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1 [The R.M.C. 803 session was called to order at 1009,
2 15 November 2016.]

3 MJ [Col RUBIN]: Commission is called to order. All
4 parties again are present that were present when the
5 commission recessed.

6 DC [MR. RUSHFORTH]: Judge, I learned during the recess
7 that you at one point in your career worked directly for
8 General John Baker. And, of course, that's disqualifying in
9 and of itself. Every now and then I am given to an
10 inappropriate witticism, Judge, but we have nothing further.

11 MJ [Col RUBIN]: Thank you.

12 Trial Counsel, any questions from the government?

13 TC [CDR SHORT]: Yes, Your Honor. And I think
14 Mr. Rushforth just cut to our question. Do you have any past
15 or current relationship with any member of the defense?

16 MJ [Col RUBIN]: Not with defense counsel. As
17 Mr. Rushforth indicated, I have worked and know General Baker.
18 At the time, General Baker, 2011 time frame, was the Chief
19 Defense Counsel of the Marine Corps; I was the Regional
20 Defense Counsel for the Pacific Region. General Baker at the
21 time was a colonel, he was my reporting senior.

22 TC [CDR SHORT]: And so he wrote your FITREPs?

23 MJ [Col RUBIN]: Yes, he did write my FITREPs.

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1 TC [CDR SHORT]: How many did he write?

2 MJ [Col RUBIN]: There was a one-year period. I have
3 known General Baker for, I'd say, 15 plus years.

4 TC [CDR SHORT]: And, Your Honor, is there anything that
5 Your Honor is aware of or does this commission feel in any way
6 that it could not faithfully or impartially perform, according
7 to your conscience and the laws applicable to trials by
8 military commission, all the duties incumbent upon you as
9 military judge to this Military Commission?

10 MJ [Col RUBIN]: No.

11 TC [CDR SHORT]: One second, Your Honor. Let me confer.

12 [Pause.]

13 TC [CDR SHORT]: Your Honor, I have nothing further.

14 MJ [Col RUBIN]: Does counsel for either side wish to
15 challenge the military judge?

16 Trial Counsel?

17 TC [CDR SHORT]: No, Your Honor.

18 MJ [Col RUBIN]: Defense Counsel?

19 DC [MR. RUSHFORTH]: No, Judge.

20 MJ [Col RUBIN]: Thank you. I will now advise the accused
21 of his right to be present and his right to waive such
22 presence.

23 Mr. Hadi, good morning. You have the right to be

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1 present during all sessions of the commission. If you request
2 to absent yourself from any session, such absence must be
3 voluntary and of your own free will. Your voluntary absence
4 from any session of the commission is an unequivocal waiver of
5 the right to be present during that session.

6 Your absence from any session may negatively affect
7 the presentation of the defense in your case. Your failure to
8 meet with and cooperate with your defense counsel may also
9 negatively affect the presentation of your case.

10 Under certain circumstances your attendance at a
11 session can be compelled, regardless of your personal desire
12 not to be present. Regardless of your voluntary waiver to
13 attend a particular session of the commission, you have the
14 right at any time to decide to attend any subsequent session.

15 For example, if you decide not to attend the morning
16 session but wish to attend the afternoon session, you must
17 notify the guard force of your desires. Assuming there is
18 enough time to arrange transportation, you will then be
19 allowed to attend the afternoon session.

20 You will be informed of the time and date of each
21 commission session prior to the session to afford you the
22 opportunity to decide whether you wish to attend that session.

23 Mr. Hadi, sir, do you understand what I just

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1 explained to you?

2 ACC [MR. HADI]: Yes, sir.

3 MJ [Col RUBIN]: Thank you.

4 The trial counsel, defense counsel and the military
5 judge held an R.M.C. 802 conference at 1700 on 14 November
6 2016. That conference was held in the panel deliberation room
7 in building AV-34. The accused was not present. After the
8 parties and I made introductions, we briefly discussed the
9 order of business at today's R.M.C. 803 session to include the
10 following:

11 Captain Fischer informed me that he has been detailed
12 to this case and would be meeting with the accused this
13 morning. I delayed today's start time by 30 minutes to afford
14 Captain Fischer an opportunity to meet with Mr. Hadi.

15 Captain Fischer and Commander Cooper would announce
16 their detailing and qualifications on the record. The captain
17 and commander have done that.

18 I informed the counsel that I would put my detailing
19 and qualifications on the record and give counsel the
20 opportunity to question and challenge the military judge.
21 Once again, that's been accomplished.

22 The government stated that they would like to be
23 heard on the defense request to withdraw Appellate

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1 Exhibit 059.

2 The government inquired about the way ahead on
3 Appellate Exhibit 064. I indicated that this matter would not
4 be taken up at today's R.M.C. 803 session.

5 The government inquired about the Military Judge's
6 oath. As stated on the record, the oath was administered to
7 me by the Chief Judge of the Military Commissions Trial
8 Judiciary.

9 Finally, Mr. Rushforth reiterated that the defense
10 would continue to refer to the accused as Mr. Nashwan
11 Al-Tamir. As I informed the counsel yesterday, the commission
12 intends no disrespect to the accused, but will refer to him
13 during these proceedings as Mr. Hadi.

14 Counsel for either side have any corrections or
15 additions to the Military Judge's summary of our 802
16 conference?

17 TC [CDR SHORT]: Nothing from the government, Your Honor.

18 DC [MR. RUSHFORTH]: No, Your Honor.

19 MJ [Col RUBIN]: Appellate Exhibit 063 is the commission's
20 docket order dated 13 October 2016. It lists two defense
21 motions to be litigated at today's 803 session. These
22 motions, Appellate Exhibits 059 and 062, are motions for
23 appropriate relief pertaining to the recording and

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1 transcription of R.M.C. 802 conferences and the accused's
2 possession of a Microsoft-enabled laptop computer.

3 On 10 November 2016 the commission received Appellate
4 Exhibit 059C, a defense motion seeking the commission's leave
5 to withdraw Appellate Exhibit 059 without prejudice. This is
6 the defense motion for appropriate relief pertaining to the
7 recording and transcription of R.M.C. 802 conferences.

8 The government opposes the defense moving for leave
9 to withdraw 059 as set forth in paragraph 7 of Appellate
10 Exhibit 059C.

11 Trial Counsel, I understand the defense motion was
12 filed on 10 November. The government has not had an
13 opportunity to respond to that motion in writing. Regardless,
14 the commission will afford the government an opportunity to be
15 heard, if desired, on this motion.

16 DC [MR. RUSHFORTH]: Thank you, Your Honor. Your Honor,
17 before we turn to that matter, in our meeting with the client
18 this morning, he wished to address the judge, the commission
19 briefly on the subject of counsel. Would that be appropriate
20 now?

21 MJ [Col RUBIN]: Yes, Mr. Rushforth. Are you aware of the
22 matters that Mr. Hadi will address with the commission?

23 DC [MR. RUSHFORTH]: Yes, I am.

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1 MJ [Col RUBIN]: Very well.

2 ACC [MR. HADI]: Your Honor, Captain Fischer, I didn't
3 have enough time to meet with him and get acquainted. This is
4 the first time I have had a chance to meet with him, and the
5 time given was very brief. It wasn't enough for me to get to
6 know him.

7 And this is not his fault. He has been detailed with
8 the team for approximately two months, and he has held a
9 number of government positions in the past, but his security
10 clearance was just granted. So I didn't have enough time to
11 get to know him, and this was the first time we have met.

12 And I came in this morning without having an
13 intention to approve him as someone who would represent me
14 because I didn't have enough time to meet with him and because
15 of the security clearance and because the government canceled
16 a number of meetings. Even the approved meetings that we had,
17 we didn't have enough time to meet.

18 But after consulting with Mr. Rushmore --
19 Rushforth -- but after getting the approval to meet with
20 Captain Fischer, the understanding was that I would have the
21 right to either approve him as representing me or not.

22 Thank you.

23 MJ [Col RUBIN]: Thank you. Mr. Rushforth, how would you

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1 like to proceed with that?

2 DC [MR. RUSHFORTH]: Your Honor, my understanding, my
3 client, Mr. Nashwan Al-Tamir, has approved Captain Fischer as
4 counsel representing him. He simply, as he spoke to you this
5 morning, Your Honor, doesn't believe he had enough time to
6 fully apprise and fully get to know Captain Fischer, but in
7 spite of that, on my advice, he accepts him as counsel.

8 And he simply is reserving the right to kick him out
9 if he finds some reason to kick him out later on. And I told
10 him -- without violating any attorney-client privilege, I told
11 him he could kick me out any time he wants. So that's where
12 he is.

13 MJ [Col RUBIN]: Very well. Will Captain Fischer have an
14 additional opportunity to meet today with Mr. Hadi?

15 DDC [CAPT FISCHER]: Yes, Your Honor.

16 MJ [Col RUBIN]: Very well. Thank you for alerting the
17 commission.

18 DC [MR. RUSHFORTH]: Thank you, Judge.

19 MJ [Col RUBIN]: Thank you, Mr. Hadi.

20 Trial Counsel, do you wish to be heard on the defense
21 motion to withdraw?

22 ATC [LCDR SPENCER]: Good morning, Your Honor. Lieutenant
23 Commander Vaughn Spencer, JAG Corps, United States Navy, for

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1 the United States.

2 Your Honor, as the commission noted, this motion was
3 filed on 10 November, which was the last business day prior to
4 the travel yesterday to come here. So the government has not
5 had the opportunity to respond in writing. Given that we
6 would normally have 14 days, I will do my best to orally
7 respond, since it affects the docketing order that the
8 commission previously referenced and also affects this hearing
9 this morning.

10 Your Honor, the government opposes the withdrawal of
11 the motion on two bases. Number one is that in Appellate
12 Exhibit 059 and 059C, the defense essentially alleges
13 malfeasance on the part of the former military judge, Captain
14 Waits. The withdrawal as phrased may be read as a warning by
15 the defense to the current military judge. The government
16 would like to resolve that issue prior to moving forward.

17 Number two, in Appellate Exhibit 059 the defense
18 asserts, without any legal authority or justification, that
19 the accused has a right to a verbatim record of 802
20 proceedings and that he has a right to be present for all 802
21 conferences.

22 Your Honor, first with respect to the alleged
23 malfeasance, the government infers that from a couple of

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1 things. First, in Appellate Exhibit 059, the original motion
2 that they now intend to seek to withdraw, on page 10, the
3 defense makes the following claim: "The practice of
4 memorializing the 802 proceedings after the fact results in
5 omissions and errors on the record, presumptively accidental,
6 but where humans are involved, probably not always."

7 That, in a vacuum, wasn't particularly concerning to
8 the government, although it certainly implies that either
9 there is some deliberate act on either the government's part
10 or the military judge's part to insert error or omission into
11 the record.

12 This is obviously concerning, Judge, for the reason
13 that we saw this morning when Your Honor summarized the 802
14 conference, as Judge Waits did, as every military judge has
15 presumably done since 1951 when Rule for Military
16 Courts-Martial 802 was passed or enacted. The military judge
17 gives both sides the opportunity to amend or correct or append
18 the summary given by the military judge.

19 In the past, both defense counsel and government
20 counsel have had that opportunity with Judge Waits. Either
21 that opportunity was never taken in instances where they
22 thought there was an error or the correction was made and that
23 was placed on the record. Either way, the defense had ample

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1 opportunity to adjust or correct or append the record. To
2 suggest now in AE 059 that they haven't is concerning.

3 More concerning, in 059C, the motion to withdraw, the
4 defense makes very clear what was not clear in 059, which is
5 the fault apparently lies with Judge Waits. The defense makes
6 very clear that their basis for withdrawing this motion now is
7 the new detailing. The defense cites in paragraph 5(a) the
8 circumstances of 1 November 2016. "As of 1 November 2016" --
9 which is the date that your detailing became effective --
10 "circumstances have changed significantly," which again
11 implies that there was some malfeasance on the part of the
12 military judge. Again, the government would like to put that
13 to rest in full argument on Appellate Exhibit 059.

14 With respect to the timing of the motion, it's also
15 concerning, Judge, because if the basis was actually the fact
16 that you have now been detailed, we became aware -- we, both
17 the defense and the government, became aware that you were
18 detailed -- you were detailed prior to this, I believe it was
19 14 October, but we became aware, it was 27 October 2016.

20 The defense then waited 13 days to conference 057C,
21 the motion to withdraw, waited 13 days and then waited an
22 additional day, an extra day because they are only required to
23 wait 24 hours for conferencing. They waited an extra day,

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1 until November 10, the last possible day they could have filed
2 to withdraw the motion.

3 So it's concerning to the government in the sense
4 that this is now at least the second time that the defense,
5 right on the eve of the hearing, has attempted to undo the
6 docket without actually filing a motion to amend the docket,
7 but attempted to either gut the docket completely, as they did
8 in July when they attempted to withdraw Appellate Exhibit 045,
9 the motion to suppress, which was the only motion docketed for
10 that hearing, on the eve of that hearing. On the eve of that
11 hearing, they filed a motion to withdraw, which effectively
12 would have granted them a continuance, which had been he
13 denied multiple times. And they have done the same thing in
14 this instance, Your Honor.

15 And the government believes that although there was
16 another item on the docket, specifically the computer issue,
17 that this last-minute attempt to frustrate the docket should
18 not be one awarded or rewarded by granting the motion to
19 withdraw.

20 Lastly, Your Honor, the principal, the most important
21 reason that the government opposes this motion and the
22 previous motion is the way, the basis for the defense's
23 motion, the basis for the defense's requested relief.

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1 As the defense points out, the government as a
2 general rule does not object to the judge, in your discretion,
3 ordering a particular 802 conference to be held on the record.
4 That's clearly within your discretion, Your Honor, although
5 not a very common practice, certainly one within your
6 discretion.

7 The defense characterizes the government's opposition
8 to their motion, despite that concession, as somehow insidious
9 or odd -- which the government thinks is odd because we
10 clearly disagree on the underlying rationale, and that's
11 something that reasonable parties can disagree on.

12 The underlying rationale of the defense is that, as
13 stated in 059, is that the accused has a right. Now, the
14 right to the conference or the right to the verbatim 802
15 transcript, they don't actually state in detail what that
16 right is or from where that right derives.

17 The defense in its Appellate Exhibit 059 makes
18 repeated reference to open and fair proceedings, et cetera,
19 which open and fair proceedings again would, the government
20 suggests, would confuse the right to a trial -- the trial
21 right or the hearing right with R.M.C. 802 conferences, again
22 which has been in effect in the military context for 61 years.
23 R.C.M. 802 conferences are always conducted -- I would say 99

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1 percent of the time conducted not on the record, certainly
2 conducted typically outside of the presence of the accused,
3 yet the defense asserts that there is some sort of right for
4 the accused to have these 802 sessions transcribed without
5 citing any actual legal authority.

6 The more concerning claim by the defense is that the
7 accused has a constitutional right under the Fifth and Sixth
8 Amendment to be present during any R.M.C. 802 conference.
9 What the defense is now suggesting is they are willing to
10 withdraw the motion that they say -- in which they state their
11 client has a certain right under two different constitutional
12 amendments, a right which is apparently being violated by the
13 government according to the defense. So the defense is
14 somehow now accepting of that rights violation if he indeed,
15 in their mind, has a Fifth and Sixth Amendment right. This is
16 a non sequitur, Your Honor.

17 The prejudice that the government is concerned about
18 is, if the defense truly believes that he has a constitutional
19 right, let's argue that today as docketed. Let the military
20 judge make a ruling as to whether he has a right or he doesn't
21 have a right. If he does have the right, it turns out later
22 that he has a right, and the defense -- either one of two
23 things: Either they have waived that argument from today's

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1 date up until some future date when they raise it possibly on
2 appeal; or they are building in prejudice if it turns out
3 later that he has the right. And from now until whenever it's
4 litigated, again at trial or on appeal, then there is
5 automatic prejudice. They have raised that he has a
6 constitutional right, Judge. The government's position is
7 that we are prepared and the defense should be prepared to
8 litigate this issue.

9 Now, if the rationale truly is that, well, we have a
10 new judge so all the problems are solved, then that, number
11 one, suggests that they don't really believe this is a very
12 strong right and, number two, implies that -- or suggests that
13 they should be perfectly happy with withdrawal with prejudice.

14 The government does not object to the defense
15 withdrawing this motion with prejudice. If it is specific to
16 Captain Waits, then prejudice does not prejudice the defense
17 in any way because Captain Waits is no longer on this case.
18 So if that's the real basis, that Captain Waits was the issue
19 and now the new judge solves the issue for the time being,
20 then dismissal with prejudice or withdrawal with prejudice is
21 appropriate. If a similar issue comes up with the new
22 military judge, the defense would certainly be free at that
23 point to raise the new motion and not be prevented by the

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1 previous prejudice.

2 Thank you, Your Honor.

3 MJ [Col RUBIN]: Defense Counsel, do you wish to be heard?

4 DC [MR. RUSHFORTH]: Very briefly, Your Honor. We meant
5 no aspersions to Captain Waits in this motion and I'm sorry
6 that the prosecution drew such an inference. We meant no
7 such -- or were throwing no such aspersions on Captain Waits
8 whatsoever.

9 And withdrawing the motion as we did, we frankly were
10 of a mind that the circumstances are such that we no longer
11 need to worry about it. But if the circumstances change, I
12 think we have an ongoing right to raise this issue.

13 Judge Rubin, if you wanted to put these on the
14 record, we have no objection to that, but we don't think at
15 this time that there is any necessity to have that done or
16 really, frankly, to rule on this motion.

17 Thank you.

18 MJ [Col RUBIN]: Could you address the trial counsel's
19 argument that essentially the defense has asserted that
20 Mr. Hadi's rights are being violated by not recording and
21 transcribing 802 conferences? Is that, in fact, the defense's
22 position?

23 DC [MR. RUSHFORTH]: No, that is not our position,

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1 Your Honor.

2 MJ [Col RUBIN]: Thank you.

3 Counsel, the commission has not heard argument or
4 made a ruling on Appellate Exhibit 059. Based on the matters
5 set forth by the defense, the commission does find that there
6 is a sufficient basis and a reasonable cause to grant the
7 defense motion. Accordingly, the defense request to withdraw
8 Appellate Exhibit 059 without prejudice is granted. The
9 commission will sign a written ruling to this effect.

10 Counsel, let's now turn to Appellate Exhibit 062. In
11 this motion for appropriate relief, the defense requests that
12 the commission order the government to permit defense counsel
13 to provide the accused with a direct or special security
14 office approved write-enabled laptop computer with document
15 marking, word processing, database, and video editing
16 software, without wireless data capability for the accused's
17 use in assisting counsel and participating in the presentation
18 of his defense.

19 The government opposes the requested relief as set
20 forth in the government's response marked as Appellate
21 Exhibit 062A.

22 Defense, is there any additional evidence to present,
23 aside from the attachments to the defense motion?

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1 DDC [MAJ HALL]: Not at this time, Your Honor.

2 MJ [Col RUBIN]: Does the government have any evidence to
3 present in response to this motion?

4 ATC [LCDR LINCOLN]: No, Your Honor, not at this time.

5 MJ [Col RUBIN]: Does the defense want to present oral
6 argument?

7 DDC [MAJ HALL]: Yes, Your Honor.

8 MJ [Col RUBIN]: Major Hall, you may proceed.

9 DDC [MAJ HALL]: Good morning, Your Honor.

10 MJ [Col RUBIN]: Good morning.

11 DDC [MAJ HALL]: People manage to communicate with each
12 other by sharing common thoughts, language, imagery from a
13 unified framework which comes about. It can happen relatively
14 quickly, or it can be a slow, arduous process that suffers
15 through misunderstandings and a back and forth that a
16 2200-mile round trip snail mail translation -- snail mail,
17 again -- process dictates.

18 Before we get to the heart of AE 062, there are a few
19 items that the defense submits should be acknowledged. In
20 front of you today is not a question of whether access to a
21 computer is constitutionally permissible. It is. It is not a
22 question of whether it is legally permissible. It's not even
23 a question of whether it is permissible under the regulations

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1 that govern the military commissions or JTF Guantanamo itself.
2 It is permissible.

3 Why are these not questions before you today,
4 Your Honor? Because the government has already answered them
5 by providing computers to five different men charged -- with
6 charges referred pursuant to the 2009 Military Commissions
7 Act, the very act through which this case is brought before
8 this commission.

9 Can an accused before a military commission use a
10 computer to assist himself with the preparation of his own
11 defense? Yes. Not only is it possible, it has been done.

12 There is already a process through which the
13 government has overseen this type of tool being delivered to a
14 prisoner facing a military commission. Not only has the
15 government provided computer access in other cases, but the
16 military judge within these commissions has taken an active
17 role. That judge has ordered the government to allow the
18 defense teams to provide computers to their clients.

19 The government, as it knows, has already received
20 orders to return access to the previously provided computers
21 to these five men. Judge Pohl had given -- has given orders
22 three times through AE 149L, AE 182G and AE 182K in the
23 U.S. v. Mohammad et al. case. And he was pretty clear when he

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1 said not later than 8 March 2016, the laptops will be returned
2 to the accused with the same functionality they had when
3 seized.

4 So what is the defense asking you today, Your Honor?
5 The defense is asking that you compel the government to allow
6 Nashwan Al-Tamir access to a defense provided, security
7 cleared laptop computer to assist with the preparation of his
8 own defense through the system the government has already used
9 for this very procedure. This is not an expert witness
10 request asking to delve into some experimental analysis of
11 physical evidence, no. This is a request for the use of a
12 simple small piece of common everyday equipment that can be
13 found in almost every office, every classroom, in almost every
14 home throughout the United States, a simple laptop computer
15 with enough processing ability, software and hard drive space,
16 to handle word processing, database, and a review of
17 audiovisual recordings.

18 Your Honor, computers are basic office equipment that
19 you will find used by both the prosecution and the defense in
20 criminal litigation, civilian cases, military justice cases,
21 and here at the military commissions. The government admits
22 in their response allowing five prisoners charged access to
23 computers for preparation of their defense. While they were

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1 seized after 18 months after they already had them, they were
2 ordered to be returned by the senior military judge.

3 Now, what computers are used for in the 21st century
4 may be self-evident to most, but maybe not to all. There are
5 tens of thousands of digital pages of unclassified documents
6 currently in the defense's possession. This discovery is in a
7 digital format primarily because it is the format utilized by
8 the government itself in the provision of discovery: Sorting,
9 note-taking, cross-referencing, tables, charts, presentations,
10 audio and video review and analysis.

11 The government said in its response that the defense
12 has not shown that Mr. Al-Tamir needs the software requested
13 because it is more akin to what an attorney would use. Ask
14 yourself, Your Honor, what use would an attorney have for the
15 requested software? Answer: Assist with the preparation of a
16 defense.

17 It is not just the discovery that the government
18 provides that is in the digital format. Today, as we practice
19 within the law, we are talking about dictionaries, legal
20 research, articles, treaties, cases, stacks upon stacks of
21 cases, motions, and much more that in the 21st century are
22 sorted, transmitted, maintained, collaborated on through
23 digital media.

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1 Think back not too long ago, 1999-2000 time frame,
2 the Department of Defense made a determination that it wanted
3 to move forward towards a paperless military. Digital. How
4 was it going to maintain that? How was it going to achieve
5 that goal? Computers, Your Honor. Now we are approaching the
6 end of 2016, conducting the majority of the nation's business
7 in a digital format, and the government's position is that we
8 should go back to the last century.

9 The defense request is the least intrusive manner to
10 accomplish the task of defense preparation. Going with the
11 government's scheme would require the JTF to provide rooms or
12 even buildings to store, review, manage hard copy prints, the
13 automation to support that, to copy that, to send out hard
14 copies to their defense teams and back, the documentary
15 evidence and resources collected for cases that span multiple
16 countries and over a decade's worth of time. And in that
17 process, it would ignore the system already created for the
18 provision of laptops.

19 The government does not suffer any hardship or
20 penalty if the defense request is granted, Your Honor. No new
21 policies or procedures need to be developed. No additional
22 resources are being requested from the government. The
23 government's opposition to the defense attempts to streamline

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1 communication and increase Mr. Al-Tamir's ability to assist in
2 his own defense appears to be they don't believe it is
3 required. That is not a legal objection, Your Honor. That is
4 an opinion.

5 Your Honor, the defense requests that you order the
6 government to allow provision of a functional laptop to
7 Mr. Al-Tamir, using the security procedures the government
8 already created for the provision of laptops to accused with
9 hearings before the commissions.

10 Thank you.

11 MJ [Col RUBIN]: One question for you, Major Hall: Would
12 this computer be subject to search by government officials?

13 DDC [MAJ HALL]: Your Honor, there are procedures in place
14 for the handling of material for -- between an accused and his
15 legal team that would cover a laptop computer. It would be no
16 different than what is already in place.

17 MJ [Col RUBIN]: So the answer is yes?

18 DDC [MAJ HALL]: The answer is in -- if there is a
19 security issue, the JTF already has the ability to search. If
20 it is not a security issue, if it is between an accused and
21 his legal team, then that search does not rise to a level of
22 being permissible.

23 MJ [Col RUBIN]: Thank you.

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1 Trial Counsel, do you wish to present oral argument?

2 You may proceed.

3 ATC [LCDR LINCOLN]: Good morning, Your Honor. Lieutenant
4 Commander Lincoln, JAG Corps, United States Navy, for the
5 government.

6 MJ [Col RUBIN]: Good morning, Lieutenant Commander.

7 ATC [LCDR LINCOLN]: Thank you, sir.

8 The government concurs that the defense has the
9 burden by a preponderance of the evidence but believes that
10 they have failed to meet their burden of showing the accused
11 has a right to or that the commission should order that the
12 accused be provided with a laptop.

13 The defense argues in oral arguments today that this
14 is not about whether it's permissible -- or, excuse me, not
15 about whether the accused has a right to a laptop but whether
16 it is constitutionally legally and regulatorily permissible.
17 However, in their motion itself, multiple times the defense
18 argues that this is about, in fact, the defense having a
19 right. For example, in paragraph 6, under the circumstances
20 of this case, the accused's right of access to a write-enabled
21 computer is necessary to vindicate his rights.

22 In regard to whether the accused has the right to a
23 laptop, every court that has addressed has ruled that there is

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1 no right to a laptop or similar devices for prisoners. In
2 fact, the Eastern District of California in 2016, in a case
3 cited by the government, in their survey they found no court
4 has given this right to a prisoner or an accused. And in fact
5 the defense has not cited a single case on point to support
6 their argument that the accused has a right.

7 They cite various cases that talk about shackling,
8 involuntary administration of psychotropic medications, the
9 provision of a psychiatrist to assist defense counsel, and
10 discuss the pervasive -- excuse me, the adjudicatory
11 competence of the accused and how a laptop would assist in his
12 adjudicatory competence, which, you know, that's a legal term
13 of art, which apparently they are referencing the mental
14 competence of the accused. How those apply to the provision
15 of a laptop, the government is not quite sure, but they just
16 simply don't appear to be on point.

17 The motion is filled with bare conclusory statements
18 which are not sufficient to support the burden of
19 preponderance of the evidence. They argue that it's essential
20 for the accused to factually and rationally understand the
21 nature of the proceedings, to monitor and participate in his
22 defense, and to communicate with defense counsel, which
23 defense counsel even argues, they opened up their argument

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1 stating that, referencing how people communicate with each
2 other and the separation of 2200 miles and snail mail.

3 Now, by defense's own admission, the laptop would not
4 have the ability to communicate with defense counsel. It
5 would not be -- it would not have wireless or other
6 connectivity functionality. So that of itself is a red
7 herring.

8 Now, moving on to the reliance on the laptops in the
9 9/11 commission. Again, that reliance is misplaced. First of
10 all, that case they are dealing with almost 2 million pages
11 worth of documents, whereas defense pointed out there is about
12 31,000 pages right now of discovery that the accused has
13 access to view.

14 He has never been pro se, and the defense has not
15 articulated or shown or submitted any evidence whatsoever to
16 this commission to show why they have been unsuccessful and
17 why the accused has been unsuccessful in participating and
18 understanding the material before him.

19 While the nature of these commissions, both -- all
20 the commissions being held is in a sense unique, the sheer
21 volume of discovery is not unheard of. Courts throughout the
22 United States deal with enormous amounts of discovery
23 significantly greater than 31,000 pages and do it through a

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1 variety of methods. And the defense has again not shown why
2 the court in this case must order that a laptop be provided to
3 defense.

4 And specifically on that point, if we are looking at
5 the specific relief requested, which the government contends
6 isn't even clear, they are asking that the court order a
7 defense-provided security-cleared laptop. In their motion
8 they reference Lexis-Nexis. They reference video editing
9 software in their motion, which presumably they are still
10 requesting, even though their oral arguments refer to
11 audiovisual viewing capability, which is very different from
12 video editing, i.e., Adobe Premiere, specifically articulated
13 in their motion. So their request isn't even really clear to
14 the prosecution, we would argue to the commission.

15 And if they are, in fact, asking that the commission
16 order that a defense provided laptop be provided -- that it be
17 ordered to be provided to the accused, there is no evidence
18 that the defense has attempted to do this at any point and
19 that they have failed in being able to use some form of laptop
20 in line with the negotiations that are currently underway and
21 have not been settled in the 9/11 commission as far as we
22 understand, but there are still security issues involved. But
23 there is no evidence that they have attempted to do this and

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1 failed and, therefore, even require relief from this
2 commission at this time.

3 Thank you, Your Honor.

4 MJ [Col RUBIN]: Thank you. Trial Counsel, has the
5 defense requested, either to the government trial counsel or
6 the convening authority, a laptop computer?

7 ATC [LCDR LINCOLN]: For the accused, Your Honor, not from
8 the prosecution and, to our knowledge, not from the convening
9 authority, sir.

10 MJ [Col RUBIN]: Defense, could you address that? Has a
11 computer been requested before coming to the commission for
12 relief? Have you requested a laptop?

13 DDC [MAJ HALL]: Your Honor, trial counsel is correct that
14 the request did not go through the trial counsel. An inquiry
15 was made as to whether the defense could provide a computer to
16 Mr. Al-Tamir through the JTF, and the response -- the request
17 was made through MCD0, the Military Commissions Defense
18 Organization, to the JTF. The response was it would have to
19 be ordered by the military judge.

20 MJ [Col RUBIN]: Thank you.

21 ATC [LCDR LINCOLN]: And, Your Honor, the government does
22 not have a copy of that, nor is it in front of us or the
23 commission at this point.

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1 MJ [Col RUBIN]: Major Hall, did the defense receive a
2 formal response?

3 DDC [MAJ HALL]: I believe informally, Your Honor.

4 MJ [Col RUBIN]: Informal.

5 DDC [MAJ HALL]: From JTF to the Military Commissions
6 Defense Organization.

7 MJ [Col RUBIN]: Thank you. Major Hall, anything
8 additional from the defense?

9 DDC [MAJ HALL]: Yes, Your Honor. Can I have a moment,
10 please.

11 MJ [Col RUBIN]: Yes.

12 DDC [MAJ HALL]: Thank you.

13 [Pause.]

14 DDC [MAJ HALL]: Your Honor, a couple of items from the
15 defense. This is a request for resourcing. It's not about a
16 particular item, a particular type of computer. It is for the
17 resourcing to the defense. That is why the different cases
18 were cited in the defense's original brief.

19 As far as addressing the time delay, the snail mail
20 process, as I phrased earlier, communication between
21 Guantanamo and the Military Commissions Defense Organization
22 headquarters is sent digitally from the military
23 commissions -- MCDO's staff here at Guantanamo to the staff up

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1 north. So information that is reduced to a disc from a laptop
2 computer can be transmitted from the accused to the MCD0 staff
3 here, which is then sent ----

4 Your Honor, we are being informed that there is a
5 translation issue.

6 MJ [Col RUBIN]: Okay. Back up? Thank you. All right.

7 If you would just repeat that last sentence, please.

8 DDC [MAJ HALL]: Yes, Your Honor.

9 As far as the transmittal of communication from here
10 at Guantanamo to the offices north, to the defense team's
11 office north, it is done by delivering to the defense staff
12 here at Guantanamo and then digitally transferred to the
13 defense organization north of here. So reduced to a disc
14 where markings, editing, comments, commentary can be applied
15 directly to documents without having to reproduce them or just
16 lose the hard copy for however long the process takes, can be
17 simplified and sped up by putting on a disc being delivered to
18 the defense staff here at Guantanamo and transmitted north to
19 the legal staff there.

20 Yes, the other teams were pro se -- excuse me, the
21 other five individuals were pro se at the time. They are not
22 pro se now. They have not been pro se for a very long time.
23 We are talking about accused, men before the military

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1 commissions, that have full legal teams that utilized those
2 pieces of equipment, the laptops, to assist with their case.

3 Now, as far as the volume of evidence here that we
4 are dealing with today, we are not talking about a hundred
5 pages, we are not talking about a thousand pages. We are
6 still in the process of, not only receiving discovery from the
7 government, but requesting discovery. They have received --
8 they have knowledge of our -- what we believe are due to this
9 case, and the sheer volume of that could fill a normal sized
10 room if printed out, multiple rooms.

11 In the end, sir, this is about speeding up the
12 process. This is about using what already exists to help
13 facilitate the preparation of a defense, the sorting through
14 the massive amounts of information and getting ready to be in
15 front of this commission, sir.

16 MJ [Col RUBIN]: I just want to get back to something I
17 touched briefly before. Isn't the convening authority
18 responsible for resourcing to the defense?

19 DDC [MAJ HALL]: Ultimately, yes, Your Honor.

20 MJ [Col RUBIN]: It sounds like a request was not made,
21 though, to the convening authority for this laptop computer.
22 It was done informally to the JTF?

23 DDC [MAJ HALL]: Your Honor, there are multiple avenues

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1 for the acquisition of computers for the -- well, acquisition
2 of all resources for the different accused that go before
3 military commissions. The convening authority is one, as far
4 as obtaining either the funds to acquire or the actual items
5 themselves, that's one avenue. But even after you have
6 obtained those items, there is getting it to the accused
7 themselves, and that's handled through the JTF.

8 So while the physical acquisition of a computer is
9 possible, that still doesn't cross that bridge to getting the
10 laptop, that resource, to the accused.

11 MJ [Col RUBIN]: You said you received an informal
12 response. Is that e-mail or some type of telephonic contact
13 from the JTF?

14 DDC [MAJ HALL]: It was direct communication between the
15 JTF and the military commissions -- one moment, Your Honor.

16 As far as the exact medium of communications, I
17 cannot actually answer that fully at this moment, Your Honor.
18 It was from the JTF that the answer was received. This was
19 originated by a request from the Military Commissions Defense
20 Organization to the convening authority for the acquisition of
21 laptops for the active cases, to include this case, that are
22 before military commissions.

23 And the response from the JTF was that if it was

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1 ordered by the military judge, then it -- then that laptop
2 could make it through the system to the accused.

3 MJ [Col RUBIN]: But you don't know if that response was
4 e-mail, formal memorandum, or informal communications?

5 DDC [MAJ HALL]: Correct, Your Honor.

6 MJ [Col RUBIN]: Thank you.

7 Trial Counsel, any additional argument you would like
8 to present?

9 ATC [LCDR LINCOLN]: Your Honor, I am going to keep it
10 brief. I could respond point by point to some of the comments
11 just made and what is essentially the evidence that was not
12 submitted with the motion. The lack of resource was not
13 addressed in their brief.

14 And the government just believes that this is -- it's
15 not ripe for the commission to make a ruling. In the context
16 of courts throughout the United States, and in fact this is
17 starting to become memorialized, parties must meet and confer
18 and discuss these issues before spending a court's or a
19 commission's time on something that could certainly be
20 possibly resolved outside the context.

21 So the government believes it is not ready for a
22 ruling, that the defense has not explored all their avenues,
23 and it is not time for the court -- for the commission to make

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1 a ruling.

2 Nothing further from the government, subject to your
3 questions, Your Honor.

4 MJ [Col RUBIN]: Thank you. No further questions.

5 Defense, I would like to see any correspondence you
6 may have regarding this matter. I don't know if you have any,
7 but the commission would like to see that.

8 DDC [MAJ HALL]: Understood, Your Honor.

9 MJ [Col RUBIN]: Thank you.

10 Major Hall, do you have any idea when that
11 information may be provided to the commission?

12 DDC [MAJ HALL]: A moment, Your Honor?

13 MJ [Col RUBIN]: Yes.

14 DDC [MAJ HALL]: Your Honor, the defense can obtain
15 information later today.

16 MJ [Col RUBIN]: Thank you.

17 Counsel, the commission will take this matter under
18 advisement and notify the parties of the court's ruling. I
19 would like to look at that additional paperwork, whatever you
20 may have.

21 Counsel, our next scheduled session is the week of
22 9 January 2017. Is there anything further from either side
23 before the commission recesses?

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1 DC [MR. RUSHFORTH]: Nothing from defense, Your Honor.

2 MJ [Col RUBIN]: Thank you, Mr. Rushforth.

3 ATC [LCDR SPENCER]: Your Honor, just to quickly clarify
4 the government's position. The government feels that the
5 commission can rule presently on whether there is a right to a
6 computer. In terms of the ripeness argument, the government
7 feels that whether a computer is ultimately provided, that is
8 potentially not ripe, based on what's not yet been done.

9 But whether the accused has a right to the computer
10 can certainly be ruled on now by the commission.

11 MJ [Col RUBIN]: Thank you for that clarification.

12 Trial Counsel, anything from the government before
13 the commission recesses?

14 TC [CDR SHORT]: No, Your Honor.

15 MJ [Col RUBIN]: Thank you. The commission is in recess.
16 [The R.M.C. 803 session recessed at 1102, 15 November 2016.]

17 [END OF PAGE]

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