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1 [The R.M.C. 803 session was called to order at 1146, 12 July
2 2016.]

3 MJ [CAPT WAITS]: Commission will come to order. Let the
4 record reflect that all parties who were present when the
5 commission recessed are once again present.

6 Mr. Rushforth, I asked you to file a supplemental
7 pleading or a brief or a notice about the -- Mr. Chemerinsky.

8 DC [MR. RUSHFORTH]: Yes.

9 MJ [CAPT WAITS]: I've got to make sure I don't confuse
10 him with Mr. Szymanski.

11 DC [MR. RUSHFORTH]: Yes. It's a lot of potential
12 confusion.

13 MJ [CAPT WAITS]: It's a lot of -skis.

14 So anyway, if you decide -- if you do not have
15 anything to present, I'd appreciate it if you could forward an
16 e-mail at least to my clerk stating that you don't have
17 anything to file. Otherwise, if you do have something to
18 file, then the deadline I set was a week from Friday.

19 DC [MR. RUSHFORTH]: Yes, Your Honor. We will have some
20 things to file next Friday.

21 MJ [CAPT WAITS]: Okay. Thank you.

22 DC [MR. RUSHFORTH]: Thank you.

23 MJ [CAPT WAITS]: All right. Then moving on to the last

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1 item on the docket, it's Appellate Exhibit 020U, which is the
2 defense's motion to withdraw AE 020.

3 Okay. I'm handing the court reporter Appellate
4 Exhibit 056D which is still up here.

5 Who will be arguing 020U for the defense? Okay.

6 DDC [MAJ KINCAID]: Your Honor, Major Kincaid.

7 MJ [CAPT WAITS]: All right. Major Kincaid, please state
8 the -- who has the burden and what is it on this motion.

9 DDC [MAJ KINCAID]: Your Honor, the burden is on the
10 defense by a preponderance of evidence.

11 MJ [CAPT WAITS]: Okay. I will hear from you.

12 DDC [MAJ KINCAID]: Thank you, Your Honor.

13 Your Honor, the defense is arguing this motion today
14 over its objection to going forward without the accused's
15 counsel of choice; however, I am not going to belabor that
16 since the commission has plenty of that on it just from this
17 morning's hearings, but I did want to state that before I
18 proceeded.

19 MJ [CAPT WAITS]: All right. Objection is noted.

20 DDC [MAJ KINCAID]: Thank you, sir.

21 Your Honor, the defense seeks to withdraw the entire
22 AE 020 series without prejudice for because -- because it was
23 prematurely filed. It was prematurely filed for two reasons:

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1 The government's failure to produce discovery in a timely
2 manner, and it was filed in violation of the accused's right
3 to counsel of choice.

4 Turning to the first point, discovery production, the
5 vast majority of discovery was unavailable, and a significant
6 amount remains unavailable. At the time AE 020 was filed on
7 16 October 2014, the government had already blown the ordered
8 discovery cutoff date of 1 September 2014. Per the
9 government's own admission at last month's hearing, the
10 discovery that was required to be produced nearly two years
11 ago still has not been fully produced.

12 Our records reveal that as of the date that AE 020
13 was filed, 16 October 2014, the government had only produced
14 to the defense four batches of discovery all on 22 September
15 2014. The government did not produce any other discovery
16 until 29 October 2014 after AE 020 was filed by our prior
17 defense team.

18 This commission issued its ruling on 19 November
19 2014. To this point, the prior defense team did not file a
20 motion to compel discovery until 20 April 2015, and this
21 commission issued its order on that motion to compel denying
22 it on 27 May 2015.

23 Since 29 October 2014, well after AE 020 was filed,

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1 the government has produced an additional 31 separate batches
2 of discovery. The government still says those figures -- as
3 of last month's hearing, those figures are not all that it has
4 personally identified as relevant and material and
5 discoverable.

6 That history of discovery production does not include
7 any documents requested by the defense, most recently on
8 12 April 2016, and in response to its 12 April request, the
9 government provided four pages of what can best be described
10 as word salad: We're aware of our obligations; we know it's
11 ongoing; we know it's continuance; you haven't established
12 relevance and materiality, thank you. By way of additional
13 example ----

14 MJ [CAPT WAITS]: I'm going to interrupt you ----

15 DDC [MAJ KINCAID]: Yes, sir.

16 MJ [CAPT WAITS]: ---- and ask you what all of this has to
17 do with whether personal jurisdiction is decided by an Article
18 5 tribunal or by the commission. What is the relevance? I've
19 heard -- okay, I get the government hasn't complied with its
20 discovery obligations because it's mentioned in every motion
21 the defense files, okay? So I don't need a recount of how
22 many ways the government hasn't complied with their discovery
23 obligations unless it's relevant to the question I just asked

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1 you. Because the court's already ruled -- the commission has
2 already ruled partially on the motion. The government says
3 it's the law of the case now.

4 So what I -- if you you want to talk about discovery,
5 I want you to relate it to what it has to do with the issue of
6 whether the commission is a competent entity to determine the
7 issue of personal jurisdiction or whether the commission
8 should, must order a CSRT Article 5 tribunal. Okay, so ----

9 DDC [MAJ KINCAID]: To answer that question, Your
10 Honor ----

11 MJ [CAPT WAITS]: I have heard enough about discovery
12 violations. I want to know how it relates to this motion.

13 DDC [MAJ KINCAID]: I understand, Your Honor.

14 MJ [CAPT WAITS]: Okay.

15 DDC [MAJ KINCAID]: To answer that question, I've got
16 to -- I've already mentioned discovery. The information that
17 would affect the decision on whether he is a privileged or
18 unprivileged belligerent by any tribunal was unavailable, and
19 we did -- the defense team did not consist of an expert in
20 international law who could have informed this tribunal on
21 its -- on whether it was competent under the international law
22 known as the Geneva Conventions.

23 So without going back into the entire choice of

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1 counsel issue, the defense position is that even
2 notwithstanding the Supreme Court's decision in Khadr, when
3 this motion was filed by the prior defense team, it was filed
4 prematurely without all of the facts and without the expertise
5 necessary to advise this commission before it establishes the
6 law of the case.

7 I understand the government does not want to lose the
8 law of the case, but that's not our concern. Our concern is
9 that the accused is represented on factual and legal issues by
10 experts and professionals and all the evidence to inform this
11 commission, or a Category 5 tribunal. But as I sit here, I'm
12 not an expert in international law. I can't tell you if the
13 Supreme Court was correct. I can't tell you if the Supreme
14 Court was incorrect.

15 I've read the decision. I understand what they were
16 trying to say, but as with every Supreme Court case, with
17 every court case, there are nuances and comparatives,
18 comparisons that can be drawn, or altered, based on facts,
19 based on the law. And so when we get the clearance necessary
20 to have Professor Moore, our international law expert on the
21 team with access to the evidence, that's going to enhance -- I
22 submit to you that will enhance this commission's decision or
23 ability to make a decision regarding whether it is truly

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1 competent under Khadr.

2 Just accepting Khadr at face value that a commission
3 can do this, we submit, is improper, but it was also raised
4 prematurely. And that's why we're trying to move to set it
5 aside to more or less do damage control and get this case back
6 set and narrow so that the parties can argue the issues based
7 on the facts, the evidence, and all of the law; not just one
8 Supreme Court case, but all of the law.

9 I have further -- I can go down on my prepared
10 argument, but you asked for a specific answer, so I gave you a
11 lengthy one.

12 MJ [CAPT WAITS]: Well, if the rest of your argument is
13 just how many other ways the government has not met its
14 discovery obligations, I don't need to hear that, because it
15 just -- it doesn't further inform the question that I asked,
16 okay?

17 For purposes of this, of your argument, I will assume
18 that the government has not met its discovery obligations,
19 okay, for purposes of this argument.

20 DDC [MAJ KINCAID]: Let me suggest, Your Honor, in federal
21 case law going all the way back to 1804 and the Charming Betsy
22 case, these -- the federal courts cannot make decisions that
23 contravene international law when such -- when a construction

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1 that is consistent with international law is possible.

2 Our position, the current team's position, is that we
3 need to explore whether Khadr was justly adjudicated, and if
4 it was, whether it's applicable to this proceeding. And we
5 can't do that under the current law of the case that was put
6 in place prematurely and we submit is not done with -- in the
7 interest of justice. The interest of justice, we believe and
8 we assert, requires a full adjudication of the facts and the
9 evidence and the qualification of counsel informed by the law,
10 both federal and international, and we intend to explore that
11 if we're allowed to.

12 The concern that defense has -- and we're aware that,
13 you know, last month you indicated that you would -- that we
14 were not going to be allowed to go down the road to overturn
15 the law of the case, but we submit respectfully that saying
16 that without us being able to raise the issue -- it's the law
17 of the case, any discussion, move on, defense -- we think
18 that's ----

19 MJ [CAPT WAITS]: No, you're raising -- you've raised the
20 issue in this motion, so you are raising the issue right now.

21 DDC [MAJ KINCAID]: Yeah. We're actually trying to get
22 AE 020 withdrawn to unstable -- or to disestablish what we
23 believe was an improper setting of law of the case. We wish

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1 the court, the commission to simply be fully informed by both
2 facts, law and argument or -- and qualifications under federal
3 international law at some point in the future.

4 Let me put it out this way: Granting -- allowing us
5 to withdraw AE 020 does no one any harm. It doesn't prejudice
6 the government. It doesn't prejudice this commission. It
7 certainly doesn't prejudice the accused because we're
8 requesting to withdraw it without prejudice so we will refile
9 it at the appropriate time.

10 When this was filed initially, it led eventually to
11 the use of a 505(h) hearing, so the commission and the
12 government have seen evidence that we still haven't seen.
13 Now, our position is they can still raise that evidence. They
14 can still -- resetting the clock and allowing them to redo all
15 of the presentation they've done, unless perhaps some of that
16 evidence is contradicted by whatever we can present will
17 inform this commission with respect to the law of the case and
18 what it should be from that point going forward.

19 Withdrawing AE 020, disestablishing the law of the
20 case on this issue, effectuates no prejudice to any party and
21 allows the parties to proceed into the future towards a trial
22 date which has not been set and which potentially could be
23 years out. It allows us to move forward appropriately to

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1 establish the appropriate law of the case.

2 MJ [CAPT WAITS]: Okay.

3 DDC [MAJ KINCAID]: Subject to your questions, sir.

4 MJ [CAPT WAITS]: Thank you. That's all.

5 ATC [Maj MILTON]: Good morning, sir.

6 MJ [CAPT WAITS]: Major Milton.

7 ATC [Maj MILTON]: The government does not object to the
8 withdrawal of the undecided aspects of AE 020; however, the
9 government does object to relitigating the Article 5 tribunal
10 issue that the commission has already ruled upon. The defense
11 has not met their burden of persuasion by a preponderance of
12 the evidence to overturn or withdraw the ruling of this
13 commission.

14 MJ [CAPT WAITS]: Okay, Major. I'm getting the yellow
15 light, so I need you to speak a little bit slower.

16 ATC [Maj MILTON]: Yes, sir.

17 MJ [CAPT WAITS]: Like I'm doing right now. The
18 interpreters appreciate that.

19 ATC [Maj MILTON]: Yes, sir.

20 MJ [CAPT WAITS]: Okay.

21 ATC [Maj MILTON]: To determine if the defense has met
22 their burden, there's three aspects that should be looked at.
23 Number one, new evidence; two, intervening change in the law;

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1 three, the need to correct clear error or to prevent manifest
2 injustice.

3 Number one, the defense cannot have new evidence
4 because there is no new evidence that will exist -- that
5 exists at this time to demonstrate why an Article 5 tribunal
6 would be a competent tribunal to determine jurisdiction
7 instead of this commission.

8 Number two, there has been no change to the statute,
9 MCA Section 948d that still states that this commission is a
10 competent tribunal to make the determination as to
11 jurisdiction. Also what has not changed is the Rules of
12 Military Commission; Rule 201(b) and Rule 202(c) also still
13 state this military commission can always determine
14 jurisdiction.

15 In regards to correct a clear error of the law, case
16 law that defense has mentioned Khadr case from 2007, stated
17 that the Court of Military Commissions is able to make
18 determinations. This was reaffirmed recently with the Court
19 of Military Commission Review in United States v. Nashiri that
20 was released on 9 June 2016. That ruling also stated that the
21 military judge is a competent tribunal to hold a hearing to
22 make a determination as to personal jurisdiction based on the
23 accused being an alien unprivileged enemy belligerent.

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1 And, Your Honor, as to the manifest injustice, the
2 standard to overturn or overrule the law of the case is not
3 whether or not anyone would suffer prejudice. A lack of
4 prejudice is not justification to overturn the rule of the
5 case, the law of the case.

6 Change in defense counsel is not an extraordinary
7 event to justify changing the law of the case according to the
8 Rozar case cited in the government's motion. And because no
9 prejudice is not the standard, the government requests that
10 you look back at the three issues of no evidence -- no new
11 evidence, no intervening changes in the law, no need to
12 correct clear error as the Court of Military Commissions
13 Review has just recently stated a little over a month ago,
14 again, that you are the competent tribunal to determine
15 jurisdiction.

16 In conclusion, sir, if you do grant the defense's
17 request to withdraw the uncontested portions of AE 020, the
18 government just requests that you place in the order the fact
19 that with the withdrawal, there is no current challenge to the
20 jurisdiction of the accused in this commission.

21 One moment, sir.

22 Sir, just to add to the conclusion, the fact that
23 with the withdrawal, the jurisdiction is presumed to be

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1 unchallenged in reference to the Khadr case in 2007. I
2 believe it was 1225.

3 MJ [CAPT WAITS]: Say that one more time.

4 ATC [Maj MILTON]: It was a footnote in the motion that we
5 provided that absent a motion from the defense to dismiss
6 based on jurisdiction, the court is presumed to have
7 jurisdiction.

8 MJ [CAPT WAITS]: Okay. I want to ask you a question
9 about the law of the case. It's a new, I guess, concept to me
10 based on my practice as a military judge in courts-martial,
11 and when you read the appellate case law, it's usually talking
12 about rulings, decisions of appellate courts. And as between
13 higher and lower appellate courts, I mean, it seems like
14 everyone agrees that, you know, that law of the case is an
15 applicable doctrine here, but how does it apply, you know, at
16 a trial court level within the same case?

17 ATC [Maj MILTON]: Sir, I think it goes to -- rule of the
18 law goes towards reconsideration. It should meet the same
19 sort of standard as reconsideration, which is the three issues
20 I mentioned earlier in the argument with the new evidence, new
21 law, manifest error. This court has taken into consideration
22 argument from both sides to reconsider motions in the past.
23 That is the standard that the government puts forth that

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1 should be required any time reconsideration of the case due to
2 judicial economy the fact that the parties need to have some
3 expectation going forward, the waste of time and resources on
4 a clearly decided matter, absent new evidence that may change
5 the Military Judge's ruling.

6 Absent those sort of issues, that both parties should
7 be able to go forward with the expectation of they know what
8 the law is. Absent that, there is going to be confusion. The
9 defense mentioned there's no prejudice. Well, if you open the
10 door to allow them to do it this time, what's to prevent them
11 asking to withdraw all previous motions: Oh, this was not the
12 defense team that filed these so we want reconsideration on
13 all of the motions that you previously ruled upon?

14 There needs to be some sort of standard. This should
15 not be an easy thing that happens. This should need to be
16 proof what happened before either there is no evidence to
17 present new statute or new law or there was a clear error that
18 was made that needs to be remedied. Because this law is so
19 clear on this matter concerning Article 5 tribunals versus the
20 Military Commission's competence to be a tribunal, there is no
21 prejudice to the defense going forward. There is nothing new
22 to allow them to argue that you are not a competent tribunal
23 in this aspect.

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1 The government is agreeing to not objecting to the
2 withdrawal of 020 that was filed because you have not ruled
3 upon it and we have not made argument on it. But once
4 argument is made and once you've made a ruling, there should
5 be an extraordinary event that occurs prior to you withdrawing
6 a previous ruling. And what the defense has stated, there is
7 no extraordinary event.

8 MJ [CAPT WAITS]: Very well. Thank you. Last word, Major
9 Kincaid?

10 DDC [MAJ KINCAID]: Thank you, Your Honor.

11 The government points out three bases for overturning
12 the law of the case. The first one -- I'm going to address
13 two of them, the first and the third.

14 The discovery of new evidence, as discussed -- I know
15 you don't want to hear discovery arguments again, but as I've
16 represented to the court, we received the -- the defense team
17 had received four batches of discovery at the time the motion
18 was filed, a fifth batch shortly after oral arguments, and
19 before the -- excuse me, shortly before oral arguments and
20 before the court made its ruling. Since then there have been
21 an additional 31, plus there was a presentation via 505 of
22 some type of ex parte classified evidence.

23 Now, if those examples from this record don't

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1 constitute new evidence, I don't know what does. And
2 unfortunately, because we don't have it all, I'm not in a
3 position to tell you exactly what is new and what is not.

4 MJ [CAPT WAITS]: Well, it's not all new evidence. It's
5 evidence that's relevant on the issue that the commission has
6 already ruled on, which is only that the commission is a
7 competent body to determine the existence of personal
8 jurisdiction. So it's not is there any new evidence that's
9 been provided to the defense; it's what new evidence provided
10 to the defense would have influenced the commission's partial
11 decision on AE 020, which was only that the commission is
12 competent to make this determination.

13 So it's not -- I mean, you can have a zillion pages
14 of evidence that's been provided. The question is what part
15 of that evidence makes any difference one way or another as to
16 the commission's ruling that it's competent to determine
17 personal jurisdiction.

18 DDC [MAJ KINCAID]: Let me submit that the competence of
19 not only the parties to this case but this commission will be
20 driven by the presentation of both the law and the evidence
21 before it, and there was no involvement on either side by an
22 international law expert.

23 We have that waiting, just waiting in the wings, to

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1 view classified evidence. We have the ability to fully brief
2 this commission on that issue, the issue of this tribunal's
3 competence under international law to make a decision under
4 federal law that is consistent with international law pursuant
5 to case law going all the way back to the Charming Betsy case
6 in 1804.

7 All we are asking is the ability to make that
8 challenge. We might fail, but then again, we might succeed
9 because we don't know and this commission doesn't know what
10 the full state -- what the accurate state of international law
11 was.

12 And on that point, what is the harm in
13 adjudicating -- whether we adjudicated it a year ago, next
14 year, or in two years, whether this tribunal has jurisdiction.
15 Obviously, we don't want to wait too long, and we -- I am
16 representing to you that as soon as we get our experts, we
17 will be moving and moving fast.

18 But given the early stage of this proceeding, even
19 though it's well over two years old, given the early
20 litigation posture, this delay -- or this will not result in a
21 delay, allowing us to withdraw the AE 020 series based on
22 additional information, a new argument of the law, both
23 federal and international.

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1 With respect to the decision in Nashiri, all I will
2 say to that -- and this actually goes to the issue of arguing
3 the merits of this jurisdiction -- this tribunal's
4 jurisdiction or this tribunal's competence to establish
5 personal jurisdiction. Eleven days after the CMCR issued
6 Nashiri on 9 June, the U.S. Supreme Court issued an
7 extraterritoriality decision in RJR Nabisco v. The European
8 Community, a criminal case its actual applicability to these
9 proceedings and to jurisdiction remains to be seen. Again,
10 it's driven by the merits. I'll give you the cite.
11 Unfortunately, it's such a new case all I can give you is a
12 partial cite, Your Honor, 579, U.S. -- and then the typical
13 Supreme Court empty line where they're going to plug the
14 number in eventually.

15 MJ [CAPT WAITS]: RJR Nabisco ----

16 DDC [MAJ KINCAID]: RJR Nabisco v. The European Community.
17 That was issued on 20 June. And it deals with the
18 applicability of extra -- extraterritorial applicability of
19 statutes, whether they are substantive conduct controlling or
20 simply jurisdictional. So again without getting too far into
21 whether that applies and how it applies, I think it supports
22 that we re -- we need to reset this clock on impose or allow
23 us to litigate the law of the case at an appropriate time with

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1 the facts, evidence and expertise that this commission, the
2 accused and I dare say even the government deserve: An
3 informed decision.

4 Thank you, Your Honor.

5 MJ [CAPT WAITS]: Tell me again what you -- what you
6 identify as the relevant issue in the case that you just
7 cited?

8 DDC [MAJ KINCAID]: Extraterritorial application of a
9 jurisdictional statute. To the extent that RJR Nabisco
10 applies -- to the extent that the MCA applies to conduct
11 extrajurisdictionally, we need to litigate -- or explore and
12 if necessary raise, the actual extraterritorial application to
13 specific conduct that may or may not have occurred with or
14 without any nexus to the United States or a United States
15 citizen.

16 It's a much bigger issue under both federal law and
17 international law, and, in fact, I would submit that it's sort
18 of similar to what we had to raise in AE 045J, the issue is
19 not really just pure law. We've got to have some facts and
20 we've got to have some statutory analysis. We're going to
21 have to have some international law analysis to determine how
22 clear the MCA is on its extraterritorial application, and if
23 it's clearly extraterritorial, whether its focus in another

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