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1 [The R.M.C. 803 session was called to order at 0900, 10 May 2024.]

2 MJ [Col McCALL]: The commission is called to order.

3 Good morning, Mr. Trivett. Can you please identify who is
4 here on behalf of the United States both in the courtroom and at the
5 RHR.

6 MTC [MR. TRIVETT]: Yes, sir. Good morning.

7 Representing the United States today in the courtroom in
8 Guantanamo is myself, Mr. Clay Trivett; Lieutenant Commander Robert
9 Baxter; Mr. Christopher Dykstra. Also present is paralegal
10 Mr. Rudolph Gibbs.

11 Present from the FBI today is Supervisory Special Agent
12 Joseph Hokanson, Staff Operations Specialist Jeremy Ucciardi.

13 We have no one currently in the Remote Hearing Room. We do
14 not plan on having anyone in the Remote Hearing Room this morning.

15 But these proceedings are being broadcast via closed-circuit
16 television to sites in the continental United States pursuant to the
17 commission's orders.

18 MJ [Col McCALL]: All right. Thank you, Mr. Trivett.

19 Good morning, Mr. Sowards.

20 LDC [MR. SOWARDS]: Good morning, Your Honor.

21 Appearing on behalf of Mr. Mohammad, who is not present, are
22 Gary Sowards and Kathleen Potter, Lieutenant Colonel United States
23 Air Force. And we anticipate being joined shortly by Major Elspeth

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1 Theis, also United States Air Force.

2 MJ [Col McCALL]: All right. Thank you.

3 LDC [MR. SOWARDS]: You're welcome, sir.

4 MJ [Col McCALL]: Good morning, Mr. Montross.

5 DC [MR. MONTROSS]: Good morning, Your Honor.

6 William Montross and Lieutenant Austin Ridgeway for
7 Mr. Bin'Attash.

8 Present in the RHR is Ms. Tasnim Motala, Mr. Matthew Engel,
9 and Mr. Prax Kennedy.

10 MJ [Col McCALL]: All right. Thank you.

11 Good morning, Mr. Connell.

12 LDC [MR. CONNELL]: Good morning, sir.

13 Representing Mr. al Baluchi are myself, James Connell; Alka
14 Pradhan; Rita Radostitz; and Defne Ozgediz.

15 In the Remote Hearing Room is Lieutenant Jennifer Joseph.

16 MJ [Col McCALL]: All right, thank you.

17 Good morning, Mr. Ruiz.

18 LDC [MR. RUIZ]: Good morning, Judge.

19 I'm here on behalf of Mr. al Hawsawi along with Ms. Suzanne
20 Lachelier, Captain Kerry Mawn, and Mr. Sean Gleason.

21 MJ [Col McCALL]: All right. Thank you.

22 All right. I note that the four accused are not present
23 this morning.

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1 Mr. Dykstra, do you have a witness to account for these
2 absences?

3 DMTC [MR. DYKSTRA]: Yes, Your Honor.

4 **CAPTAIN, U.S. Air Force, was called as a witness for the prosecution,**
5 **was previously sworn, and testified as follows:**

6 **DIRECT EXAMINATION**

7 **Questions by the Deputy Managing Trial Counsel [MR. DYKSTRA] :**

8 Q. Good morning, Doc.

9 A. Good morning, sir.

10 Q. And that's your pseudonym or call sign, correct?

11 A. Correct.

12 Q. And you testified yesterday, correct?

13 A. Yes, sir.

14 Q. I just remind you that you remain under oath.

15 A. Yes, sir.

16 Q. Did you have the opportunity to advise the accused of
17 their right to be present this morning?

18 A. Yes, sir. Between approximately 0615 and 0635, I advised
19 each of the accused of their respective right to attend today's
20 session using the English version of the Statement of Understanding,
21 Right to Be Present for Commission Proceedings. I also had a
22 translated version and a linguist present with me when I advised
23 each.

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1 Q. Thank you.

2 DMTC [MR. DYKSTRA]: Your Honor, if I may approach the
3 witness, I'm going to hand him what has been previously -- been
4 marked as Appellate Exhibit 943CCC (KSM), 943DDD (WBA), 943EEE (AAA),
5 and 943FFF (MAH).

6 MJ [Col McCALL]: Go ahead.

7 Q. Are these the forms that you used this morning to advise
8 the accused of their right to be present?

9 A. Yes, sir. They are.

10 Q. And when you so advised them, what was their response to
11 whether or not they wanted to come this morning? To proceedings, I
12 should say.

13 A. All of the accused declined to attend today's session, but
14 several did accept legal meetings, either here or at Echo II.

15 Q. And for purposes of the record, what accused are attending
16 these proceedings or otherwise having legal meetings in the adjacent
17 facilities to this courtroom?

18 A. I believe Mr. Mohammad is already on the premises, and
19 Mr. Ali was in the process of being transported. I don't know if he
20 has arrived yet.

21 Q. Thank you. And as far as their waiver as far as the right
22 to attend this morning's proceedings, did you have any questions or
23 concerns regarding the voluntariness of those waivers?

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1 A. No, sir.

2 DMTC [MR. DYKSTRA]: Thank you, Your Honor. No further
3 questions.

4 MJ [Col McCALL]: All right. Thank you, Mr. Dykstra.

5 Do any defense counsel desire to question this witness?

6 Apparently not.

7 All right. Thank you for your testimony. You're excused.

8 WIT: Thank you, Your Honor.

9 **[The witness was excused and withdrew from the courtroom.]**

10 MJ [Col McCALL]: The commission finds that Mr. Mohammad,
11 Mr. Bin'Attash, Mr. Ali, and Mr. al Hawsawi have knowingly and
12 voluntarily waived their right to be present at today's session,
13 although it sounds like Mr. Mohammad and Mr. Ali may be in the
14 adjacent facility where they can watch the proceedings and may join
15 us at some point today.

16 Just while we're on that topic, I anticipate probably a
17 shorter day today than we normally have. So, again, as past
18 practice, if the defense teams desire to meet with their clients,
19 either in the adjacent facilities or in the courtroom, that's fine
20 with me. I think that's useful, as long as the guard force can
21 support.

22 Mr. Connell?

23 LDC [MR. CONNELL]: Sir, on that topic, I know the answer to

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1 this question, but just to have it formally said: Would that apply
2 to Sunday as well? It's okay if we use the courtroom for our meeting
3 on Sunday?

4 MJ [Col McCALL]: I don't see a -- an issue with that, so
5 definitely.

6 LDC [MR. CONNELL]: Thank you.

7 MJ [Col McCALL]: And Mr. Sowards.

8 LDC [MR. SOWARDS]: Yes, Your Honor.

9 And with respect to the schedule today, if it's possible to
10 perhaps move our lunch hour approximately 15 minutes to the right,
11 either starting and ending. There's a little more involvement with
12 Friday's activities, not -- I don't know whether Mr. al Baluchi will
13 join. But the time that it takes us to get out there and back here,
14 it would be -- it would be more likely to have us timely at 1:45.

15 MJ [Col McCALL]: All right. That's fine. I don't have a
16 problem with that, and just remind me as we get closer to that hour.

17 LDC [MR. SOWARDS]: Thank you, sir.

18 MJ [Col McCALL]: All right. Moving on.

19 So yesterday afternoon, following Dr. Morgan's classified
20 testimony, I conducted a brief conference pursuant to Rule for
21 Military Commission 802 to discuss some scheduling issues with trial
22 and defense counsel. The accused were absent.

23 At this administrative conference, Mr. Connell informed the

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1 commission that, based on the testimony that had been provided by
2 Dr. Morgan, Mr. Connell no longer anticipated a need to take
3 testimony from Dr. WK5I.

4 After querying counsel for the remaining accused, it was
5 determined that we still would need to call Dr. 5KI -- WK5I, but that
6 the testimony might not take as long as originally anticipated.

7 Thereafter, I informed the parties that we would make use of
8 today to hear oral argument on some of the pending motions and that
9 we would probably recess a little bit early to allow counsel time to
10 prepare for the two witnesses for next week and to consult with their
11 clients.

12 After discussing which issues were ready for argument, the
13 commission decided to hear oral argument on the following two pending
14 motions: AE 940A, that's Mr. Mohammad's motion for protection of
15 privileged workspace; and then AE 645A, Mr. al Baluchi's motion to
16 exclude statements noticed after his motion to suppress.

17 All right. I believe I've covered everything we covered in
18 the 802 yesterday. Any additions or corrections?

19 Apparently not.

20 That's all the housekeeping that I have. Any additional
21 housekeeping before we roll into the oral argument?

22 Apparently not.

23 All right. Let's start with AE 940A.

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1 LDC [MR. SOWARDS]: Good morning, Your Honor ----

2 MJ [Col McCALL]: Good morning, Mr. Sowards.

3 LDC [MR. SOWARDS]: ---- again.

4 Your Honor, this motion makes an exceedingly modest request
5 that, nevertheless, has profound implications for the fairness and
6 the legitimacy of these proceedings.

7 We are asking this commission to safeguard Mr. Mohammad's
8 attorney confidences, work product, and workspaces from nonconsensual
9 and surreptitious intrusion by unauthorized parties. In other words,
10 what we're asking the commission to prevent is intrusions into our
11 defense workspaces by third parties who believe they have the
12 authority and the right to enter those spaces anytime day or night
13 without our knowledge or our consent.

14 Specifically, we ask the commission to order that, in the
15 absence of emergency circumstances that may threaten the physical
16 safety of persons or places, no third parties may enter defense
17 workspaces without the knowledge and consent of a defense team
18 representative. And we also request that this protection should
19 expressly apply to prevent entries by members of the Washington
20 Headquarters Services Office of Special Security and the Joint Task
21 Force-Guantanamo.

22 As recognized by the United States Supreme Court over 90
23 years ago in Powell v. Alabama, which is cited at our motion, page 5,

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1 footnote 12, the right to counsel, particularly in a capital case,
2 includes the ability to, quote, participate in those necessary
3 conferences between counsel and accused, which sometimes partake of
4 the inviolable character of the confessional.

5 Such a right, however, is, as a practical matter, rendered
6 meaningless if the fruits of the investigations, development of
7 strategies, and a host of decisions prompted by those, quote,
8 necessary conferences are divulged to the government or other third
9 parties.

10 That is among the reasons that the professional and ethical
11 standards imposed by my state bar licensure requires attorneys,
12 quote, to maintain -- and this echoing the language of the Supreme
13 Court in Powell -- to maintain inviolate the confidence and, at every
14 peril to himself or herself, to preserve the secrets of his or her
15 clients.

16 Thus, as the Military Commissions Defense Organization, or
17 MCDO, Chief Defense Counsel Brigadier General Jackie L. Thompson Jr.
18 observed in his memorandum for WHS OSS and the commander of Joint
19 Task Force-Guantanamo, memorandum which appears as Attachment B to
20 our motion, the availability of legally privileged workspaces is
21 necessary to accomplish the military -- I'm sorry, to accomplish the
22 mission of the Military Commission Defense Organization, quote, to
23 provide ethical, zealous, independent, client-based defense services

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1 to defend the rule of law and maintain the nation's commitment to
2 equal justice under the law.

3 We respectfully submit that the material facts that give
4 rise to this motion and that also compel the requested relief are not
5 disputed by the prosecution and in many cases are expressly conceded
6 by the government.

7 On the afternoon of Thursday, March 28th, 2024, members of
8 Mr. Mohammad's defense team were surprised to hear an unknown person
9 make entry into their defense offices while they were conducting
10 confidential conversation. Upon investigation, they found a member
11 of the WHS OSS whom they were more surprised to have inform them of a
12 newly implemented policy of, quote, spot-checks for security
13 purposes.

14 The individual informed them that these would be conducted,
15 as he was conducting them, without notice to them. And in response
16 to one of the attorneys' inquiries as to whether WHS OSS had given
17 any consideration to countervailing considerations and interests of
18 attorney-client and other privileged matters, the individual informed
19 the team members that OSS would have no way of notifying
20 Mr. Mohammad's attorneys when future intrusions into the office would
21 occur.

22 Concerned by this rather significant development, the next
23 day, on Friday, March 29th, we filed AE 940 (KSM), Mr. Mohammad's

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1 notice of government breach of protected defense workspaces. We
2 reported to the commission and to the parties the details of the
3 incidents and the intrusion described above, and we explained that
4 the government's stated intention to continue unannounced,
5 nonconsensual entries anytime of the day or night made the workspaces
6 incompatible with conducting confidential representational
7 activities.

8 And at the same time, we emphasized for the commission and
9 the parties our willingness and our attempt to resolve the issue
10 through engagement with WHS OSS. As explained in our notice of
11 Friday, March 29th, we had relayed our concerns to the MCDO
12 leadership and WHS OSS was duly notified that day through proper
13 channels from -- from the MCDO leadership.

14 Unfortunately, WHS OSS's only response on that date was to
15 actually confirm the facts, the intrusion as reported by us, and
16 otherwise indicate no intent to correct course. We were nevertheless
17 committed to resolving the issue through discussion.

18 And on Tuesday, April 2nd, 2024, after the weekend,
19 Brigadier General Thompson e-mailed Daniel Purtill, director of
20 security, Washington Headquarters Services, and United States Army
21 Colonel Steven Kane, commander of the Joint Task Force-Guantanamo.

22 General Thompson's e-mail, which also appears in
23 Attachment B to the motion along with his memorandum, informed

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1 Mr. Purtill and Colonel Kane about the recent events and specifically
2 pointed to concerns that were raised about, quote, the integrity of
3 privileged legal materials and conversations in workspaces and
4 elicited Colonel Kane's and Mr. Purtill's comments on how to address
5 this important issue. That was on April 2nd.

6 In turn, General Thompson's memorandum explicitly and
7 respectfully requested that WHS and JTF adopt the very reasonable
8 policy that he proposed for personnel wishing to gain access to the
9 MCDO workspaces. Contrary to the government's later characterization
10 of this overture at AE 940D, as in Delta, (Gov) at (2), contrary to
11 their representation, Governor -- I'm sorry -- General Thompson did
12 not demand that anyone do anything. He requested that, in addition
13 to discussing this with him, they consider the adoption of his
14 policies.

15 And as we -- as we mentioned in the briefing, in a nutshell,
16 the policies boil down to when you have -- you think you have a
17 legitimate reason to inspect the defense workspaces, notify a defense
18 representative, someone with authority such as a lawyer, request
19 entry, and then do so with the knowledge of the occupants.

20 General Thompson also allowed for the possibility that, as
21 sometimes occur, there may be some significant emergency that does
22 truly present a risk to the safety of individuals or the integrity of
23 the physical structure which may not allow for that sort of

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1 consultation. And I would note that we don't really foresee how that
2 would -- how that would arise, but perhaps if there's a necessity to,
3 for instance, allow first responders into the building, naturally
4 they wouldn't have the clearances and perhaps WHS OSS wants to
5 supervise their activities.

6 We understand that. That was also allowed in
7 General Thompson's proposal.

8 Other than acknowledge receiving General Thompson's
9 memorandum, neither WHS OSS nor JTF said anything to us and we heard
10 nothing from them, from the government, including the prosecution,
11 for a week.

12 Because of the approaching date of these hearings for which
13 travel began on Saturday, April 13th, we filed 940A (KSM) on Tuesday,
14 April 9th, 2024. And we asked, as I said, that the -- in that
15 pleading that either the commission order -- order the parties, and
16 in this case WHS OSS and JTF, to abide by the policy enunciated or
17 the expectations enunciated by General Thompson, or to abate the
18 proceedings until we could continue to work it out.

19 And I would hasten to add we were absolutely shared this
20 commission's and I'm pretty sure my defense cocounsel's interest in
21 not having that be the option. We wanted to proceed as expeditiously
22 as possible. But we were in a -- in that quandary.

23 The government's response, pursuant to the court's expedited

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1 briefing order 940D, as in Delta, provided us finally with a response
2 from Mr. Purtill in the form of his declaration. That
3 declaration -- and I can respond to the court's questions that you
4 have or will await the government's response, but again, the bottom
5 line of the government's response and the declaration from
6 Mr. Purtill demonstrate that, in fact, there is no mandate, let alone
7 unreviewable or uncontrovertible authority that prevents WHS OSS or
8 the JTF-Guantanamo from complying with or, if necessary, this
9 commission from ordering a policy that all third parties be subject
10 to the policy outlined by the Chief Defense Counsel,
11 General Thompson.

12 In particular, Mr. Purtill's declaration at paragraph 10
13 allows for coordination -- specifically allows for a coordination
14 with on-site personnel prior to security inspections. After -- after
15 we filed the motion, after conferring with the government,
16 Mr. Purtill represented that he might -- or he would adopt this
17 option and consult with the MCDO security officer, quote, if time
18 permits, which of course is very subjective and the sort of loophole
19 that does not give counsel, particularly learned counsel, the
20 confidence they would need to continue occupying those spaces and
21 leaving privileged confidential materials available to potential
22 search.

23 His other proposal is, rather -- again, rather than giving

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1 advanced notice or conducting any inspection with a prearranged
2 coordination with counsel and defense team, is that presumably with
3 respect to usual business hours at the time the premises can be
4 expected to be occupied, he will inspect **[sic]** his -- his staff to
5 loudly announce their presence in the MCDO space as they're making
6 their unannounced entry, again, if coordination is not practicable.

7 And I would submit to the court that if the defense spaces
8 are being occupied during regular business hours and there is no
9 emergency that I just described, the sort of hypothetical emergency,
10 there is no lack of practicability in telling people that you are
11 arriving and wish to be given access. And that limits
12 potentially -- comes as close as possible to eliminating any
13 inadvertent or otherwise disclosure or exposure of confidential
14 information.

15 The response at page 4, which cites the Department of
16 Defense regulations -- this one I believe is 5105.21-v2, quoted by
17 the prosecution at (4) of their response, begins with a statement
18 that after-duty hours inspections, and then says: Unannounced after
19 duty hours security inspections are aimed at heightening the overall
20 security posture of an organization by determining if classified
21 materials are properly protected.

22 So two things about that. One is the notion that there's
23 going to be an inspection of classified materials to determine

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1 whether they are properly handled necessarily raises the specter of a
2 fairly wide-ranging and detailed search of defense spaces without the
3 attendance or knowledge of defense counsel.

4 In light of what Mr. Purtill also says, that -- that WHS OSS
5 purportedly has procedures in place to wall off the individuals who
6 would be assigned or instructed to conduct these searches in our
7 workspaces, they have certain walled-off procedures to minimize the
8 dissemination of confidential information which may be inadvertently
9 or consequentially brought to their attention.

10 The premise for that is these individuals will be exposing
11 or having -- having exposed to them confidential information. And
12 that's -- that's the problem, though I submit no attorney worth his
13 or her salt would voluntarily agree to such an arrangement.

14 Very different from the question of if you have a legitimate
15 reason, give us a call, we'll come down, we'll let you in, we'll see
16 what you need to see and we'll do the protection.

17 The other part of this particular section that I read and
18 that is quoted at the response at (4) that's not included in -- in
19 their citation -- and I don't mean that they're misleading the
20 commission, but I mean, I think that, you know, that's certainly
21 strong language to suggest there's a right to unannounced searches,
22 but that doesn't end the matter.

23 The first paragraph under that, paragraph 1, explaining how

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1 these procedures and this anticipated way of proceeding will be
2 implemented includes the admonition or the guidance that procedures
3 shall be tailored to what is or is not possible and
4 practicable -- I'm sorry -- practical for the location.

5 So there -- and I think it's fair to say that given the
6 breadth of security context in which these procedures are written,
7 you know, what is necessary for a nuclear submarine or somebody in
8 charge of nuclear codes is very different from the considerations
9 that govern supervision or checking in on lawyers who are working in
10 a complex capital case and trying to maintain not only the security
11 of classified information but the security and viability of their
12 attorney-client information.

13 And in making that comparison, I talk about the
14 practicalities, what people have in mind when they generally write
15 these -- these regulations. But from the perspective of someone
16 who's on trial for his life, there's no more important activity
17 than -- than that. And so in that sense, it's on the same par as
18 people operating a nuclear submarine.

19 But the point I'm making is that individuals who are in
20 those service roles defending our country do not anticipate -- in
21 fact, are not imposed with the obligation of keeping information,
22 the -- the privilege and the confidentiality of information from the
23 eyes of the government. They're working hand-in-hand with the

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1 government. They want that sort of supervision.

2 In the government's brief, the sole legal authority that
3 they cite, other than these regulations -- and again, I understand
4 under the expedited proceedings, no one is going to provide Your
5 Honor with a law review article. But the one case they do cite, that
6 I at least notice they cite, Department of Navy v. Egan, 484 U.S.
7 518, a 1988 case, is, I would suggest, not helpful in this context
8 because it relates to recognizing the broad discretion of the
9 Executive Branch in adjudicating questions of security clearances
10 and, in particular, the limited rights that an individual has in
11 appealing to the Merit System Protection Board where he or she has
12 been found to have done something warranting the removal of their
13 clearance.

14 So I don't -- it doesn't really have the, I guess, direct
15 helpfulness to resolve or address the issue that we're talking about
16 here.

17 Finally, I would say that in the context or the spirit of
18 perhaps the government is saying to us or to the commission, you
19 know, you don't understand, we're charged with protecting classified
20 information. We don't really have to give consideration to
21 countervailing interests of attorney-client privilege or issues of
22 that ilk because this is so important to our nation's security.

23 And you have heard me before, I would say respectfully

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1 demur, that probably 98 percent of the information we're talking
2 about really isn't that. Nevertheless, we all signed agreements and
3 we are all -- are operating under these procedures. And so in that
4 regard, we seriously -- take seriously our promise and our
5 obligation, our procedures to protect that information.

6 But if it has -- has to be done at the expense of what are
7 regarded as, I would say, sort of a cross between sacrosanct and
8 garden variety expectations for the conduct of a lawyer in any case,
9 let alone a death penalty case, if those have to be sacrificed or
10 significantly compromised to achieve that end, then this is another
11 one of those choice -- choice points that the government has reached
12 and that long ago, Judge Pohl warned them that they may reach in
13 which they have to decide which it is. Just as they in 2003 made it
14 a choice whether they were going to engage in certain activities that
15 they thought were justified to obtain national security protected
16 information versus the impact it would have on a defendant's trial
17 rights in the year 2024. This one is accelerated. It's here. It's
18 for them to decide.

19 But the further issue which -- which we raised, and it's not
20 at all, you know, some sort of tantrum or threat, but it's just to
21 say to the court that this is another time when, in the long series
22 of similar situations we have had with government intrusion into the
23 defense camp, including by FBI agents, listening devices, and the

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1 whole array of very troubling behaviors.

2 An offshoot of that is that it puts counsel, yours truly, in
3 a conflicted situation at some point of either adhering to state bar
4 ethical requirements and withdrawing from the case or going forward
5 and being conflicted because I am knowingly compromising my client's
6 rights to have this information protected, as I know it must.

7 So unless Your Honor has questions, I will await the
8 government's response.

9 MJ [Col McCALL]: I have a few questions.

10 LDC [MR. SOWARDS]: Yes, sir.

11 MJ [Col McCALL]: All right. So since that initial intrusion
12 that precipitated this motion series, have there been any other
13 intrusions ----

14 LDC [MR. SOWARDS]: Well, as we ----

15 MJ [Col McCALL]: ---- that your team or any of the other
16 defense teams have had?

17 LDC [MR. SOWARDS]: Sure. As we noted in, I believe it was,
18 footnote 2 of the -- of our brief -- but let me say I'll find it for
19 you while I'm sitting down. The problem is we know of two instances
20 where this has occurred. But by nature, the problem is because they
21 assert the right to do these after hours, we don't ----

22 MJ [Col McCALL]: I understand that. It's the policy.

23 LDC [MR. SOWARDS]: Sure.

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1 MJ [Col McCALL]: Sure.

2 LDC [MR. SOWARDS]: The other point, though, Your Honor -- but
3 that does remind me -- and I -- and I should have mentioned
4 this is -- in terms of Mr. Purtill's declaration is in terms of
5 weighing or considering the necessity or what this policy is and how
6 it's being implemented is that what the -- the reason this was
7 so -- and sort of the opposite, I think, of maybe what you're asking.
8 But the reason this was so startling to us as we were busily trying
9 to, you know, manage classified information and get ready to travel
10 down here for the hearings is that, to my knowledge, this had never
11 happened before.

12 Now, again, maybe they've been conducting these ----

13 MJ [Col McCALL]: Well, that was going to by my next question.

14 LDC [MR. SOWARDS]: Yeah.

15 MJ [Col McCALL]: And so I know from -- it seemed to be a new
16 policy. I don't know if it was clearly enunciated that it had
17 been -- how much of a change.

18 But so, again, you've been on this case much longer than me.
19 But you're not tracking that this has occurred before? Or, like,
20 what was the policy before? Were there spot-inspections with some
21 type of knock-and-announce or prearranged or -- I assume that these
22 type of spot-inspections had occurred before. It was just the manner
23 in which they were set up?

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1 Again, and this is -- I'll ask the other defense teams if
2 they have any data, or the government. But from your experience,
3 what has happened so far in this case to accommodate, you know, that
4 type of security concern?

5 LDC [MR. SOWARDS]: Sure. And let me say, I can -- I'm happy
6 to survey. I don't know if anyone's been here longer than I. I'm
7 sort of the last man standing, but...

8 But first I'll tell you there are, both here and -- here in
9 Guantanamo and up north in Virginia, it's not unusual to see people
10 come and go that you don't know and don't know what their role is,
11 but it is -- I've never been aware of anyone doing so without a knock
12 announce.

13 And what's interesting is, which sort of was chilling to
14 me -- it didn't occur to me until I read General Thompson's proposal,
15 but his one sort of bottom line is that it's improper for a
16 nondefense team member to use their card for swipe access.

17 There are lots of people have swipe access who have duties
18 that we don't interfere with, but to my knowledge, no one has ever
19 done a non-knock-notice intrusion. And of course, it's hard
20 to -- hard to know what happens when you're not there or to -- or to
21 talk about that.

22 The other thing, though, I think is important, Your Honor,
23 is from what I understand from Mr. Purtill's declaration and from the

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1 vintage of these regulations I read, which the one I read cited by
2 the prosecution dates back 12 years ago, is that these are not new
3 policies.

4 What I think is interesting from a practical standpoint is
5 WHS OSS says essentially we haven't been doing these because we
6 didn't have enough personnel, okay? And so I know there are problems
7 with COVID and with budgets and all of that.

8 But the point is this is not a necessity on which the fate
9 of the safety of the republic hangs. And I don't say that in a
10 mocking way. What I'm saying is I understand that there are some
11 things that you say, no, we're not going to -- you know, you have to
12 buckle your seatbelt before takeoff or we have to do this or we have
13 to do this. But what they're saying is they're kind of getting
14 around to doing this now that they've filled some slots.

15 And our response is, well, you know, we -- certainly I as
16 a -- you know, I can speak with Mr. Nevin who, as we explained to
17 you, is otherwise engaged, but as a -- somebody asked to step in as
18 learned/lead counsel, I have never been apprised of someone saying
19 take note, we have a -- we have a key to your office and we use it
20 anytime we feel like without telling you.

21 And I would -- and I would also contrast that with the
22 litigation that we brought to the commission's attention in 155,
23 AE 155 series. And again, the -- there's sort of a balance here that

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1 on the one hand, I know people don't want to hear us rehearse the
2 very long history and all of the incidents of governmental intrusion,
3 worrisome governmental intrusion that are clearly not proper every
4 time something like this happens.

5 On the other hand, what we hope that -- that each -- each
6 succession or succeeding military judge appreciates is that has a
7 cumulative effect and it has a basis that said -- that causes us not
8 to so blithely shrug and excuse something and say, oh, it's just the
9 cleaning crew which, by the way, here at JTF is accompanied by
10 somebody from the defense organization and we have as I understand
11 similar protections up there.

12 But that's why we raise it. And so it was news to me when,
13 you know, both -- it was news to me this was happening. But it was
14 also news to me that when Mr. Purtill said in a sense, well, we could
15 have been doing this for the last 12 years, and I don't know -- you
16 know, it doesn't say in his declaration how long they have not been
17 doing it.

18 MJ [Col McCALL]: Sure.

19 LDC [MR. SOWARDS]: But the point is, it has not posed,
20 obviously, a threat to national security.

21 MJ [Col McCALL]: All right. Mr. Sowards, my other question
22 is ----

23 LDC [MR. SOWARDS]: Yes, sir.

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1 MJ [Col McCALL]: So I've never been to the defense space. So
2 give me a better understanding of it. So is this -- I'm assuming
3 it's somewhat set up like the OMC judiciary space. Is it one large
4 office space that is a MCDO space and then it's broken out into the
5 various teams? Or is this a specific Team Mohammad space that you
6 have? Like, walk me through that.

7 LDC [MR. SOWARDS]: Yeah, and I was going to say as much as
8 I'd like to, I have not intruded into the OMC judiciary space.

9 MJ [Col McCALL]: Right, exactly.

10 LDC [MR. SOWARDS]: But, yeah, it's essentially on the -- I
11 guess I won't talk about the specifics.

12 MJ [Col McCALL]: We don't have to get into location.

13 LDC [MR. SOWARDS]: But it's in an office building at a
14 relatively high floor, by my lights, and we share kind of a common
15 entryway with another team. And then you have, you know, sort of
16 have like a vestibule entryway with doors leading to either wing, if
17 you will.

18 And once inside, there's a place for -- I'm sorry, I guess
19 I'm -- on the outside there's a place for cell phones and any
20 electronic devices to be put in cubbies during the time
21 you're -- you're inside the main room.

22 You then are in a place that's non-SCIF and then most -- my
23 kind of idea, but when I'm there because I go back to a conference

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1 room, an area, most of the kind of the business end of the place
2 legally is in the -- the area that is actually a SCIF and has a
3 conference room and offices and the like back there.

4 It was back there that -- and that's -- and that's -- again,
5 thank you for the question. The other troubling thing about the
6 particular incident on the 28th is that it wasn't someone -- and
7 obviously, it was somebody with swipe access who didn't knock,
8 didn't, you know, summon anybody who -- and went in and was heard
9 walking through the premises. And when someone called out and said,
10 who's there or who is it, whatever, there was no response.

11 Now, Mr. ----

12 MJ [Col McCALL]: I'm tracking that.

13 LDC [MR. SOWARDS]: Okay. You know all that. But ----

14 MJ [Col McCALL]: So ----

15 LDC [MR. SOWARDS]: But they were deep into -- they were deep
16 into the office space where we would be discussing matters in the
17 conference room.

18 MJ [Col McCALL]: All right. So I think I have the
19 perspective I need on that piece.

20 So how does it work when a visitor typically comes to your
21 office? Let's start with somebody from MCDO. Let's say
22 General Thompson is going to come by the space. So it sounds like he
23 does not work in that space?

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1 LDC [MR. SOWARDS]: He does not.

2 MJ [Col McCALL]: Okay. So if he's going to come by, like,
3 how does it work? Does he swipe in? Does he ring a doorbell? How
4 does it work?

5 LDC [MR. SOWARDS]: Yeah. Let me ----

6 MJ [Col McCALL]: And you can confer.

7 LDC [MR. SOWARDS]: Yes. I was going to say, there is a
8 doorbell.

9 MJ [Col McCALL]: I'm tracking.

10 LDC [MR. SOWARDS]: I have not met with General Thompson
11 there. I usually see him here or on VTC, but, yeah, we have a
12 doorbell ----

13 MJ [Col McCALL]: That's what I figured.

14 LDC [MR. SOWARDS]: ---- and all that sort of stuff. And I'm
15 also, if I didn't make it clear, the -- the SCIF that -- the formal
16 SCIF space is, of course, divided into Secret and Top Secret.

17 MJ [Col McCALL]: Okay.

18 LDC [MR. SOWARDS]: So there's also that.

19 MJ [Col McCALL]: All right. And -- but you're saying that if
20 he does come by, that he -- did you say whether he swipes or he rings
21 the doorbell ----

22 LDC [MR. SOWARDS]: You know, my ----

23 MJ [Col McCALL]: ---- in his attempt to access?

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1 LDC [MR. SOWARDS]: As I say, I have not been there when he's
2 paid us a visit to consult ----

3 MJ [Col McCALL]: You or someone else -- yeah, go ahead. And
4 I'm sorry to talk over you.

5 LDC [MR. SOWARDS]: No, that's good.

6 **[Counsel conferred.]**

7 LDC [MR. SOWARDS]: If he wants to speak with us, his
8 assistant sets up a meeting saying he's coming by and when he
9 arrives, he uses to the doorbell.

10 MJ [Col McCALL]: All right. So what -- and I appreciate
11 that, you know, the defense teams have continued to work and prepare
12 and we've been able to handle this session even though this issue
13 came up right beforehand. What -- or how have you adjusted any work
14 practices for your team based on this -- the current policy as you
15 understand it?

16 LDC [MR. SOWARDS]: Sure. So the adjustment has been with
17 respect to the space in Arlington. And I don't mean to sound
18 omnipotent or dictatorial, but just in terms of exercising
19 professional judgment and ethical duties, I have asked, instructed,
20 whatever, everyone on the team to assume a what we regard it as a
21 remote or telework posture as we did during COVID, which is to say
22 there is some absolutely essential things we have to have someone pop
23 into the office for such as P2P transmissions to receive client mail,

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1 which is the only way, as everyone knows, that we can communicate
2 with Mr. Mohammad. And so that -- we have to be available to do that
3 at least on a daily basis during the workweek.

4 If there's something else that comes in, like Secret
5 discovery or something, it's -- we have to be in a position to
6 receive that and store it properly. But the idea is that no one be
7 in the office working with or handling anything that could lead to
8 the possibility that they're either in place or materials that are
9 not classified but reflect work product, interviews, all that sort of
10 stuff, are out in the space would normally be, you know, in a
11 workspace.

12 So that's what I've asked folks to do. And, you know, in
13 the spirit of never say never, you know, there's always something
14 that comes up. And someone says, do you really mean we can't do
15 this? And we can't -- so we have to adjust for it.

16 Here on the Naval Station Guantanamo Bay, at least during
17 the hearings we have the relative luxury of always having our offices
18 occupied. There are a few hours in the wee hours of the evening and
19 early morning when there's not someone physically there and, you
20 know, we're kind of at their mercy.

21 But particularly with the local, you know, recent wet
22 weather, it doesn't make sense to try to camp out, and certainly we
23 can't take the classified material someplace else. So we're -- you

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1 know, we're trying to hobble along.

2 That's why -- one reason that we asked the -- the commission
3 earlier to possibly address this so we could resolve it, because it
4 really doesn't give us, in the long run, sort of an option. I mean,
5 I'm -- sort of feel that I'm, in a sense, skating the line right now
6 and kind of robbing Peter and pay Paul.

7 MJ [Col McCALL]: All right.

8 LDC [MR. SOWARDS]: Because I also don't want to say we're not
9 prepared, we're not going to participate. That does -- that does no
10 one ----

11 MJ [Col McCALL]: Right.

12 LDC [MR. SOWARDS]: ---- or at least certainly does
13 Mr. Mohammad no good.

14 MJ [Col McCALL]: I appreciate that. All right. That's all
15 the questions I have for now.

16 LDC [MR. SOWARDS]: All right. Thank you, sir. Appreciate
17 it.

18 MJ [Col McCALL]: Do any of the other defense teams desire to
19 be heard before I hear from the government?

20 Apparently not.

21 Mr. Trivett, I'm not sure who's addressing this from the
22 government.

23 MTC [MR. TRIVETT]: We stand on brief, subject to any

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1 questions you may have, sir.

2 MJ [Col McCALL]: So, Mr. Trivett, from your understanding,
3 are there any continuing, ongoing discussions between WHS OSS and
4 MCDO, or is this both sides have stated their positions and we have
5 what we have?

6 Because, again, I'm trying to stay within my lane as much as
7 if things are being worked behind the scenes that I'm just not privy
8 to.

9 MTC [MR. TRIVETT]: I think in the declaration from
10 Mr. Purtill, he indicated what he was willing to do. And to the
11 extent that they're continuing to communicate, that I don't know.
12 Because we're walled off from it. We really don't have much
13 involvement in it at all.

14 MJ [Col McCALL]: Understood.

15 And, Mr. Sowards, I mean, can you address that? Again, I'm
16 not sure if you're privy to any -- if there's any additional
17 discussions between General Thompson and WHS.

18 Sure.

19 LDC [MR. SOWARDS]: Just to, first, clarify one point I think
20 I may have left slightly hanging, and that is that, more specifically
21 in answer to your question, Brigadier General Thompson does have
22 swipe access.

23 MJ [Col McCALL]: Okay.

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1 LDC [MR. SOWARDS]: But as a courtesy to us, he doesn't use
2 it. He rings the doorbell and waits to be admitted.

3 MJ [Col McCALL]: That's what I was assuming.

4 LDC [MR. SOWARDS]: Okay.

5 MJ [Col McCALL]: So that's -- I had taken that from your
6 answer, but I appreciate you ----

7 LDC [MR. SOWARDS]: Oh, good.

8 MJ [Col McCALL]: ---- clarifying.

9 LDC [MR. SOWARDS]: Okay. Right. Some folks thought it
10 wasn't that clear, but I appreciate that.

11 Yeah, and again, I'm not meaning this as, you know, snide or
12 punchline or something. But again, we're in this situation where, on
13 the one hand, Mr. Purtill doesn't talk to us, doesn't respond to us.
14 He prepares a four-page or three-page declaration for the government.

15 I assume the way it's incorporated into his brief -- into
16 the government's brief, it wasn't sent to them under seal and they
17 submitted it without looking at it. I -- my guess is if we had him
18 testify, he would probably say there was some consultation with the
19 prosecution, how it works.

20 And then on the other hand, we hear, no, we're walled off.
21 We have no idea what they're doing. I don't think that's accurate.
22 I think there is -- and, in fact, we don't mind them not being walled
23 off on this.

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1 We had hoped when we filed the notice saying what are we
2 to -- basically, what are we to do? We're going to continue trying
3 knocking on their door and getting a response.

4 It was sort of our hope -- maybe we should have been more
5 explicit with it -- that somebody from the prosecution would have
6 picked up the phone and said, hey, can you, you know, talk to these
7 people? Are they off base? Is there any room to move?

8 The answer to your question from the deputy chief defense
9 counsel, Mr. Darren Wall, is no, there has been no other
10 communication from WHS OSS or between us and them. And -- and the
11 point is that Mr. Purtill's -- aside from the way he communicated it
12 to us, the suggestion that he's going to have people just yell louder
13 when they barge into the office, or to the extent he can maybe decide
14 on a case-by-case basis to give us notice in other than -- I mean,
15 give us notice other than being excused by emergency circumstances,
16 you know, just doesn't get us where we need to go.

17 I mean, it's -- you know, you mentioned, Your Honor -- and,
18 again, I'm not -- I'm not at all being flippant, I promise you. And
19 I remind you that we have the sign here, you can cut me off anytime.

20 But it was interesting when -- you know, I was
21 being -- trying to be humorous when you suggested about the -- you
22 know, the trial judiciary's space. You know, but it's almost like
23 we -- if we were to say to you, Judge, this is a capital case. We've

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1 got to make sure that, you know, you're not having ex parte
2 communications. We've got to make sure this, we've got to make sure
3 that. So you wouldn't mind, by the way, if we just detailed
4 somebody. They won't tell us what they see. You wouldn't mind if we
5 detailed somebody to go into your spaces anytime day or night without
6 telling you just to kind of look around.

7 You know, and again, you don't have to impute ill motive or
8 malice to someone who wants to do that. It's just -- it's sort of,
9 you know, one of these bright-line rules that that's not the way a
10 law office is supposed to operate, and there are actually
11 professional and ethical consequences if it does.

12 MJ [Col McCALL]: All right. One last question ----

13 LDC [MR. SOWARDS]: Yes, sir.

14 MJ [Col McCALL]: ---- that comes to mind is: So for your own
15 defense -- defense team members -- again, I -- you know, I've been a
16 defense counsel before. I know things are different probably in the
17 Air Force from the way they are set up in the commissions, perhaps.

18 So what do you do when you're onboarding somebody? Is there
19 any documents that they sign, confidentiality agreements, things like
20 that?

21 LDC [MR. SOWARDS]: Yes, sir. Without divulging
22 attorney-client information, I can -- I can say yes, we have a -- we
23 have an array of, first of all, very rigorous and focused onboarding

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1 procedure.

2 One of the things we do -- and I think the other teams do it
3 as well -- is we recognize that this is a, now, four-codefendant
4 case, was five, and there has to be some necessary
5 intercommunication. But we also talk about where the lines are
6 between what you can say that's privileged versus what we say to
7 facilitate cooperation.

8 But we're very -- and you can also speak to our friends in
9 the media about how rigorous we are about preventing disclosure of
10 confidential case information.

11 And that's part of the onboarding. That's part of reminders
12 at any all-hands meeting we have. And sometimes there are things
13 that pop up that we have to be maybe a little more rigorous about
14 telling people.

15 MJ [Col McCALL]: All right.

16 All right. I think have the information that I need. I'm
17 going to give this some thought.

18 LDC [MR. SOWARDS]: Thank you, sir.

19 MJ [Col McCALL]: All right.

20 Let's go ahead and take a ten-minute recess, and then we'll
21 move on to the next AE.

22 The commission's in recess.

23 **[The R.M.C. 803 session recessed at 0949, 10 May 2024.]**

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1 **[The R.M.C. 803 session was called to order at 1002, 10 May 2024.]**

2 MJ [Col McCALL]: The commission's called to order.

3 The parties are present. The accused are absent.

4 All right, Mr. Connell. I believe we'll hear argument on
5 Mr. al Baluchi -- this is AE 645A, Mr. al Baluchi's motion to exclude
6 statements noticed after his motion to suppress.

7 LDC [MR. CONNELL]: Yes, sir. Before we reach that issue, I
8 just wanted to take a moment to remind the military commission that
9 we are standing by on action related to AE 948, the government's
10 requested destruction of certain evidence.

11 MJ [Col McCALL]: So, yeah, that's -- let me address that.

12 So I had tried to put down some verbiage just to explain on
13 the record, and I felt like it was getting a little too convoluted
14 for everybody to sit there trying to take notes.

15 So I'm actually working on putting out an order to the
16 parties. I mean, it's -- it's going to track pretty much like what
17 we did in 911, but I should be able to get that out today.

18 But for now, again, I understand the concern, but it's also
19 one where it's been out there for a bit, and so I think just stand
20 pat and I should have that out today.

21 LDC [MR. CONNELL]: Yes, sir. Thank you.

22 MJ [Col McCALL]: All right. Good morning.

23 CDC [MS. OZGEDIZ]: Good morning, Your Honor. May I proceed?

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1 MJ [Col McCALL]: Yes.

2 CDC [MS. OZGEDIZ]: Thank you.

3 So first of all, this motion is linked to AE 645 (AAA),
4 which is our base motion for a protective order regarding XYM
5 discovery.

6 And as Your Honor knows, that's a classified motion that is
7 much broader in scope than this one. And because that motion and
8 this motion, 645A, relate to evidence from Camp VII, I may speak in
9 very general terms about some things, and there's one document that
10 I'm just going to ask to put on the document camera for Your Honor to
11 look at but I won't make any oral argument about.

12 MJ [Col McCALL]: All right.

13 CDC [MS. OZGEDIZ]: And with that, my hope is that I can
14 confine this argument to an open session.

15 MJ [Col McCALL]: All right.

16 CDC [MS. OZGEDIZ]: So nominally, this is a motion to exclude
17 evidence because of late notice by the government. But I think it's
18 better summed up with lyrics from a song that says, "You made me
19 promises, promises, knowing I'd believe. Promises, promises you knew
20 you'd never keep."

21 Because this really is about the government making promises
22 saying one thing but then doing another, and that's what I'm going to
23 focus on here.

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1 MJ [Col McCALL]: All right.

2 CDC [MS. OZGEDIZ]: The evidence we seek to exclude is
3 statements made by the defendants in conversations at Camp VII that
4 took place after March of 2008.

5 And the government had set March of 2008 as a sort of cutoff
6 for itself and pledged not to use any statements from conversations
7 after that time, because that was around the time the defendants were
8 notified that charges had been sworn; they were notified they were
9 going to be prosecuted in a capital case before the first military
10 commission; and counsel around that time was first appointed to
11 represent them.

12 And for years the government affirmatively and repeatedly
13 told us and the military commission that it would not use statements
14 from any of these conversations at trial. And not just that it
15 wouldn't use the statements at trial. The government actually went
16 so far as to say it wouldn't even look at these conversations,
17 wouldn't even be privy to their contents.

18 But then in 2019, which is seven years into the iteration of
19 this case, the government went back on that assurance and that's what
20 gave rise to this motion.

21 And that's the overview. But the timeline is especially
22 relevant here, so I'm going to just briefly review some of the most
23 important parts of it. There is a more detailed history of

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1 all -- about all the Camp VII recordings in AE 645, which is the
2 classified base motion, but I'm just going to speak about the
3 specific subset of recordings from 2000 -- March of 2008 to July of
4 2015, which are the subject of this one.

5 So in a letter on January 31st of 2014, the government said
6 they had not reviewed any communications of the defendants that took
7 place after January of 2008, which was around the time of the initial
8 swearing of the charges.

9 And they said, quote: We have no intention of reviewing any
10 communications made after that date.

11 And that letter was Attachment D to AE 575.

12 On 19 May 2015, the government sent us a letter saying it
13 intended to use portions of 33 conversations at Camp VII in its case
14 in chief, and those were conversations that took place between
15 January 2007 and March 2008.

16 And I know initially the government had said January 2008
17 was going to be their cutoff. Now they're saying March. And we're
18 not really taking issue with that period of two months. You know,
19 we're sort of assuming that at that point they adjusted it to March
20 and that's the time period we're working with.

21 On 14 October 2016, Mr. Trivett said to Judge Pohl that the
22 prosecution team had, quote, walled ourselves off, end quote, from
23 Camp VII conversations that took place after early 2008. And that is

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1 in the unofficial unauthenticated transcript at page 13649.

2 About a week later, 22 October 2016, there was another
3 representation made by the government in a 505(h) hearing, and I'm
4 just going to ask to put the page of the transcript on the document
5 camera for Your Honor and the parties to look at. This is in the
6 record at AE 380Q, page 23.

7 MJ [Col McCALL]: All right.

8 CDC [MS. OZGEDIZ]: I realize in hindsight I highlighted most
9 of the page, so sorry about that.

10 MJ [Col McCALL]: That's fine.

11 **[Pause.]**

12 CDC [MS. OZGEDIZ]: May I remove the document?

13 MJ [Col McCALL]: I've had a chance to read it.

14 CDC [MS. OZGEDIZ]: Thank you. And the -- for the record, the
15 answer to the judge's question at the end of that page was in the
16 affirmative.

17 So for the next two years after that point in 2016, there
18 was plenty of other pretrial litigation going on, although in 2017
19 the government asked the military commission to issue a
20 Trial Scheduling Order and represented that it had noticed all
21 statements of the accused that it intended to offer at trial as
22 required by M.C.R.E. 304(c) (2) (B).

23 In June 2018, the government said it would, quote, continue

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1 to abide by its promise, end quote, not to use the statements made
2 after March 2008 in its case in chief or in its presentencing case.
3 And it made this representation about abiding by its promise twice in
4 AE 575, which is a motion the government has since withdrawn. And
5 again in that same motion the government said it hadn't even reviewed
6 any of those statements from conversations after March of 2008.

7 So we are moving along. We're keeping our promises. But
8 then the turning point comes about two months later in August 2018
9 when Judge Pohl suppresses the LHM statements. And in response to
10 that ruling, AE 524LL, the government begins to reverse course.

11 Very soon after Judge Pohl's ruling, the government drops
12 the first hint that maybe it's not going to honor the commitment it
13 had made.

14 On August 31st, 2018, the government files AE 575D, where it
15 drops a footnote -- and this is an unclassified paragraph -- that
16 says, quote: In light of the fact that AE 524LL ruling included the
17 suppression of the accused's statements to the FBI, the prosecution
18 provides notice that pending the outcome of the prosecution's motion
19 to reconsider and any subsequent appeal, the prosecution reserves the
20 right to adjust its position regarding the time frame and number of
21 statements it will affirmatively use at trial, to include statements
22 made between March 2008 and July 2015, end quote.

23 And, you know, that is such a deceptively simple statement

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1 by the government, but it begs a big question, which is: Did it
2 really not cross the government's mind until that point that the LHM
3 could possibly be suppressed?

4 So then a few months later, the government apparently starts
5 going through all the Camp VII statements that it had previously said
6 it wouldn't use or even look at. And it says as much in AE 645C,
7 where it writes that it started that process of review in February of
8 2019.

9 Over the next few months of 2019, Judge Parrella grants the
10 government's motion to reconsider the suppression decision, orders
11 the parties to file motions to suppress, and Mr. al Baluchi files his
12 motion to suppress the LHM on 15 May 2019.

13 And then nine days later, the government files a new notice
14 that it will seek to introduce at trial a number of the statements
15 that it had disavowed and pledged not to use. And those included
16 statements from 63 different conversations at Camp VII over a period
17 of four years from March of 2008 to 2012.

18 So that's the history in a nutshell. And I know part of
19 Your Honor's inquiry on an issue of late notice is prejudice to the
20 defense.

21 MJ [Col McCALL]: That's exactly what I was going to ask,
22 so ----

23 CDC [MS. OZGEDIZ]: And I acknowledge that it's been five

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1 years since the government provided this notice. And now in 2024, we
2 don't face the same level of prejudice as we did when we first found
3 out the government was planning to use all these statements.

4 But what the government did here is part of an ongoing issue
5 where it makes representations, it makes assurances, it makes
6 promises, promises, and then reneges on those when things don't go
7 its way.

8 And, you know, it happened earlier during this set of
9 hearings when the government filed AE 937A, Alpha, its notice of
10 position regarding the topic sets for 505 notices. And it
11 retroactively objected to all of our prior notices that were
12 organized by topic set, which was a system that the government had
13 agreed to and that the parties had relied on for years.

14 And, you know, even just earlier this morning, the
15 government represented that they've walled -- they're walled off
16 from, you know, OSS's relationship with our organization. And
17 they're asking Your Honor to rely on that representation in deciding
18 Mr. Mohammad's motion, AE 940.

19 What if that changes? So perhaps the government will say
20 there is just no way it could have foreseen the possibility that the
21 LHM would be suppressed, but this is a team of experienced
22 prosecutors. They can't be making decisions about what evidence to
23 notice based on the assumption that they are going to prevail in

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1 every evidentiary dispute in this case.

2 And how can you square that with Ms. Waltz's testimony just
3 a few weeks ago that, as far as the FBI was concerned in 2010, the
4 LHM's wouldn't be admissible in federal court because Miranda warnings
5 weren't given.

6 I know this isn't federal court. I know the government has
7 the advantage of different rules here. But like in any court,
8 representations and candor to the court and the parties matter. They
9 affect everyone's decisions. And when the case goes in an unexpected
10 direction, the government cannot just go back on their word.

11 So for that reason, we ask Your Honor to exclude the
12 statements in the interest of justice as the rule allows.

13 And I'm subject to any of Your Honor's questions.

14 MJ [Col McCALL]: No questions. Thank you.

15 Major Theis?

16 DC [Maj THEIS]: Good morning, Your Honor.

17 MJ [Col McCALL]: Good morning.

18 DC [Maj THEIS]: Your Honor, we adopt the position raised by
19 our colleague. However, we further request that this commission
20 invoke judicial estoppel as it applies to this case.

21 Judicial estoppel is a doctrine distinct from the res
22 judicata doctrines of claim and issue preclusion. It is a judge-made
23 doctrine designed to prevent a party who plays fast and loose with

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1 the courts from gaining an unfair advantage through the deliberate
2 adoption of inconsistent positions.

3 Under the -- under the doctrine of judicial estoppel, where
4 a party assumes a certain position in a legal proceeding and succeeds
5 in maintaining that position, he may not thereafter, simply because
6 his interests have changed, assume a contrary position, especially if
7 it would be to the prejudice of the parties who have acquiesced in
8 the position formerly taken by him. That's New Hampshire v. Maine,
9 532 U.S. 742, citing Davis v. Wakelee, 156 U.S. 680 at 689.

10 Sir, when it comes to the New Hampshire v. Maine case, this
11 is from 2001 where New Hampshire sought to redefine its state borders
12 in order to claim sovereignty over the entire Piscataqua River. And
13 I apologize, it's such a hard word. I'm spelling it now:

14 P-I-S-C-A-T-A-Q-U-A.

15 In 1740, King George II made a boundary decree, an
16 adjudication as the line betwixt these two states would be the,
17 quote, middle of the river.

18 Now, in 1977, there was an additional consent judgment
19 entered by the Supreme Court fixing that river's boundary in the
20 middle of the river's main channel, affirming that 1740 decree with
21 regards to the lateral maritime boundary.

22 New Hampshire reversed its position on what the border would
23 be and had set forward a new position that the entire river, and,

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1 by extension, the Portsmouth Naval shipyard at Seavey Island located
2 within this region, would be its territory.

3 The Supreme Court emphatically, in an 8-0 decision, denied
4 New Hampshire's attempts to take this river, to take this territory,
5 affirming the integral role of judicial estoppel. They were
6 unequivocal, and I'm pulling a couple of quotes from them.

7 The doctrine of judicial estoppel is to protect the
8 integrity of the judicial process. It prohibits parties from
9 deliberately changing positions according to the exigencies of the
10 moment. Forgive me, sir.

11 Judicial estoppel is a doctrine intended to prevent the
12 perversion of the judicial process. The doctrine is to protect the
13 essential integrity of the judicial process and to stop that playing
14 of fast and loose, because the rule's intended to prevent improper
15 use of judicial machinery. Cite is between pages 749 to '50.

16 The Supreme Court recognized that it is not reductible to a
17 formula or principle. It explicitly says that there is no inflexible
18 prerequisites. Instead, they give us three guideposts to determine
19 the balance of these equities, invoking whether judicial estoppel is
20 appropriate.

21 First, whether the parties later position is clearly
22 inconsistent with its earlier position.

23 Second, whether the party has succeeded in persuading a

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1 court to attempt to accept that party's earlier position, so that
2 judicial acceptance of an inconsistent position in a later proceeding
3 would create the perception that either the first or the second court
4 was misled.

5 And, third, whether the party seeking to assert an
6 inconsistent position would derive an unfair advantage or impose an
7 unfair detriment on the opposing party if not estopped.

8 So as to the case before this military commission, first, a
9 party's later position must be clearly inconsistent with its earlier
10 position.

11 Your Honor, the government's conduct in this case clearly
12 meets this guidepost. They've done a complete 180 on whether the
13 Camp VII audio statements could be used or not based on what happened
14 with regards to the motion to suppress.

15 In the beginning and repeatedly over the years, the
16 government has provided assurances that it would never use these
17 recordings in the litigation, as my colleague pointed out.

18 Yet, despite this, they have reversed their position after
19 receiving the defense's motions on the LHM, and Judge Pohl with
20 those regards has an additional consideration that I will go into in
21 a moment, sir.

22 So second is the parties have succeeded in persuading a
23 court to accept that earlier position, as again I am only

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1 supplementing what the counsel for Mr. Ali had already represented.

2 In 2015, when Mr. Bin'Attash was considering whether or not
3 to represent himself pro se, there were concerns about what
4 obligations would be triggered under Faretta v. California, 422 U.S.
5 806.

6 So in order to effectuate a way forward with regards to the
7 Camp VII recordings, the government made explicit representations
8 about their nonuse in the litigation process. And specifically
9 because of that, because of the concerns about the security, they
10 proposed a way forward based on what the court requested.

11 And to highlight, Your Honor, this was a 22 October 2015
12 e-mail, which is an in-court submission, AE 645J (KSM), which has
13 been provided to the parties and the court. It is an e-mail entitled
14 "The Prosecution's Proposed Addition to the Pro Se Rights Advisement
15 Contemplated in AE 380," which is specific to the Camp VII
16 recordings.

17 Now, this is because Judge Pohl ultimately ended up relying
18 on it on the 25th of October 2015, while fashioning a solution should
19 a defendant go pro se. And that is found in the
20 unofficial/unauthenticated transcript at pages 8666 to 8668.

21 Now, by fashioning these particular remedies based on the
22 reliance of the assertions by the prosecution, and by doing so, the
23 court has relied on these representations. So now the government is

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1 asking for a reversal on that position for its own benefit.

2 Now, the third consideration is whether the party
3 seeking ----

4 MJ [Col McCALL]: Major Theis.

5 DC [Maj THEIS]: Yes, sir?

6 MJ [Col McCALL]: Go back.

7 DC [Maj THEIS]: Yes, sir.

8 MJ [Col McCALL]: I'm trying to follow, as I'm reading through
9 the e-mail, so what is it -- why do you say that this is -- this
10 e-mail and the -- the question that Judge Pohl asked in giving the
11 pro se rights advisement to Mr. Bin'Attash was premised on the idea
12 that the recordings would not be used? Because it seems to be
13 warning him that just that it -- the conversations would -- that none
14 of the statements you make to anyone while in Camp VII would be
15 treated as privileged.

16 DC [Maj THEIS]: Yes, sir. Part of it is with regards to the
17 other defense teams and the agreement by signing the MoU regarding
18 classification.

19 MJ [Col McCALL]: Okay.

20 DC [Maj THEIS]: And how would these other defense teams work
21 for their clients with a pro se defendant while not disclosing this
22 classified information.

23 MJ [Col McCALL]: All right.

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1 All right. Go ahead.

2 DC [Maj THEIS]: Yes, sir. So the third consideration is
3 whether the party seeking to assert that inconsistent position would
4 derive an unfair advantage or impose an unfair detriment on the
5 opposing party if not estopped.

6 So by asserting its position that it would not use the
7 recordings, the government continued to record Camp VII for several
8 more months. And by refusing to release the defense from those MoU
9 obligations to inform their clients about what was not privileged at
10 Camp VII and switching their position as the wind blows with
11 litigation, we are seeing it today.

12 You heard from the defense counsel for Mr. Ali about the 505
13 process changing. Another example is the phone calls themselves
14 where we heard extensive testimony from Special -- SIA Waltz that
15 they were originally classified, but then when it comes to discussing
16 any of the inconsistencies or expanding on the issues, that's held by
17 Protective Order #3. It's an ongoing frustration, Your Honor,
18 because we also have issues where they invoke national security
19 privilege and then reverse it when it benefits their case.

20 Your Honor, in crafting a decision on exercising judicial
21 estoppel, the Supreme Court was explicit that it should be based on
22 the actual factual considerations and how it's applicable in the
23 instant case.

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1 The function is to protect the integrity of the courts and
2 the legal system. An effective legal system depends upon norms of
3 candor and responsibility. If a party is free to select
4 contradictory positions whenever they are seeking the most
5 advantageous position for their side, the integrity and the efficacy
6 of the courts will suffer.

7 Moreover, sir, this is a capital case. It requires the
8 utmost rigor. It is a perversion of our values for the government to
9 attempt to game the system, to hold its thumb on the scales of
10 justice by changing the rules, changing its stated positions, and
11 those are positions that have been relied upon by this commission and
12 the defense, and weaponizing the discovery and litigation process
13 when it wants to engage in the ultimate use of its power to put a
14 person to death.

15 Sir, if this perversion of the military commission
16 continues, how can it meet with the rigors of Common Article 3 of the
17 Geneva Convention of 1949, which prohibits the passing of sentences
18 and the carrying out of execution without previous judgment announced
19 by a regularly constituted court affording all of the judicial
20 guarantees which are recognized as indispensable by civilized people,
21 Geneva Convention (III) relative to the Treatment of Prisoners of
22 War, Article 31 D **[sic]** August 12th, 1949. Sir, how can it meet the
23 rigors and the requirements of the Constitution?

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1 Now, I understand that the prosecution quips that the
2 Constitution does not apply in this court. Only the statutes apply.
3 Hold them to that for the judicial integrity of the military
4 commission.

5 Consider, as Captain Leahy spoke about, that the government
6 must follow its own rules and regulations, as articulated in U.S.
7 v. Russo, 1 M.J. 134.

8 Judicial estoppel unequivocally says one side, and in this
9 instance it is the prosecution, cannot use the judiciary to play
10 games at heads I win, tails you lose.

11 The defense requests you grant our motion and stop the
12 government's attempt to weaponize the judiciary for it's advantage
13 and hold it to its original representations.

14 Thank you. Pending your questions.

15 MJ [Col McCALL]: No questions. Thank you, Major Theis.

16 DC [Maj THEIS]: Yes, sir.

17 MJ [Col McCALL]: Do any other defense teams wish to be heard
18 on this motion?

19 Apparently not.

20 Government.

21 DMTC [MR. DYKSTRA]: Good morning, Your Honor.

22 MJ [Col McCALL]: Good morning.

23 DMTC [MR. DYKSTRA]: So I'll start off with a couple of

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1 points. First of all, the prosecution does not seek to weaponize the
2 trial judiciary or this commission in any context or form.

3 Second of all, I note that Major Theis' argument largely
4 relies on judicial estoppel. That whole concept was not a briefed
5 issue within the pleadings and certainly was not raised. To the
6 extent Your Honor wants additional briefing on that, he should
7 request that and we'll promptly address that at that point in time.

8 And then, third, before I get into the content of my
9 argument, I'd say that's nice to be able to say and -- that the
10 Camp VII recordings are declassified. To the extent we can admit
11 that, that is a nice fact.

12 Because a lot of -- a lot of what we've been talking about
13 today, we couldn't talk about it in the same kind of way a year ago.
14 So it's nice to be able to -- be able to say that out in the open.

15 Now, before we dive into the real legal issues here, it's
16 important to provide some factual context. And I know that
17 Ms. Ozgediz kind of laid that out for you in their perspective with
18 respect to the Camp VII audio recordings that are at issue.

19 First, and I'll -- it's really six or seven data points that
20 I'd like to lay out for Your Honor.

21 First, in 2012, when this case was -- was arraigned, the
22 prosecution was unable to provide the defense with the Camp VII audio
23 recordings because there was no protective order in place, and the

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1 defense had not signed the required MoUs for receipt of classified
2 information, at least right away. Certainly, some of the MoU
3 litigation dragged out, I think, until 2014 or 2015.

4 Second, and that notwithstanding, the prosecution had
5 originally identified 33 recordings it intended to use during its
6 case in chief for presentencing cases. The prosecution did not
7 require additional recordings based on the availability of the
8 accused's LHM, which it has always, and continues to this day,
9 maintained are voluntarily **[sic]** and reliable.

10 Third, unexpectedly and without litigation regarding the
11 LHM, in 2018 this commission suppressed the LHM, not based on their
12 voluntariness or reliability, but rather in relation to the adequacy
13 of Protective Order #4.

14 Fourth, immediately in response to the suppression order,
15 the prosecution was forced to examine evidence that it had previously
16 sworn off, including the Camp VII recordings at issue.

17 Noticeably -- notably, the prosecution did not wall itself
18 off from these recordings for any reason based on law but, rather,
19 for reasons based on litigation expediency.

20 Fifth, it is important to note that during this time frame
21 and through 2019 ----

22 MJ [Col McCALL]: Walk -- let me stop you there.

23 DMTC [MR. DYKSTRA]: Yes, Your Honor.

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1 MJ [Col McCALL]: So walk me through that a little bit more.
2 When you say through -- why was the prosecution walling itself off?
3 When you're saying it's for expediency, give me a little more on
4 that.

5 DMTC [MR. DYKSTRA]: Yes, Your Honor.

6 There was certain -- we were anticipating certain litigation
7 if we had not -- and I won't get into our strategic
8 decision-making ----

9 MJ [Col McCALL]: Sure.

10 DMTC [MR. DYKSTRA]: ---- but there was certain litigation
11 that we anticipated that defense would get into. And obviously we'd
12 been -- our sole focus has been to bring this case to trial.

13 And so the -- we were not looking to put unreasonable
14 obstacles to get -- get to that end goal. And so that's -- that's
15 why we originally decided on the circumstances that we did. And the
16 LHM's provide us everything that we need at that point in time, so...

17 MJ [Col McCALL]: I thought that's what you were saying, so
18 that's fine.

19 DMTC [MR. DYKSTRA]: Yes, Your Honor.

20 Fifth, it is important to note that during this time frame
21 and through 2019, this commission lacked a trial scheduling order
22 and, thus, lacked the structure needed in a case like this, and in
23 all cases, for that matter.

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1 But when this commission eventually issued one in 2019,
2 which was shortly after this motion was filed, the commission for the
3 first time specified a date certain for the prosecution to provide
4 the defense a formal notice of all statements by the accused in
5 accordance to M.C.R.E. 304(c) and also a date certain for the defense
6 to file, and I quote, all evidentiary motions to include motions to
7 suppress any additional statements noticed by the government in
8 accordance with M.C.R.E. 304(c).

9 Notably, this commission eliminated the last deadline and
10 the defense had made clear their intention to file additional motions
11 with respect to the LHM's as well as other evidence. The prosecution
12 contends that this commission should immediately reinstate this
13 deadline and others so the case can have the structure it needs going
14 forward.

15 With that said, in response to the commission's
16 trial scheduling order in 639M, the prosecution filed Appellate
17 Exhibit 477 (Gov Sup) providing notice of its intent to utilize the
18 statements at issue.

19 Here, the defense in filing their motion seek to extend a
20 rule that, by its very definition, is focused on trial on the merits
21 rather than pretrial proceedings. One needs to look no further than
22 the text of the rule itself wherein it states within
23 M.C.R.E. 304(c)(1), disclosure -- and this is quote; this is

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1 verbatim, Your Honor: Subject to the requirements of M.C.R.E. 505
2 and 506, as applicable -- and I spoke to you earlier about there not
3 being a protective order for this information and the MoUs not being
4 signed at that point in time -- prior to arraignment, the prosecution
5 shall disclose to the defense the contents of all relevant
6 statements, oral or recorded, made or adopted by the accused that are
7 within the possession, custody, or control of the government, the
8 existence of which is known or, by the exercise of due diligence, may
9 become known to trial counsel and are material to the preparation of
10 the defense under R.M.C. 701, or are intended for use by trial
11 counsel as evidence in the prosecution case in chief at trial.

12 The prosecution can affirmatively state that it had no
13 intention to offer the Camp VII recordings that are at issue here in
14 its case in chief at trial prior to the suppression of the LHM's.

15 That notwithstanding, it is clear, based on the text of the
16 rule, that the rule of notice that defense cite as the basis for
17 exclusion of evidence is a rule focused on the trial itself, not
18 pretrial. This conclusion is supported by all the case law and
19 commentary on it. And our -- our response walks through all of that,
20 but I -- I point specifically in United States v. Blackshear, a 1986
21 Navy-Marine Corps case cited in our motion -- or our brief.

22 The court stated, and I quote: The rule exists in order to
23 assist the defense in formulating its challenges to the admissibility

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1 of the accused's statements by giving it notice of statements to
2 which it may object.

3 The analysis of Military Rule of Evidence 304 sets forth a
4 nonexclusive list of examples of potential defense objections
5 envisioned.

6 However, even if we get beyond the fact that the rules focus
7 on trial, not pretrial, the defense attempt to stretch it beyond the
8 four corners of its construction by arguing converting a rule of
9 notice into a rule of exclusion, and they fail to cite a single case
10 supporting the relief they seek.

11 Instead, they disregard the case law that, at most, provides
12 a continuance or a delay, for that matter, so the defense may review
13 the statement and determine whether they wish to object to its
14 submission. And even then, those cases are focused on statements
15 disclosed at the middle of trial.

16 Here, the defense have had the statements at issue for
17 several years. In fact, they had access to the statements even
18 before the -- we decided to use them. And we are still in the midst
19 of pretrial proceedings.

20 In fact, the defense have had their delay and have filed the
21 motion to suppress the recordings at issue. And I refer Your Honor
22 to Appellate Exhibit AE 878 (MAH) filed on 3 February 2022.

23 Notably, and further demonstrating the lack of prejudice in

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1 this instance, defense also have had the opportunity to examine the
2 statements at issue and present argument regarding them within their
3 various LHM suppression supplements that Your Honor has requested the
4 parties.

5 By all definitions in this case, the purpose of the rule has
6 been fulfilled and the defense have formulated their challenge to the
7 admissibility of the statements at issue. And there, quite frankly,
8 is no prejudice in this instance at all, other than the statements
9 being incredibly inculpatory of their clients.

10 Given this, Your Honor, the commission should deny the
11 defense motion as soon as practicable.

12 Subject to your questions, Your Honor.

13 MJ [Col McCALL]: No questions. Thank you, Mr. Dykstra.

14 Ms. Ozgediz?

15 All right. Major Theis.

16 DC [Maj THEIS]: Your Honor, may I have a moment?

17 MJ [Col McCALL]: Take your time.

18 DC [Maj THEIS]: Thank you, sir.

19 **[Counsel conferred.]**

20 DC [Maj THEIS]: Thank you, Your Honor.

21 The fact that the Camp VII recordings are declassified shows
22 just how much the government controls the classification when it
23 suits them.

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1 Government's counsel represented that, well, the LHM's had
2 everything we needed, and we needed to adjust our strategy after they
3 were suppressed. That goes straight into what judicial estoppel
4 addresses. That is an inconsistent position. They had all of this
5 evidence and made those representations.

6 Moreover, when talking about those statements, that we had
7 these statements that the linguists could rely on and have these
8 accesses, Your Honor, it is a situation similar to 940 which
9 Mr. Sowards brought up.

10 We did not have the ability to onboard those linguists with
11 the rigors of making sure that all of the required documents were
12 signed, that the person's background was fully investigated.

13 So understanding that that is their position today, I ask
14 you hold them to the position that they have forwarded for many, many
15 years.

16 Thank you, Your Honor. Pending your questions.

17 MJ [Col McCALL]: No questions.

18 DC [Maj THEIS]: Yes, sir.

19 MJ [Col McCALL]: Thank you.

20 All right. So this might be a record for us for an early
21 end, at least recently. So, again, I'll give you back an early start
22 on the weekend. I know everyone is going to be prepping for next
23 week, so I know you'll be busy.

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1 We'll be back on the record at 0900 on Monday starting with
2 the testimony of Dr. WK5I.

3 Any housekeeping matters to take up before we recess for the
4 weekend?

5 Apparently not.

6 The commission is in recess.

7 **[The R.M.C. 803 session recessed at 1044, 10 May 2024.]**

8 **[END OF PAGE]**