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1 [The R.M.C. 803 session was called to order at 1042, 17 May
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 All right. Mr. Rushforth? Okay, Mr. Rushforth, my
7 first question whenever I hear a motion is who has the burden
8 and what is the burden?

9 DC [MR. RUSHFORTH]: Your Honor, we have the burden of
10 demonstrating that we meet the elements for a continuance. I
11 can be mercifully brief I believe here, Your Honor, because we
12 discussed this, to some extent, last evening in the conference
13 with Your Honor.

14 MJ [CAPT WAITS]: I don't want you to omit anything that
15 was discussed in that conference for expediency sake. I want
16 it all on the record.

17 DC [MR. RUSHFORTH]: I don't want to omit anything for the
18 expediency sake, Your Honor. I intend to omit some things
19 because we have heard and absorbed your admonitions and we
20 agree with them, and your admonitions including that we meet
21 with counsel for the other side to set a schedule for pretrial
22 business, that it is premature to set a trial date.

23 We also heard and agree -- or at least have absorbed

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1 your admonitions regarding the issue of unlawful influence and
2 the issue of the health risks. We are going to reserve -- I'm
3 not going to argue those issues today. I'm going to -- we are
4 likely to file separate motions on both of those issues. But
5 I'm not going to argue those issues today with respect to
6 their support or nonsupport for our motion for a continuance.

7 MJ [CAPT WAITS]: Thank you. I really appreciate that.

8 DC [MR. RUSHFORTH]: So that's what I mean by I think I
9 can be mercifully brief.

10 MJ [CAPT WAITS]: That's wonderful.

11 DC [MR. RUSHFORTH]: Our motion for a continuance really
12 rests on three primary bases. One is we don't have our
13 counsel team together. And I find it a little rich that the
14 other side says, well, you only need the team that you've got.
15 I have a couple of comments to that.

16 One, in all the years I've been litigating cases in
17 federal court, the other side has never been able to tell me
18 what my team is, and I don't think that's -- I'm not
19 comfortable with that happening today. But they control a key
20 aspect of our putting together our team. "They," being the
21 United States Government, controls our access to top secret
22 information by slow-rolling or otherwise not getting to our
23 clearances for some members of our team.

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1 And the only way to remedy that, Judge, is to put the
2 onus on the United States to at least get these -- I know the
3 United States nor the judge can -- I'm not asking for an order
4 that certain people be cleared. That's not your prerogative,
5 it's certainly not in my purview to ask that a certain person
6 be cleared. But we can certainly get them interviewed, or we
7 can get them in the process.

8 And what's happening in this case is that certain
9 members of this team -- it's just come to a complete halt.
10 There are no interviews going on; there is nothing with
11 respect to the clearance process going on. And so we are not
12 getting people cleared that have been assigned to this case.
13 And they are critical people. Two of them are my partners and
14 they litigated several habeas cases with me. They're
15 extremely familiar with some of the issues in this case.
16 They're extremely familiar with Guantanamo, and I need them.
17 This team needs them.

18 And it's a little rich to be told that we don't need
19 them by a team that has multiple people on their team, many
20 more people than we do. And if you multiply the number of
21 people on their team by the number of years that they have
22 been involved in this case, then it's not a close fight. They
23 are multiple years, man-years, woman-years ahead of us in that

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1 regard.

2 And so the first thing that has to happen, in my
3 view, Judge, is the government has to be told we're not going
4 to move until these people at least get in the pipeline and
5 get moved through the pipeline. And if the answer is no,
6 you're not entitled to a top secret clearance, so be it. But
7 it's not happening. And it's extremely frustrating because --
8 and to be told you don't need these people is just wrong. We
9 do need these people.

10 MJ [CAPT WAITS]: Okay. I want to ask you a question. In
11 the 802 last night, I believe that you identified particular
12 subject matter areas that one or more of these people were
13 associated with in terms of your, I guess, work, you know,
14 areas of responsibility -- I don't know what you want to call
15 it -- areas of expertise. Is that so or are all these
16 people ----

17 DC [MR. RUSHFORTH]: That is so. They're not all
18 generalists. Professor Moore is a specialist in international
19 law.

20 MJ [CAPT WAITS]: Okay.

21 DC [MR. RUSHFORTH]: And her expertise is absolutely
22 essential to us with respect to -- for example, not solely
23 but, for example, to the motion regarding personal

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1 jurisdiction.

2 MJ [CAPT WAITS]: Okay. I want to ask the government a
3 question on that, then. On the issue of personal
4 jurisdiction, is the government going to be using classified
5 evidence?

6 ATC [LCDR SPENCER]: No, Your Honor.

7 MJ [CAPT WAITS]: Okay. Does that make a difference?

8 DC [MR. RUSHFORTH]: Well, it may well be, Your Honor,
9 that we use classified evidence in making our motion. And the
10 notion that she can come in and do her job without having
11 access to classified evidence, I frankly think that is going
12 to limit her very much to enable her to do her job. And I
13 think the notion that they're not going to use classified
14 evidence doesn't answer the question. We may want her to look
15 at a lot of classified evidence in making the judgment -- or
16 in rendering the contribution to our team that she will
17 render.

18 MJ [CAPT WAITS]: Okay.

19 DC [MR. RUSHFORTH]: Have I answered your question, Judge?

20 MJ [CAPT WAITS]: I think so.

21 DC [MR. RUSHFORTH]: The second element that -- and,
22 Judge, these things are going to come up over and over again.
23 When we meet with counsel to talk about, well, we can hear

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1 this motion on this date, we're going to say no, we can't,
2 because we can't prepare it, because our team isn't
3 constituted the way it must be constituted.

4 And secondly, we don't have full discovery. Now,
5 there are discovery orders that have been issued in this case
6 before I ever became involved that have been blown right
7 through by the government. We heard last night that the order
8 which was supposed to be complied with a year and a half ago,
9 September of 2014, still has not been fully complied with.
10 Still has not been fully complied with. We can't do our job
11 until it is.

12 And last month, we filed another 200 discovery
13 requests. We expect the government to respond to those. And
14 when they do -- and if need be, we'll bring motions to compel.
15 We can't do our job until we have that discovery.

16 So while we're perfectly -- we're not only happy,
17 we're bound to follow Your Honor's advice or order to meet
18 with counsel and to come up with a pretrial plan. We will do
19 our very best to do that. But we will be handcuffed unless we
20 have our team put together and unless we have full
21 discovery -- access to full discovery. That's where we are,
22 Judge.

23 Now, there's a third point which I'll mention. And

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1 Your Honor is very aware of the case pending in front of the
2 D.C. Circuit, the en banc panel, Bahlu. And that case
3 addresses an issue that goes to the very heart of this case,
4 namely whether conspiracy can be tried before the military
5 commissions. If it can be, then this case will move forward
6 in its full glory. If the D.C. Circuit says that it cannot
7 be, then this case will change radically -- radically. And
8 there is really no use whatsoever, in my view, to going
9 forward in motion practice and in pretrial practice until that
10 issue is resolved.

11 Thank you, Your Honor.

12 MJ [CAPT WAITS]: Okay. Go ahead -- wait.

13 The reason -- you know, there are several outstanding
14 motions that relate to conspiracy. And the reason that the
15 commission -- that this commission has not ruled on those is
16 because there is no urgency to resolve those motions until
17 either Bahlu is decided or we have a trial. Okay? Whichever
18 one of those happens first is going to dictate the timing of
19 any decisions on any motion related to conspiracy.

20 DC [MR. RUSHFORTH]: Understood.

21 MJ [CAPT WAITS]: But in the pleadings that you filed even
22 to continue this hearing, you raised a lot of issues. Now,
23 you know, you said at the beginning of your argument that

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1 you're going to probably refile those issues as, I assume,
2 motions for appropriate relief, or whatever other proper style
3 they should be filed under. Those types of issues have
4 nothing to do with how many people you have on your team or
5 how much discovery the government hasn't provided yet. Those
6 are legal, what have been called earlier in this commission,
7 law motions.

8 And the commission finds no reason why these two --
9 that is, the provision of discovery and evidentiary-related
10 motions and progress toward those things -- cannot occur in
11 parallel to the litigation of law motions. Okay?

12 DC [MR. RUSHFORTH]: Your Honor ----

13 MJ [CAPT WAITS]: So I hear everything you're saying, but
14 asking for a bald "we need 18 months before we do anything,"
15 the commission does not find that reasonable, because there's
16 a lot of business we can take care of that has nothing to
17 do -- and I'm as frustrated as you are about the provision of
18 discovery, okay? As I said last night in the 802 conference,
19 that is the long pole in the tent. Regardless of whatever
20 else has happened in this case, we wouldn't be anywhere
21 different, to my knowledge, on the road to completing
22 discovery regardless of what's happened up until now
23 collaterally.

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1 So I hear what you're saying, but I don't -- I don't
2 accept the proposition that everything has to come to a dead
3 stop for a year and a half while we wait for those things that
4 you're talking about to happen.

5 DC [MR. RUSHFORTH]: Let me -- if I may respond, Judge,
6 let me say a couple things: We're not asking for 18 months
7 dead stop until X, Y, and Z happens. But the way to get it
8 done is to say to the government, the clock will start on
9 getting this matter ready for trial when these guys get their
10 team together and when discovery is completed. That's when it
11 should start.

12 Now, I hear Your Honor saying there's some law
13 motions that could be done. Absolutely, we agree with that in
14 principle. But, you know, when the government says, well, the
15 Fifth Amendment motion is just law, well, no, it's not. It
16 involves all kinds of facts. So there will be a back and
17 forth about what's purely law and what involves facts that
18 demand discovery.

19 MJ [CAPT WAITS]: Sure.

20 DC [MR. RUSHFORTH]: But if someone can say -- if Your
21 Honor tells us this is a purely legal motion -- for example,
22 what about the health risks of being in this courtroom?
23 Should that delay things until the Navy tells us whether it's

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1 risky or not? Well, that involves some discovery, too,
2 apparently. We've already consulted an expert on the issue.

3 I'm not arguing it today. All I'm saying is that
4 things that sometimes look like they're purely legal can
5 involve factual issues. And if something is purely legal,
6 then I agree with Your Honor. I agree that we can go forward
7 with those things and get those things out of the way. But
8 many -- there are many things that just aren't going to move
9 forward until discovery is complete and until our team gets
10 constituted.

11 MJ [CAPT WAITS]: Thank you, Mr. Rushforth.

12 DC [MR. RUSHFORTH]: Thank you.

13 MJ [CAPT WAITS]: Lieutenant Commander Spencer?

14 ATC [LCDR SPENCER]: Thank you, Your Honor.

15 Your Honor, the defense appears to be retracting the
16 primary basis for their motion under 015K, which was specific
17 to Rushforth -- Mr. Rushforth. It did mention the civilian
18 counsel to be employed at DoD expense, who I believe is no
19 longer detailed to the case and they're no longer a factor.

20 Essentially, the 015K motion was -- in the absence of
21 the detailed civilian counsel under the Convening Authority's
22 discretionary authority, remains only Mr. Rushforth, only the
23 pro bono civilian counsel. Mr. Rushforth, as we've now

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1 learned, has been read on. He possesses all the necessary
2 clearances. Therefore, the basis for the defense's motion in
3 015K no longer exists.

4 Now, the new basis that the defense has articulated
5 today and the new testimony, if you will, from Mr. Rushforth,
6 regarding these new counsel, the new counsel that the accused
7 apparently elected as well, all of that information was never
8 previously provided to the prosecution. None of the
9 prosecution team had ever heard any of those names until last
10 night at the R.M.C. 802 conference.

11 I submit to the commission that this new information
12 could have and should have been part of an amendment or a
13 supplement to 015K if that's what the defense wished to form
14 the basis of this new continuance request.

15 MJ [CAPT WAITS]: So you literally never heard of these
16 people until the 802 last night and you were not aware of them
17 having done any paperwork to initiate their security
18 clearances?

19 ATC [LCDR SPENCER]: That's correct, Your Honor.

20 MJ [CAPT WAITS]: Okay. Mr. Rushforth, I'm going to ask
21 you -- I mean, you're talking about the government not moving
22 forward on obtaining clearances for these other attorneys.
23 And the prosecution themselves are saying they've never even

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1 heard of these people.

2 DC [MR. RUSHFORTH]: Well, I don't know whether that's
3 accurate or not, but the security clearance applications have
4 long been submitted, and these people have been detailed to --
5 two of them, at least, have been detailed to the defense.
6 They've been admitted to the pro bono pool. So it's a little
7 incredulous to me that they didn't know we were trying to get
8 these people onto this team.

9 MJ [CAPT WAITS]: How would they know if you didn't tell
10 them?

11 DC [MR. RUSHFORTH]: Well, we submitted all of these
12 applications to WHS.

13 MJ [CAPT WAITS]: The prosecutors have no way of knowing
14 which pro bono counsel that are applying to get in the pool
15 are going to be assigned to which cases.

16 DC [MR. RUSHFORTH]: Your Honor, it's a little hard for me
17 to see why that's such a -- they're not surprised as of today.
18 I'm telling them today. And what exactly are the consequences
19 for them not knowing until today?

20 The government has these applications and they should
21 move the applications. And the fact is if we sit down with
22 them and we start talking about work on the personal
23 jurisdiction motion, we're going to be saying, "We need our

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1 team fully constituted." So let's assume that they are
2 completely surprised as of today. So what?

3 MJ [CAPT WAITS]: Okay. I'm not endorsing the
4 government's processing of classified -- you know, of security
5 clearances as a model of efficiency, okay? But if you're not
6 aware, your clearance and your read-ons, by recent standards
7 in the federal government, were accomplished in record time,
8 okay?

9 People are talking about -- you know, when you were
10 first brought onto the case, people were telling me this is
11 going to take two years. Well, it took less than six months.

12 So the answer to your question is if they had known
13 sooner, possibly the same thing could have been done for these
14 other attorneys. That's the answer to your question.

15 DC [MR. RUSHFORTH]: Well, let's get them started today,
16 then. You know, Judge, when I came in 1978 in the Carter
17 Administration, I was the deputy general counsel to the
18 Secretary of Defense. I had to have every clearance known to
19 mankind. And I came in without any clearances, nor had I ever
20 had a clearance. Those clearances were done in about two
21 weeks because the Secretary of Defense needed me -- or wanted
22 me, at least. Whether he needed me or not, I'll let him say
23 that.

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1 But this can be done. And, in fact, when you tell me
2 how fast mine was done, well, I submitted an application in
3 September and then I was told in December they weren't even
4 processing it.

5 MJ [CAPT WAITS]: I told you I wasn't endorsing the
6 process as a model of efficiency.

7 DC [MR. RUSHFORTH]: So let's get them done now. Let's
8 get the thing started today. I mean, I've got -- one of my
9 partners who's been with me for ten years working habeas cases
10 and is extremely knowledgeable and, quite frankly, a very
11 gifted trial attorney, Bob Palmer, that I want in this case,
12 he hasn't even been interviewed. It's been three and a half
13 months. He has not had a single interview.

14 Now, that's just outrageous from my point of view.
15 And it certainly doesn't lead to the -- I'm going to continue
16 to argue with these folks that we need our full team. And
17 when we meet with them, as Your Honor has ordered, I'm going
18 to tell them we don't have our full team. And I'm going to
19 continue to make that point.

20 And the only way to get this to happen, in my view,
21 is to tell the prosecution, the government of the
22 United States, we need this to happen. And until it happens,
23 this case is not moving forward.

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1 MJ [CAPT WAITS]: All right.

2 Commander Spencer, I won't interrupt you again, I
3 don't think.

4 ATC [LCDR SPENCER]: Thank you, Your Honor.

5 MJ [CAPT WAITS]: But go ahead.

6 ATC [LCDR SPENCER]: Your Honor, the government would like
7 to clear a couple of things up. As is evident from the record
8 and multiple pleadings, Mr. Rushforth filed security clearance
9 application to the Department of Justice in September, not to
10 the Department of Defense. It was prior to our knowledge of
11 any of his involvement on the case. There were a number of
12 issues with the way that the Office of Chief Defense Counsel
13 proceeded and is evident from our response, Appellate
14 Exhibit 055F, there was even some delay requested by the
15 Office of Chief Defense Counsel for Mr. Rushforth.

16 So the constant accusation of slow-rolling, I believe
17 is the phrase that was used, is inaccurate, not based on fact,
18 and also does not reflect the feet dragging by the defense in
19 this case with respect to Mr. Rushforth's clearance.

20 I don't know whether the same thing has happened with
21 these four new people or not. Again, this is all new evidence
22 or testimony or proffers from the defense that were not part
23 of the motion, not part of the briefings, and so to form the

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1 basis of a decision on 015K, based on this new information, I
2 think, suggests respectfully that the commission should not
3 consider that information.

4 That's really all a threshold matter. Because the
5 primary issue that the defense is ignoring or is apparently
6 uninformed of is there is a distinction between what the
7 defense would like to have and what the accused has a right to
8 have proceeding forward. The accused -- the rule is very
9 clear. The accused has a right to civilian counsel. The
10 government has been consistently reasonable with respect to
11 that right, attempted to afford him that opportunity when
12 possible, and even concurred with delay so that Mr. Rushforth
13 could be read on and could be ready to proceed forward with
14 the case.

15 The accused does not have the right to multiple
16 civilian defense counsel at no expense to the United States or
17 at expense to the United States. In fact, the commission
18 itself in the September hearing specifically instructed that
19 with respect to the GS-15 DoD civilian defense counsel that
20 the Chief Defense Counsel was appointing to assist that the
21 court would not wait for her to be read on prior to
22 proceeding. Why? Because he has no right to her. That's a
23 discretionary decision by the Chief Defense Counsel to assign

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1 her. Ultimately he, using his discretion, unassigned her or
2 moved her to a different case.

3 These four new counsel, whether they're detailed or
4 not from what Mr. Rushforth just said, two are detailed, he
5 thinks, we've previously had the issue of using the term
6 "detailing" inartfully. Detailing, as you know, is a term of
7 art where they're assigned to the case. It's been recently
8 the Chief Defense Counsel's position that counsel are
9 initially assigned to the case internally for the purposes of
10 obtaining a security clearance. Based on the representation
11 of Mr. Rushforth just a moment ago, it's not even clear that
12 all four have been internally assigned because Mr. Rushforth
13 said only two had been detailed that he knows of.

14 So there are a number of facts or allegations, or
15 however you'd like to characterize them, that the defense is
16 claiming are relevant to this motion but they've given you no
17 evidence, Judge.

18 MJ [CAPT WAITS]: Well, doesn't -- I mean, doesn't the
19 prosecution do the same thing in terms of assigning counsel
20 internally to particular cases? I think this is what I heard
21 last night in the 802. And subsequently, at some point
22 potentially, as Major Milton, I think, was this week, actually
23 detailed to the case?

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1 ATC [LCDR SPENCER]: Your Honor, Major Milton has been
2 detailed for some time, Your Honor. We don't have -- we have
3 internal assignment as well, but we don't -- as a rule or
4 general practice, don't have attorneys who are not detailed
5 counsel assigned to the case signing pleadings.

6 MJ [CAPT WAITS]: So Major Milton has been signing
7 pleadings?

8 ATC [LCDR SPENCER]: It's my recollection that she has,
9 Your Honor, post her detailing.

10 MJ [CAPT WAITS]: Post her detailing?

11 ATC [LCDR SPENCER]: Yes.

12 MJ [CAPT WAITS]: How long has she been detailed to the
13 case?

14 ATC [LCDR SPENCER]: I don't have that information, Your
15 Honor.

16 MJ [CAPT WAITS]: Okay. Honestly, I'm not hearing much
17 difference between the way the defense assigns people and
18 ultimately details people to cases than what the government
19 does.

20 ATC [LCDR SPENCER]: Yes, Your Honor. Understood.

21 MJ [CAPT WAITS]: So you're not really ringing any alarm
22 bells for me. I agree that I don't want to see pleadings
23 signed by people who I don't know are detailed to the case. I

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1 don't want that. Okay?

2 ATC [LCDR SPENCER]: Your Honor, my point is ----

3 MJ [CAPT WAITS]: Right now I don't see a whole lot of
4 difference between the way the government is doing business
5 and the way the defense is doing business.

6 ATC [LCDR SPENCER]: With regards to assigning internal
7 counsel, yes, that's accurate, Your Honor. However, my point
8 is based on purely representations. We have no detailing
9 memos, we have no information, no internal assignment
10 information. What we have is limited and incomplete
11 information from the defense that -- last night we learned
12 that the four counsel were internally assigned. Today
13 Mr. Rushforth said he believes at least two of them are.

14 So in terms of -- they're asking the commission to
15 full stop until these four people, two of whom the defense has
16 no right, regardless of whether they would like him or not --
17 or like these people or not, the defense wants to wait until
18 those people are ready to go. And that's not a reasonable
19 request, Your Honor.

20 Specifically in their motion, the defense cites a
21 couple of cases. The first case that they cite that I would
22 like to invite the court's attention to is the Avery case.
23 The Avery case dealt with a capital murder case for which two

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1 court-appointed attorneys were assigned five days before a
2 capital murder trial. The Supreme Court said that he was
3 accurate -- that the accused was accurately represented in
4 that instance and there was no prejudice to the accused.

5 It's ironic that they would cite that case as well as
6 the Unger case, which had a four-and-a-half-day period between
7 new counsel being assigned and them being ready to go
8 according to the Supreme Court to prepare. And that was for
9 trial in the capital murder case, and then in the Unger case,
10 a contempt hearing.

11 As we discussed last night, Your Honor, the
12 government is not suggesting that the defense should be ready
13 to go to trial five days from now or four and a half days from
14 now. But what the defense is asking the commission is to deny
15 the motion for continuance, keep the currently two scheduled
16 sessions of court, which are July and September, and proceed
17 with other matters that even the defense apparently concedes
18 we could proceed with.

19 They also cite the Miller case, Your Honor, which is
20 interesting. Miller points to Thomas for its authority. And
21 I'd like to read a quote from Thomas. "The exercise of the
22 right to civilian counsel 'cannot operate to unreasonably
23 delay the progress of the trial.' Only an unreasoning and

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1 arbitrary 'insistence upon expeditiousness in the face of a
2 justifiable request for delay' violates the right to the
3 assistance of counsel."

4 This is clearly not an unreasoning and arbitrary
5 request for expeditiousness on the commission's part nor on
6 the government's part. Again, the government has been
7 reasonable in allowing sufficient time for Mr. Rushforth and
8 attempting as quickly as possible to get him the required
9 read-ons.

10 Both of those quotes, the first one is from
11 United States v. Thomas quoting United States v. Montoya 13 MJ 268,
12 and Morris v. Slappy, 461 U.S. 1. Both of those talk about
13 the right to counsel.

14 As we've discussed, 506 says that he has the right to
15 civilian counsel, he has the right to military counsel,
16 detailed military counsel, or right to individual military
17 counsel, which has been previously briefed. The government is
18 not suggesting that they shouldn't proceed with the current
19 team in place but that he's adequately represented by counsel.
20 He is adequately represented by civilian counsel, with more
21 experience than I've been alive apparently, and dating back to
22 the Carter administration, perfectly capable of proceeding in
23 the current proceedings and three military counsel with

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1 probably 30 years of military justice between them. The
2 accused is adequately represented.

3 Even if we had detailed counsel who were cleared or
4 ready to go, 805 would still allow us -- the discussion under
5 805C would still allow us to proceed in their absence. So the
6 defense is asking you to ignore 805C and to ignore 506 and
7 wait until four people to whom the accused does not have a
8 right are read on before they proceed; and that's just not a
9 reasonable request, Your Honor.

10 The other two bases besides the team composition that
11 the defense now raises for the first time is the issues of
12 discovery and the issues related to Bahlul. I'll first
13 address, out of order, the issues related to Bahlul.
14 Appellate Exhibit 020, 026 and 028 as the court previously
15 discussed are pending but I would also for the record clarify
16 those motions have not even been argued. They've been filed
17 and the court, at the government's request or -- in agreement
18 with the government continue the arguing of those motions
19 until such time as we have a decision in the Bahlul case or
20 until such time as trial, whichever comes first.

21 So those are pending issues. That's not a basis
22 for -- that's not good cause for continuing the July or
23 September hearings, Your Honor.

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1 Lastly, with respect to discovery, it's true that the
2 government has provided a large amount of discovery as
3 previously discussed, previously provided to the clerk as well
4 as previously provided to the defense. The government would
5 like the -- invite the commission to view Appellate Exhibits I
6 believe it's 015N and 0150. Those are inventories of
7 discoveries that have been provided.

8 MJ [CAPT WAITS]: Is this -- this is, okay, so this
9 includes November is unclassified and ----

10 ATC [LCDR SPENCER]: Your Honor, both documents are
11 unclassified.

12 MJ [CAPT WAITS]: Right. But I'm talking about what they
13 contain.

14 ATC [LCDR SPENCER]: Yes, that's correct, Your Honor.
15 November references the Bates numbers -- essentially the
16 inventory of documents that's been produced to the defense
17 already. November is the unclassified documents; Oscar is the
18 classified documents.

19 MJ [CAPT WAITS]: Other than unclassified?

20 ATC [LCDR SPENCER]: Correct. Classified higher than
21 unclassified, yes, Your Honor. And those are documents that
22 are currently in defense possession ----

23 MJ [CAPT WAITS]: Okay.

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1 ATC [LCDR SPENCER]: ---- not documents that are part of
2 the ongoing 505 process, Your Honor.

3 MJ [CAPT WAITS]: Right.

4 ATC [LCDR SPENCER]: As previously mentioned by the court,
5 those documents, with respect to the classified portion,
6 represent approximately three quarters -- it's actually
7 slightly higher than 80 percent of everything currently in the
8 government's possession. The remaining 20 percent, a portion
9 of those are going through the 505 process now, Your Honor, as
10 you're aware.

11 For the unclassified, that represents between 90 and
12 95 percent of the discovery that the government is aware of
13 for discoverable, unclassified material.

14 With respect to the unclassified material, what that
15 means, then, is that Mr. Rushforth, since filing a notice of
16 appearance with the commission on 17 December 2015, has had or
17 should have had access to the overwhelming majority, almost
18 100 percent of the unclassified discovery in the case. The
19 same is true for these four new counsel that the prosecution
20 became aware of only yesterday.

21 With respect to the classified evidence, obviously
22 Mr. Rushforth would not have had that. And contrary to what
23 was previously represented to the court, Mr. Rushforth did not

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1 possess his secret clearance prior to -- prior to being
2 adjudicated at the top secret/SCI level. He had previously
3 had it at some point but I believe it was expired, so he was
4 unable to review secret material -- contrary to the
5 government's previous understanding, he was unable to review
6 secret material until his March 3, 2016 TS/SCI read-on.

7 With respect to -- so in terms of discovery, as the
8 court noted, it's an ongoing discovery obligation. It's been
9 an ongoing discovery obligation since the beginning. Much of
10 that information that has been turned over and that we are
11 working through now is information that the defense -- that
12 the government did not have at the time of the court's order
13 18 months ago. It is a volume of information, the
14 overwhelming majority of which the defense has had for quite
15 some time. Even before the new military counsel have come on
16 board.

17 So Major Kincaid who was, I believe, cleared and
18 detailed as of the end of October, and then Major Hall and
19 Lieutenant Commander Lofland who were also cleared shortly
20 thereafter, within a few weeks, have had, since then, almost
21 what, eight, nine months to review classified discovery. And
22 before that, they could even review unclassified discovery.

23 They've had ample time. The accused has a fully

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1 constituted defense team, to which he has a right. Waiting
2 for countless other people, potentially, is not a reasonable
3 request. By the defense's rationale, the defense -- if
4 Mr. Rushforth had previously worked with 30 or 40 attorneys or
5 every other attorney at his law firm with whom he has a
6 relationship, by that rationale we should wait for literally
7 countless number of attorneys to come on because the defense
8 says they need them. That's not the standard, Judge. The
9 standard is to what is the accused entitled? He has more than
10 what he is entitled to under law. And the government is of
11 the position the defense should be ready to proceed.

12 Now, the government does agree with the defense with
13 one point that Mr. Rushforth made repeatedly, which is that
14 it's clear from Mr. Rushforth position that the defense will
15 not agree to any dates, with any sit-down with the government,
16 until their team is fully constituted. So I respectfully
17 submit, Judge, that any sit-down would be less than productive
18 because it's their position that he has -- he should have the
19 right, even though the rules don't say that, that he should
20 have the right to all these other counsel.

21 And that without those counsel, if the defense is
22 unwilling to proceed, attempting to have the parties mutually
23 agree to dates would probably be an unproductive exercise.

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1 The defense -- the government suggests that rather
2 than do that, last time -- previously in this case, both the
3 defense and the government submitted proposed dates. There
4 was some coordination on that, but there was not an agreement.
5 It was Appellate Exhibit 011A and 012A. Those were proposed
6 dates by the government and the defense. The government would
7 ask following the requested denial of 015K that the court
8 order the parties to provide similar proposed milestones and
9 upon those proposals, Your Honor, the commission could then
10 make a ruling as to what was going to be litigated in July --
11 or in the July hearing or the September hearing.

12 Specifically, as previously stated, the government
13 suggests respectfully that the 045A -- I'm sorry, Appellate
14 Exhibit 045 is a purely law motion. Whether Miranda applies
15 or not in a military commission, contrary to what
16 Mr. Rushforth just said, does not require any discovery,
17 doesn't require any evidence. It's a strictly does Miranda
18 apply in a military commission? That could easily be argued
19 in July.

20 The new -- newly raised issue by the defense of them
21 needing their entire defense team before they can go forward
22 could also be a motion for appropriate relief as to what
23 equals due process and what equals appropriate representation.

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1 That could also be litigated in July.

2 The multiple references to the government's supposed
3 delay in the clearance procedure and the discovery procedure,
4 the defense repeatedly in its motion, in its 015K motion,
5 discusses excludable delay. As the government points out in
6 its response, that's misplaced. The judge has already ruled
7 on that delay. But should the defense relitigate that issue
8 in the form of a speedy trial motion, for example, that's also
9 something that could be litigated in July.

10 There are multiple issues that we could proceed
11 forward with, Your Honor. The defense has had ample time to
12 prepare. He's had three fully qualified defense counsel for
13 the better part of nine months. And Mr. Rushforth is clearly
14 capable of proceeding forward in preliminary matters in this
15 case, Your Honor. The government is not suggesting that he
16 should be ready for trial in five days, even there's Supreme
17 Court precedent that says in certain circumstances that's
18 authorized.

19 Thank you, Your Honor.

20 MJ [CAPT WAITS]: Thank you.

21 All right, Mr. Rushforth, since you have the burden,
22 I will give you the last word.

23 DC [MR. RUSHFORTH]: Thank you, Judge. I can be brief. I

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1 heard the government say they haven't performed their
2 discovery obligations. They didn't say that they blew through
3 the September 2014, over 18 months ago discovery was supposed
4 to be complete. It not only wasn't complete, it isn't
5 complete today. And until it's complete, we can't do our
6 jobs.

7 And then there was -- counsel said, well, we're
8 springing these four people on you and we've never heard about
9 them and it's not evidence anyway because Mr. Rushforth is
10 just telling you.

11 Well, I represent to the court, it's a representation
12 from me to the court that these four people are essential to
13 my team. And they have already, as I'm reminded by my
14 co-counsel, been assigned to the pro bono pool, all four of
15 them. And they are now awaiting their clearances and, you
16 know, they're waiting and waiting and waiting. And we need
17 them on the team to be fully prepared.

18 And, you know, I'm making that representation to the
19 court today. And the only way we're going to get it moving,
20 Judge, in my opinion, is to say to the United States, and in
21 this case it's the prosecution, to say to the United States,
22 We're going to move forward, but we're going to move forward
23 when you're at least beginning to process the security

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1 clearances for members of this team.

2 It is very rich, indeed, for a team that has multiple
3 years of experience on their team to say, well, we're okay,
4 we're fully constituted. We're not. We need these people and
5 we can't really move forward until we have them.

6 Thank you, Judge.

7 MJ [CAPT WAITS]: Okay. I want clarification on this.
8 You're saying that the defense is ready to move forward once
9 the processing of the security clearances for these four
10 lawyers commences?

11 DC [MR. RUSHFORTH]: If we -- Judge ----

12 MJ [CAPT WAITS]: I mean, I'm just telling you what I
13 think I just heard.

14 DC [MR. RUSHFORTH]: If we can get -- if we can get them
15 started down the process with an assurance of some kind that
16 it would be complete within a number of months, that would be
17 wonderful.

18 I'm not saying we can't move forward an inch until
19 these guys are all cleared and come on. But right now they're
20 sitting in complete and total limbo. As you said, Judge,
21 you've been told this is going to take two years. Well,
22 that's just not acceptable to our team. This case will be
23 over in two years -- or should be over in two years. And

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1 there's no acceptable reason why these -- the process for
2 these folks can't begin now. But it's not going to unless the
3 government suffers some consequence for just sitting there
4 doing nothing.

5 I'll tell you two quick stories. Premal Dharja, who
6 was assigned to this case, still doesn't have her read-ons.
7 If she were sitting here at counsel table -- she's been moved
8 to another case -- if she were sitting here, she still
9 wouldn't be cleared because she hasn't been read on.

10 Secondly, one of my partners, Jimmy Szymanski -- I'm
11 testifying, Judge, I know, but I'm representing to you, he
12 found out that his clearance had been assigned to a woman on
13 maternity leave. And he jumped on it and called the primary
14 person and said, "This person's on maternity leave," and so it
15 got reassigned to somebody who wasn't on maternity leave.

16 Now, that just isn't acceptable. It shouldn't be
17 acceptable, and yet it goes on and on.

18 And until the government suffers some consequence for
19 just blowing through these discovery deadlines, then they'll
20 continue to do it. That's what always happens.

21 And so I'm asking you, Judge -- I'm not asking for
22 18 months. I'm asking you to order that the clearance process
23 begin on these four people and that they complete their

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1 discovery. And, you know, it can be three or four months.
2 You know, I don't see why it should take 18 months, but we're
3 just not going to be able to argue motions and get into
4 pretrial preparation without these things being done.

5 MJ [CAPT WAITS]: Okay. All right. I'm not making an
6 order or a ruling right now, Trial Counsel. But I'm telling
7 you that these people are apparently in the pro bono pool,
8 okay?

9 I'm taking Mr. Rushforth at his word that they have
10 applied for clearances. And I'm not ruling that the accused
11 is entitled to these people or that the defense team is not
12 going to be complete until they are in place with clearances.
13 I'm just telling you that once their applications have been
14 filed, then obviously in due course they are supposed to be
15 processed. Whatever you did in Mr. Rushforth's case, whatever
16 you had to do with it or whatever any government entity had to
17 do with the, at least by federal government standards, quick
18 processing of his clearance, I recommend that you get that
19 started with these other counsel. Okay?

20 I mean, it's supposed to happen anyway. Right?
21 They're there, they've applied, it's supposed to happen. This
22 isn't -- you know, it's not a ruling, it's not an order. I'm
23 just telling you, it's probably in your best interest to make

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1 that happen, to influence that process as best you can. And
2 I'm not -- again, I'm not saying that it's an entitlement,
3 that the commission is not going to move forward until they
4 have their clearances. And apparently Mr. Rushforth is at
5 least making the concession that the defense's position is not
6 that they have to have security clearances in place before the
7 defense is willing to move forward.

8 So take that for whatever it's worth. Okay?

9 I want to ask you, Mr. Rushforth, the government has
10 proposed a few specific items for hearing at the next
11 scheduled session of this commission. The Miranda motion,
12 what Appellate Exhibit number is that?

13 ATC [LCDR SPENCER]: 045, Your Honor.

14 MJ [CAPT WAITS]: AE045, this issue of not being able to
15 move -- or not moving forward until the process of clearing
16 these four counsel has been initiated, briefing that and
17 hearing a motion on that at a July hearing.

18 And the last one is this -- what the defense has
19 characterized as "attributable delay"? Is there any reason
20 that -- do you have any qualms with those three issues being
21 briefed and -- I mean, some of them have already been -- one
22 of them has already been briefed but you can file a
23 supplemental brief on that. Do you have any qualms with

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1 hearing those three motions related to those three subject
2 matter at a July hearing?

3 DC [MR. RUSHFORTH]: Your Honor, would you clarify for me?
4 I only heard two, and I'm sure I missed the third.

5 MJ [CAPT WAITS]: The AE045, that's the one that's
6 actually been briefed.

7 DC [MR. RUSHFORTH]: And what is the 045?

8 MJ [CAPT WAITS]: It's the applicability of ----

9 DC [MR. RUSHFORTH]: Miranda?

10 MJ [CAPT WAITS]: ---- Miranda to commissions.

11 DC [MR. RUSHFORTH]: And the second?

12 MJ [CAPT WAITS]: To, I guess, unlawful enemy
13 belligerents.

14 The second one was the counsel issue, the issue of
15 the defense saying that you're not ready to move forward until
16 these four other counsel have been -- the process of their
17 clearances being initiated.

18 DC [MR. RUSHFORTH]: And you're asking me whether that
19 could be argued and heard ----

20 MJ [CAPT WAITS]: Briefed and heard.

21 DC [MR. RUSHFORTH]: ---- in July?

22 MJ [CAPT WAITS]: Yeah.

23 DC [MR. RUSHFORTH]: Okay. And then the third?

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1 MJ [CAPT WAITS]: Because the fact is the government -- or
2 these prosecutors heard about it for the first time last
3 night.

4 DC [MR. RUSHFORTH]: I understand. I understand.

5 MJ [CAPT WAITS]: Okay. I mean, I understand the
6 difference between these prosecutors and the United States.

7 DC [MR. RUSHFORTH]: Well, I don't understand that
8 difference but I'm sure you do, Judge.

9 MJ [CAPT WAITS]: Well, I mean, I'm just looking at
10 reality. They're telling me they didn't know about it. Okay?
11 So they haven't had a chance in this commission to respond to
12 that thoroughly.

13 DC [MR. RUSHFORTH]: I understand that.

14 MJ [CAPT WAITS]: They made an oral argument.

15 DC [MR. RUSHFORTH]: I understand that point, Judge.

16 MJ [CAPT WAITS]: And the last one is -- the third one is
17 the issue of excludable delay versus attributable delay.

18 DC [MR. RUSHFORTH]: Judge, if I could have just a few
19 minutes to confer with my ----

20 MJ [CAPT WAITS]: Sure.

21 DC [MR. RUSHFORTH]: ---- with my counsel here who are
22 smarter than I on all of these issues?

23 MJ [CAPT WAITS]: Sure.

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1 DC [MR. RUSHFORTH]: You know, if you want to take a brief
2 recess, I could use a half hour to confer with them and
3 perhaps answer your question.

4 MJ [CAPT WAITS]: I think that's time probably well spent
5 for everyone. And the next prayer time is not until almost
6 1300, so I think that would still give us an hour before that.
7 And I don't think it should take that long.

8 But before we do, I want to ask the government if you
9 have any other proposals for matters to be heard at the July
10 hearing.

11 ATC [LCDR SPENCER]: Your Honor, may I approach the
12 lectern?

13 MJ [CAPT WAITS]: Yes.

14 ATC [LCDR SPENCER]: Your Honor, additionally potentially
15 the alleged unlawful influence, the defense did indicate a
16 desire to reraise that issue at some point.

17 Also, Mr. Rushforth also indicated a desire to
18 litigate the medical or the health issue, understanding that
19 that might require some discovery. Mr. Rushforth did refer to
20 200 recent items requested in discovery. That's accurate. A
21 few weeks ago they did submit a new discovery request. The
22 government is in the process of responding to that. I don't
23 believe that encompassed, off the top of my head, encompassed

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1 anything specific to that motion. But they're certainly free
2 to request ----

3 MJ [CAPT WAITS]: Talking about the health issues?

4 ATC [LCDR SPENCER]: Yes, Your Honor, correct, request
5 whatever they believe would be relevant to those motions.
6 Those are two additional motions that we could potentially
7 litigate in July. The government would respectfully ask that
8 should the judge order that specific deadlines be set for
9 motions, a scheduling order specific to that hearing on those
10 motions be set so it's clear to the parties, deadlines for
11 filing those motions including any request for discovery
12 needed in support of those motions.

13 Also, Your Honor, if I may address the clearing
14 issues, as I have become aware of it, with respect to the four
15 newly requested people. It's not clear to the government when
16 they were made a member of the civilian pool. And my
17 understanding from the security clearance folks is that they
18 would have no way of knowing that those people were intended
19 for a specific case.

20 MJ [CAPT WAITS]: Right. I said that.

21 ATC [LCDR SPENCER]: In addition, with respect to
22 Mr. Rushforth, the prosecution had little to no ability to
23 affect that process. Largely that was a result of the fact

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1 that Mr. Rushforth applied with the Department of Justice.
2 Department of Justice actually adjudicated his clearance and
3 then transferred that over to the Department of Defense. So
4 the process ----

5 MJ [CAPT WAITS]: Why do we need to keep talking about
6 this? He's sitting here now and he has a clearance. Why do
7 we need to keep talking about this?

8 ATC [LCDR SPENCER]: Because Your Honor suggested we do
9 what we did in Mr. Rushforth's case and make it happen.

10 MJ [CAPT WAITS]: I understand what you are saying.

11 ATC [LCDR SPENCER]: I'm trying to inform the commission,
12 we as the prosecution has very little ability to move things
13 along. If we could, I would be happy to assist in whatever
14 way possible.

15 MJ [CAPT WAITS]: I don't know who influenced it. All I
16 know is at least according to people who know, who have talked
17 to me, it happened in record time. So -- I mean I'm -- I have
18 to agree with Mr. Rushforth on this. You are the
19 United States, okay?

20 ATC [LCDR SPENCER]: Yes, Your Honor.

21 MJ [CAPT WAITS]: So I understand you have a hard job and
22 you're dealing with a monolithic bureaucracy, interagency
23 tangled webs. I mean, I understand. I understand what you're

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1 up against. But ----

2 ATC [LCDR SPENCER]: Your Honor, we have the same
3 challenges. We're losing personnel. We have new personnel
4 coming in. We've had one individual who's been internally
5 assigned to the team for a very long time still awaiting
6 clearance. It's an ongoing ----

7 MJ [CAPT WAITS]: I mean, that doesn't make it any better.
8 That's just -- you know, it's bad all around if that's the
9 case. And this isn't -- you know, it really isn't a who's got
10 it worse. It's we need to get it done so that we can move
11 forward in this case.

12 All right. So the only question I really had for you
13 is: What other business do you think we can take care of?
14 And you've said the -- you know, parsing out the unlawful
15 influence motion that we had talked about briefly today that I
16 said was misplaced, and the continuance motion, and the
17 health-related issue of working here in Guantanamo.

18 So, Mr. Rushforth, if you could add those to your
19 list of prospective possible things to hear at the July
20 hearing and ----

21 DC [MR. RUSHFORTH]: Well, Your Honor, I can comment on
22 those right now. They will not be ready to be heard in July.

23 Your Honor commented this morning unlawful influence

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1 is an ongoing matter anyway. And the legislation that we
2 were -- that we've been talking about may or may not be passed
3 by then. And it may be a really good argument that there
4 isn't unlawful influence until it's passed. I don't know, I
5 haven't thought that through.

6 But we're not going to get it ready and get it ready
7 to be heard in July unless, of course, the court orders, but I
8 would respectfully request that the court not so order.

9 MJ [CAPT WAITS]: Okay.

10 DC [MR. RUSHFORTH]: And with respect to the health
11 issues, we're already seeking to retain an expert. The Navy
12 report, as Your Honor knows, I'm sure Your Honor has read it,
13 basically raises all kinds of questions and answers none of
14 them. And so we're going out to get our own expert to try to
15 help us answer those. And we're not going to be prepared to
16 do that by July.

17 MJ [CAPT WAITS]: Okay. You'll talk about the other three
18 that we talked about originally and get back to me when we
19 come back on the record?

20 DC [MR. RUSHFORTH]: Yes, sir. Yes, Your Honor.

21 MJ [CAPT WAITS]: Okay. We'll take a recess until, we'll
22 say 1205. We'll come back and address those three prospective
23 motions. Okay?

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1 Court's in -- the commission is in recess until 1205.

2 [The R.M.C. 803 session recessed at 1143, 17 May 2016.]

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