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1 [The R.M.C. 803 session was called to order at 1207, 17 May  
2 2016.]

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

6 All right, Mr. Rushforth.

7 DC [MR. RUSHFORTH]: Thank you, Judge. Sorry for jumping  
8 the gun there.

9 I am prepared to answer your question regarding the  
10 three items. Before I do that, General John Baker, the head  
11 of the MCD0 organization passed me some documents that bear  
12 directly on what we've been talking about. They are the  
13 documents submitted from his office to WHS regarding the  
14 appointment, the security clearances with respect to the four  
15 individuals we've been talking about. They are dated and they  
16 reflect directly that those folks were being assigned to our  
17 case. And if I could approach, I'd pass one -- I gave counsel  
18 a copy.

19 MJ [CAPT WAITS]: Okay.

20 DC [MR. RUSHFORTH]: I'm prepared to give you a copy,  
21 Judge, if I can approach.

22 MJ [CAPT WAITS]: Sure. We need to have those marked as  
23 Appellate Exhibits.

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1 DC [MR. RUSHFORTH]: Judge, counsel just gave me a  
2 heads-up that there's some personal information on this that  
3 should be redacted before it goes public.

4 MJ [CAPT WAITS]: Okay. I mean, that's up to OMC, right?  
5 I'm sure they -- I mean, is it something you're saying should  
6 be done before the filing?

7 TC [MR. VITI]: Well, we'd just like to point out for the  
8 court, I don't know how these four individuals will feel about  
9 their personal information being made part of a record. So if  
10 defense feels it needs to be redacted or should be  
11 redacted ---

12 DC [MR. RUSHFORTH]: No, I don't feel it needs to be  
13 redacted. They've already put their applications basically on  
14 the record. So I think it's fine.

15 MJ [CAPT WAITS]: Well, actually, I don't think it is. I  
16 think what I'm going to have you do is after we go off the  
17 record, I need you to get redacted copies of these and provide  
18 them back to the court reporter.

19 DC [MR. RUSHFORTH]: Yes, Judge, will do.

20 MJ [CAPT WAITS]: Okay. This has Social Security numbers,  
21 dates of birth. I mean, this can't be in the record.

22 DC [MR. RUSHFORTH]: Thank you, Judge. I will do that.

23 MJ [CAPT WAITS]: Okay.

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1 DC [MR. RUSHFORTH]: Now, regarding the question that Your  
2 Honor asked regarding the hearing regarding three matters,  
3 here's what we would propose, Judge, with respect. It is --  
4 in July we hear a motion regarding who gets attributed with  
5 the delay. That we hear in July.

6 In September we can hear the issue of counsel who --  
7 and frankly, Judge, we say September because I think by  
8 September I sure as heck hope it's moot because if we can get  
9 started, we can get it done by then and we won't have to do  
10 any arguing or deciding on that issue. So we'd like to do  
11 that in September.

12 And regarding Miranda, we think that is fraught with  
13 facts and circumstances regarding when interrogations took  
14 place, who interrogated, where was he, what law applies. It's  
15 just fraught with factual issues. And we just aren't prepared  
16 because we haven't yet seen all the discovery to tee up and  
17 argue that motion.

18 So I would put that off for the time being. Maybe by  
19 July we can decide when it can be heard, but it certainly  
20 can't be heard in July. And we doubt it can be heard in  
21 September.

22 That's our response, Judge.

23 MJ [CAPT WAITS]: Okay. All right. I want to hear from

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1 the prosecution on those three potential motions to be heard.  
2 I also want to hear from the prosecution on what notice you  
3 think that the defense should have provided with respect to  
4 these four individuals.

5 ATC [LCDR SPENCER]: Your Honor, may I approach the  
6 lectern?

7 MJ [CAPT WAITS]: Those two things. I know it sounded  
8 like I was going to say a third thing but I don't know what it  
9 was.

10 Go ahead.

11 ATC [LCDR SPENCER]: Thank you, Your Honor. I believe I  
12 have the same question that the commission had for  
13 Mr. Rushforth, which is it sounds like they're conceding they  
14 can proceed on pretrial, certain pretrial matters prior to the  
15 other four people being fully constituted members of the  
16 defense team, in which case I agree that we can certainly  
17 argue the attributable delay issue in July.

18 With respect to the Miranda motion, Your Honor, the  
19 defense is conflating 304-type issues, voluntariness-type  
20 issues that would be factual with the purely legal argument of  
21 does Miranda apply. I don't know if Mr. Rushforth has read  
22 Appellate Exhibit 054, but that clearly runs along the line of  
23 strictly a law motion, strictly only references the law.

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1 Obviously the government disagrees with the defense's position  
2 on that law, but it's certainly something that the parties  
3 could litigate in July.

4 MJ [CAPT WAITS]: Okay. On that note, what would be the  
5 assumptions -- any potential assumptions that we would make  
6 that would have to be made that would make it -- that would  
7 keep it a purely law motion?

8 ATC [LCDR SPENCER]: Your Honor, I think the court could  
9 presume that at least for the sake of litigating that motion  
10 that full Miranda warnings were not provided to the accused.  
11 Should it come out later ----

12 MJ [CAPT WAITS]: Why would we need to assume that? I  
13 mean, that's factual. I think -- I mean, the question is  
14 whether -- I think the question is whether Miranda Rights were  
15 due.

16 ATC [LCDR SPENCER]: Yes, sir. Understood.

17 MJ [CAPT WAITS]: I mean, the presumptions that I think  
18 would make it a -- and this is -- again, I haven't read it in  
19 months either. I haven't read it since last year when we were  
20 going to hear it.

21 The presumptions I think would be that the person  
22 being interrogated is an alien. Whether unprivileged enemy  
23 belligerent is important in this context, maybe not. But at a

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1 minimum, it is an alien person.

2           Number two, the person is questioned by law  
3 enforcement.

4           And number three is it didn't occur in the  
5 United States.

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

7           MJ [CAPT WAITS]: Those are three things that I would like  
8 to go back and read the motions. And if I think that it can  
9 be, you know, hypothetically framed in a way that it makes it  
10 a pure law motion, then I may order that we hear that motion  
11 in July.

12          ATC [LCDR SPENCER]: Your Honor, that's how both the  
13 motion and the government's response are drafted, as purely  
14 legal issues.

15          MJ [CAPT WAITS]: Okay. And, again, since this is a new  
16 defense team, if you want to file a supplemental motion, you  
17 don't have to live with the one that is currently filed.  
18 Okay.

19                So go ahead. Next.

20          ATC [LCDR SPENCER]: Lastly, Your Honor, with respect to  
21 the representation, while I appreciate Mr. Rushforth's  
22 optimism, as my colleagues reminded me, individual security  
23 clearance matters are very complicated. And depending on the

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1 person's background, it might take a significant amount of  
2 time; it might take less. I don't believe that we can say,  
3 well, they should be ready by September, so we should push  
4 that off to September.

5           The question is -- the defense has asserted that he  
6 has a quasi right, effectively a quasi right to these people,  
7 or maybe they're calling it an outright right. I understand  
8 that they're unhappy with 506, but unhappiness is not the law.  
9 It doesn't control the rule. The rule says they get what they  
10 get. They disagree with that potentially or they say that due  
11 process -- I don't know what their argument would be, Judge --  
12 I don't want to put words in their mouth -- are required to  
13 afford the accused with due process. That argument and issue  
14 could be very easily litigated in July.

15           MJ [CAPT WAITS]: Okay. Okay. Now turn to the question  
16 of the notice that was received on these -- let me read these  
17 real quick here.

18           Okay. Commander Spencer, I'm just wondering if the  
19 government has a position on how you believe that you should  
20 have been apprised of these four additional attorneys that  
21 General Baker applied for clearances for.

22           ATC [LCDR SPENCER]: Well, Your Honor, as you may recall  
23 in the November 802, telephonic 802, there was some reference

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1 of some additional civilian counsel who was going to be  
2 advisory only. It's apparent to me now that was Ms.  
3 Catherine Moore, although we never heard her name, didn't know  
4 what her status was, whether she had been assigned to the  
5 civilian pool or not, that's who that person was.

6           And I agree with the defense that on its -- in the  
7 documents they do reference that they will be assigned to the  
8 Hadi team. Although, I would note since this is now part of  
9 the record, that the 8 December memorandum from Captain  
10 Filbert, the Deputy Chief Defense Counsel states inaccurately  
11 pro bono civilian counsel in the al-Iraqi case are under a  
12 court-ordered deadline to obtain security clearance. That was  
13 obviously not true; that was not even true with Mr. Rushforth.  
14 So it's not clear to me when the defense should have notified  
15 us. It certainly would have been more helpful for the  
16 commission and the defense could have apprised the commission  
17 via notice that these people or that at least four people were  
18 in the process of being added and that the security clearances  
19 were being sought.

20           I'm also told with respect to at least the first  
21 three, Ms. Moore, Mr. Szymanski, and Mr. Palmer, that they  
22 have open active investigations. With respect to the final,  
23 Mr. Chemerinsky, my understanding is that's awaiting Convening

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1 Authority approval because these requests go through the  
2 Convening Authority.

3           Again, the government -- the prosecution team was not  
4 aware of the processing of any of these people. But at least  
5 three of them are open and active investigations and they are  
6 proceeding as open and active investigations do, which, again,  
7 is individually specific.

8           MJ [CAPT WAITS]: Okay.

9           All right. Mr. Rushforth, I don't know what the -- I  
10 don't have the commission's order here in front of me related  
11 to what notice is required to the commission by the defense as  
12 related to people that are in the civilian pool that have been  
13 assigned to this case. Okay? Not detailed but assigned.

14           What I do know is that your team has not complied  
15 with that -- with what I do know falls within that order. Do  
16 you know what I am talking about?

17           DC [MR. RUSHFORTH]: I have no idea.

18           MJ [CAPT WAITS]: Okay. I'm going to give you details.  
19 Okay.

20           On the 22nd of September 2015, the commission issued  
21 an order, Appellate Exhibit 053B, releasing the accused's  
22 prior detailed military defense counsel and setting notice  
23 requirements for incoming detailed military defense counsel.

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1 This order stated that defense counsel will inform the  
2 commission in a notice pleading with the occurrence of certain  
3 events, including: No. 1, when the military defense counsel  
4 to be detailed to represent the accused is granted the  
5 necessary security clearances with appropriate additional  
6 authorizations to fully represent the accused.

7 No. 2, detailing of detailed military defense  
8 counsel.

9 No. 3, the scheduling of a meeting between the  
10 accused and detailed military defense counsel.

11 That's 4.

12 No. 5, the formation of an attorney-client  
13 relationship between the accused and military defense counsel.

14 On the 13th of November of 2015 -- and all this  
15 information is taken from your pleadings.

16 DC [MR. RUSHFORTH]: Your Honor, I wasn't familiar with  
17 the way you phrased it, but I have read what you're reading to  
18 me. Yes.

19 MJ [CAPT WAITS]: Okay. It's taken either from your  
20 pleadings and it could be potentially supplemented by the  
21 courtroom security officer who has access to some of this  
22 information independently.

23 So on the 13th of November, 2015, the defense filed

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1 Appellate Exhibit 053C stating that Major Kincaid, Major Hall,  
2 and Lieutenant Commander Lofland had received their required  
3 security clearances and had met with and formed an  
4 attorney-client relationship with the accused. Major Kincaid  
5 and Major Hall were assigned to the case on the 22nd of  
6 September 2015, which was the same day that the commission  
7 issued AE 053B.

8 Major Kincaid received the appropriate security  
9 clearances on 22 September 2015, which is also the same day  
10 that that order was issued by the commission.

11 Lieutenant Commander Lofland was assigned to the case  
12 on 1 October 2015, and all three of these military defense  
13 counsel provided notice of these events on 13 November 2015,  
14 which, based on the court's order, is 53 days late. Okay?

15 Major Kincaid was officially detailed as defense  
16 counsel on 24 October 2015. Major Hall and Lieutenant  
17 Commander Lofland were officially detailed as defense counsel  
18 on 30 October 2015. These military defense counsel provided  
19 notice of these events on 13 November 2015, days -- 2015,  
20 which is 21 days and 15 days, respectively, after those events  
21 occurred.

22 Major Hall received the appropriate security  
23 clearances on 2 October 2015. He provided notice of this

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1 change in status, which was part of the court's -- the  
2 commission's order on 13 November 2015, which was 52 days  
3 after that event occurred.

4 Lieutenant Commander Lofland received the appropriate  
5 security clearances on 20 October 2015, and provided notice of  
6 this change in status on 13 November 2015, which is 25 days  
7 after the event occurred.

8 Major Hall and Lieutenant Commander Lofland met with  
9 the accused on 24 October 2015, which again is a reportable  
10 event based on the commission's order in AE 053B. That wasn't  
11 reported until 13 November 2015, which was 22 days after that  
12 event occurred.

13 So there's a pattern here, and it needs to be -- I  
14 mean, the commission expects its orders to be followed. I  
15 mean, these are the first orders I've issued. This is just  
16 basic.

17 DC [MR. RUSHFORTH]: Understood, Judge.

18 MJ [CAPT WAITS]: And really, I don't want to continue to  
19 go through all the details, but the same things apply to you.  
20 I could go on. I have another whole page of that type of  
21 information.

22 And I have a -- I mean, my question -- one question I  
23 do want to ask you is: When you did not go to GTMO in

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1 March ----

2 DC [MR. RUSHFORTH]: Yes.

3 MJ [CAPT WAITS]: ---- it's before the court that you  
4 could -- I mean, that you -- there was a scheduled trip in  
5 March and you were going to get your SAP read-on in March but  
6 you didn't get it for, I think, almost a month after that.  
7 That was time, if you had gotten that read-on, that would have  
8 been time -- that would have been an entire month. You can  
9 get that read-on in D.C., right?

10 DC [MR. RUSHFORTH]: Well, yes, you can, Judge. That was  
11 a scheduling conflict. I tried several times to get  
12 scheduled; they couldn't schedule me. Then they scheduled me  
13 on the one day that I had a hearing in the D.C. District  
14 Court. I couldn't go.

15 MJ [CAPT WAITS]: Okay.

16 DC [MR. RUSHFORTH]: So then they said, okay, here's the  
17 next time you can come. That was one of those things that  
18 happens in life.

19 MJ [CAPT WAITS]: Okay. I understand. The bottom line is  
20 there are numerous reportable events, based on the  
21 commission's order ----

22 DC [MR. RUSHFORTH]: Well, I can ----

23 MJ [CAPT WAITS]: ---- frankly they were completely blown

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1 off.

2 DC [MR. RUSHFORTH]: I can represent to Your Honor we will  
3 focus on that like a laser and it won't happen again.

4 MJ [CAPT WAITS]: Thank you. That's all I want to hear  
5 from you on that.

6 ATC [LCDR SPENCER]: Your Honor, may I ask a question?

7 MJ [CAPT WAITS]: Yeah.

8 ATC [LCDR SPENCER]: Your Honor, inviting the commission's  
9 attention to 053D, the government, clearly with respect to  
10 Ms. Moore, she would have fallen under that order 25 November  
11 2015, the commission's order saying the deadline for pro bono  
12 civilian counsel and she was identified at the time as a pro  
13 bono civilian counsel, at least internally, of one January  
14 submission. She did comply with that on 8 December  
15 apparently. And then notice to the court for her, if what the  
16 government is unclear on and would ask the commission to  
17 clarify is this is obviously a specific -- not specific to  
18 Mr. Rushforth necessarily, it says pro bono civilian counsel,  
19 in terms of ongoing notice requirements specific to security  
20 clearance. Does the commission intend this to continue to  
21 apply to the -- all four new counsel?

22 MJ [CAPT WAITS]: Yes. I mean, I haven't rescinded the  
23 order. We're talking about pro bono counsel, correct?

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1 DC [MR. RUSHFORTH]: Absolutely.

2 MJ [CAPT WAITS]: So the order applies. And that's why  
3 I'm bringing this up now. Because we're going to have --  
4 we've got a lot more, potentially, based on your  
5 representation to the commission, potentially reportable  
6 events. And I'd like to hear -- I think I've heard from you  
7 now that you're going to report those events in a more timely  
8 way than has been done so far.

9 DC [MR. RUSHFORTH]: Judge, let me repeat. This will not  
10 happen again.

11 MJ [CAPT WAITS]: Thank you.

12 DC [MR. RUSHFORTH]: We will report it to you as your  
13 order requires.

14 MJ [CAPT WAITS]: Thank you.

15 DC [MR. RUSHFORTH]: May I just make one point that I may  
16 have missed along the way?

17 MJ [CAPT WAITS]: Yes.

18 DC [MR. RUSHFORTH]: Once the government is informed  
19 through WHS that attorneys have applied for their security  
20 clearance, then those security clearances have to be processed  
21 before, of course, that attorney can be read on. They have to  
22 get a security clearance, as I know Your Honor is well aware,  
23 before they can go ahead and get read on.

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1 MJ [CAPT WAITS]: Right. They do. And I'm going to say,  
2 whether this is in my order, whether this falls within my  
3 orders or not, I want you -- I want the prosecution, the trial  
4 counsel, to be copied on any correspondence with WHS related  
5 to people that are assigned to the Hadi case.

6 DC [MR. RUSHFORTH]: Yes. Yes, Judge.

7 MJ [CAPT WAITS]: It's, you know ----

8 DC [MR. RUSHFORTH]: We will make sure that the  
9 communication between us and General Baker's office is intact.  
10 And when we receive it, we will notify -- we will give the  
11 government -- give the prosecution a copy of that.

12 MJ [CAPT WAITS]: Thank you.

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

14 MJ [CAPT WAITS]: Okay. All right. So, just so everyone  
15 knows the way ahead here, I'm not going to -- I'm not going to  
16 make an oral order right now about -- a scheduling order about  
17 what we're going to hear at the next scheduled session of the  
18 commission.

19 The one thing that has been agreed upon, I think, is  
20 the delay attribution. There are at least two others that are  
21 on the table, the counsel issue and the excludable delay  
22 issue -- I'm sorry, and the AE 045 issue. As well as, as I  
23 said in the 802 conference last night, I understand Commander

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1 Spencer, that you've said that you don't think that it would  
2 be productive to meet with the defense on coming up with a  
3 litigation -- pre-litigation schedule, pretrial litigation  
4 schedule.

5           But as I said last night, at a minimum I want the  
6 parties to meet and attempt to agree on at least what the  
7 applicable milestones are so that when I get proposed pretrial  
8 litigation schedules from each side, I'm comparing apples to  
9 apples. Okay? And I don't get, you know, one thing -- one  
10 list of milestones from the defense and another list of  
11 milestones from the government, and they don't mesh.

12           So I want to have documents, I want to have pleadings  
13 that I can at least say, okay, you know, discovery deadline or  
14 witness request or other potential milestones that I can match  
15 up and say, okay, the defense wants it to be in December, the  
16 government wants it to be in September. I have to break the  
17 tie. I have to figure out when a reasonable time for this  
18 event to occur should be on a scheduling order.

19           So if you can't agree on timelines, I want you to  
20 agree on -- to agree on milestones. And then part of the  
21 commission's order will be to provide a proposed pretrial  
22 litigation schedule.

23           So the other things are to be determined but they

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1 will come out in an order. And I will also come out with, as  
2 I told you last night, a schedule of future hearings through  
3 the end of 2016 and into and hopefully including all of 2017.

4 Are there any matters from counsel for either side  
5 that you would like to bring before the court -- before the  
6 commission before we recess? And does anyone have any  
7 requests for any further hearings of this session of the  
8 commission this week for any reason?

9 DC [MR. RUSHFORTH]: Nothing from defense, Your Honor, and  
10 no request for any further hearings.

11 MJ [CAPT WAITS]: Very well.

12 TC [MR. VITI]: No, Your Honor.

13 MJ [CAPT WAITS]: Okay. Then I'm going to say, based on  
14 the fact that we have at least one issue that counsel for both  
15 sides have agreed are ripe for hearing in July, that -- what's  
16 the date of the July hearing? 11 -- that this commission is  
17 in recess until 11 July 2016.

18 [The R.M.C. 803 session recessed at 1243, 17 May 2016.]

19 [END OF PAGE]

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