needs to be done, I

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1 will listen to you. But for today's hearing is they're
2 allowed to bring in anything without being searched, okay?
3 They'll go through -- the electronic issue is a separate
4 issue.

5 So we will take a short recess. I don't know if
6 Mr. Nevin is the only one affected, but whoever needs to
7 retrieve their materials will have an opportunity to go do
8 that, and then we'll pick up with 541.

9 TC [MR. SWANN]: All right, sir.

10 MJ [COL POHL]: Commission is in recess.

11 [The R.M.C. 803 session recessed at 0926, 8 January 2018.]

12 [The R.M.C. 803 session was called to order at 0950,
13 8 January 2018.]

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

15 Mr. Harrington? I believe all parties are again present. And
16 if I'm wrong when I say that, please stand up and tell me.
17 Mr. Harrington.

18 LDC [MR. RUIZ]: Judge, I would just add, Lieutenant
19 Commander Furry has joined us.

20 MJ [COL POHL]: Okay. Thank you. And Mr. Sowards has
21 just joined us, too.

22 Mr. Harrington.

23 LDC [MR. HARRINGTON]: Judge, I'm going to make an attempt

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1 to stand here for a bit, I if could.

2 MJ [COL POHL]: Okay.

3 LDC [MR. HARRINGTON]: And I just want you to know that
4 the trial in Buffalo is not over yet.

5 Anyway, you just mentioned the issue of temperature,
6 Judge. And an auxiliary of 152 now is a continuous problem we
7 have had for Mr. Binalshibh with extreme cold temperature. He
8 has complained over and over again to us. We have complained
9 to the authorities. There has supposedly been some
10 investigations. No relief from it. I've talked with the
11 assistant SJA last hearings, I talked to him again this
12 morning.

13 Mr. Binalshibh has been given a thermometer for his
14 cell, and the temperature goes as low as 60 degrees
15 constantly. He has shown it to the assistant SJA where it was
16 63 degrees. We have written to the -- everybody that we can
17 to try and get some relief from it, and there's been a refusal
18 to do an investigation. And obviously he is at his wit's end.
19 We are at our wit's end.

20 This leads to him complaining, yelling, screaming,
21 banging, and trying to get attention. He ends up getting a
22 disciplinary proceeding and getting moved to a different cell
23 where he says he experiences the same thing, even though the

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1 other detainees do not experience the same thing that he does,
2 which obviously leads us to the conclusion that there is some
3 way of controlling this. And I know we've been told that it
4 can't be controlled, but it is very, very disruptive.

5 It's -- for example, yesterday we came down -- or
6 Saturday, and yesterday Mr. Binalshibh cancelled his attorney
7 visits because he is so distraught about this. And this goes
8 back to the times when he was in the black sites and one of
9 the methods that was used. And these things are horribly
10 disruptive to him, horribly painful to him, and it interferes
11 with our ability to represent him. And I bring up the ability
12 to represent him not because -- because that's the hook that
13 the court needs to do something about this.

14 And so I'm requesting that the court make another
15 order if the court can; if not another order, to do something,
16 have somebody testify this week at this hearing. We can file
17 emergency papers this afternoon on this and have somebody
18 testify as to what the conditions are and why it is that this
19 cannot be controlled. It is extremely, extremely painful. It
20 is totally disruptive to everything that we are trying to do
21 in this case.

22 MJ [COL POHL]: Okay. Thank you, Mr. Harrington.

23 Trial Counsel, I'm assuming -- are you aware of this

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1 issue? Mr. Trivett?

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

3 MJ [COL POHL]: Do you wish to respond to what
4 Mr. Harrington just said?

5 MTC [MR. TRIVETT]: Yes, sir. Good morning, Your Honor.

6 MJ [COL POHL]: Good morning.

7 MTC [MR. TRIVETT]: So my understanding of this issue is
8 that, in fact, there is a mechanical issue involving the air
9 conditioning unit; that Mr. Binalshibh has been offered to
10 move to another cell to attempt to rectify this issue; and
11 that he's refused.

12 So JTF-GTMO is looking into it. This is a mechanical
13 thing. This is a legitimate issue, at least in regard to the
14 temperature. But their way of solving it was to try to move
15 him to another cell, and my understanding is that he's
16 refused. So that's where we're at with this issue.

17 MJ [COL POHL]: And I'm going to ask Mr. Harrington in a
18 second, but just so I'm understanding how this confinement
19 facility is run: The detainee gets to decide which cell he's
20 in?

21 MTC [MR. TRIVETT]: They ----

22 MJ [COL POHL]: Is that what you're telling me?

23 MTC [MR. TRIVETT]: I ----

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1 MJ [COL POHL]: Is that what you're telling me?

2 MTC [MR. TRIVETT]: Could they forcibly move him if they
3 wanted to? Sure. But they're not taking that position.
4 They're simply asking him if he'd be willing to leave and go
5 to another cell, and he's refusing.

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

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

8 MJ [COL POHL]: Mr. Harrington, any response? I mean,
9 Mr. Trivett seems to be agreeing with you that there's a
10 problem with that particular cell's temperature, and the --
11 and the resolution was to give him another cell.

12 LDC [MR. HARRINGTON]: Judge, I would agree with him, and
13 I think that it's extreme in this particular cell, but he has
14 experienced the same thing when he's been put in disciplinary
15 proceedings. And over the past six months that has happened a
16 number of times, it has happened in the other cells that he
17 has been moved to. So it's not like this -- we -- you know,
18 we have empirical evidence from him that -- that it continues
19 no matter where he is.

20 MJ [COL POHL]: I understand. But what I'm hearing the
21 government say is this particular cell has got a problem with
22 its temperature, with this air conditioner thing. We will
23 move him to another cell, but he doesn't want to move.

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1 LDC [MR. HARRINGTON]: Well, I haven't discussed that with
2 him, Judge.

3 MJ [COL POHL]: Okay. It's just -- I mean, the government
4 is agreeing. This is one of the few times the government is
5 agreeing with you on this issue. ----

6 LDC [MR. HARRINGTON]: Right.

7 MJ [COL POHL]: ---- that there is a temperature problem
8 in that cell. And they're agreeing that's a mechanical issue
9 and they're saying here's our short-term fix. If he's ----

10 LDC [MR. HARRINGTON]: But the response that we've always
11 gotten is we can't control any cell. They're all the same.
12 It's all the same system. We don't have individual control of
13 these mechanics.

14 MJ [COL POHL]: Apparently that's ----

15 LDC [MR. HARRINGTON]: Judge, Ms. Wichner just spoke to
16 Mr. Binalshibh, and it confirms what I said before, that he
17 has been moved to other cells and the same thing has happened
18 to him. That's all. We are complaining that this is
19 something that is being targeted to him. There's no question
20 about that.

21 MJ [COL POHL]: Okay. On this particular cell he's been
22 given the option to move. And as I asked Mr. Trivett,
23 apparently that's -- they're giving him an option to move. He

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1 chooses not to move out of this cell for -- because of the
2 mechanical issue. That's apparently his choice.

3 LDC [MR. HARRINGTON]: I will discuss that with him,
4 Judge.

5 MJ [COL POHL]: The other cells we can discuss
6 differently, but I can't -- what I'm hearing the government
7 say, yes, there is a problem with this cell but he doesn't
8 want to move. Now, there may be problems with other cells,
9 but we don't know that because he's not in them.

10 LDC [MR. HARRINGTON]: Okay.

11 MJ [COL POHL]: Okay?

12 LDC [MR. HARRINGTON]: I will discuss that with him and
13 report to the court.

14 MJ [COL POHL]: Okay.

15 LDC [MR. HARRINGTON]: Thank you.

16 MJ [COL POHL]: We'll hopefully resolve that this week,
17 Mr. Harrington. Okay.

18 We're going to ----

19 ACC [MR. BINALSHIBH]: **[Speaking in English]** Judge, can I
20 add something, just make things clear? Because it's not about
21 moving from cell to cell. If they're going to move me from
22 this cell to other cell, they going to continue the same
23 things.

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1 The policy of the camp is to disturb me in every
2 place that I am in. And then they said okay, we're going to
3 move you to another cell. They move me to another cell. They
4 started again. And then after six months or year or so,
5 they're going to come and say okay, let's move you to other
6 cell. They move me from alpha to bravo, from one cell to the
7 other cell. Same problems. Now, just last three days, I was
8 in three different cells. They were okay with all brothers
9 except for me. And those cells where they are saying we can
10 move you into it, so same problem. It's not going to fix it.

11 My cell has no problem. If I go now, it is -- the
12 temperature is okay. But when I go to sleep, in the morning,
13 9:00, they're going to turn it very cold. When I go to sleep
14 at night, at nighttime, they're going to turn it very cold.
15 If I call the WC and ask him to turn it down, adjust it, he's
16 going to make it the opposite. He's going to make it very
17 cold. And they come say, oh, I don't have any control.

18 Who is controlling the whole things? If you don't
19 have the control, who is doing this whole things? It's not
20 just my cell. Every place I go to, they're going to do it.
21 It's not about them moving me -- over to me. That's not
22 the solution. That's only the policy -- their policy is not
23 going to stop. Harassment, vibration, banging, noises, all

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1 places they're going to do it. And they're going to tell me,
2 okay, we're going to move you to other cell.

3 Keep moving me from cell to cell, I cannot
4 concentrate on my issues, on my case. I cannot work on any of
5 my legal stuff. It's going to just disturb me. That's not
6 right. I'm not going to move to any other cell because I know
7 what's going to happen there. And I already moved to two
8 cells that are available now in my tier that they can move me
9 to it, and it's cold. They turn it cold only when I am in.
10 Bravo 9, Bravo 14. The other one is -- they are so -- or they
11 are not working.

12 Where are they going to take me now? That's only two
13 cells that they have. And if you remember other brother, they
14 went in the same cell, they have no problem with it. This
15 unit and the unit before, the guard -- the one who started
16 these things, the coldness that started was just something
17 very, very rare. Now it's become everyday issues, every day.

18 MJ [COL POHL]: Okay. I understand, Mr. Binalshibh.

19 Mr. Harrington, I don't really want to get into the
20 mechanics of how air conditioning works in a confinement
21 facility, but I do understand your concern. You asked for an
22 additional order for it. I'm not sure exactly what you want.
23 So if you draft a proposed order, give it to the government,

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1 and we will see if that can work out to at least address this
2 issue, okay?

3 LDC [MR. HARRINGTON]: Thank you.

4 MJ [COL POHL]: That brings us to 541.

5 LDC [MR. NEVIN]: Yes, Your Honor. And the issues around
6 541 are laid out in the moving papers, and the military
7 commission ruled that we would be given time before these
8 hearings commenced to meet with our client in view of the
9 problems we had with the cancelled meetings, and we
10 respectfully request that we be given that time and that there
11 not be substantive proceedings.

12 And I guess by substantive, I mean proceedings that
13 go to motions other than the kinds of things we've discussed
14 so far this morning about immediate condition issues; that
15 there not be discussions about matters until we've had a
16 chance to have those meetings with Mr. Mohammad.

17 MJ [COL POHL]: Mr. Nevin, I'm reading the government's
18 pleading on this issue, and just so -- you filed a motion
19 basically complaining about last-minute cancellation of
20 meetings.

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

22 MJ [COL POHL]: And apparently the government -- I'm
23 reading the government response here, is some of those

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1 cancellations were done by the government, by the JTF, because
2 of the need on MRI exams for certain accused. But also in
3 there, it indicates that there are meetings that were
4 scheduled, approved, that your client refused to meet with
5 you.

6 LDC [MR. NEVIN]: Not during -- not during that period of
7 time.

8 MJ [COL POHL]: Well, yeah, but I'm just -- what I'm
9 saying here is that -- which period of time are you talking
10 about?

11 What I'm looking at is -- is during the week of 11 to
12 15 December, Mr. Mohammad refused the afternoon meeting -- and
13 again, I'm just reading from their papers, so understand if
14 it's not true, it's not true. I got it. But I'm just telling
15 you what they're saying -- and refused the morning meeting the
16 next day and only part of the afternoon meeting.

17 So if Mr. Mohammad is refusing to meet with you and
18 then later on the confinement facility has to adjust their
19 schedule, isn't part of this on Mr. Mohammad?

20 LDC [MR. NEVIN]: The ----

21 MJ [COL POHL]: Not all of it, understand what I'm saying,
22 but part of it.

23 LDC [MR. NEVIN]: Yeah, well -- and, Your Honor, counsel

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1 advises me that the reason that Mr. Mohammad was unable to
2 attend those meetings was because he was experiencing back
3 pain that was severe and that made him unable to -- unable to
4 report to the visit, so it was -- it was a matter that was
5 outside his control.

6 But I guess the point is we -- we schedule visits
7 and, you know, if the facility tells us, no, you can't have a
8 visit, that's one thing -- we're -- we can't accommodate that
9 now. But we plan our own visit and hearing preparation
10 schedule based on what they tell us they can accommodate. And
11 they told us they could accommodate these meetings and then
12 cancelled, and then cancelled those without explanation.

13 So that leaves us ----

14 MJ [COL POHL]: They didn't tell you there was an issue
15 with the MRI exams that diminished the number of guards
16 available?

17 LDC [MR. NEVIN]: I hear that.

18 MJ [COL POHL]: I mean, did they tell you that at the
19 time?

20 LDC [MR. NEVIN]: I wasn't present, but I'm told that they
21 did not.

22 MJ [COL POHL]: Okay.

23 LDC [MR. NEVIN]: They just simply said your visits are

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1 cancelled.

2 MJ [COL POHL]: Okay. Okay.

3 LDC [MR. NEVIN]: I mean, I can speak to the MRI issue if
4 the military commission would like. I mean ----

5 MJ [COL POHL]: Well, what I'm simply saying is is -- and
6 again, I'm taking it from the government pleadings, so I'm not
7 saying this is -- I have no independent knowledge of this, let
8 me put it that way -- that they had to adjust the meetings
9 because they had an operational shortfall to support the
10 meetings and the MRI, and therefore, they chose to do the MRI.

11 LDC [MR. NEVIN]: Right. And my understanding is that the
12 MRIs are taking place at night. In fact, we -- one of the
13 things that, in our dealing with the MRI situation, we've
14 asked that ours not take place at night ----

15 MJ [COL POHL]: Yeah.

16 LDC [MR. NEVIN]: ---- but -- for a variety of reasons.
17 But I think that's the kind of thing that would need to be
18 resolved by testimony, because I don't -- I don't think that
19 that is -- I don't see how that presents an issue, number one.

20 But number two, it's a point that we have made on a
21 number of occasions, and I think the military commission has
22 made on a number of occasions. I don't doubt that it's
23 difficult to accommodate MRIs and accommodate a detainee about

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1 whom we know who has had special medical problems and to do
2 that and to accommodate visits.

3 But it is true, on the other hand, that facilities
4 all across the United States do this every day without any
5 problem. And it is, as we've said many times, the
6 government's decision to do this here in this difficult
7 environment. And if they're going to do it here, they should
8 be obligated to do it in a way that is efficient.

9 And if it's a question of staffing, this was -- this
10 came up during the December hearings, and there was an
11 indication that the staffing levels were going to be stepped
12 up. And I don't know where we stand on that now, but I think
13 the point of that remark or of that concession or of that
14 direction by the military commission was, you're running a
15 capital prosecution here in a pretrial detention facility in a
16 law of war environment. Staff it up. It was your idea to
17 come here and do this here as opposed to somewhere else, so
18 prepare for it and get it right.

19 So -- but I'm not asking -- I'm not even asking you
20 to condemn anything. I'm just saying could we please have our
21 day of meetings before we get into the meat of 502 so that we
22 can sufficiently consult with Mr. Mohammad in order to decide
23 what steps to take next.

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1 MJ [COL POHL]: Okay. Thank you. Any other defense --
2 this appears to be a Mr. Mohammad-specific issue on these
3 specific meetings. Any other defense counsel think somehow
4 they want to be heard on this? I know, Ms. Bormann, you've
5 had a similar issue on other occasions.

6 LDC [MS. BORMANN]: Judge, we have, and it necessitated
7 the calling of a member of the JDG staff, who indicated that
8 they were indeed going to staff up. So we would join this
9 because it's a recurring issue.

10 MJ [COL POHL]: Trial Counsel, do you wish to be heard?

11 TC [MR. SWANN]: Just a couple of things, Your Honor.

12 You indicated Mr. Nevin was unsure about when he was
13 notified. I've got the e-mail to him that's dated 13 December
14 2000 [sic]. It's a Wednesday, about a week or so before these
15 meetings, that because of operational reasons, they needed to
16 deny his request for the meetings on -- on the 20th and the
17 morning meeting on the 21st.

18 You know, I understand they want meetings. I've got
19 that. And I've spent too much of my time dealing with this
20 issue. If you recall back in the 254 series, that was the
21 other half of the female guards issue. And I provided the
22 court with pie charts for a number of years across the board,
23 just exactly what happens during those meetings. When they

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1 make a request, does the request get approved.

2 By and large, I would say this: Mr. Mohammad attends
3 more of his meetings than any of the five accused; and he
4 rarely, if ever, gets a meeting that's disapproved. In this
5 instance, it was.

6 The court indicated that you looked at our brief.
7 I'll take you back to the first week of October. I think we
8 were down here for the hearings, and that's when a witness
9 testified that -- we addressed the issue of could they have
10 meetings here in the courtroom. Could we also do it over in
11 the ELC.

12 That week the camp was able to accommodate. So if
13 the accused decided he didn't want to be in the room here and
14 his lawyer had a meeting over at the Echo II, they would --
15 they'd make those arrangements. By and large, that entire
16 week, if they had that meeting over there, many of them
17 refused those meetings over here. They weren't in this room.
18 They just decided to stay back at the camp.

19 The week of -- when we left here, I believe, on
20 the Saturday, the 9th or the 10th, Mr. Mohammad's team, some
21 members of his team stayed around. So they had meetings
22 during the week of 11 to 15. He asked for four meetings -- he
23 asked for eight meetings, a morning meeting, an afternoon

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1 meeting is counted as two. He asked for eight meetings,
2 Monday through Thursday. All of those meetings were approved.
3 He chose not to go to two of the meetings, and then chose to
4 leave early, much -- very early on one of those meetings. So
5 those were three meetings.

6 Apparently, there was nobody on island from the 15th,
7 that Friday, Saturday, or Sunday, but then they chose to fly
8 down here on the rotator the following Tuesday. It's common
9 practice. They fly in on the rotator, they turn around and
10 fly out on the rotator on Friday. That's fine.

11 They were able to accommodate the meeting on the
12 21st. There have been no meetings, that I'm aware of, between
13 21 December and yesterday. And I don't know if Mr. Mohammad
14 had meetings yesterday. If he did, because of the rule,
15 weekends before and weekends after, he would have been
16 accommodated on that meeting.

17 Now, on further look, you see where the camp has
18 approved -- and I think the number is going through March now,
19 yeah -- he's asked for 78 meetings between now and the first
20 week in March. The camp has approved 74 of those 78 meetings.
21 They have plenty of opportunity to meet with their client.

22 The camp is not -- I work -- I work hard with the
23 camp, and the camp has been able to accommodate. Back in

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1 November, I think Ms. Bormann wanted meetings for a particular
2 week. She didn't have an attorney on island. Normally they
3 require an attorney to be on island. In this case, they
4 originally denied the meetings and then turned around and
5 approved all of the meetings that she wanted.

6 So the camp goes out of its way to provide meetings
7 to these particular individuals. They either refuse them,
8 they accept them. Very rarely, if ever, if ever, except on
9 this one instance here in the last couple, three months, have
10 they ever disapproved a meeting for -- certainly for
11 Mr. Mohammad.

12 So with that said, sir, I know -- again, I didn't
13 make an inquiry as to whether he met with his lawyers
14 yesterday or not. If he did, then I certainly don't think
15 that we need to stop and give them another Tuesday to meet
16 with their attorneys. And even so, I think we need to proceed
17 and get the court's business done this week.

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

19 Mr. Nevin?

20 LDC [MR. NEVIN]: Well, Your Honor, yes, we did meet with
21 Mr. Mohammad yesterday, and we'd like to meet with him -- we'd
22 like to take the court up on its suggestion, at least that it
23 would provide us with additional time to meet with him

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1 beforehand.

2 I can lay out and would be glad to lay out in a
3 closed session or in an ex parte session exactly what was to
4 occur at the meetings that were cancelled and which lawyer
5 from our team was to have participated in those meetings.

6 MJ [COL POHL]: Mr. Nevin, that's not necessary. I don't
7 want to get into your business.

8 LDC [MR. NEVIN]: Yeah, I didn't ----

9 MJ [COL POHL]: That's ----

10 LDC [MR. NEVIN]: I don't -- I'm not really proposing that
11 that would be a great idea either.

12 MJ [COL POHL]: Good. Then we agree it's a bad idea.

13 LDC [MR. NEVIN]: Yeah, okay. It's a bad idea. But in
14 some ways I can't really respond to all ----

15 MJ [COL POHL]: No, I understand.

16 LDC [MR. NEVIN]: ---- of Mr. Swann's remarks.

17 MJ [COL POHL]: I'm making an assumption that people
18 always act in good faith until proven otherwise. You have --
19 in my view, you've presented a good faith reason why you need
20 these meetings, and that's -- that's enough for this purpose.

21 LDC [MR. NEVIN]: All right. That's what I needed to say.
22 Thank you.

23 MJ [COL POHL]: Okay. What we're going to do is this:

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1 Although it appears that we have ample time in the next seven
2 days, seven court days, perhaps eight court days to get our
3 business done, experience has shown that sometimes we don't go
4 as fast as we think we're going to.

5 So that being said, what we're going to do today is
6 we're going to go up till the lunch recess, and then this
7 afternoon we will not meet, and you can meet with your client
8 in the courtroom, all of you can, until 1630. And tomorrow
9 we'll go as scheduled with the 505(h) hearings, and there's
10 another issue with that that's just come up. And then we'll
11 pick up to wherever we are in the open session on Wednesday.

12 Back to what I just stated is that, Mr. Connell, I
13 understand that you have a 505(g) notice on the groin issue --
14 I'm going to reframe that -- the search issue, just for going
15 forward. Go ahead. True?

16 LDC [MR. CONNELL]: Sir, yes. We have some relevant
17 classified material that seems to inform the issues before the
18 military commission, so we have requested an AE number to get
19 that 505(g) notice so we can get that information before the
20 court.

21 MJ [COL POHL]: And it seems to me if we're dealing
22 with -- if we get to the TTPs of how the confinement facility
23 is being run, that's going to be classified information, too.

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1 LDC [MR. CONNELL]: Yes, sir, at the secret level.

2 MJ [COL POHL]: Trial Counsel, do you think we can resolve
3 the search issue without discussing secret information?

4 TC [MR. SWANN]: I doubt it. Absolutely not. If
5 that's what we're going to be talking about, tactics,
6 techniques, and procedures, it will be at the classified
7 level, it needs to be in a classified proceeding.

8 MJ [COL POHL]: Okay. Well, that will give everybody an
9 opportunity to actually to maybe even research the law in the
10 area. It will give me an opportunity to, anyway. You guys
11 may already know what you're talking about. Okay.

12 LDC [MR. CONNELL]: Sir, the Ghailani case that Mr. Swann
13 referred to is found at 751 F.Supp 2d 508, and the
14 D.C. Circuit opinion regarding groin searches that the
15 military commission referred to is found at 760 F.3d 54.

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

17 So that's going to bring us to the 530. I'm not sure
18 if this is a government motion or a defense motion.

19 LDC [MR. CONNELL]: Sir, if I could, there are aspects of
20 this that have 505 notices. I had listed those for a 505.

21 MJ [COL POHL]: Yeah.

22 LDC [MR. CONNELL]: But there are two aspects of it, G and
23 D, that do not have any 505 notices. So my suggestion at the

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1 802 was that if counsel involved in those cases wish to take
2 them up without -- prior to the 505, the government asked part
3 of this motion, the motion for search, does require a 505
4 hearing; but the question of whether the military commission
5 can go forward while the defendants don't have access to their
6 legal materials does not implicate a classified aspect.

7 MJ [COL POHL]: Okay. Trial Counsel, I've got a question
8 for you, is -- Mr. Ryan, this is yours?

9 TC [MR. RYAN]: Good morning, Your Honor. Edward Ryan on
10 behalf of the United States.

11 In part, Judge, last session if you'll recall, you
12 approved this one being broken up because it's two very
13 distinct matters within one. 530 as it pertains to laptops is
14 mine, 530G as it pertains to legal materials in the specific
15 case of Mr. Mohammad is being handled by Mr. Swann. I can
16 answer any question you have.

17 Your Honor, as to the way forward right now, at the
18 802, Your Honor, I believe, accepted and without our objection
19 the proposed order of march presented ----

20 MJ [COL POHL]: Uh-huh.

21 TC [MR. RYAN]: ---- which would indicate that 530G was to
22 go forward today. 530D, I believe, is actually withdrawn by
23 the defense. The 530G, by the way, pertains to the legal

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1 materials in the case of Mr. Mohammad, particularly papers.

2 As far as the laptops are concerned, that portion of
3 530, 505 notices have been filed which were to be taken up at
4 the closed session to be followed in the next open session
5 with the handling of the laptops motion.

6 MJ [COL POHL]: Let me ask you a question, Mr. Ryan.

7 TC [MR. RYAN]: Yes, sir.

8 MJ [COL POHL]: And if -- and I don't want a classified
9 answer, obviously.

10 TC [MR. RYAN]: You won't get one, sir.

11 MJ [COL POHL]: Okay. It's unclear to me, and perhaps
12 it's because I'm not very digitally proficient, of exactly
13 what was done to the computers that caused the problem and
14 what's the risk of what was done to the computers? Are you
15 with me? And the question is: Can you answer those questions
16 in an open session?

17 TC [MR. RYAN]: Yes, I can, sir.

18 MJ [COL POHL]: Okay. What was done to the computers that
19 caused them to be seized?

20 TC [MR. RYAN]: Your Honor, this pertains to the full
21 argument as to 530, that portion of it that deals with the
22 laptops. I prefer, and as we have already discussed, that the
23 505 aspect of it go first before the open court session

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1 because one might impact on the other.

2 As far as what was done to the laptops at this point,
3 alterations were done that, however specified in government
4 pleadings as far as the full extent of what was altered within
5 them and the events that took place within them as described
6 in the document that was seized, that has been presented as an
7 attachment. Those are documented for Your Honor.

8 MJ [COL POHL]: No, I have that. My question is is that:
9 What is the risk here? I mean, I understand there's an order
10 for them not to modify the computers. I got that. You know,
11 so that part I got.

12 But my question is: What is the risk here? Is it --
13 by that, I mean can they alter the computers in such a way to
14 give them capability that presents a risk to the United States
15 or the confinement facilities?

16 TC [MR. RYAN]: Yes, sir.

17 MJ [COL POHL]: Can you tell me what that is if -- in an
18 open session?

19 TC [MR. RYAN]: I believe I can, sir.

20 The computers were being modified in such a way
21 that -- and, you know, part of this argument, Judge, is sort
22 of circular with our request for the ----

23 MJ [COL POHL]: Yeah.

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1 TC [MR. RYAN]: ---- forensic analysis.

2 MJ [COL POHL]: I understand. All I want to do is get
3 kind of a framework here, and then we're going to go into the
4 substantive arguments. I don't want to get into the whole
5 issue now because we're going to do it after the 505 hearing.
6 I just want to kind of get the lay -- that's the part that was
7 unclear to me in the proceeding -- in the pleadings of the
8 risk -- what I'm calling the risks to the -- to the
9 United States or the -- and/or the confinement facility.

10 TC [MR. RYAN]: One of the significant risks -- risks that
11 we're presenting that Your Honor -- that we're presenting to
12 Your Honor that has to be dealt with and part of the reason
13 for the forensic search is that, based on the very limited
14 analysis thus far, based on the reading of the documents,
15 based on those with extensive knowledge as to the workings of
16 computers, there are a couple of different risks involved.

17 One is creating an entire operating system within the
18 computers that is separate and apart from that which was
19 already part of that installed and that could be monitored and
20 that had been approved, et cetera; that this new operating
21 system, this separate operating system, could not be easily
22 detected, monitored, et cetera.

23 And secondly, that the alterations to the laptops

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1 could involve -- along with other changes to the base as a
2 whole -- could involve the ability to access the internet.

3 MJ [COL POHL]: Okay.

4 TC [MR. RYAN]: That is -- I think I'm saying it fairly,
5 Judge, to say that's sort of the biggest concern of all.

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

7 And again ----

8 TC [MR. RYAN]: And, Your Honor, in answering your
9 question, I do, of course, reserve the right to make further
10 argument at the appropriate time.

11 MJ [COL POHL]: No, I just wanted to kind of get the lay
12 of the land because that was kind of my issue.

13 Mr. Ruiz?

14 LDC [MR. RUIZ]: Just briefly, Judge. Judge, I know you
15 don't want to get into the meat and bones of this issue, but
16 what I want to make very clear here is that Mr. Ryan spoke in
17 very broad, general terms about what was done to these
18 computers as though these alleged modifications were made to
19 every computer.

20 The question that I would suggest you ask, Judge, is:
21 What was done to, for instance, Mr. al Hawsawi's computer, if
22 anything? The answer to that is absolutely nothing. The
23 answer, as I've said all along, is there is absolutely not one

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1 scintilla of evidence that the government possesses that
2 indicates that there is any risk whatsoever or any evidence
3 whatsoever that Mr. al Hawsawi's computer was compromised or
4 modified in any way, shape, or form.

5 There were multiple searches that were conducted of
6 each of these accused's cells. Some things were found. None
7 in Mr. al Hawsawi's cell. And these were fairly comprehensive
8 searches.

9 And so when Mr. Ryan gets up here and talks in these
10 general terms and says the computers were modified and that
11 these systems were compromised, it's inaccurate. There's
12 absolutely nothing that has been done to Mr. al Hawsawi's
13 computer. There's absolutely no evidence that anything has
14 been done to Mr. al Hawsawi's computer or that it presents any
15 kind of risk whatsoever. That's undisputed. There's been no
16 evidence whatsoever presented to you, classified or otherwise,
17 that contradicts that, Your Honor.

18 Under those circumstances, we have a very strong
19 interest in proceeding with getting Mr. al Hawsawi's laptop
20 back to him because it is his primary method of reviewing
21 discovery, of getting discovery, and of participating in this
22 case in a way that is meaningful and a way that allows him to
23 continue to participate.

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1 All of those things and some of the things you've
2 heard today are things that go to the quality of the
3 representation and the ability of counsel to interact with the
4 accused, the people we are asked to represent. These things
5 matter and have collateral and ripple effects. And they've
6 had that effect in our case. That's why, when the issue first
7 came up, I tried very hard -- we had another week of hearings,
8 and I tried very hard to see if we could try to resolve that
9 at that time.

10 Here we are, as I expected, two, three months down
11 the line. Mr. al Hawsawi still does not have his computer.
12 It's impacting the ability to get discovery to him, to review
13 that discovery, to have meaningful conversations about the
14 issues.

15 And I ask, Judge, that you put the government to the
16 test to show you exactly what you've asked. What is the risk
17 specifically in Mr. al Hawsawi's case and why should we
18 continue to withhold his computer from him?

19 Thank you.

20 MJ [COL POHL]: You're welcome.

21 LDC [MR. NEVIN]: Your Honor, could I speak to the
22 scheduling question, please?

23 MJ [COL POHL]: Yeah, okay. Because I see 530G is your

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1 motion.

2 LDC [MR. NEVIN]: Right. And this has to do with the
3 seizure of legal -- Mr. Mohammad's legal materials.

4 And I did file a 505 notice and a motion for a 505(g)
5 notice and a motion for a 505(h) hearing, so I think it's not
6 ready to be argued at this point.

7 I've also had conversations with counsel. I filed a
8 witness request, which I -- well, I'll let counsel speak to
9 that. But that -- but the time for responding to that hasn't
10 run yet, so the time -- I'm not in a position to file a motion
11 to compel yet. And it may be that those motions won't be
12 necessary in any event, depending on how the discussions go.

13 So I submit that 530G -- I believe it's -- there's a
14 response and a reply as well, three separate pleadings. I
15 believe those are not ready to be argued.

16 MJ [COL POHL]: Until after the 505(h) hearing.

17 LDC [MR. NEVIN]: Until after the 505. I really --
18 honestly, I think it should be -- it should be moved until
19 later on the calendar to allow counsel and I to have
20 additional discussions about it.

21 MJ [COL POHL]: Okay. I mean -- okay. Just, you know,
22 I hear what you're saying there, Mr. Nevin, but the only thing
23 is is that I hear you saying it may take longer than Mr. Ruiz

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1 saying we need to decide today. What's the ----

2 LDC [MR. NEVIN]: Oh, I think ----

3 MJ [COL POHL]: ---- intention here?

4 LDC [MR. NEVIN]: I think Mr. Ruiz is talking about
5 something different.

6 There is a -- how this works is that while -- there
7 were a number of cell searches that occurred in the course of
8 the seizure of the computers and immediately after. And
9 during the course of that cell search, a lot of Mr. Mohammad's
10 legal materials became implicated.

11 MJ [COL POHL]: Okay.

12 LDC [MR. NEVIN]: And that led to the filing of a motion.
13 And because it related to the computer seizure issue, it got
14 filed in the 530 series.

15 MJ [COL POHL]: So your issue is the legal materials, not
16 the -- you have a computer issue, too?

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

18 MJ [COL POHL]: But you're talking about your -- okay.

19 LDC [MR. NEVIN]: Correct.

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

21 And, Mr. Connell, 530D was withdrawn, correct?

22 LDC [MR. CONNELL]: That's right, sir. Since it appeared
23 on the docket, I thought you just wanted to confirm that ----

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1 MJ [COL POHL]: Yeah.

2 LDC [MR. CONNELL]: ---- we seek no further relief on
3 530D. Your order taking custody of the laptops and all
4 associated materials resolved our concerns.

5 MJ [COL POHL]: Okay. Thank you. 133RR.

6 DDC [Maj WAREHAM]: Good morning, Your Honor. Major
7 Wareham for Mr. al Baluchi.

8 MJ [COL POHL]: Good morning, Major Wareham.

9 DDC [Maj WAREHAM]: Good morning. This is a status
10 update. We still have a pending request for the TSCM expert.
11 But in addition, we supplemented on 30 November with the
12 convening authority's findings concerning a different case,
13 but one that acknowledged the issues contained in AE 133RR,
14 stating that he is working with the command structure here to
15 develop a clean facility. And we wanted to note that for the
16 court. And as far as anything else, we're still awaiting
17 assignment of the expert to resolve these issues.

18 MJ [COL POHL]: Okay. So 133RR, except for what you just
19 told me, is not ripe for these sessions?

20 DDC [Maj WAREHAM]: Correct, Your Honor.

21 MJ [COL POHL]: Thank you.

22 Just while we're on that topic, Trial Counsel, is
23 there any, to your knowledge -- and I know this is maybe not

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1 even your bailiwick -- of some type of construction or of a
2 new defense counsel meeting area?

3 TC [MR. RYAN]: I do not have information, Judge. But in
4 light of counsel's reporting, I'll make it my business to look
5 into it.

6 MJ [COL POHL]: Again, I know you guys don't -- you're not
7 Home Depot. But I just would be curious as to, if there
8 really is going to be something done or it's just a -- because
9 it came from the convening authority, of course, it didn't
10 have authority over the JTF. So just a status on it.

11 TC [MR. RYAN]: Understood, sir. I'll be able to report.

12 MJ [COL POHL]: Thank you. 350C.

13 LDC [MR. CONNELL]: Sir, with respect to 350C and 3500,
14 they both are regarding the former CIA interpreter utilized by
15 Mr. Binalshibh's team.

16 The government has represented that it is -- it will
17 produce discovery regarding that material, that matter. It
18 says that it will do so by the end of January. So this -- the
19 350 series is not ripe for decision.

20 MJ [COL POHL]: Trial Counsel, is that your ----

21 TC [MR. RYAN]: It's accurate, sir.

22 MJ [COL POHL]: ---- accurate? Thank you, Mr. Connell.

23 LDC [MR. RUIZ]: Judge, one issue on the 350 series with

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1 respect to our filings, 350R.

2 MJ [COL POHL]: Uh-huh.

3 LDC [MR. RUIZ]: I still do not believe that I have
4 received language from the prosecution on exactly how I can
5 refer to our issue in open court. And I think I've been
6 awaiting that, and I just want to flag that so that we can try
7 to get that.

8 MJ [COL POHL]: Mr. Ryan?

9 TC [MR. RYAN]: I have stated -- I'm sorry, Judge. I'll
10 make it clear. We'll take care of it.

11 MJ [COL POHL]: Thank you. We talked about 478. We're
12 going to do that later in the week. One moment, please.

13 [Pause.]

14 MJ [COL POHL]: I think the witness issue on 502 may take
15 a while, so I'm going to -- I want to come back to that.

16 What I do want on the 502 series is 502JJJ. And
17 there is a couple of issues there, one of which is
18 Mr. Hawsawi's objection to even considering the government
19 pleading; and secondly is the pleading itself, which Mr. Ali
20 takes issue just strictly with the legal basis.

21 So, Mr. Ruiz, it seems to me you would be heard first
22 on this, on the procedural aspect. And if you want to,
23 obviously, you can go to the other -- rephrase this. Only

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1 talk about the procedural aspect, because it's really a
2 government motion.

3 So you object to me considering it at all on a
4 procedural basis?

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

6 MJ [COL POHL]: Okay. Go ahead. Tell me why.

7 DC [MAJ WILKINSON]: Well, the rules are clear. If you
8 want to supplement your arguments, you ask for permission.
9 And then with the supplement, you better have something new,
10 new facts or newly decided case law. The government did
11 neither of those things. They didn't ask permission, they
12 simply filed it. They titled it as motion to adopt a standard
13 instead of as a supplement, but it's supplemental argument on
14 something that was in front of you in the December hearings.

15 And the result of that is now it's also, I mean,
16 delayed your ruling on our part of 502 itself. Because once
17 you put it on the docket, then we knew there would be no
18 decision between then and now. That isn't right. It isn't
19 fair. You should strike it.

20 MJ [COL POHL]: And then what do I do with the issue?

21 DC [MAJ WILKINSON]: I mean, if -- well, firstly, you
22 have, for Mr. Hawsawi's part of 502, a complete record now.
23 Either rule on it, or if you decide ----

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1 MJ [COL POHL]: No, but I'm saying on this particular
2 issue of ----

3 DC [MAJ WILKINSON]: Yes, sir.

4 MJ [COL POHL]: ---- what does "part of al Qaeda"
5 mean ----

6 DC [MAJ WILKINSON]: Yes, sir.

7 MJ [COL POHL]: ---- as I recall, I asked you that in open
8 court, and you gave me some ----

9 DC [MAJ WILKINSON]: And we argued it in open court.

10 MJ [COL POHL]: Yeah, and you argued. I don't recall any
11 legal standard you gave me. Did you? So what I'm saying is
12 is, do I just ignore any legal authority that -- on one way or
13 the other because it was improperly filed?

14 DC [MAJ WILKINSON]: Well, what you should do is, if you
15 decide that you need supplemental briefing on the subject, if
16 you don't feel the record in front of you is enough to rule on
17 that issue, then you do what you've done in the past. You
18 say, parties, I want supplemental briefing; here's the issue I
19 want the briefing on; here's the date by which you do it. And
20 then everybody will have a proper opportunity to brief it as
21 fully as it needs to be briefed.

22 MJ [COL POHL]: Do you think you guys did not have an
23 opportunity to fully brief it?

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1 DC [MAJ WILKINSON]: Well, when the government filed ----

2 MJ [COL POHL]: I agree it was irregular, I'm not going to
3 dispute you on that. I agree that the rules don't neatly
4 address this issue.

5 DC [MAJ WILKINSON]: Right. I mean the choice ----

6 MJ [COL POHL]: In fact, doesn't address it at all. So
7 I've got that. I got that. But I'm just saying is,
8 procedurally going forward is, this is clearly -- and, you
9 know, I ----

10 DC [MAJ WILKINSON]: Uh-huh.

11 MJ [COL POHL]: ---- work on a lot of motions at one time,
12 so it's -- so understand, okay? And I can't say I would have
13 said -- required supplemental briefing on it or I wouldn't
14 have, but clearly I was concerned on what "part of al Qaeda"
15 meant.

16 DC [MAJ WILKINSON]: Right.

17 MJ [COL POHL]: So -- and again, it wasn't a regular
18 filing, I concede that. But I'm not sure -- but it is a
19 significant issue in the underlying 502 issue.

20 DC [MAJ WILKINSON]: Yes, sir, it is.

21 MJ [COL POHL]: So I'm asking you is, have you had a
22 sufficient opportunity to respond? Because I know your
23 pleading objected to the procedure and then talked about the

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1 substance. But I -- again, I don't want to penalize you if
2 you think you were -- hadn't had sufficient time to respond to
3 the government's substantive argument about that.

4 DC [MAJ WILKINSON]: Right. As I think you saw, the
5 substantive argument we made is basically cut and pasted out
6 of 502E, where we took the position that, with what they
7 wanted you to do, it was really something we'd responded to
8 already.

9 MJ [COL POHL]: Okay.

10 DC [MAJ WILKINSON]: But we made the procedural choice
11 ourselves when we saw the irregular filing. We didn't want to
12 acquiesce in the irregular filing by doing a full brief on
13 what that should mean, and so what we gave you was not a full
14 brief on that issue.

15 If you want to consider, you know, either that or to
16 just to start it over again and say everybody give me your
17 best brief on what this means by this date, then we would give
18 you something fuller than what we did give you in both 502KKK
19 and 540A.

20 MJ [COL POHL]: Okay. Thank you. Trial Counsel.

21 MTC [MR. TRIVETT]: Your Honor, the way in which
22 Mr. Hawsawi decided to challenge personal jurisdiction in its
23 entirety was irregular, and I wanted to point the court's

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1 attention back to what the original challenge was when the
2 filings papers were drafted. And on 17 April when we
3 responded, the only challenge that Mr. Hawsawi had offered in
4 regard to his personal jurisdiction was on the issue of
5 hostilities, period.

6 I've stood up in this court a couple of times and
7 said I'm still confused with what exactly they're challenging
8 because it sounds like, although they wrote it's just
9 hostilities, it sounds like there may be other aspects of the
10 AUEB standard that they're challenging.

11 Not until, I believe it was 19 October, after the
12 April filings, after a July response where they only wanted
13 one witness, and their only one witness was Professor Watts.
14 He was specific only to the hostilities issue. Not until you
15 actually pinned down Major Wilkinson on 19 October did he
16 indicate that all aspects of the AUEB standard were going to
17 be challenged. So this was subsequent to any of our filings.
18 We did not have an opportunity to file on it.

19 It's a fairly straightforward issue. But then when
20 there was no standard that we had an opportunity to even file
21 for you, Major Wilkinson started making up his own, right?
22 And he started discussing that "part of" was really synonymous
23 with being a member of al Qaeda. He said that there was no

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1 oath that was taken or bay'at pledge, so therefore, he
2 couldn't be a member of al Qaeda or a part of al Qaeda.

3 Upon a question that you gave whether a DoD
4 contractor would be considered part of DoD, he said no;
5 whether training in an al Qaeda camp would make someone part
6 of al Qaeda, he said no. And most remarkably, he even said
7 that you can conduct an operation on behalf of al Qaeda and
8 not be part of al Qaeda.

9 Those arguments were first raised by him during the
10 argument phase of the jurisdictional hearing. And I was
11 sitting there saying, you know, there's at least nine years of
12 case law directly contrary to everything he was saying that
13 was being handled at the D.C. Circuit Court. It was dealing
14 with this very issue under the law of war: Who can we detain
15 under the authorization to use military force in regard to who
16 is part of al Qaeda?

17 And we would have been negligent to not at that point
18 seek that that be the standard, that that functional standard
19 be adopted by the judge who can look at the D.C. Circuit,
20 understand that there's been a wealth of habeas petitions on
21 this, and that ultimately a functional test was adopted.

22 That's why we did what we did. I don't dispute that
23 it was irregular, but I think it was irregular in reacting to

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1 what was a very irregular way in which they challenged
2 personal jurisdiction. Had they challenged it up front back
3 in July and said we don't believe he was a part of al Qaeda,
4 we would have briefed it at that time. But when you're
5 dealing with jurisdictional challenges, you're just going to
6 deal with the jurisdictional challenge that's in front of you.
7 We're not going to make up other things, we're not going to
8 brief other things. He challenged the existence of
9 hostilities, and that's what we answered.

10 So we would ask that you consider the standard. I'm
11 ready to argue whenever on the substance of it with
12 Mr. Connell. I can do that now, or I can wait. I'll defer to
13 you on that, sir.

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

15 Mr. Connell, do you want to be heard on the
16 procedural aspect of this issue?

17 LDC [MR. CONNELL]: We take no position on the procedural
18 aspect, sir.

19 MJ [COL POHL]: Thank you. Thank you, Mr. Trivett.

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

21 DC [MAJ WILKINSON]: Well, firstly, sir, when you told us
22 on the 31st of May that you were going to have an evidentiary
23 hearing, you put everyone on notice that the entire issue of

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1 personal jurisdiction was at issue. On jurisdictional issues,
2 the government always has the burden of proof; the proponent
3 of jurisdiction always does.

4 MJ [COL POHL]: Wait a minute. Because I said we're going
5 to do an evidentiary hearing, that somehow defines the scope
6 of the motion you filed?

7 DC [MAJ WILKINSON]: No, sir, but ----

8 MJ [COL POHL]: Why would you say that?

9 DC [MAJ WILKINSON]: Because the scope ----

10 MJ [COL POHL]: I mean, if the scope of your motion was
11 hostilities alone, why would I -- how does my ordering an
12 evidentiary hearing somehow expand that scope?

13 DC [MAJ WILKINSON]: Because when you said they were going
14 to have to prove personal jurisdiction, they have to prove
15 personal jurisdiction.

16 MJ [COL POHL]: Beyond what's being challenged?

17 DC [MAJ WILKINSON]: That was my understanding of the
18 orders that you issued. And it certainly came out in hearings
19 that we weren't waiving any piece of it. You said they have
20 to ----

21 MJ [COL POHL]: It went back and forth, quite frankly, and
22 then eventually you said yes, we're not waiving anything.

23 DC [MAJ WILKINSON]: That's right.

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1 MJ [COL POHL]: But your original motion was just
2 hostilities, correct?

3 DC [MAJ WILKINSON]: That's true, sir.

4 MJ [COL POHL]: So when I ordered the evidentiary hearing,
5 I ordered the evidentiary hearing to support the motion that
6 you filed, not one you could have filed. Then later on, it
7 devolved that you wanted -- you were challenging all aspects
8 of the jurisdictional issue, true?

9 DC [MAJ WILKINSON]: I mean, that we weren't going to
10 waive them because -- so that, for example, there was no way
11 for them to avoid hostilities, which we don't think is a
12 possibility anyway, with any other aspect of it. If they
13 would like to take other aspects off the table and say it's on
14 hostilities alone, we're fine with that. But that's not how
15 they wish to do it and that's not how they described it in
16 their own motions.

17 When it comes to the things that came out in
18 December, I argued off the evidence and I argued off the
19 English language, which is not making up anything at all. The
20 evidence that I mainly used from the 302s, they had only given
21 us a few weeks before that hearing. So I argued off the
22 evidence that was there.

23 But, I mean, there's nothing especially irregular

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1 about challenging what we want to challenge. And if you say,
2 Government, you've got to prove personal jurisdiction one way
3 or the other, that's what they have to do. And as long as the
4 burden is on them, they're not absolved from proving it any
5 way that they can prove it.

6 And in any case, there was plenty of time before the
7 hearing, even between October and the hearing, to say if they
8 want to introduce argument, if they want to supplement, they
9 could do the regular procedure, ask for it. And if you
10 granted permission for it, then, you know, we would do a full
11 response at that time. That's all.

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

13 I would note for the record that the issue about
14 being part of al Qaeda was in 502E, which was a reply brief
15 and therefore not necessary to have a response to.

16 I agree with the defense to a certain amount that
17 this is somewhat irregular, that I don't know whether we would
18 have gotten to it or not; but obviously this was an issue
19 that would have had to have been addressed in the eventual
20 ruling anyway. Whether I would have asked for a supplemental
21 pleading or just researched it myself, I don't know. I don't
22 know what I would have done since we're not at that point.

23 Be that as it may, since it is an issue, I'm going to

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1 permit the government to litigate it. And Mr. Hawsawi is
2 saying they want to file a more robust pleading, and I will
3 give them that option. You have two weeks to file the
4 pleading. And that's the last pleading on this issue from
5 everybody, okay?

6 DC [MAJ WILKINSON]: Understood, sir.

7 MJ [COL POHL]: And then we'll ----

8 LDC [MR. NEVIN]: Your Honor, excuse me.

9 MJ [COL POHL]: Yes.

10 LDC [MR. NEVIN]: It's the last briefing on this
11 issue ----

12 MJ [COL POHL]: As far as they're concerned.

13 LDC [MR. NEVIN]: On ----

14 MJ [COL POHL]: 502, part of al Qaeda ----

15 LDC [MR. NEVIN]: Part of al Qaeda.

16 MJ [COL POHL]: ---- of Mr. Hawsawi and Mr. Ali's motion.
17 It's not the last word on 502 from others.

18 Mr. Connell?

19 LDC [MR. CONNELL]: Out of fairness, our 502000 was a
20 response. The government would already have the ability to
21 file the reply if they chose. I mean, it's up to them. It's
22 their horse, but ----

23 MJ [COL POHL]: Now, this has got to end. Understand,

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1 they've styled it as a motion, and it really wasn't a motion,
2 at least under the rules. And you filed a response to what
3 really wasn't a motion. I understand your argument is
4 completely different than theirs. I've got it. They can
5 argue the distinction when we get to that point, but I'm --
6 I'm just going to stop the ----

7 LDC [MR. CONNELL]: Understood, sir. Thank you.

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

9 LDC [MR. CONNELL]: Sir, I have something else to say
10 about 502 when you're ready.

11 MJ [COL POHL]: Okay. One moment, please. Mr. Connell.

12 LDC [MR. CONNELL]: Sir, I just wanted to mention on 502
13 that, while the witness list issue does require a 505(h),
14 there is one other carve-out from the 502 series, which is
15 502MM, which is the Jencks R.M.C. 914 issue. And we're
16 prepared to argue it if the military commission wishes.

17 MJ [COL POHL]: Okay. Well, since we're on 502, why don't
18 you go ahead, Mr. Connell.

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

20 MJ [COL POHL]: Refresh my memory. Didn't the government
21 say they were going to give this to you?

22 LDC [MR. CONNELL]: They said that sir, yes. But I -- I'm
23 going to address that issue.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: There's real disagreement over what
3 that -- "we're going to give it to you" means.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: May I approach the clerk, please?

6 MJ [COL POHL]: Sure. Commission will be in recess for
7 ten minutes.

8 [The R.M.C. 803 session recessed at 1049, 8 January 2018.]

9 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1103,
2 8 January 2018.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present.

5 Mr. Connell.

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

7 Your Honor, the issue before the military commission
8 at this moment is 502MM, Mr. al Baluchi's motion for advanced
9 production of statements under Rule for Military
10 Commission 914.

11 I have provided the parties and the court reporters
12 with a series of slides which are marked as AE 502PPP. Prior
13 to court, we complied with the fourth in a series of, shall we
14 say, increasingly demanding requirements for advanced
15 production of slides. I do not know whether to be insulted or
16 complimented by that, but they have been provided to the court
17 security officer for advanced production on disc rather than
18 e-mail. And I would request permission to display them to the
19 gallery and publish them.

20 MJ [COL POHL]: Okay.

21 [Conferred with courtroom personnel.]

22 LDC [MR. CONNELL]: PPP.

23 MJ [COL POHL]: Yes, go ahead.

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1 LDC [MR. CONNELL]: Thank you, Your Honor. May we have
2 the feed from Table 4?

3 Sir, may we have the feed from Table 4?

4 MJ [COL POHL]: Yeah, go ahead. I'm sorry.

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

6 In many ways, this is a relatively straightforward
7 issue. The Rule for Military Commission 914 is a strict
8 parallel to Rule for Court-Martial 914, which is a strict
9 parallel to Jencks, 18 U.S.C. 3500, in the federal court. So
10 the actual requirements are fairly well-established. Despite
11 that, there are significant differences among the parties on
12 what Rule 914 requires, and that's why I want this opportunity
13 to bring this before you today.

14 Rule 914 itself, the so-called Jencks rule, has two
15 significant sources of discussion of room for interpretation.
16 The rule itself requires that the calling party after direct
17 examination produce -- and then we come to the first issue
18 which is -- let me just highlight here, give that a shot --
19 "statement of the witness" is an issue that causes some
20 disagreement. And the second area which causes disagreement
21 is "relates to the subject matter."

22 The third area, of course, which is really the basis
23 for the motion is that the Jencks Act was passed following

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1 United States v. Jencks to change the timing of production of
2 the statements of the witnesses that relate to the subject
3 matter. Rule 914, like the Jencks Act itself, requires that
4 that production only take place after a witness has been
5 called on direct.

6 Now, in this particular instance regarding Special
7 Agent Fitzgerald and Special Agent Perkins, interestingly,
8 they have already been called on direct, although I'm sure
9 that there will be additional direct with respect to
10 Mr. al Baluchi specifically. Special Agent Fitzgerald has
11 already testified about his involvement in the USS COLE
12 investigation as a basis for hostilities. Special Agent
13 Perkins has already testified about her involvement in the
14 East Africa Bombing case as a basis for hostilities.

15 So in this situation, although at the time we filed
16 the motion the witnesses had not yet testified on direct, now
17 they have. So that brings us to the question of, well, what
18 has the government produced because they said they were going
19 to produce this, and that's where we have a substantial
20 disagreement with the government. They don't brief it, so I
21 don't know if their disagreement is about "statement of the
22 witness" or if their disagreement is about "relates to the
23 subject matter."

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1 But let's begin with statement of a witness, because
2 this issue is going to come up again and again between now and
3 trial. It will apply to us with the numbers of witnesses that
4 we intend to call for -- in the personal jurisdiction hearing.
5 It already applied to us. We already -- there's already a
6 production from the defense in the record with respect to
7 Ms. Maher and a number -- we've given notice of the
8 production -- we've been on a rolling basis producing
9 discovery to the government with respect to personal
10 jurisdiction.

11 So let us come to what is a statement. A statement
12 in the -- in Rule 914 has three different aspects, and really
13 the government has produced a number of statements under the
14 third definition but not under the other two.

15 Under Rule 914, a statement is, number one, a written
16 statement made by the witness that is signed or otherwise
17 adopted or approved by the witness. For most people, this is
18 the most -- the largest collection of documents that they
19 produce.

20 If someone called me to testify on this case, for
21 example, as a witness, and I were testifying about the 9/11
22 investigation, there would be tens of thousands of documents
23 that would have to be produced for me: All of the e-mails

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1 that I sent related to the subject matter of my jurisdiction,
2 all the pleadings that I've prepared, all the times that I had
3 spoken, because those are written statements made by a witness
4 and "written" has been fairly well established in the military
5 and federal courts to include electronic as well as, you know,
6 written out by a scrivener.

7 MJ [COL POHL]: So what's the problem then?

8 LDC [MR. CONNELL]: Well, the problem is that the
9 government does not seem to believe that written statements go
10 beyond either handwritten notes or a statement to bridge prior
11 testimony because they -- it's my understanding from the
12 government as of Friday, as of three days ago, they had
13 produced all the material that they intend to produce for
14 Special Agent Perkins and Special Agent Fitzgerald.

15 That included essentially about eight prior
16 transcripts -- and I have a slide on this actually, but I want
17 to answer your question -- the handwritten notes of Special
18 Agent Perkins and some 302s that they had produced prior,
19 either in the December hearing with respect to Special Agent
20 Perkins and in the ordinary FBI production. But there are a
21 vast amount of writings related to the subject matter that
22 they've already testified about, much less what they intend to
23 testify about, that would fall within the scope of this rule.

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1 The -- I do believe that the government has -- to the
2 best of my knowledge, the government has complied with the
3 third element of the definition, which is their statements to
4 the grand juries, they have produced those; and as far as I
5 know with the second element as well, their testimony other
6 than the grand juries. But with respect to written statements
7 made by the witness, there are a lot of statements that
8 remain.

9 And so I wanted to give you a few examples of those
10 just with respect to these two witnesses that we're talking
11 about, Perkins and Fitzgerald. Special Agent Perkins and
12 Special Agent Fitzgerald both testified about the ordinary
13 practice of producing FD-302s by the FBI. It's well known and
14 well documented in their procedures and obvious examples of
15 statements.

16 The real issue that ordinarily comes up in 302s is
17 whether 302s are a statement of the interviewee. But in this
18 situation, the people who are testifying are the interviewers,
19 or the people who conducted investigation into three different
20 major attacks on the United States between 1998 and now, and
21 there are probably an enormous number of 302s that these two
22 witnesses have produced.

23 I can't -- I can't prove that, but I do know that the

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1 prosecution has produced only four percent of the 302s that
2 were produced -- that the FBI produced. The government culled
3 those out. They said that these are the relevant ones. But
4 there's a different standard with respect to Rule 914 than
5 simple helpfulness to the defense and materiality.

6 MJ [COL POHL]: Four percent of what? What is the hundred
7 percent?

8 LDC [MR. CONNELL]: A hundred percent is the -- is all of
9 the 302s that the FBI produced in the 9/11 investigation.

10 MJ [COL POHL]: Okay. And you've got -- you said the
11 government has only produced four percent of them to you?

12 LDC [MR. CONNELL]: Yes. And they say that's the relevant
13 four percent. That's their position.

14 MJ [COL POHL]: Under the ----

15 LDC [MR. CONNELL]: And what we're comparing -- what we're
16 comparing with is Moussaoui. In Moussaoui, they produced
17 a factor of 20 or more 302s to the defense than they produced
18 here, so that's the population and the sample that I'm
19 referring to.

20 MJ [COL POHL]: Okay. But the production of the Moussaoui
21 302, just to use that shorthand ----

22 LDC [MR. CONNELL]: Sure.

23 MJ [COL POHL]: ---- was because of the statements of a

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1 witness or because of discovery helpful to the defense?

2 LDC [MR. CONNELL]: That was Federal Rule of Criminal
3 Procedure 16 discovery, equivalent to 701.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: The government has taken a more
6 restrictive view here of what was relevant and helpful to the
7 defense. But obviously -- and I don't have circles for you,
8 but obviously there are circles that -- that there are
9 materials that were produced both under -- that were produced
10 under ordinary Rule 16 federal discovery, and probably would
11 be produced under Jencks as well. The same is true here, that
12 there are some documents which are responsive to 914 have
13 already been produced under ordinary Rule 701 discovery.

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

15 LDC [MR. CONNELL]: The government -- that's for 9/11.
16 Now, the two other categories that the government called these
17 witnesses about, the East Africa Embassy Bombing and the COLE,
18 are radically different. The government has produced two 302s
19 related to Special Agent Perkins out of the East Africa
20 Embassy Bombing case, and has produced no 302s related to the
21 COLE investigation and that Special Agent Fitzgerald testified
22 about.

23 MJ [COL POHL]: Did they say the 302s don't exist, or what

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1 was their response?

2 LDC [MR. CONNELL]: Well, unfortunately, the pleading
3 response was we're going to produce it. But as they began
4 producing these materials ----

5 MJ [COL POHL]: So you don't know ----

6 LDC [MR. CONNELL]: I don't know the answer.

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

8 LDC [MR. CONNELL]: The -- with the -- Special Agent
9 Perkins testified about the alternative to a 302, which is an
10 EC, or an electronic communication. She testified about
11 producing some of those, as did Special Agent Fitzgerald. The
12 government has produced no electronic communications to us,
13 other than the 10 January 2007 memorandum that they produced
14 in December that was introduced as 502XX.

15 With respect to e-mails of Special Agent Fitzgerald
16 and Perkins, the government has produced no e-mails. With
17 respect to notes, Special Agent Perkins testified about her
18 review of a set of hard-copy CIA reporting related to,
19 specifically in that situation, Mr. Hawsawi.

20 It seems unlikely to me that, during the course of an
21 entire investigation, that Special Agent Perkins never took --
22 didn't take notes on that set or any other set falling within
23 the scope of these two enormous investigations.

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1 On Friday, the government produced the set of
2 handwritten notes from the interrogation on -- at the end of
3 January 2007, but I imagine that there are many, many other
4 sets of notes.

5 And then finally, Special Agent Perkins testified
6 about the way that she sent in requests for questions to
7 Mr. al Hawsawi was to prepare a formal cable, and that she
8 would prepare those cables, send them through her chain of
9 command. Ultimately, they would wind up at the CIA, and then
10 there would be some sort of response that came back. Now, the
11 response ----

12 MJ [COL POHL]: If it goes through the chain of command,
13 would the cable indicate that it was Perkins as the author of
14 the cable or would it be somebody else?

15 LDC [MR. CONNELL]: So I have never seen an FBI cable, but
16 by analogy to an FBI electronic communication, there is a
17 Drafted By line.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: And so if you look at 502XX, for
20 example, which is an example of an FBI electronic
21 communication, there is a Drafted By line, there is a To line,
22 and there is an Approved By line. And so it's very clear --
23 it's very easy to see under Rule 914 what is written by and

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1 adopted in some way by a -- by a testimonial sponsor.

2 And so that brings us to the last issue, which is
3 what is the scope of the subject matter. Both witnesses, both
4 Special Agent Fitzgerald and Special Agent Perkins, testified
5 about the 9/11 investigation, and they both testified about
6 the January 2007 interrogations.

7 I should note that, of course, the government has
8 produced the letterhead memorandum that was the subject of
9 testimony, has already produced that to us, which didn't fall
10 within my five categories that I talked about there because
11 it's unusual and I don't expect there are any other letterhead
12 memoranda out there. There could be. She testified that
13 there were some side memoranda sometimes relating to abuse
14 issues, but I don't know that those exist or not.

15 But with respect to Special Agent Fitzgerald, his
16 testimony, as brought out on direct, also included the
17 USS COLE bombing. And with respect to Special Agent Perkins,
18 her testimony on direct, the scope of her subject matter also
19 included the East Africa Embassy Bombings.

20 The reason why this issue is before the military
21 commission is so the military commission in some ways can tell
22 us its interpretation of Rule 914 so that the parties can
23 comply. I believe that the extreme minimalist position that

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1 the government has taken is not supported by the text of
2 R.M.C. 914, and that written -- when a witness who is called
3 by the government to testify on direct produces written
4 statements related to the scope of their subject matter, the
5 government has an opportunity -- has a responsibility to
6 produce them.

7 That's equally true for the defense as we're going --
8 as we, in fact, are seeing in this personal jurisdiction
9 litigation, that we're producing vast amounts of statements of
10 our witnesses to the prosecution, even in advance of knowing
11 which witnesses will be called to testify.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: Thank you.

14 MJ [COL POHL]: Thank you, Mr. Connell.

15 Trial Counsel.

16 MTC [MR. TRIVETT]: Your Honor, we believe this issue is
17 moot as of a 5 January disclosure of Special Agent Perkins'
18 notes for Mr. Ali's LHM. We believe that we have completed
19 all of our obligations under Rule 914.

20 The 914 rule obviously doesn't require disclosure
21 until after testimony. We don't intend to invoke that. We're
22 not using that strategically to try to benefit the government
23 in any way. Like we said to Mr. Connell initially, that we

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1 would be happy to turn these over beforehand, and we started
2 turning them over right around when we said we would.

3 MJ [COL POHL]: Are there any 302s of Ms. Perkins related
4 to the East Africa Embassy Bombings you did not turn over?

5 MTC [MR. TRIVETT]: No, sir. The ones that she wrote,
6 statement of the witness, have been disclosed to ----

7 MJ [COL POHL]: Are there any 302s that Agent Fitzgerald
8 wrote about the COLE bombing that you did not turn over?

9 MTC [MR. TRIVETT]: No, sir.

10 MJ [COL POHL]: I could go through each topic, but I -- I
11 mean, you're not restricting your response only to the 9/11
12 itself?

13 MTC [MR. TRIVETT]: It would just depend on the -- we
14 understand, obviously, the scope of what their testimony is
15 going to be.

16 MJ [COL POHL]: Okay.

17 MTC [MR. TRIVETT]: And we understand our obligations
18 under the rule.

19 MJ [COL POHL]: So looking at Mr. Connell's circles, you
20 agree that that's the scope of the subject matter?

21 MTC [MR. TRIVETT]: Yes, sir. We take no quarrel with
22 that.

23 MJ [COL POHL]: Okay. So there's not a scope issue.

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1 Okay. And then you say you've given them all of the 302s.

2 Have you given them all the electronic communications?

3 MTC [MR. TRIVETT]: We have ----

4 MJ [COL POHL]: I can go down the list. I'm just telling
5 you. Okay.

6 MTC [MR. TRIVETT]: Yes, sir. We have looked in all
7 relevant depositories for any other statements of the
8 witnesses, and we have provided all of them. That would have
9 included a search for ECs.

10 Again, part of the concern is we have no obligation
11 to sort of wave the flag and say this is your Jencks, this is
12 your 701 discovery. We've turned over the relevant portions
13 of the FBI investigation. Those would have things that would
14 certainly constitute Jencks for both Special Agent Fitzgerald
15 and for Special Agent Perkins. But they were provided earlier
16 as -- once we turn it over once, that's all we have to turn it
17 over.

18 So we believe we have complied with our obligations.
19 I don't know if I want to go down or can go down with the
20 voluminous discovery, that there was an EC given on this date
21 or there was a cable given on this date. But we understand
22 our obligations. I took no ----

23 MJ [COL POHL]: Okay. Just on my technical question of

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1 the cables, was Mr. Connell's surmise accurate that a cable
2 would have a Drafted By, or at least some way you could
3 determine who -- who wrote it?

4 MTC [MR. TRIVETT]: It would depend on the nature of the
5 cable ----

6 MJ [COL POHL]: Okay.

7 MTC [MR. TRIVETT]: ---- sir. It would.

8 MJ [COL POHL]: So when you're doing a search for cables
9 for Special Agent Fitzgerald, for example, you would do the
10 word search, and if his name was on there, it would come up as
11 his statement?

12 MTC [MR. TRIVETT]: Correct.

13 MJ [COL POHL]: Okay. But if his name wasn't on there,
14 even though he may have originated it, there would be no way
15 for you to know that he originated it?

16 MTC [MR. TRIVETT]: Right. I think some of this is a bit
17 of a red herring, because it's not like FBI agents file a lot
18 of cables on this issue ----

19 MJ [COL POHL]: Okay.

20 MTC [MR. TRIVETT]: ---- when they're investigating the
21 case as law enforcement officers.

22 MJ [COL POHL]: Okay.

23 MTC [MR. TRIVETT]: I think when she discussed that one

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1 issue, it was sort of unique to ----

2 MJ [COL POHL]: So just so I'm clear, Mr. Trivett, as an
3 officer of the court, you're telling me that you've given them
4 all of this information.

5 MTC [MR. TRIVETT]: Correct.

6 MJ [COL POHL]: And you agree with his scope ----

7 MTC [MR. TRIVETT]: I do.

8 MJ [COL POHL]: ---- whether it's got to do with any of
9 those other, East Africa or the USS COLE, so it's not a scope
10 issue?

11 MTC [MR. TRIVETT]: Correct.

12 MJ [COL POHL]: It's not a definition of statement issue?
13 It's just a misunderstanding of what you have sent and what
14 he's received, apparently. Okay. I hear you. Thank you.

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

16 MJ [COL POHL]: Mr. Connell?

17 LDC [MR. CONNELL]: On occasion, the competing
18 representations of parties can be tested by evidence. This is
19 one of those occasions.

20 Special Agent Perkins has testified and so has
21 Special Agent Fitzgerald, excuse me, and I will be
22 cross-examining them on this topic of what they actually wrote
23 and then we'll know the answer.

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1 But in the short-term, I suggest to the military
2 commission, since there's no issue here, that the military
3 commission go ahead and issue an order requiring the
4 production at whatever time you consider reasonable, and we'll
5 comply with that order too, right? This is not a goose versus
6 gander issue. We will also comply with the order as to
7 advanced production of Jencks materials.

8 And we know, for example -- and let me just give you
9 this one example: Special Agent Perkins has already testified
10 that she drafted a cable about information that she wanted to
11 know related to the CIA interrogations of Mr. al Hawsawi. So
12 we know she -- we already know that document exists.

13 MJ [COL POHL]: But is it -- is it retrievable? By that I
14 mean is she no longer works for the FBI.

15 LDC [MR. CONNELL]: Right.

16 MJ [COL POHL]: Okay, if her name isn't on the cable as
17 Drafted By, even though she did draft it, okay, for example,
18 is that retrievable?

19 LDC [MR. CONNELL]: Sure. I mean, there's -- Mr. -- or,
20 excuse me, the government just represented, and I think it is
21 accurate, there's a relatively small number of cables from the
22 CIA -- from the FBI to the CIA regarding interrogation of CIA
23 detainees.

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1 MJ [COL POHL]: Let me, let me -- let's frame it
2 differently then.

3 LDC [MR. CONNELL]: Right.

4 MJ [COL POHL]: Even if you can't determine that on the
5 cable issue, the FBI cable issue, who the exact author is,
6 therefore, for 914 purposes it may be difficult; but for 701
7 purposes, shouldn't you have it anyway?

8 LDC [MR. CONNELL]: Yes, sir. And I also agree with the
9 government that -- I'm not asking them to flag I'm producing
10 this under 701 versus Brady versus 914. If they produced it
11 to us once, that's all they have to do. But this is an
12 example of something that they didn't produce at all.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: And you know ----

15 MJ [COL POHL]: I'm with you.

16 LDC [MR. CONNELL]: Maybe it says Drafted By, maybe it
17 says POC, or maybe there were seven of these and she can look
18 at the seven and say, yes, that's the one I drafted and not
19 the other.

20 But, yes, whether under 701 or 914, all of this
21 material should be produced. And there's an easy solution,
22 which is, issue an order and then we'll -- the evidence will
23 demonstrate whatever it demonstrates.

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1 MJ [COL POHL]: Sure. When counsel asks me to issue
2 orders, I always turn around and say go ahead and draft one.

3 LDC [MR. CONNELL]: Very good, sir.

4 MJ [COL POHL]: Submit it in two weeks, give it to the
5 government. Government, then you'll have two weeks to
6 respond. You don't -- when I say two weeks, if you do it
7 earlier than that, you can.

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

9 MJ [COL POHL]: I'm talking to both sides on that. So
10 then we'll see if it works out.

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

12 MJ [COL POHL]: It's basically what you're saying, it's an
13 order to comply with the law.

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

15 MJ [COL POHL]: Got it?

16 LDC [MR. RUIZ]: Judge, may I be heard?

17 MJ [COL POHL]: Sure.

18 LDC [MR. RUIZ]: Judge, the one thing that I want to
19 highlight for the commission is that Mr. Trivett indicated
20 that they provided this discovery to us on January 5th. They
21 provided it to all of the teams, and I'm referring to the
22 handwritten notes of Special Agent Perkins. They seek to gain
23 no advantage.

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1 Nevertheless, we were never provided with her
2 handwritten notes prior to our examination when she testified.
3 I understand that the distinction, I think, the prosecution is
4 drawing here is that there were handwritten notes of
5 Mr. al Baluchi's interview. However, our position is that we
6 should have reviewed -- we should have received those
7 handwritten notes.

8 Again, we're operating in a co-accused case. This is
9 a joint motion with Mr. al Baluchi. And where I may not have
10 chosen to ask her specific questions about the substantive
11 details in those handwritten notes, certainly as you saw from
12 my cross examination, there were questions about protocols,
13 about procedures, about how she went about conducting her
14 investigation, her interviews, her interrogations.

15 So this is a -- a theme that we continue to see from
16 the prosecution, which is, we have a co-accused case because
17 they fought very hard to make this a co-accused case and to
18 maintain it as a co-accused case; yet when they're parsing out
19 discovery, they take a very individualistic approach when they
20 choose to provide documents to one team or another. This is
21 an instance where we believe we should have received that
22 discovery and we did not.

23 MJ [COL POHL]: Okay. Since you received it on the 5th of

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1 January after she testified ----

2 LDC [MR. RUIZ]: Sure.

3 MJ [COL POHL]: ---- it wasn't available at the time of
4 testifying, do you wish to file a supplement and necessarily
5 re-call her?

6 LDC [MR. RUIZ]: No. I wanted to, I wanted to -- not at
7 this time; we're still reviewing the documents.

8 MJ [COL POHL]: But you understand ----

9 LDC [MR. RUIZ]: What I want to highlight for you is that
10 this is an issue.

11 MJ [COL POHL]: I got that part.

12 LDC [MR. RUIZ]: Right.

13 MJ [COL POHL]: I'm just trying to -- you give me issues,
14 I try to give you remedies.

15 LDC [MR. RUIZ]: Sure.

16 MJ [COL POHL]: Some you like, some you don't. I got it.
17 But in this particular example, you got something on the
18 5th of January, new evidence. If you wish to file a
19 supplement with a request to re-call the witness, that would
20 be your option.

21 LDC [MR. RUIZ]: Great. That's one of the things I wanted
22 to alert you to is there's a possibility that I may ask to ask
23 additional questions because of this issue.

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1 What I'm also doing and I've done a number of
2 different times when I've had the opportunity, is to highlight
3 for you an issue that will be put before the commission in
4 greater context at some time, which is, the manner in which
5 discovery is provided to some of the defense teams and not to
6 others in this co-accused case, we're going to be challenging
7 that. Some teams are receiving discovery, some are not,
8 because the government is making these very fine distinctions
9 as to who it's relevant to.

10 MJ [COL POHL]: Is there anything that would prevent the
11 co-accused sharing their discovery with you?

12 LDC [MR. RUIZ]: I believe, yes, in some of these
13 instances it says "only releasable to."

14 MJ [COL POHL]: Yeah, right. You've got that category.

15 LDC [MR. RUIZ]: Yes.

16 MJ [COL POHL]: Is that the only category we're talking
17 about? When it says released to detainee by number, I know
18 that. Okay. Obviously that's ----

19 LDC [MR. RUIZ]: Yes, there is discovery that is not --
20 cannot be shared with other teams. We have received such
21 discovery in our case that we are not to share with other
22 teams, and I'm sure other teams have as well. That creates
23 problems that I will be putting in greater context for you,

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1 but this is yet another instance where I wanted to highlight
2 exactly the mentality that is being -- that is driving the
3 productions of discovery.

4 MJ [COL POHL]: Okay.

5 LDC [MR. RUIZ]: Thank you.

6 MJ [COL POHL]: Thank you, Mr. Ruiz.

7 Just as a housekeeping thing, AE 543 was an ex parte
8 request from Mr. Mohammad's team, I believe. I just put this
9 on the docket to remind me to tell you you'll get a response
10 very quickly from me on that. Okay. But it's not -- it
11 wasn't to be discussed. Okay.

12 Mr. Connell, are you ready to argue 513? And then
13 just to let you know, we'll do 513, and then if we have time,
14 we'll do 528. But if we don't, we will stop at noon. Go
15 ahead.

16 LDC [MR. CONNELL]: I understand, sir.

17 Your Honor, in 513, the government's response is that
18 it intends to produce some responsive discovery. It makes
19 sense to us to wait until we receive that discovery.

20 MJ [COL POHL]: Did they give you a timeline?

21 LDC [MR. CONNELL]: Not in the pleading, but they might
22 have one.

23 CP [BG MARTINS]: Your Honor, on 20 December, we moved for

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1 substitutions and other relief related to some of this ----

2 MJ [COL POHL]: Hold on a second.

3 [The Military Judge conferred with courtroom personnel.]

4 MJ [COL POHL]: Okay. You indicated you submitted it for
5 substitutions.

6 CP [BG MARTINS]: 20 December, I believe it was accepted
7 for ----

8 MJ [COL POHL]: Okay. I directed them to bring it down
9 here, and I plan to review it this week.

10 CP [BG MARTINS]: Great. And, Your Honor, actually we
11 have one other -- one other piece of -- we're not conceding
12 that it's discoverable as a matter of law, but we've elected
13 to produce it, and it is covered by his 513-related underlying
14 discovery request that 513 -- for which 513 is a motion to
15 compel.

16 MJ [COL POHL]: Okay.

17 CP [BG MARTINS]: So we have one other additional document
18 that we just arranged and coordinated to be able to provide to
19 you in that same mechanism of ----

20 MJ [COL POHL]: The 505 review?

21 CP [BG MARTINS]: ---- 505.

22 MJ [COL POHL]: Okay.

23 CP [BG MARTINS]: And I would -- I'm actually, in order to

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1 get it to them quicker, I'm moving here for a leave to file a
2 supplement to Appellate Exhibit 542 in order to catch that
3 document up with the others that are related to his 513
4 motion. And if you would ----

5 MJ [COL POHL]: 542. Okay. You just want to submit ----

6 CP [BG MARTINS]: I just ----

7 MJ [COL POHL]: 542 is the other one. Also, I'm doing
8 that one this week also. So the answer to supplement with the
9 additional thing, I'm assuming there's no objection?

10 LDC [MR. CONNELL]: No objection, sir.

11 MJ [COL POHL]: Okay. Your motion is ----

12 CP [BG MARTINS]: So we'll then file a ----

13 MJ [COL POHL]: ---- granted.

14 CP [BG MARTINS]: ---- supplement that catches up one
15 document with that.

16 MJ [COL POHL]: Yeah. Okay.

17 CP [BG MARTINS]: But the ----

18 MJ [COL POHL]: I plan to get to all that this week.

19 CP [BG MARTINS]: Thank you.

20 MJ [COL POHL]: Okay. That brings us to 528.

21 LDC [MS. BORMANN]: Good morning, Judge.

22 MJ [COL POHL]: Ms. Bormann.

23 LDC [MS. BORMANN]: As I indicated to the court at the 802

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1 conference yesterday, 538 is a motion to compel the remaining
2 records we requested from the government regarding seizure of
3 phone records from a Taliban embassy.

4 We received some responsive documents. They were
5 illegible. We went back to the prosecution. We received the
6 same set of documents in a more legible copy, but they were
7 not the full set of documents we'd requested.

8 As a result of what we got, we began an
9 investigation. We've received new developments as part of
10 that investigation which continues, and we will -- we intend
11 to supplement, but we -- at this point, the investigation is
12 ongoing. I anticipate a supplement being filed in the next 30
13 days or so. So that's where we are with it.

14 MJ [COL POHL]: Okay. Just on the government response to
15 the -- they've -- they have complied with your discovery
16 request ----

17 LDC [MS. BORMANN]: Well, they ----

18 MJ [COL POHL]: ---- as of now.

19 LDC [MS. BORMANN]: ---- claim that their material is
20 responsive. We did an investigation to determine -- once we
21 got legible copies, or more legible copies -- whether or not
22 it in fact was ----

23 MJ [COL POHL]: It may or may not be responsive, but the

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1 government's position is this is what we're going to give you.

2 LDC [MS. BORMANN]: Right.

3 MJ [COL POHL]: You want to do the supplemental
4 investigation to see ----

5 LDC [MS. BORMANN]: We're doing a supplemental
6 investigation to determine whether -- to what extent it is not
7 responsive. And so we'll have a supplement filed, we
8 anticipate, within 30 days.

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

10 LDC [MS. BORMANN]: Thank you.

11 MJ [COL POHL]: While you're there, Ms. Bormann.

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

13 MJ [COL POHL]: 538.

14 LDC [MS. BORMANN]: 538.

15 MJ [COL POHL]: Defense Motion to Compel FBI Manual for
16 Terrorism Interrogation.

17 LDC [MS. BORMANN]: That is a situation where Mr. Connell
18 indicated that, at the 802, that they were doing an
19 investigation. This has to do, in great part, with part of
20 what Mr. Connell just argued in 502MM.

21 What we did after the testimony of Agent Perkins and
22 Agent Fitzgerald in the December hearings was we issued eight
23 separate discovery requests to the government requesting

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1 additional materials specifically mentioned by the agents in
2 their testimony, all of it dealing with policies and protocols
3 involving FBI interrogation during the time period relevant to
4 this case.

5 They have not yet had the opportunity to respond to
6 any of that. We anticipate that we'll probably be asking to
7 combine those arguments, because it appears that they all deal
8 with the same issues, which are: What were the protocols for
9 the FBI at the time? What were the policies for the FBI at
10 the time? How did these agents diverge from those protocols
11 and policies? Why did they diverge? And what information
12 were they given and how that information was given as to why
13 they should diverge. All of which is, of course, discoverable
14 because it's material to the preparation of our defense and
15 it's -- it leads to investigation, cross-examination of the
16 FBI agents in Mr. Bin'Attash's case.

17 I hesitate to say we couldn't argue ----

18 MJ [COL POHL]: I look at 538, and it sounds to me like
19 you're asking for one manual.

20 LDC [MS. BORMANN]: No. The ----

21 MJ [COL POHL]: Just the way it's titled.

22 LDC [MS. BORMANN]: The title of it is a misnomer, and I
23 apologize for that. But if you read through the motion

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1 itself ----

2 MJ [COL POHL]: Okay.

3 LDC [MS. BORMANN]: ---- it asks for every policy,
4 protocol involving FBI interrogation of detainees.

5 MJ [COL POHL]: Have you gotten a response from the
6 government?

7 LDC [MS. BORMANN]: Yes, we got a response from the
8 government. And that's why the motion to compel got filed.
9 The only responsive material we received were the two
10 documents we received in December. I think they're marked as
11 part of 502, and I ----

12 MJ [COL POHL]: Okay.

13 LDC [MS. BORMANN]: ---- cannot remember.

14 MJ [COL POHL]: Are you ready to proceed with argument on
15 538 then ----

16 LDC [MS. BORMANN]: We ----

17 MJ [COL POHL]: ---- or do you want to delay it and
18 combine it with something else?

19 LDC [MS. BORMANN]: Yeah. We could, but I suggest to you
20 that it is more fruitful to let the government -- we've
21 submitted eight separate discovery requests that are connected
22 to it as a result of the agents' testimony that we heard in
23 December. We got those in right away. They were all in

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1 before the end of December, and so they're now running the
2 course of the 30 days. I anticipate we'll get responses
3 probably while we're here.

4 And then we'll take a look at what we got, and then
5 we'll make a determination about whether or not and to what
6 extent those are responsive and then sort of combine the whole
7 thing. So ----

8 MJ [COL POHL]: Okay. They'll all be folded up into 538?

9 LDC [MS. BORMANN]: That's what we're anticipating doing.
10 And so I think for judicial economy it makes sense to sort of
11 combine all the FBI policy documents and interrogation into
12 one big motion.

13 MJ [COL POHL]: Okay. Got it. So basically you want to
14 put this, in until you get -- you were almost going to get
15 away there. You're going to put this -- wait for the
16 response, then see how much needs to be incorporated, if you
17 need to supplement or not?

18 LDC [MS. BORMANN]: Exactly.

19 MJ [COL POHL]: All right.

20 LDC [MS. BORMANN]: That's what we plan to do.

21 MJ [COL POHL]: Got it. Thank you.

22 LDC [MR. CONNELL]: May I be heard, sir?

23 MJ [COL POHL]: Sure.

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1 LDC [MR. CONNELL]: Sir, I don't have any objection to
2 Mr. Bin'Attash's position on that, but at the 802 the military
3 commission did mention that it saw a relationship between 538
4 and the discussion around witnesses in 502J.

5 MJ [COL POHL]: Actually, it was more like I asked whether
6 there was a connection between the two.

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

8 MJ [COL POHL]: Go ahead. I don't -- okay.

9 LDC [MR. CONNELL]: That's okay.

10 MJ [COL POHL]: And I put it in the framework of let's
11 talk about it. So let's talk about it.

12 LDC [MR. CONNELL]: I think it's clear that there are a
13 lot of sort of iterative investigations and discovery requests
14 that will ultimately affect 502, the personal jurisdiction
15 litigation. My position has been consistently that I'm not
16 asking to wait. I'm -- you know, additional material will
17 come as additional material comes, but that I don't feel that
18 it is necessary to wait.

19 So I don't have a problem with deferring 538 to
20 another day. But if you had some specific connections that --
21 you know, I don't know if you've read 538C yet or not -- we
22 just filed it on Friday -- our reply in the 538 series, but it
23 very clearly articulates a number of FBI/CIA connections,

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1 which is, you know, an issue in the statements basket of the
2 502 personal jurisdiction litigation.

3 MJ [COL POHL]: While we're talking about the statement
4 basket, you're prepared to go forward on the statement
5 basket ----

6 LDC [MR. CONNELL]: I am, sir.

7 MJ [COL POHL]: ---- without the 538 being fully done?

8 LDC [MR. CONNELL]: That's what I'm saying, sir.

9 MJ [COL POHL]: And that was just my question, was whether
10 or not -- you know better than me.

11 LDC [MR. CONNELL]: Things come up as we go along, and we
12 deal with them.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: Thank you.

15 MJ [COL POHL]: Okay. As discussed, we'll do 478 later in
16 the week, the remaining 502s later in the week. Okay.

17 One issue going forward is the search issue we
18 discussed earlier today, is that obviously it is not going to
19 be resolved today because there's a need for the 505(h)
20 hearing and perhaps an 806 after that. But the issue -- and I
21 just raise it without making any decision, is this means that
22 if we reconvene in an open session later in the week, there's
23 the status quo, whatever that is, is in place. So just --

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1 just I'm looking at the defense counsel here to explain.
2 That's just the way the process has to work, is just we
3 have -- you know, you've asked for certain relief, the
4 government has an opportunity to respond, and we're going to
5 put some evidence in, hopefully, on the issue. But it could
6 entail the clients coming back on Wednesday or Thursday. It
7 may or may not, because apparently it's not a requirement.
8 It's -- have the same issue again. So I just put that out to
9 you, just to talk to your clients.

10 That being said, tomorrow we'll discuss things in the
11 classified session, as we discussed. We will add
12 Mr. Connell's most recent notice so we can resolve this search
13 issue this week.

14 And which the last thing we would do today, though,
15 is -- if we can: Is there a search of the defense counsel's
16 bag issue still out there?

17 TC [MR. SWANN]: There's a hundred percent search of
18 everybody coming into the ELC. That means the following: If
19 you bring a bag in and you've got legal papers inside the bag,
20 all you've got to do is take the legal papers out of the bag,
21 give those to the guard that's standing there. They're not
22 going to look at them. If you want to, put them in a manila
23 folder, okay? They're not going to look at them. But they're

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1 still going to look inside the bag for a variety of reasons.

2 People have come into the ELC, and, you know,
3 innocently, I suspect, where they have something laying at the
4 bottom of their bag like a smart watch or something along
5 those lines, and apparently the smart watch is far more
6 capable of setting off these alarms that are around here and
7 doing other things that I'm not aware of. I can't afford one.

8 That said, if you have a bag like that, and you
9 should be on notice -- and it happened to me this morning. I
10 came in, I had a bag. I had my lunch in it. They took the
11 lunch, they just kind of looked inside, gave it back to me,
12 and told me to go on.

13 MJ [COL POHL]: But they're not reading any of the
14 materials?

15 TC [MR. SWANN]: They're not interested in any of the
16 materials. And, in fact, when Mr. Nevin came in this morning,
17 as I understand it, because I talked to the people who were
18 actually present, all he had to do was just open up his bag,
19 take his papers out, hand them to the guard, and he could have
20 brought his bag in.

21 Now I understand when he came back in this next time
22 after he went and got the bag, they didn't even look at it at
23 all. That said, that's not going to happen tomorrow. If you

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1 bring a bag in containing anything, knapsack or any of those
2 other things, like I said this morning, when people came in
3 with their bags -- they found a thing like a Leatherman or
4 something like that, other knives and stuff like that.
5 Soldiers have those things and they carry them all the time.
6 But that doesn't mean they come into this facility with those
7 things. Those things either get stored in the lockers out
8 there or they go back to your car.

9 But in Mr. Nevin's case, they did want to look in the
10 bag. He didn't want them to look in the bag. He took the bag
11 outside. He kept his papers in there.

12 Again, I say the following: Everybody is being
13 looked at. There are no exceptions. And while I do
14 acknowledge that this has changed over the last ten years, I
15 too have been subject to those kind of changes. I don't
16 dispute this. They can look at anything they want. They are
17 not looking at what the documents say, and if you want to
18 protect your documents, just put them in a sealed envelope,
19 and they're not going to look inside the envelope, period.

20 Thank you, sir.

21 MJ [COL POHL]: Thank you, Mr. Swann.

22 Mr. Nevin, do you want to be heard on this?

23 LDC [MR. NEVIN]: Yes, Your Honor. I'm obviously in a

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1 different position from Mr. Swann. I have materials that
2 relate to my confidential relationship with Mr. Mohammad.

3 MJ [COL POHL]: Uh-huh.

4 LDC [MR. NEVIN]: The other lawyers on the team do. I
5 know it's true of the other lawyers on the defense side of the
6 room as well. And we have an obligation to protect the
7 confidentiality of those materials. So that's the first
8 point. I'm not good with anyone who wants to look at my
9 materials looking at them.

10 MJ [COL POHL]: He just said they're not going to look at
11 the materials. They just want to look at the physical ----

12 LDC [MR. NEVIN]: No, I'm responding to what -- to his
13 remark with respect to his materials.

14 MJ [COL POHL]: No, I got that. You're in a different
15 position than the government.

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

17 MJ [COL POHL]: I'm just saying is they're saying is we
18 just want to look for, quite frankly, physical contraband. If
19 you've got papers you want out, just pull the papers out, we
20 will look at the bag, we will put the papers back in without
21 reading it, and then we're done.

22 LDC [MR. NEVIN]: Yeah. And I guess I would say, Your
23 Honor, it is true, coming up on ten years in doing this, and

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1 it's always been done in the way that I have described to you
2 earlier this morning: We walk through. It's the way this
3 worked last time.

4 MJ [COL POHL]: But to be fair, as I recall last session,
5 we had a number of times when the cell phone alarm went off
6 and we -- so I don't know necessarily that things have not
7 changed a little bit. I don't know what -- understand, I had
8 no role at all in this, so I'm not -- I'm simply speculating
9 that one of the problems last time was, I think, two or three
10 times, including one closed session, we had the cell phone
11 detector went off.

12 Now, whether it was a cell phone, a smart watch, a
13 defective detector, which is always a possibility when dealing
14 with the government, so ----

15 LDC [MR. NEVIN]: Could I say that's exactly -- I mean,
16 that's pretty close to what I was going to say, is this: I've
17 gone into courtrooms all over the country as an officer of the
18 court and been waived through. And I get TSA ----

19 MJ [COL POHL]: You're telling me when you go to federal
20 court they don't send your bag through an x-ray?

21 LDC [MR. NEVIN]: Oh, yeah, through an x-ray scanner,
22 absolutely. And I get that because now you've scanned for
23 contraband in a way that can't possibly get at the content of

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1 my materials.

2 MJ [COL POHL]: If you're holding your materials, how do
3 they -- I understand the best world would be to have a scanner
4 out there, okay? We don't have one.

5 LDC [MR. NEVIN]: Okay, yeah, I'm ----

6 MJ [COL POHL]: Maybe they can borrow the MRI, I don't
7 know. But the bottom line is they're just saying is we want
8 to do a quick visual search for physical contraband. And if
9 you're concerned about your papers, you're now on notice so
10 you can pull your papers off, look at it, and put it in.

11 LDC [MR. NEVIN]: Yeah. And what I'm -- what I'm saying
12 to you is, first of all, it's not a problem. I mean, in other
13 words, you point out that the alarm goes off from time to
14 time, but so far as I know, there has not been any -- no one
15 has been found to be communicating in some improper way or
16 smuggling some sort of a something.

17 I think this is a solution that is looking for a
18 problem. And as the military commission said, and this has
19 been my experience as well, I don't even know if it's actually
20 picking something up in here or if it's a problem with the
21 sniffer itself. But in any event, there have not been any
22 incidents of anything improper occurring, apart from the alert
23 from the -- from the electronic device.

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1 So against ten years of this having worked fine,
2 against my experience in many, many places of simply being
3 waved through before there were scanners, and again, not
4 having problems arise and being in the position of being an
5 officer of the court, I object to it.

6 And it's ----

7 MJ [COL POHL]: Mr. Nevin, if I apply your officer of the
8 court theme, does that apply to everybody in here then?
9 Anybody ----

10 LDC [MR. NEVIN]: Yes.

11 MJ [COL POHL]: I mean, if you say they're not going to
12 look at your bag, then what do we tell the guard force?
13 Here's a list of names you don't look at? I mean, practically
14 speaking ----

15 LDC [MR. NEVIN]: Pardon me?

16 MJ [COL POHL]: I mean, practically speaking, is you want
17 them to discriminate who's walking in to determine who they
18 search or not?

19 LDC [MR. NEVIN]: I just want to do what we did in
20 December and in October and in July, all the way back to 2008,
21 the exact same thing. I don't -- I can't -- I mean, I don't
22 know, frankly, what was done or whether there was a list of
23 names or whatever, but I have been waved through this process

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1 with the question "Do you have any electronics" a thousand
2 times or whatever it is. Many, many, many times. And my
3 question is: Why do we have to -- why do we have to do it a
4 different way now?

5 MJ [COL POHL]: Got it. Thank you.

6 LDC [MR. NEVIN]: Thank you.

7 DC [MS. WICHNER]: Your Honor ----

8 LDC [MR. CONNELL]: May I be heard?

9 MJ [COL POHL]: Sure, let Ms. Wichner be heard. She
10 hasn't gotten to talk this time.

11 DC [MS. WICHNER]: Thank you, Your Honor. I just request
12 two clarifications from the prosecution on this issue. This
13 has occurred to me the past two hearings in a very alarming
14 way. I want to make clear for everyone that there's a lot of
15 discussion about attorney-client privileged information that
16 we're concerned about, and that includes me as well. But we
17 also have a number of documents that we are under a duty not
18 to disclose to the public at large.

19 I know Mr. Swann said yes, they looked through the
20 documents. He's okay with it. I am not okay with that. I
21 have a duty. There's many motions. Unless -- we are told by
22 the government, unless things are released on mc.mil, we have
23 an obligation not -- for no one to see these documents.

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1 Whether it's a cursory scan or not, I don't -- I don't care.

2 What I went through with the 531 issue this past
3 hearing on an issue where myself and my colleagues were
4 accused of something that we knew nothing about, you know, I'm
5 not okay with this idea of they can just look through your
6 documents, they're not really looking at them. I'm not okay
7 with that, given what I've now learned through the 531 series,
8 that there's not a presumption of -- that I am operating under
9 good faith in these proceedings.

10 So I would like -- I request clarification on two
11 issues from Mr. Swann or the government. One, I heard him say
12 we can put our documents into a manila envelope. Fair enough.
13 And that they will not -- if we seal it, they will not request
14 to go through those documents.

15 Secondly, I want a clarification that -- I think I
16 heard him say we'd have to give our stack of documents, we'd
17 have to release control of them to the guards. But I heard
18 you giving the -- kind of the ongoing hypothetical to
19 Mr. Nevin that we would retain control of the documents and
20 they could certainly search the rest of the bag.

21 MJ [COL POHL]: I think I actually said it both ways. So,
22 Mr. Swann, defense counsel walks in, has got a stack of
23 documents. He or she pulls the documents out and says this is

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1 all paper and they're holding them. Is that good enough for
2 the guards, for the documents, and they look in the bag?

3 TC [MR. SWANN]: I've got the word of authority. It is
4 good enough.

5 Here's my point on the manila envelope, okay?

6 MJ [COL POHL]: Mr. Swann, we've already resolved the
7 issue.

8 TC [MR. SWANN]: Okay. All right. I got it.

9 MJ [COL POHL]: You can keep talking if you'd like, but
10 I'm not sure it's useful.

11 TC [MR. SWANN]: I'd much rather try the case, Judge.

12 MJ [COL POHL]: Okay. Okay. The way I understand it to
13 work, and if it doesn't work this way I'm sure you'll tell me,
14 is when you walk in, put your documents -- if you want to pull
15 documents out, put them separately. You will maintain control
16 of them. They will do a cursory examination of the -- make
17 sure there's no electronics or whatever in the box, in the
18 thing, and then hand it back to you and you can move on.
19 Okay.

20 DC [MS. WICHNER]: So we -- okay. So my understanding, we
21 are retaining control of the documents?

22 MJ [COL POHL]: Right.

23 DC [MS. WICHNER]: They can have the bag.

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1 MJ [COL POHL]: They have the bag, you have the documents.

2 DC [MS. WICHNER]: Thank you, Your Honor.

3 MJ [COL POHL]: Okay. Mr. Connell.

4 LDC [MR. CONNELL]: In a military situation, such as the
5 one we are in here, the will of the commander controls.

6 The -- that will may change from day to day. On 21 December I
7 did have a client visit, both in the morning and the
8 afternoon. When I came back after using the restroom in the
9 afternoon, the guard told me "You have to remove that belt.
10 That is excess clothing."

11 I said, "Listen, I don't like to argue with you all,
12 but it wasn't excess at 9:00, and I haven't lost any weight
13 since then."

14 And he said, "Well, that's the rule right now."

15 MJ [COL POHL]: You can't wear a belt to your meeting?

16 LDC [MR. CONNELL]: No, it was only that one day. It was
17 only the afternoon of 21 December 2017, no belts allowed.
18 Okay? In the morning belts were allowed. Yesterday, belts
19 were allowed, thank goodness. And that was the rule that day.

20 MJ [COL POHL]: I don't mean to make light of this, but
21 were suspenders allowed?

22 LDC [MR. CONNELL]: I should have checked, sir. That
23 would have been good. But my actual point is ----

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1 MJ [COL POHL]: Okay. Yeah.

2 LDC [MR. CONNELL]: My actual point is that was the will
3 of the commander that day, that in the afternoon the will of
4 the commander was no belts were allowed. In the morning, the
5 will of the commander was that belts were allowed.

6 Today, 8 January 2018, the will of the commander, we
7 just heard -- in fact, the record won't reflect it, but
8 Mr. Swann for his voice of authority actually turned to
9 someone in the courtroom, pointed at them, got some kind of a
10 nod or a wave, and then said yes, this is the answer.

11 But ----

12 MJ [COL POHL]: Understand -- just to make it clear on
13 this issue, is if he gave an answer I didn't like, that
14 wouldn't be the right answer.

15 LDC [MR. CONNELL]: I agree, sir. This is your
16 courthouse.

17 MJ [COL POHL]: So understand, I'm not simply deferring to
18 them. I'm saying okay, you give me a -- they have a security
19 concern, I understand. You give me a practical way to protect
20 your privilege thing and their security concerns, I'm good
21 with it. You give me an impractical way to do it, like then
22 I'm not good with it and we do it my way. But their way
23 strikes to me as a fair balance between the two competing

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1 interests, and that's why I approve what he decided to do.

2 LDC [MR. CONNELL]: Which is why I'm asking you to give us
3 the procedure in writing, because if tomorrow the will of the
4 commander changes again ----

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: If you had asked me how do you protect
7 your documents, I would have said put them in a bag, if
8 someone had asked me this morning.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: And when putting them in a bag exposed
11 them to scrutiny, whereas hand-carrying a piece of paper did
12 not ----

13 MJ [COL POHL]: I got you. I understand that. You know
14 what I'm going to say next, don't you?

15 LDC [MR. CONNELL]: Yes, sir, and I'm on it.

16 MJ [COL POHL]: Two weeks, give it to the government. Two
17 weeks to respond. Okay. You know what I'm talking about, I
18 know what I'm talking about, but let me make sure everybody
19 else knows what I'm talking about.

20 You want this order to cover this? Draft the order,
21 give it to the government, you give it to me, I'll sign it.
22 As long as everybody agrees to it and it's a fair balance
23 between the two competing interests I just talked about, then

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1 we're good.

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

3 MJ [COL POHL]: Thank you.

4 The commission is in recess. Tomorrow will be a
5 classified session only beginning at 0900, and we will set --
6 we anticipate an open -- so no detainees tomorrow. We
7 anticipate the next open session would be Monday -- or, excuse
8 me, Wednesday at 0900; and if that changes, we will inform
9 people as quickly as possible. The detainees may stay here
10 until 1630.

11 The commission is in recess.

12 [The R.M.C. 803 session recessed at 1157, 8 January 2018.]

13 [END OF PAGE]

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