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1 [The R.M.C. 803 session was called to order at 1308,
2 17 November 2014.]

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

6 Counsel, now moving on to Appellate Exhibit 018, the
7 defense motion to compel discovery. Colonel Jasper, who has
8 the burden on this motion and what is it?

9 DDC [LtCol JASPER]: Your Honor, the defense has the
10 burden of persuasion and proof by a preponderance of the
11 evidence.

12 MJ [CAPT WAITS]: Very well, I will hear from you.

13 DDC [LtCol JASPER]: Good afternoon, Your Honor.

14 MJ [CAPT WAITS]: Good afternoon.

15 DDC [LtCol JASPER]: Your Honor, the defense seeks to
16 compel the production of any communications between the
17 convening authority and the DoD or the executive branch
18 regarding the timing of the referral of this case as it
19 relates to the Sergeant Bergdahl exchange for five prisoners
20 at Guantanamo Bay which occurred on May 31 of 2014, this year.

21 Now, when examining, Your Honor, our motion to compel
22 in this particular matter, you need to look at the factual
23 history of our request and why it raises significant questions

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to the defense, why we believe the government did not extend
2 the proper good faith efforts to procure the information that
3 we requested, and also we would like to establish relevancy in
4 this matter as well, Your Honor.

5 MJ [CAPT WAITS]: Very well.

6 DDC [LtCol JASPER]: First the facts. The charges before
7 this commission were preferred, Your Honor, on 3 February of
8 2014. They were actually forwarded to the convening
9 authority's office on 14 February of 2014. At that time,
10 there was a different convening authority who referred the
11 case from today. As of October 1st of 2014, just last month,
12 a new convening authority took over from the previous
13 convening authority.

14 Again, on May 31 of 2014, the U.S. released five
15 prisoners from Guantanamo Bay in exchange for
16 Sergeant Bergdahl. This was on a Saturday, Your Honor, and as
17 you know, it was very public, it was highly controversial, and
18 it was discussed widely amongst the United States. It was all
19 over the news.

20 On June 2nd, which was a Monday, this case was
21 referred by the previous convening authority. All 63 common
22 allegations that were discussed earlier and all five charges
23 in the underlying specifications were all referred.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Because of that timing, Your Honor, the defense
2 simply put in its discovery request on June 14, two weeks
3 after the exchange, to the government asking for all of the
4 communications related to the convening authority that he may
5 have had or did not have. We wanted an answer from the
6 convening authority, who is supposed to act independently with
7 his communications, whether they be written or oral, to the
8 DoD, upper echelons of government or executive branch.

9 One month later exactly, on July 14th of 2014, we had
10 a response -- and I don't want to misquote it. The response
11 from the government was to the extent that communications
12 exist, these communications are not relevant nor discoverable.
13 Accordingly, as a consequence of that response, the defense
14 decided that it was its responsibility to inquire further and
15 actually compel that information from the government via a
16 motion. And as you know, Your Honor, from the rules, we need
17 to conference that motion with the government before we file
18 it to note whether they object in any manner. That's a
19 prerequisite on every motion. That was on October 7 of this
20 year, 2014.

21 The government responded via e-mail that they needed
22 an additional 48 hours to exercise final due diligence on this
23 matter. However, just 24 hours later, on October 8, 2014, the

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 government stated that no responsive materials were located;
2 and then further in response to our motion on 22 October
3 stated that no documents within the convening authority's
4 control are responsive to our defense request.

5 However, Your Honor, note -- remember back in July
6 they said that, to the extent the communications exist, they
7 are not relevant, which begs the question, Your Honor: How
8 hard did they look? Looking at the timing -- and that's why
9 the timing of our request and their answers are so important.
10 It looks as if they only looked for 24 hours. And in their
11 response to our motion, they say within the convening
12 authority's control there was no communications, and they got
13 that response from the convening authority's office.

14 And as I stated earlier, this is a new convening
15 authority, Your Honor. We don't know the lengths they went to
16 in that 24 hours to get an official answer. And as you know,
17 Your Honor, unlawful command action or influence in these
18 proceedings, just like our military courts-martial, are
19 considered the mortal enemy of military justice.

20 Under the UCMJ, we have implied unlawful command
21 influence, there is actual command influence, and sometimes it
22 can result in dismissal of all charges with prejudice,
23 sometimes without prejudice, depending on whether it's implied

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 or actual prejudice.

2 Here the rules plainly state in Section 949b of the
3 Military Commissions Act that no person may attempt to coerce
4 by any authorized means, influence the action of any
5 convening, approving or reviewing authority with respect to
6 their judicial acts.

7 Surely one of the most important things in a
8 convening authority's decision-making and responsibilities in
9 any type of court is the decision to refer charges or refer
10 some of the charges or refer none of the charges in a
11 particular case.

12 The law is expansive, Your Honor, as it pertains to
13 the Rules of Military Commission and also case law on
14 discovery obligations of the government. In Rules for
15 Military Commission 701, it states that the defense is
16 entitled to examine and copy documents within the control of
17 the United States which are material to the preparation of
18 their defense.

19 Contrast that to the discovery obligation in a
20 regular Uniformed Code of Military Justice court-martial,
21 where it is just in the control of the convening authority,
22 here it expands more expansively to beyond the convening
23 authority. So their response even to our motion to compel

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this information, Your Honor, to the extent that it does
2 exist, doesn't answer whether they went further beyond the
3 convening authority's office. It was stopped there according
4 to them.

5 And we understand, Your Honor, it's not a monolith
6 that they have to go to every subset of government to
7 determine this information, but we specifically requested
8 actions also and communications that may have occurred between
9 the Department of Defense, Secretary of Defense, which is
10 under the umbrella of the Department of Defense, or the
11 executive branch, someone that works at the White House.

12 And again this case was so controversial and so
13 heavily scrutinized, and I would argue criticized, and looking
14 at the timing, it is suspicious. And it did raise questions
15 on why this case was referred the Monday right after the
16 Saturday that the exchange occurred, after four and a half
17 months, five months it sat -- these charges sat at the
18 referral stage at the convening authority's office.

19 MJ [CAPT WAITS]: When you say it raised questions, what
20 are you talking about? Besides questions that you are raising
21 in your motion, you said it raised questions as kind of like
22 there was something in the air, in the media, in the
23 government that people, that someone out there was questioning

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 which would all go to the question of an appearance of
2 unlawful command influence, obviously. So what are you
3 talking about?

4 DDC [LtCol JASPER]: That's what we're talking about, sir,
5 whether it exists, whether there was any influence implied or
6 actual on the convening authority to refer every single common
7 allegation and charge and specification to show that there are
8 commission cases that are being pursued. As you heard in
9 recent motions here, sir, there haven't been a lot of cases in
10 the commissions that have been referred. So that's what we
11 are asking for, that information.

12 MJ [CAPT WAITS]: But my question is what -- you said
13 there were questions. What questions are you talking about?

14 DDC [LtCol JASPER]: We are asking specifically whether
15 anyone called the convening authority and said, get some of
16 those cases, the commissions going. Your Honor, what is going
17 on ----

18 MJ [CAPT WAITS]: I know what you are alleging in your
19 motion, I'm talking about a specific statement you made just a
20 few minutes ago in your argument. You said there were
21 questions.

22 DDC [LtCol JASPER]: Questions in our mind ----

23 MJ [CAPT WAITS]: In your mind?

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DDC [LtCol JASPER]: We think it's our burden of
2 persuasion here, but we think it is our responsibility as
3 defense counsel to seek information on what may -- it could
4 have been -- it is very possible that someone could have
5 called the convening authority's office or the convening
6 authority himself and said, what is the status of some of the
7 cases that are currently preferred at GTMO? We are getting
8 bad publicity right now because of the exchange that happened
9 two days ago.

10 And we simply inquired, and we had questions, I would
11 say suspicions -- suspicions, especially when every single
12 charge and specification of the common allegations were
13 preferred, and their response to the initial request was they
14 are not discoverable, it's not relevant, and -- to the extent
15 that these communications exist, which implied to us,
16 Your Honor, that maybe there were some communications.

17 The case law is also clear on discovery obligations.
18 It defines information material to the preparation of the
19 defense that's helpful to the accused. We are entitled to
20 some of that information. This would be helpful. If there
21 were some information, it could apply to our case, it could
22 enhance some of our litigation to defend Hadi al-Iraqi.

23 The rules also state that when the defense requests

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 documentary evidence, it would generally be provided on
2 showing that the material is relevant and the request is
3 reasonable. Our request was very clear, it was extremely
4 reasonable. Are there any communications, which could easily
5 have been answered yes, we talked to the convening authority
6 himself, we interviewed him, we found that there was no one
7 that spoke with him. As of today, right now as I talk to you,
8 sir, we don't know whether that occurred.

9 MJ [CAPT WAITS]: Well, I mean, the government said it
10 didn't.

11 DDC [LtCol JASPER]: They answered, Your Honor, that the
12 convening authority's office states that there aren't any
13 discoverable information related to the Bergdahl exchange.
14 And, Your Honor, because of the timing of our request and the
15 confusion of their answers -- even in their own motion they
16 conceded that their drafting was inartful. They didn't really
17 mean that it wasn't relevant, they didn't really mean to the
18 extent that communications exist. They even used the word
19 inartful in their response to us initially.

20 And the case law is extremely clear, Your Honor. We
21 are entitled to any information that may help in our defense
22 preparation, formulate defense strategy and assist us in
23 pretrial issues like challenges for cause. In this particular

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 case, anything that could have -- where unlawful command
2 action could occur, or influence, surely that information is
3 relevant to Hadi al-Iraqi.

4 Again, the convening authority could have done a
5 number of things. He could have referred 33 of the 63 common
6 allegations. He could have referred, you know, three of the
7 five charges. But everything was -- everything was referred
8 that Monday after the Saturday Bergdahl exchange.

9 And as you know, Your Honor, the convening authority
10 was delegated at this commission the sole authority to make
11 these decisions from the Secretary of Defense. No one could
12 even apply pressure on him to take -- or exert any pressure on
13 him to take any judicial actions whatsoever.

14 So we are simply inquiring, Your Honor, from the
15 government to inform you and inform the defense of what
16 lengths they went to to find this information. And we believe
17 we are entitled to know in a case of this magnitude, and where
18 the law is clear, and where they have been inartful in their
19 drafting of their pleadings and responses to the defense.
20 They conceded to that.

21 There has been a new convening authority who took
22 over in October, so it begs the question: Was the old
23 convening authority spoken to? Did someone interview him?

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Did someone call him? Did someone ask for his e-mails? Did
2 they go beyond the convening authority's office and ask the
3 executive branch and the Department of Defense whether there
4 is any e-mails that exist related to the timing of this
5 referral? What search terms did they use? We just don't
6 know. It's all open. It's left open. We don't know.

7 We believe that, Your Honor, you can ask the
8 government what lengths they went to here today to find out
9 the scope of their search and whether that satisfied a good
10 faith effort. We are not taking their word for it because of
11 the timing of everything and because of the inartful responses
12 that we received and the change in course, even the change of
13 responses we received when we asked for this information. We
14 are not confident as the defense -- that the defense [sic] in
15 that 24-hour period exercised the type of due diligence and
16 good faith efforts that are required under law.

17 And before you deny our motion, Your Honor, we ask
18 that you get that information from the government and you,
19 yourself, Your Honor, bind them or hold them responsible for
20 the efforts they made and whether they, in fact, exerted due
21 diligence in this case to find simple information.

22 Thank you.

23 MJ [CAPT WAITS]: Thank you.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Trial Counsel, response?

2 TC [MR. CLAYTON]: Your Honor, Lieutenant Colonel Jasper
3 actually, I think, crystallized the issue for the commission
4 and for the government when he said -- his specific question
5 was: Did anyone reach out to the convening authority, then
6 the Honorable Paul Oostburg Sanz, and suggest to him that he
7 should refer this case for any reason related to the Bergdahl
8 swap.

9 I can tell you that we have inquired specifically of
10 that question, both to the convening authority's authority,
11 who then passed that inquiry along to the prior convening
12 authority, the Honorable Paul Oostburg Sanz, more than once
13 and more than once the response from that office has been no
14 such communications occurred, we have had no such influence
15 from outside of this office from the convening authority on
16 down to his staff, no such inquiries from anyone else related
17 to the Bowe Bergdahl swap. I think that puts this to bed. I
18 don't know what more -- what could be asked.

19 We even passed along the actual request itself so
20 that the convening authority's office could see the wording
21 that the defense counsel used in making their examination as
22 to whether or not such materials existed.

23 We are committed to providing noncumulative,

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 relevant, and helpful materials consistent with 701 and with
2 the Yunis standard applicable in these cases. I don't want to
3 chase this argument more than it deserves, but to the extent
4 it implies some implications that the government should then
5 go writ large to the executive branch as a whole, to all of
6 DoD to find out if anyone in government writ large had held
7 this opinion, that's what's not relevant.

8 What's relevant, if anything, is whether or not the
9 convening authority and/or his staff received such
10 communications and were potentially influenced by such
11 communications. We have inquired of that. We have been given
12 very clear answers. We have responded back to the defense
13 team saying not only did that convening authority's office,
14 including Mr. Oostburg Sanz, not receive any such
15 communications, they were not pressured by anyone anywhere as
16 to the timing of this referral.

17 It begs the age-old question, Your Honor, how does
18 one prove the negative? Colonel Jasper implies something on
19 the borderline of nefarious based upon the timing. But in
20 your own experience, Your Honor, were I to come to you and
21 say, ask you if, for example, your interim order that you
22 issued a week ago were influenced by the Bowe Bergdahl swap
23 and did you have any communications that might bear that out,

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 how long do you think it would take you to respond, which I
2 presume the response would be no, how long do you think it
3 would take you to sort through your communications to see if
4 you had you any such, and how long would it take you to do so
5 with your staff? I would suggest not very long. Indeed, the
6 more fanciful the claim, this being one of these, the more
7 quicker one can respond that no such communications exist.
8 That's simply logical.

9 That's where we stand with this particular motion. I
10 think to speak about it more belabors a dead issue. I suppose
11 we could ask a third time. I don't know to what end -- what
12 would come of that end. I suspect the answer will be the
13 same, but there is really nothing to be had here. We have
14 done our due diligence.

15 To the degree that the defense wants to inquire into
16 the precise nature of our due diligence process, they are not
17 entitled to that. I have, however, told you what our process
18 was in this instance, and what it yielded was no responsive
19 materials, no materials responsive to the specific question
20 Colonel Jasper just crystallized for the court.

21 That's where we stand, Your Honor. If there are any
22 further questions, I am happy to answer them.

23 MJ [CAPT WAITS]: Thank you, Mr. Clayton.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Any rebuttal argument, Colonel Jasper?

2 DDC [LtCol JASPER]: Nothing further, Your Honor.

3 MJ [CAPT WAITS]: Go ahead and approach the podium. I do
4 want to ask you a couple of questions based on the
5 government's response just now. Okay.

6 Mr. Clayton's position was with regard to inquiries
7 to anyone else in the executive branch, Department of Defense
8 or anyone, that based on the response of the convening
9 authority, that all of that would be irrelevant. How is he
10 not right about that? If the convening authority never
11 received any correspondence related to the Bergdahl release,
12 then how would it be relevant, even if there were -- even if
13 there were people in the executive branch talking among
14 themselves about wouldn't it be nice if there were something
15 out there that would divert the public's attention away from
16 this release that just happened?

17 DDC [LtCol JASPER]: Surely, Your Honor, we would agree if
18 there were no communications at all, then it's not relevant
19 anymore. We weren't confident based, upon the responses we
20 have got from our discovery request and also the responses in
21 the motion, that someone actually talked to the convening
22 authority.

23 And note, Your Honor, something of this high level

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 echelons of the government, we are talking Presidential level
2 in something like that. The convening authority's office is
3 what we were told. That could be a staff sergeant who was
4 called, a lieutenant colonel was called, a peon essentially.
5 Nothing -- I'm a lieutenant colonel. Not the convening
6 authority in a case of this magnitude. That would be a
7 one-on-one conversation, a one-on-one e-mail from someone
8 higher than the convening authority, someone who delegated
9 this case to him, like the Secretary of Defense, saying we
10 need to get some cases moving, we need to get some positive
11 press going on the commissions.

12 And the responses that we received initially were not
13 we talked to the convening authority and those communications
14 did not exist. That's why we have this motion here today,
15 Your Honor. We didn't get that response initially from the
16 government. And then looking at the timing of all of their
17 responses, it's clear that they didn't do anything more than
18 for a 24-hour period, the scope was limited, the magnitude of
19 their search seems to be very limited. And until you just
20 asked the prosecutor these questions, we were unclear.

21 MJ [CAPT WAITS]: I didn't ask any questions.

22 DDC [LtCol JASPER]: His argument.

23 MJ [CAPT WAITS]: He basically volunteered that

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 information as argument.

2 So are you saying at this point, having heard, by
3 your account, for the first time that the convening authority
4 was actually contacted and the convening authority -- the
5 person of the convening authority represented to the trial
6 counsel in this case that there was no such communication,
7 that you are satisfied with the government's response at this
8 point?

9 DDC [LtCol JASPER]: I don't know if the word satisfied
10 correctly states our position, Your Honor.

11 MJ [CAPT WAITS]: What else would you ----

12 DDC [LtCol JASPER]: We are uncertain why it took to today
13 to get that answer, and therefore, we are skeptical. We
14 remain skeptical.

15 MJ [CAPT WAITS]: Okay.

16 DDC [LtCol JASPER]: And that's our position on it.

17 MJ [CAPT WAITS]: Understood. Thank you.

18 DDC [LtCol JASPER]: Thank you.

19 TC [MR. CLAYTON]: Your Honor, if I may, I would like to
20 clear up one thing on the record.

21 MJ [CAPT WAITS]: What's that?

22 TC [MR. CLAYTON]: The communication to the former
23 convening authority himself was made on our behalf by his

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 staff. His response was then relayed to us by his staff. So
2 it was not exactly accurate ----

3 MJ [CAPT WAITS]: So the convening authority via his staff
4 and then back to you via his staff ----

5 TC [MR. CLAYTON]: Through the advisor, yes, Your Honor.

6 MJ [CAPT WAITS]: All right. Thank you for clarifying
7 that fact. All right.

8 That concludes the argument on the defense motion to
9 compel discovery. So as I mentioned before lunch, Colonel
10 Jasper, I wanted to hear from you about your review of the
11 discovery that you were provided yesterday -- yes,
12 absolutely -- related to the defense motion to compel
13 discovery and the defense motion related to the female guard
14 issue.

15 DDC [LtCol JASPER]: Yes, Your Honor.

16 MJ [CAPT WAITS]: Where do we stand?

17 DDC [LtCol JASPER]: Thank you.

18 Your Honor, our position on this particular matter is
19 that we are not prepared to call witnesses and present
20 evidence on this motion because of the timing of when we
21 received the discovery in our discovery request.

22 We are prepared to argue the law and the policy and
23 whether the policy is lawful, and we would also ask,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Your Honor, that if you decide that -- and you agree with the
2 government that female guards should be able to have physical
3 contact with Hadi al-Iraqi, that we be afforded the
4 opportunity to present evidence in January, and here is why:

5 We put in our discovery request very shortly after
6 Hadi al-Iraqi was touched and a forced cell extraction
7 occurred on him. We did not receive any responsive materials
8 to review. In fact, even as I talk to you right now, I have
9 not seen what occurred on video with the forced cell
10 extraction. We have seen audio, and we will be afforded today
11 after this hearing the first opportunity to watch the video.
12 In addition, we received 150 pages of discovery on policy and
13 statements related to this issue last night at 1900 for the
14 very first time.

15 I do not have the ability to analyze, synthesize,
16 discuss, strategize of how we are going to present this matter
17 from the defense, especially when we have already put the
18 court on notice that it may call for limited testimony for
19 limited purposes of this motion of our client. We need extra
20 time if we are going to do that and to put us in a position --
21 when the government knows I have been here specifically since
22 November 8 to interview and receive information and make these
23 calls and prepare for this motion, it's just unfair. We are

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 not on equal footing with the government to make these
2 decisions.

3 But we are prepared to argue the law on this policy,
4 Your Honor. But when it comes to making decisions that
5 require certain amounts of 505 notice to the court on whether
6 we want our client to testify and prepare our client to
7 testify based on the information I got last night at 1900 is
8 not fair. It is just unfair. And to ask us to do that when
9 we have all these motions to argue and prepare for, and the
10 government has had several weeks to digest this material and
11 prepare, where we have not, it is not an equal -- we are not
12 on equal footing here. We are not -- I can't stand here and
13 say let's proceed, Your Honor, I am prepared to go. It is
14 just not a fact.

15 We are still pouring through all of the information
16 that we received. My team just arrived yesterday. I mean, we
17 have a team of defense. I know I'm not the only one on the
18 team, but again, they just came in last night at 1700 was the
19 very first time I saw Major Stirk and I addressed this with
20 you, Your Honor.

21 It is not our fault that we received this at 1700 on
22 Sunday evening before the motion today, and I am grateful for
23 you to push it to tomorrow, but it is not enough time to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 totally make a decision on whether we should call our client
2 to the stand, whether we should call some of the other people
3 on this base that made decisions in this case on this issue to
4 the stand.

5 I have been afforded the opportunity to interview one
6 person involved, and we have requested to talk to many, many
7 more. And we don't have their names, we don't have their
8 locations for good reason. But I don't even have the ability
9 to present evidence without knowing who these people are, and
10 we put in these requests over about a month ago.

11 And that's our position on this particular issue,
12 Your Honor.

13 MJ [CAPT WAITS]: All right. Mr. Clayton? Sorry, Colonel
14 Long.

15 ATC [LTC LONG]: Your Honor, Lieutenant Colonel David Long
16 for the government.

17 MJ [CAPT WAITS]: Before you start talking, I don't know
18 if I like the idea of bifurcating the legal argument versus
19 any factual issues based on the government's discovery that
20 would bring in evidentiary material, pushing that to a later
21 time. I don't know how productive that would be.

22 I kind of like the idea of the holistic approach of
23 let's talk about the facts, that is, the evidence, and let's

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 talk about the law and let's talk about all of that at the
2 same time. So you are going to have to convince me that the
3 defense's proposal -- and I know this is not the defense's
4 ideal proposal, I think that is an accommodation that they are
5 offering of, hey, we can go ahead and talk about the law, but
6 I don't know that I particularly like that option. I would
7 like to deal with it all in one proceeding, if possible.

8 So I would like to hear from -- among whatever other
9 things you would like to talk to me about, I would like to
10 hear from you on my position. Go ahead.

11 ATC [LTC LONG]: Yes, Your Honor. The defense's discovery
12 request requested classified material, and the government has
13 proceeded with all deliberate speed since the receipt of the
14 discovery request. It is a multistep process. That
15 classified discovery through that process was made available
16 on Friday.

17 As the parties are all in the process of
18 developing -- whether it's information technology, whether
19 it's understanding that in this particular context and
20 litigation it's dealing with classified material, the
21 government learned at that time that the defense -- on Friday
22 the defense did not have the capacity to view or store this
23 level of classification in their offices. So we then

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 couriered that for them to this location so that we could
2 present it to them.

3 At this point -- and Lieutenant Colonel Jasper is
4 correct, there are roughly 150 pages of discovery that were
5 provided to the government. Everything the government was
6 provided, everything the government read, observed has been
7 provided to the defense.

8 There are roughly 30 pages of the 150 that amount to
9 what are classified statements. The vast majority of that
10 discovery is unclassified SOP. The requested video is
11 approximately ten minutes long. So the government's position
12 would be that, based on the fact that even those 30 pages of
13 statements aren't all statements, some are logbook entries
14 that are requested, some are just the standard detention
15 facility practices for maintaining logs.

16 So when the defense is saying that they would not be
17 able to go through the material because we have had them for
18 weeks, well, in effect, yes, they were provided to us pursuant
19 to the review process required for being able to clear and
20 release classified material, but that doesn't mean the
21 government has had four weeks to pour over this material as if
22 that were necessary.

23 MJ [CAPT WAITS]: But it was in your hands four weeks ago

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1 before you began the process of determining releasability to
2 the defense.

3 ATC [LTC LONG]: Well, I would use the monolith language.
4 Because actually, sir, it took two weeks for the government to
5 get the discovery, yes. When I came two weeks ago, I was
6 provided access, but at that point it had already been two
7 weeks into the process. So once the discovery request was
8 received, it was forwarded immediately to JTF for processing.
9 That takes time.

10 And so the time that it took for defense -- for the
11 government, I'm sorry, for the government to get that actually
12 only left us about two weeks to then clear it through the
13 remainder of the classified discovery release process. And so
14 that was Friday. And so ----

15 MJ [CAPT WAITS]: I mean, that was back in your hands on
16 Friday, and that's when you found out the defense couldn't
17 receive it any way besides the courier method that you just
18 described?

19 ATC [LTC LONG]: Correct.

20 MJ [CAPT WAITS]: So the final result of that is they
21 didn't get it until last night?

22 ATC [LTC LONG]: That is correct.

23 MJ [CAPT WAITS]: Okay.

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1 ATC [LTC LONG]: Again, back to what the material is, it
2 is not hundreds and hundreds of pages of complex or intricate
3 material. They are a very small handful of rather short
4 statements of the particular guards involved in this incident
5 with the accompanying logs, and then about more than a hundred
6 pages of unclassified SOP.

7 So the notion that, just because it is 150 pages --
8 and certainly, as has already been raised, the defense was
9 provided the opportunity to speak to the Joint Detention Group
10 commander, and I understand that was about a 45-minute
11 interview, and that's who the government spoke with. So also
12 there is also no notion that what the government received the
13 defense has not also received. Granted, just because of the
14 process -- and the timing, obviously, this week being the
15 timing of the hearings rolled back to the date of the request,
16 the date the government received it, the time it took us to
17 process that information, it's taken this long, and that's the
18 process. So it's not a matter that the government is trying
19 to obfuscate or hide the ball. It just simply took that long.

20 And so again, when we look at what this material
21 is -- and if the court wishes to, we can certainly provide
22 that so you can review that material for yourself, Your Honor,
23 so that you can see what it is that the government is

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1 referring to, would they need a half day, another day? They
2 certainly have prepared the declarant that the government has
3 attached to their motion, Colonel Heath. That's the person
4 that they have been able to speak with. That's the declarant.
5 So saying they weren't able to prepare for that individual
6 would not seem entirely accurate.

7 If they had thought that they might call the accused,
8 they certainly have known since they made the emergency
9 request for discovery that, based on the events of 8 October,
10 they certainly know what they might conceivably have asked or
11 prepared the accused for.

12 So I'm not exactly sure -- and perhaps if you were to
13 see the material, Your Honor, and to see what limited real
14 substantive information that we are talking about, you may
15 have a better sense that we can argue the facts and the law
16 and it doesn't need to wait.

17 If the defense is asking for a little more time,
18 understandable; but in light of what the materials are, it's
19 unnecessary. It's -- really there is no reason to think that
20 a day, a day and a half would be insufficient time to review
21 that material to be able to prepare for really the policy
22 legal question before the court. Of course, certain facts
23 which are relevant to it understandably, but there is

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1 sufficient time for the defense to prepare.

2 And we don't think that's unfair to the defense
3 because in light of the materials, they would have -- if the
4 court were to see the materials, you would have a better sense
5 of what it is that I am referencing, that there would be
6 sufficient time during this week of hearings to address this
7 matter, Your Honor.

8 MJ [CAPT WAITS]: So it's 150 pages?

9 ATC [LTC LONG]: Total approximately 150 pages, yes. And
10 of those, I would say roughly 34 or so are the substantive
11 statements, the rest are unclassified SOP.

12 MJ [CAPT WAITS]: Okay. Colonel Jasper, do you want the
13 last word on this?

14 DDC [LtCol JASPER]: I would just like to make clear up
15 front that the prosecutor is correct, they did everything they
16 possibly could. We don't assert otherwise. I know
17 Lieutenant Colonel Long, because we've talked on a daily basis
18 for the last few weeks about getting this information, the
19 lengths he was going through and sincere efforts to get us the
20 information. It just wasn't possible because of the
21 bureaucracies involved and so forth.

22 The problem, Your Honor, is it's not just 150 pages.
23 It's statements from many people that we want to talk to. Not

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1 just the statements that we've got to review, we have our
2 client's version. We just received the government's version
3 last night. We need to inquire and conduct some investigation
4 on our side as to whether -- what's accurate and how to
5 present that material to effectively represent
6 Mr. Hadi al-Iraqi. Being rushed into doing that in a case
7 like this, an issue this important to Mr. Hadi al-Iraqi,
8 something that has broad implications on the DoD and also his
9 Muslim faith, shouldn't be a rush job.

10 We agree with you, it should be dealt with in one
11 hearing, present evidence, be heard on the law, weigh it all
12 together so that you can make a firm, calculated decision,
13 well informed. We just can't do that without having the
14 ability to digest the information, discuss it with our client
15 and present evidence. It's not possible.

16 And additionally, Your Honor, something that you must
17 know -- we could talk about off the record -- even this
18 morning we were given information on different classifications
19 that may involve this particular matter that would cause delay
20 pursuant to Rule 505, and that's something I didn't mention in
21 my initial argument, but the government is aware of it, I am
22 aware of it, and Your Honor should be aware of it, too. And
23 maybe we can ex parte collectively off the record talk to you

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1 about it with you; but another consideration of why we are not
2 prepared to go by Wednesday.

3 MJ [CAPT WAITS]: Okay.

4 DDC [LtCol JASPER]: Your Honor, logistically, it's not
5 that easy. I can't go to Mr. Hadi al-Iraqi's cell, as you can
6 probably understand, and just talk to him any time I want. It
7 doesn't happen that way here. That's a practical
8 consideration. I have a client in pretrial confinement.

9 Thank you, Your Honor.

10 MJ [CAPT WAITS]: Understood. Okay. I guess what I would
11 like to do is take the defense up on the offer to discuss back
12 here in chambers what the 505 issue is, and then when we
13 conclude that discussion, I may take the government up on its
14 offer to review the discovery that's been provided to the
15 defense. And then after I have reviewed it, probably no
16 earlier than tomorrow, I will make a determination on whether
17 we can go forward with this motion this week.

18 I suppose I would propose -- I mean, Defense, you
19 need to continue reviewing the evidence with due diligence and
20 I guess I would propose maybe going back on the record
21 tomorrow at 1300, at which time I will be more informed. And
22 if there are any final -- at that point possibly the defense
23 might have reviewed more of the evidence, I will hear from you

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1 on that, and at that point I will decide whether we can go
2 forward on the motion or whether it's prudent to go forward on
3 the motion during this week. All right?

4 So I guess we have three orders of business right
5 here following this recess, the two that I just mentioned, and
6 then finally the classified discovery ex parte 802 that I
7 talked about yesterday in our R.M.C. 802 conference. All
8 right.

9 Any questions from either side?

10 DDC [LtCol JASPER]: No, Your Honor.

11 TC [MR. CLAYTON]: Not from the government, Your Honor.

12 MJ [CAPT WAITS]: Very well, then. I'll give you -- is
13 15 minutes sufficient before meeting back here in chambers?

14 TC [MR. CLAYTON]: Would you like the ex parte with the
15 government first or the group session first?

16 MJ [CAPT WAITS]: I think the group session first.

17 TC [MR. CLAYTON]: 15 minutes works for the government,
18 Your Honor.

19 DDC [LtCol JASPER]: The defense concurs, Your Honor.

20 MJ [CAPT WAITS]: All right. Then that would be at 1400.

21 So this commission is in recess until 1300 tomorrow
22 afternoon, at which time we will come back on the record and
23 the commission will announce the way ahead for the rest of

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1 this week.

2 [The R.M.C. 803 session recessed at 1353, 17 November 2014.]

3 [END OF PAGE]

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