

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0902,
2 19 May 2017.]

3 MJ [COL POHL]: The commission is called to order.

4 Trial Counsel, any changes since we recessed on
5 Tuesday?

6 CP [BG MARTINS]: Good morning, Your Honor. No.

7 MJ [COL POHL]: Mr. Nevin, although I note Mr. Mohammad is
8 absent, any changes since we recessed on Tuesday?

9 LDC [MR. NEVIN]: No, sir.

10 MJ [COL POHL]: Ms. Bormann?

11 LDC [MS. BORMANN]: No, sir.

12 MJ [COL POHL]: Mr. Harrington?

13 LDC [MR. HARRINGTON]: No changes.

14 MJ [COL POHL]: Mr. Connell?

15 LDC [MR. CONNELL]: Good morning, Your Honor.

16 MJ [COL POHL]: Good morning.

17 LDC [MR. CONNELL]: No changes.

18 MJ [COL POHL]: And I note Mr. Hawsawi is not here.

19 Mr. Ruiz, any changes since Tuesday?

20 LDC [MR. RUIZ]: No changes, but I will note that

21 [Microphone button not pushed; no audio.] Mr. Gleason will be
22 joining us. He is not present.

23 MJ [COL POHL]: Mr. Swann?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I will note for the record Mr. Gleason has joined us.

2 Go ahead, Mr. Swann.

3 CAPTAIN, U.S. ARMY, was recalled as a witness for the
4 prosecution, was reminded of his oath, and testified as
5 follows:

6 DIRECT EXAMINATION

7 Questions by the Trial Counsel [MR. SWANN]:

8 Q. Captain, again, I remind you that you are still under
9 oath. Did you have occasion to advise both Khalid Shaikh
10 Mohammad and Mustafa Ahmed Adam al Hawsawi of their right to
11 attend today?

12 A. I did.

13 Q. Let's take Mr. Mohammad first. What time did you do
14 that?

15 A. 5:51 this morning.

16 Q. Did he execute the English version or the Arabic
17 version of the waiver?

18 A. He executed the English version of the waiver.

19 Q. But did you follow the same procedure where someone
20 translates the Arabic version with him?

21 A. I did. Mr. Mohammad does not want it translated in
22 Arabic. He says English is fine.

23 Q. All right. Do you believe that he understood his

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 right to attend this morning?

2 A. I do.

3 Q. And do you believe he voluntarily waived his right to
4 attend this morning?

5 A. He did.

6 Q. With respect to the other man, Mr. Hawsawi, what time
7 did you do that?

8 A. 5:58 this morning.

9 Q. And did you do it in English or in Arabic?

10 A. I read to him in English as he followed along in
11 Arabic and then I had it translated into Arabic to him.

12 Q. And did he execute the waiver to attend this morning?

13 A. He did.

14 Q. Do you believe he understood his right to addend?

15 A. I do.

16 Q. And do you believe he voluntarily waived his right to
17 attend?

18 A. I do.

19 Q. You have in front of you what's been marked as 508C
20 and D, each consisting of three pages; is that correct?

21 A. That is correct.

22 Q. Is that their signature on these documents?

23 A. It is.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [MR. SWANN]: I have no further questions.

2 MJ [COL POHL]: Mr. Nevin, any questions?

3 LDC [MR. NEVIN]: No, thank you.

4 MJ [COL POHL]: Mr. Ruiz?

5 LDC [MR. RUIZ]: No questions.

6 MJ [COL POHL]: Thank you, Captain. I find Mr. Mohammad
7 and Mr. al Hawsawi have knowingly and voluntarily waived their
8 rights to be present today.

9 Mr. Harrington, last night we received notice that
10 Mr. Zubaydah will not be testifying; is that correct?

11 LDC [MR. HARRINGTON]: That's correct, Judge.

12 MJ [COL POHL]: Okay. Are there any other outstanding
13 issues -- 152 has been a long motion. I think there is
14 arguably some discovery things out there still. Is there
15 something -- what do you see that still needs to be addressed
16 before --

17 LDC [MR. HARRINGTON]: We have two outstanding discovery
18 requests, Judge, and once -- I believe that's the last thing
19 that we would need before we are prepared to argue it.

20 MJ [COL POHL]: Again, have you argued those discovery
21 requests?

22 LDC [MR. HARRINGTON]: We have not, Judge, no. We are
23 filing motions to compel on them. We still haven't received

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 them.

2 MJ [COL POHL]: Okay. So I don't have them yet?

3 LDC [MR. HARRINGTON]: You don't have it. It is not in
4 front of you.

5 MJ [COL POHL]: So for my purposes, I have everything, but
6 you have two outstanding discovery requests that may involve a
7 motion to compel?

8 LDC [MR. HARRINGTON]: Correct.

9 MJ [COL POHL]: So you want me to leave 152 open?

10 LDC [MR. HARRINGTON]: Correct.

11 MJ [COL POHL]: Okay. Got it. Thank you.

12 LDC [MR. HARRINGTON]: Just so the court is aware, the
13 decision last night, and I tried to get notice to you, I don't
14 know whether you got it or not, but that decision was not made
15 until the last minute by ----

16 MJ [COL POHL]: No, I understand that. And your notice
17 that you forwarded was forwarded to me. So I understand that
18 this is what happens and that's ----

19 LDC [MR. HARRINGTON]: Just so the court is aware, this is
20 an ongoing problem, which you know, and continuous thing,
21 continuous cycles; sometimes it's better and sometimes worse.
22 We are in a bad situation right now and Mr. Binalshibh is
23 constantly requesting me to ask you for relief. And I know

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 what the court's position is on it, until we complete this
2 motion, the court really can't do anything on it. But I want
3 to bring to the court's attention that we are asking for
4 relief.

5 MJ [COL POHL]: But understand that my order, which was
6 issued a long time ago, that if there is any such activity it
7 is to stop immediately. Now, I know that's not satisfactory
8 to Mr. Binalshibh because his position is that's being
9 ignored, but just for the record, that order is still there.

10 LDC [MR. HARRINGTON]: Right. Thank you, Judge.

11 TC [MR. RYAN]: Excuse me, Your Honor. As to the issue of
12 Mr. Zubaydah, I just want to confirm, as I heard it last
13 night, this was a decision that did not apply to just this
14 session but for all sessions; am I correct in that
15 understanding?

16 LDC [MR. HARRINGTON]: That's correct. His attorneys have
17 advised him, Judge, not to testify and I don't see that being
18 reversed.

19 MJ [COL POHL]: Okay. Thank you.

20 Sure, Mr. Nevin.

21 LDC [MR. NEVIN]: A housekeeping matter, I guess you would
22 call it.

23 We learned yesterday that a representative of the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 convening authority's office contacted General Baker, the
2 Chief Defense Counsel, to advise him that civilian members of
3 Mr. Mohammad's defense team, and presumably others within OMC
4 as well, henceforth would not be permitted to travel on OMC
5 flights. And apparently this representative of the CA's
6 office believes there is a regulation that requires this,
7 although that wasn't immediately provided.

8 MJ [COL POHL]: For the last five years there has been a
9 violation of this regulation?

10 LDC [MR. NEVIN]: Nine, actually.

11 MJ [COL POHL]: Nine. I am just going from my time, not
12 your time, Mr. Nevin, but go ahead.

13 LDC [MR. NEVIN]: Yes. But it was an immediate concern
14 for Ms. Leboeuf and Mr. Sowards and others as well.

15 MJ [COL POHL]: Let me make sure I understand this. Are
16 they saying no members of defense team can fly the OMC flights
17 or only some members of the defense team can't?

18 LDC [MR. NEVIN]: Yes, it would be -- I think I would be
19 permitted to because I am regarded as a contractor, although
20 pro bono -- attorneys serving in a pro bono role would not be
21 allowed to, is what we were advised.

22 So this brings to mind -- it raised the possibility
23 that Ms. Leboeuf would be stuck here indefinitely. And

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 apparently that has been lifted. It's particularly crucial to
2 us because we have team work that we are doing beginning on
3 Sunday in the D.C. area. But I wanted to bring this to the
4 military commission's attention just as a blip on the radar
5 screen that it may be something that's coming.

6 MJ [COL POHL]: Well, it doesn't sound like a blip. It
7 sounds like something more than a blip.

8 LDC [MR. NEVIN]: Well ----

9 MJ [COL POHL]: Let me ask you this: Was there anything
10 put in writing?

11 LDC [MR. NEVIN]: Not to my knowledge, no. I believe this
12 was -- what I am aware of is that this occurred ----

13 MJ [COL POHL]: This kind of change in procedure is just a
14 phone call, oh, by the way, all these people that have come
15 down all these years can no longer come down?

16 LDC [MR. NEVIN]: That's my understanding.

17 MJ [COL POHL]: Because somebody reads the regulation
18 differently now?

19 LDC [MR. NEVIN]: That's what I was advised, Your Honor.

20 MJ [COL POHL]: Okay. Well, this is slightly awkward
21 because this is coming from the convening authority, not from
22 the prosecution.

23 LDC [MR. NEVIN]: Right.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You can direct the convening authority --
2 or rephrase that. It needs to be put in writing. And again,
3 I don't order you to do things like this, but I'm not going to
4 have the government get involved in this because this isn't
5 their thing. But you can tell them that I want to see it in
6 writing if they want to impose this and want to see -- like I
7 say, I want a name attached to it.

8 I am not saying they are wrong, they may be. It's
9 not the first time we have done something wrong for five, nine
10 years. But it seems to me a phone call with this type of sea
11 change of the amount of support that can be given for hearings
12 and other things needs to be in writing with a name attached
13 and authority thereto, because I would suspect there is also a
14 way to get exceptions to said regulation.

15 But okay. Thank you, Mr. Nevin. I appreciate you
16 raising it to me.

17 Mr. Harrington.

18 LDC [MR. HARRINGTON]: Judge, my client has asked me just
19 to emphasize this to the court, that we are in this continual
20 cycle, which is not good for anybody, and you know that and
21 the prosecution knows that, but where things happen and then
22 he responds to it and -- because of lack of sleep and other
23 things. And he acts up and then he gets disciplinary

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sanctions for it and then the cycle just continues and
2 continues.

3 What we are asking from the court is at this time to
4 consider an interim to have somebody, you mentioned it once
5 before, as a monitor just for this particular problem, to
6 direct somebody in the camp to monitor this. He gets some
7 relief from the SJA sometimes when he complains and they go
8 and pass on his complaints, but most of the time it doesn't
9 happen.

10 MJ [COL POHL]: Mr. Harrington, I know we discussed this
11 earlier, I believe a long time ago. And I'm not sure who
12 would be a monitor that would be acceptable that wouldn't be
13 part of the same government force, guard force and others,
14 that are at least arguably causing the problem.

15 LDC [MR. HARRINGTON]: Right, and we understand there is
16 not going to be somebody from the outside to do this. But if
17 there is somebody directed to do it, then that puts a burden
18 on that person, that's all we are saying. And it makes it
19 better for a point of contact for us, it makes it better for a
20 point of contact, I think, for everybody in terms of how we
21 can continue.

22 MJ [COL POHL]: Just so I am clear right now, if
23 Mr. Binalshibh complains of this, how does that work through

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the system?

2 LDC [MR. HARRINGTON]: Right now?

3 MJ [COL POHL]: Right now.

4 LDC [MR. HARRINGTON]: We have developed a complaint form,
5 Judge, where he files a complaint, it gets passed on to the
6 SJA, and then it goes on through the system. Sometimes it's
7 addressed, sometimes it's not addressed.

8 MJ [COL POHL]: Okay.

9 LDC [MR. HARRINGTON]: But normally what happens is there
10 is an event that happens. All right. He complains that
11 someone has done something to him, he is up all night or
12 something. They don't respond or they say that it didn't
13 happen. And then he gets angry and complains about it further
14 and further and then eventually they put him on disciplinary
15 status.

16 MJ [COL POHL]: In your initial point that this is a
17 never-ending cycle and we need to try to get some resolution,
18 I agree with. I am just trying to figure out what the
19 resolution is. He files a complaint now, if he filed it with
20 the monitor, wouldn't we be in the exact same spot that we are
21 in right now? Unless -- are you talking about having somebody
22 physically sit outside his cell 24/7?

23 LDC [MR. HARRINGTON]: No, I am not talking about that. I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 am talking about somebody who could respond to this particular
2 issue right away and listen to him, listen to what the
3 response is, but at least then we have a point of contact that
4 everybody knows who it is and it is somebody that I can
5 contact, the prosecution can contact, and we can try to work
6 through this issue.

7 MJ [COL POHL]: What's the chain of command right now of
8 how this flows from the -- he files his complaint, it is
9 handed to the guard, I assume?

10 LDC [MR. HARRINGTON]: He usually gives it to the SJA,
11 Judge.

12 MJ [COL POHL]: The SJA? And ----

13 LDC [MR. HARRINGTON]: It goes to the camp commander and
14 it is either addressed or not addressed.

15 MJ [COL POHL]: You want ----

16 LDC [MR. HARRINGTON]: Somebody designated specifically.

17 MJ [COL POHL]: Again, I don't know how they work it there
18 so I am asking these questions. What you are telling me is it
19 goes to the SJA and the camp commander now?

20 LDC [MR. HARRINGTON]: Right.

21 MJ [COL POHL]: Both -- or particularly the camp commander
22 is in a position to do something about it.

23 LDC [MR. HARRINGTON]: Right.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: They already get it. Who else would be --
2 can you go back to either of those two and ask why nothing was
3 done?

4 LDC [MR. HARRINGTON]: We can't deal directly with the
5 camp commander, Judge. We do have contact with the SJA
6 office. They really have no authority to do anything; they're
7 a conduit for passing things on.

8 MJ [COL POHL]: So who do you want as a monitor, the camp
9 commander?

10 LDC [MR. HARRINGTON]: Somebody designated by the camp
11 commander within the facility who will address this particular
12 issue.

13 MJ [COL POHL]: All right. Let me think about it,
14 Mr. Harrington.

15 Okay. That brings us to 336.

16 LDC [MR. CONNELL]: Your Honor, we are really here on 336A
17 (Gov Sup) and our response, AE 336H, the classified portion of
18 which was argued yesterday. I will address today only the
19 unclassified portion.

20 MJ [COL POHL]: You mean on Wednesday?

21 LDC [MR. CONNELL]: I'm sorry, Wednesday, yes, sir.

22 MJ [COL POHL]: Okay. Go ahead.

23 LDC [MR. CONNELL]: The -- about 15 years ago the then

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Chairman of the Joint Chiefs of Staff, General Meyers, said
2 the men being transported to Guantanamo were so dangerous that
3 they would chew through a hydraulic cable to bring down a
4 C-17. No one took that literally at the time, but the spirit
5 of his comment, that the men at Guantanamo are the worst of
6 the worst and so incredibly dangerous, has lived on in popular
7 consciousness for anyone who follows Guantanamo news.

8 It will be, as it is in every capital case, an
9 important sentencing issue, because past behavior is an
10 important predictor -- not the only predictor, but an
11 important predictor of future behavior.

12 Now the government has told us at the last hearing it
13 has forsworn behavior in confinement as an aggravating factor
14 with respect to Mr. al Baluchi. They didn't give up anything
15 since there is no negative behavior in confinement, but
16 behavior in confinement is still a clear mitigating factor in
17 that ultimately a panel is going to be called upon to decide
18 as to whether, if they find Mr. al Baluchi guilty, that they
19 will impose a sentence of death or some other sentence,
20 including a confinement for some period of time.

21 The government has addressed recently the 336 as
22 solely a DIMS issue, but it actually has two pieces, which is
23 why I want to explain to you that the government's position in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 336A (Gov Sup) that 336 is now moot is incorrect.

2 The first is with respect to the DIMS records itself.
3 The government has produced a great deal of DIMS records, we
4 appreciate their diligence on it. It is clear and at previous
5 hearings it has been agreed that the government has not
6 produced -- has not yet found, I suppose, a number of records
7 which were produced only just to us in redacted form from
8 September 2006. So there are DIMS records themselves that
9 remain to be turned over.

10 The second issue is, in the redacted executive
11 summary of the SSCI report, the SSCI wrote that after the
12 transfer of Mr. al Baluchi and others to Guantanamo Bay, that
13 the men were kept in a special facility and remained under CIA
14 operational control for some period of time. The CIA itself
15 has released an unclassified, redacted version of a memorandum
16 of understanding with the Department of Defense regarding the
17 detainees at Guantanamo Bay. So it seems clear that CIA
18 records either exist or at some point did exist and have not
19 been turned over to the defense.

20 The government claims in AE 336A (Gov Sup) that the
21 DIMS records issue is moot because of a change in policy that
22 they have adopted with respect to the al Hawsawi team.
23 Clearly that is not true. There are at least two unresolved

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 issues that I just went over with respect to confinement
2 records from Guantanamo Bay.

3 So I would suggest to the court that the appropriate
4 course of action at this point, the third or perhaps fourth
5 argument about AE 336, that the government go ahead -- excuse
6 me, that the military commission grant AE 336 and the 336 (AAA
7 Sup), our position on the same material, there is a clear
8 entitlement to confinement records under
9 Skipper v. South Carolina and other authorities. And if the
10 government wants to propose any substitutions it can do so.

11 As of now, the government is not operating under an
12 order and an order I suggest would clarify the
13 responsibilities of the parties in this matter and prompt the
14 government to make -- request substitutions if it intends to
15 do so.

16 MJ [COL POHL]: Thank you.

17 LDC [MR. CONNELL]: Thank you.

18 MJ [COL POHL]: Any other defense counsel want to be heard
19 on 336?

20 Ms. Lachelier.

21 ADC [MS. LACHELIER]: Judge, we join in Mr. Connell's
22 comments on behalf of Mr. al Baluchi. The universe of records
23 that is sought in AE 336 is far broader than what the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 government is attempting to make it when it says this is moot
2 as to DIMS. First of all, it's a larger universe so they
3 haven't satisfied answering the discovery requests in the
4 motion as to that larger universe of records on behavior and
5 confinement; and secondly, as to DIMS themselves, it is not
6 moot.

7 We asked at the last session of the court that the
8 commission issue an order because there had not been
9 resolution of this issue. There continues not to be
10 resolution. The government's representations are incorrect,
11 in that they have provided us with dated DIMS -- as you might
12 recall. We were here before asking for dated DIMS with guard
13 numbers; not guard names but guard numbers. Yes, they are
14 providing those as we go along, but what they are saying, we
15 have to go in with Mr. Hawsawi, we have to memorize those
16 dates, associated guard numbers with the dates, because we
17 cannot show those records to Mr. al Hawsawi.

18 And I want to remind the commission we are talking
19 about nine years' worth of DIMS records, and counting, that we
20 would have to piecemeal memorize to go in and discuss them
21 with Mr. al Hawsawi because the government refuses to let us
22 show him the records as we discuss them with him.

23 So our motion is not moot. And we again we join in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Connell's 336 (AAA Sup) as to the larger universe that
2 this motion involves in terms of confinement records.

3 MJ [COL POHL]: Thank you. Mr. Nevin, Mr. Harrington,
4 Ms. Bormann do you wish to be heard?

5 LDC [MS. BORMANN]: Judge, we would wish to join in the
6 arguments of Mr. Connell and Ms. Lachelier.

7 MJ [COL POHL]: Mr. Nevin?

8 LDC [MR. NEVIN]: Yes, if I have to.

9 LDC [MR. HARRINGTON]: Yes, Judge.

10 MJ [COL POHL]: Trial counsel.

11 TC [MR. SWANN]: Your Honor, the motion in this case in
12 336 was to compel nonredacted detainee information, DIMS
13 records, and allow the defense to share the reports with
14 Mr. Hawsawi.

15 Now, as I have explained any number of times, there
16 are about 4,000 pages that each of these men have generated --
17 or the camp has generated on each of these men. It averages
18 out to like a page a day, maybe a little bit more. These DIMS
19 records cover everything. They cover what time they got
20 breakfast, all the way through the day, when they go to rec,
21 when they go watch television, and their daily activities,
22 when they go off to their various meetings or to the hospital.

23 We have turned all of those records over. We went up

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to 2015, September of 2015, nobody had signed the MoU, so out
2 of an abundance of caution and out of an abundance of
3 fairness, what we gave each of the accused was a releasable
4 version to the accused. About the only thing that's taken out
5 of that are force protection measures and true names of the
6 individual that makes the entry into the system. They have
7 everything they asked for in this instance.

8 Now, the one thing that was outstanding, and
9 rightfully so, based on your comment, I went back and did some
10 evaluation and came to the conclusion that it's not fair for
11 them not to be able to discuss dates and times with their
12 client about incidents that might appear in these versions.
13 They have that information. They have been given a letter.
14 Every one of these teams can take the copy of the DIMS
15 records, which they have as classified, take that column,
16 identify whatever they want to talk to their client about, and
17 then go into the meeting.

18 They don't take the classified document into the
19 meeting with him and show him that, but they can take the
20 dates down, he can pull out his version of exactly what they
21 are talking about, and it doesn't take much to say on this
22 date, which is redacted here, it says you did the following
23 things. Did you do those following things? This is not hard.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 This doesn't take a rocket science -- scientist to figure all
2 this out. So they have everything. This issue is now moot.

3 Now, with respect to the issue that Mr. Connell
4 brought up, that has nothing to do with 336, that has
5 something to do with some future filing that the court is
6 going to see. That issue is best resolved when we get to that
7 filing so then he can address that issue with respect to that
8 filing as to what he doesn't have. But as far as the
9 government is concerned, we have provided them everything.
10 The issue is moot now.

11 MJ [COL POHL]: Just so I am clear, is the government's
12 view 336 only addressing the DIMS records?

13 TC [MR. SWANN]: Only addressing the DIMS records. But if
14 I find anything that's favorable to the these defendants,
15 there are other motions ----

16 MJ [COL POHL]: I got it. But Ms. Lachelier talked about
17 non-DIMS stuff. Is that relevant to 336?

18 TC [MR. SWANN]: No, it's not, because non -- other stuff,
19 we have talked about that I think with respect to 444, some
20 threat assessments or whatever.

21 MJ [COL POHL]: No, I just want to make it clear that it
22 is the government's position that 336 only deals with DIMS
23 records and no other confinement records?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [MR. SWANN]: That's all it deals with. That was the
2 request made to us. And they get them. And they get them on
3 a rolling basis.

4 MJ [COL POHL]: Thank you. Anything further?

5 LDC [MR. CONNELL]: Yes, sir.

6 The government's main argument is one of procedure,
7 and so I would invite the military commission and the
8 government to turn to AE 336 (AAA Sup) filed on 28 December,
9 2015, which is entitled Mr. al Baluchi's Supplement to Defense
10 Motion to Compel Known Redacted Defense Information Management
11 Systems Reports and Allow the Defense to Share the Reports
12 with Mr. al Hawsawi.

13 In subsection 3, the relief requested,
14 Mr. al Baluchi's position is, A, Mr. al Baluchi joins
15 Mr. al Hawsawi's requested relief in 336; and B, and I quote
16 here slowly, In addition, Mr. al Baluchi respectfully requests
17 the military commission to order the government to produce all
18 confinement records for Mr. al Baluchi, including those not
19 maintained in DIMS.

20 The government's primary argument seems to be that it
21 has turned over -- it claims all, but it means, I suppose, the
22 vast majority of the DIMS records, and we have asked for
23 nothing else. That is not true.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 In AE 336 (AAA Sup), we intended to resolve the
2 confinement records for Guantanamo at least. And if you look
3 at the brief, the briefing is about the existence of records
4 outside of DIMS. Now, at that point the CIA had not yet
5 declassified its memorandum of understanding with the DoD, so
6 we didn't have that to rely on. But the brief is itself about
7 the redactions in the DIMS records, which have been largely
8 resolved, and the non-DIMS confinement records. So the
9 government's procedural argument, I suggest, fails completely.

10 Now, the government fails to mention a couple of
11 other things. The first one is that, although it is
12 previously acknowledged that the September 2006 DIMS records
13 contain significant redactions which it has not produced in
14 classified form to the defense, the government maintains today
15 that it has produced all DIMS records. I suggest that that's
16 probably just a figure of speech; it doesn't mean all, it
17 means the vast majority, because it has previously
18 acknowledged to the contrary. The second is that the
19 government doesn't mention the records from the period of time
20 in which the CIA had operational control over Camp VII, which
21 is now firmly documented.

22 The last thing, which I just cannot let go by, this
23 is not the first time that the government has complained that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 in 2015 no one had signed the MoU. That is completely untrue.
2 We signed the MoU within two weeks of its issuing in February
3 of 2013, and the idea that the government cannot withhold
4 information or can manipulate the discovery process on that
5 basis simply is not borne out by the record.

6 So thank you very much.

7 MJ [COL POHL]: Thank you, Mr. Connell.

8 Ms. Lachelier, anything further?

9 ADC [MS. LACHELIER]: I don't recall offhand when the
10 first 336 was filed, but Mr. Connell just mentioned that his
11 supplement was filed in December 2015. I believe the first
12 time at least I was up here arguing this motion was July 2016.
13 The government -- we have now been up several times and the
14 government has been permitted to sort of play this shell game
15 and say look over here, Judge; look over here, we don't need
16 to look over here.

17 This is clear what was filed in the series. There is
18 AE 336, it involves all the DIMS which they have not provided
19 in the form in which we requested. And then there is AE 336
20 (AAA Sup), custodial records for Mr. al Hawsawi and the other
21 codefendants.

22 These records -- the government essentially is
23 kicking the can down the road and they are delaying and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 delaying what we are entitled to receive under Skipper. So we
2 can keep filing motions, we can keep having hearings about
3 this, but the delay is on them as to why this is not being
4 provided and why this is taking so long.

5 Thank you, Judge.

6 MJ [COL POHL]: Thank you.

7 Mr. Swann, last word if you have one.

8 TC [MR. SWANN]: I apologize to Mr. Connell, he did sign
9 the MoU before the remainder of the teams.

10 With respect to -- he talked about September of 2006.
11 I thought we had told counsel this. There are about seven to
12 eight days during that month that they have redacted DIMS. We
13 have gone back to the camp, there are no other versions of
14 those redacted DIMS in existence. I understand that there
15 might have been a crash on a system or something so they can't
16 find those. But they have gotten everything else.

17 If there was anything like what they are asking for
18 from the camp, I would be more than happy to provide it to
19 them. I am not playing games. I am not playing a shell game.
20 I spend too much times with DIMS records looking at those
21 things and turning them over to the accused.

22 So I will go back one more time and ask the camp if
23 there is anything in addition to the DIMS that might address

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 issues of Skipper type evidence, you know, sentencing evidence
2 that says that they have been good in the camp over the years.

3 Other than that, Your Honor, I believe this issue
4 remains moot because I am pretty certain I am not going to
5 find anything; but if I do find it, I will turn it over.

6 MJ [COL POHL]: Okay. Hold on a second, Mr. Swann.

7 Mr. Connell, just so I am looking at the right piece
8 of paper, I see 336 (AAA Sup) dated 28 January 2015. Was that
9 the one you are referring to?

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

11 MJ [COL POHL]: Because the dates went back and forth.
12 Okay.

13 Okay. Mr. Swann, since you are going back, look at
14 that filing, because that's the one that he talks about some
15 other types of records and just respond in writing
16 specifically to that one.

17 TC [MR. SWANN]: I will, sir.

18 MJ [COL POHL]: Just so we can have the record of it and
19 there is no dispute about the government -- part of this seems
20 to be is not everybody is agreeing what's being looked at. So
21 since that's the source document for the request, it seems to
22 me a response back to them and file it with the court.

23 TC [MR. SWANN]: I will do that. If you recall, it was me

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that stood up here the last time because they had some
2 disciplinary records, that after I went back and looked at
3 them I couldn't be certain that it was even the accused that
4 had committed those offenses. So I can tell you that the
5 government is doing everything to give them what they are
6 requesting. And if we find something that just doesn't make
7 sense, I tell them that as well.

8 MJ [COL POHL]: Okay.

9 TC [MR. SWANN]: Thank you, sir.

10 MJ [COL POHL]: Thank you.

11 Okay. That may bring us to 442, and I'll use the
12 term "may" because we are in the 442 supplement that was filed
13 on 16 May. And pursuant to the Rules of Court, that extends
14 to the government 14 days to respond. The government can
15 choose to waive its response and address it if they wish to.

16 Trial Counsel, what's the government's view on 442?

17 ATC [Maj DYKSTRA]: Sir, we are ready to argue it.

18 MJ [COL POHL]: Mr. Ruiz?

19 LDC [MR. RUIZ]: Judge, 442 (MAH), filed on August 12 of
20 2016, was a motion asking the commission to grant certain
21 relief so that Mr. al Hawsawi could participate fully in the
22 defense of his case. And in the context of that motion, we
23 indicated that the injuries that Mr. al Hawsawi sustained are

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 now well chronicled. I argued those a number of times before
2 this commission in regards to -- dating back to the
3 revelations of the SSCI regarding his sodomy and the other
4 torture that Mr. al Hawsawi endured.

5 This motion keys on the aftermath of that torture and
6 those injuries, which of course is well documented now by
7 independent sources in both the Senate's torture report as
8 well as the Freedom of Information Act releases issued by the
9 Central Intelligence Agency which chronicles the history of
10 abuse of Mr. Al Hawsawi.

11 That history of abuse is partially corroborated in
12 the medical records that we finally have been able to obtain
13 and also in the Senate's torture report which, of course,
14 indicated that Mr. al Hawsawi had suffered tears to his anal
15 cavity as well as a prolapsed rectum, and hemorrhoids as well
16 as a result of the procedures that were employed on
17 Mr. al Hawsawi as a means of behavioral control.

18 Regardless of the concerted effort in recent years to
19 reframe that as a simple hemorrhoidectomy, the facts remain
20 that the Senate's investigation clearly bore out the depravity
21 of the torture that Mr. al Hawsawi was subjected to.
22 Nevertheless, that is the factual background that brings us to
23 this point.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 As you know, Judge, we have tried a number of times
2 to address this issue. It's a real challenge for us in the
3 manner we represent Mr. al Hawsawi and how we look to balance
4 the equities in this case. Judge, this motion is aimed
5 squarely at that issue. It is aimed squarely at
6 Mr. al Hawsawi's ability to fully engage and participate in
7 the defense of his case with counsel who have been provided to
8 assist him in this endeavor.

9 So the relief that we have requested in this motion
10 is that the commission ask -- or, rather, the commission
11 direct that certain accommodations be provided to
12 Mr. al Hawsawi so that he can continue to fully engage in the
13 defense of his case and participate, as it is envisioned
14 within statutory construct as well as constitutional rights.

15 In this particular case, Judge, we are asking for a
16 number of things. We are asking that the commission order
17 that there be a video feed in Camp VII, along with audio, as
18 well as a capability of teleconferencing communications with
19 the attorneys in the courtroom so that Mr. al Hawsawi may
20 participate from Camp VII itself, obviating the need for him
21 to be transported to the courtroom if the pain prevents him
22 from doing that.

23 We have also asked, Judge, and we have submitted a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 classified supplement on this issue that was argued also on
2 Wednesday in relation to the methods of transportation for
3 Mr. al Hawsawi to the commissions. The method that is
4 currently employed causes him additional and unnecessary pain.
5 We have provided an alternative to that transportation and, in
6 fact, there is one that is reported to us by Mr. al Hawsawi
7 and we have reported that to the commission in terms of a
8 reasonable alternative that exists and, in fact, has been used
9 to transport him safely to and from commission hearings. We
10 specifically ask the commission to adopt that method of
11 transportation and to direct that that method of
12 transportation be used to bring Mr. al Hawsawi to and from
13 commissions meetings as well as to and from attorney-client
14 meetings.

15 Judge, this is an instance where, when we sat down
16 and looked at this issue, we really were trying to find a way
17 to resolve the problem. And the problem for us is that we
18 have a challenge of representing a man who is very sick in
19 many respects. And we have tried to articulate that and
20 present that to the commission as well as we can through
21 medical records and the information that is available to us.
22 I think the record is really clear, that this is a person who
23 has undergone a corrective surgery. Obviously we can -- the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 prosecution has reframed that or attempted to reframe that as
2 a reconstructed simple hemorrhoidectomy. We have evidence
3 obviously that it was a more serious injury. But the fact
4 remains that there is a real medical issue that necessitated a
5 surgery.

6 Since that time, as we indicate in our supplement,
7 there have been additional surgeries that have been termed as
8 surgeries in the medical reports. When we looked at that, we
9 said, aren't those medical procedures as opposed to surgeries?
10 But the fact is they were called surgeries and they were
11 referenced as surgeries and we called them surgeries where he
12 underwent additional examinations in the rectum based on
13 continued bleeding. That was a procedure that was conducted
14 on him in late April and then also one in March, also to
15 remove a kidney stone.

16 So the issue for us now continues to be how do we
17 maximize our ability to communicate with him about the issues
18 that are important to the case, to engage with him fully in
19 communications where he gives us feedback on the decisions
20 that we need to make and on the motions that we are going to
21 file, on matters that matter to him.

22 Ultimately, it is Mr. al Hawsawi's case. And I say
23 that in regards to being his case because he is the person who

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 is facing a potential death sentence. Our role in this, of
2 course, is to be advocates, to advise him of the law, to give
3 him our counsel, and to try as best we can collaboratively to
4 provide a defense on his behalf. But that necessarily means
5 having full and meaningful representation of Mr. al Hawsawi.

6 What we seek to avoid is a situation where
7 Mr. al Hawsawi makes a decision not to come to a commissions
8 hearing, not to engage with his defense team, not to listen to
9 the evidence that is presented in the motions that are argued,
10 not because he makes a truly freely and voluntary choice not
11 to come, but because he is in pain or because he is suffering
12 from having not slept or he is under the influence of
13 medication. And that's a situation we want to avoid.

14 MJ [COL POHL]: Keep in mind, Mr. Ruiz, that you are
15 getting close to a line here that your client signed the
16 voluntary waiver, you had no issue with it, and now you are
17 saying it really isn't voluntary?

18 LDC [MR. RUIZ]: It is a real difficult line for us.

19 MJ [COL POHL]: I understand that, but it has still got to
20 be voluntary.

21 LDC [MR. RUIZ]: Sure. The procedure is a good one. We
22 certainly like it because it allows him to remain there and
23 not come here if he is not feeling well. And so it is a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 difficult choice for us to -- whether to engage with you and
2 say, Judge, Mr. al Hawsawi is really feeling very poorly
3 because he had a rectal reconstruction surgery or just have
4 him sign the waiver and let him be in the facility. That's
5 the reality, right? I mean, that's really what you are
6 getting at.

7 MJ [COL POHL]: No, what I am really getting at is this:
8 is that if you are standing up there and telling me that these
9 waivers are not voluntary, then I shouldn't accept them. If
10 you are standing up there and telling me that these waivers
11 are voluntary, he is making choices, whether he is tired, not
12 feeling well, whatever it is, but in essence he is choosing
13 voluntarily not to come and he has these other issues, then
14 that's okay. But you can't say it's an involuntary waiver and
15 then ask me to accept it.

16 LDC [MR. RUIZ]: Sure. And one option for you is not to
17 accept them. I understand that. I get that. The other
18 option is for us to engage in this dialogue and to look for
19 ways to put him in a position where he doesn't have to make
20 that choice.

21 MJ [COL POHL]: Okay. I understand that. But after every
22 time this comes up I turn to the counsel and say is there any
23 issues about the voluntariness of the waiver, and you say no.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And I am taking you at your word about the standard. And what
2 we are talking about here goes to the voluntariness of the
3 waiver, just other considerations that he has, it is still
4 voluntary, right? If you tell me it's not voluntary, I won't
5 accept it any more.

6 LDC [MR. RUIZ]: I can't tell you that because I wasn't
7 there every morning and I wasn't there every morning that
8 Mr. al Hawsawi signed that waiver. So this morning's waiver,
9 based on the knowledge I have, was signed by Mr. Hawsawi
10 without undue coercion or duress.

11 MJ [COL POHL]: Just so we are clear on this point,
12 Mr. Ruiz, is that after this you get a voluntary waiver. And
13 if you find out later that you think it is not voluntary, you
14 tell me about it.

15 LDC [MR. RUIZ]: Sure.

16 MJ [COL POHL]: You raise it and say -- I know you are not
17 there at five in the morning whenever they do it; I got it.
18 We set this procedure up, quite frankly, at the request of the
19 defense.

20 LDC [MR. RUIZ]: I heard you say it a number of times.

21 MJ [COL POHL]: I am saying it again. But if you have a
22 problem that it really isn't voluntary -- for example, you
23 remember the time about the ICRC conflict and I said that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 wasn't voluntary and we stopped until we resolved that.

2 LDC [MR. RUIZ]: Sure.

3 MJ [COL POHL]: The same thing here. If you find out
4 these aren't really voluntary waivers, despite what it appears
5 to the representative of the guard force and what's on the
6 paper, I agree we will look behind it and we will address it
7 when it comes up. But I don't want you to say on one hand
8 it's voluntary and on the other hand it's not. It has to be
9 one or the other.

10 Again, you weren't there today; I got it. But if you
11 say it really wasn't voluntary because of this, I am telling
12 you and I tell all defense counsel, if that were to come up,
13 you have a responsibility to tell that to me; otherwise, I
14 consider the issue waived.

15 LDC [MR. RUIZ]: I understand that. And based on this
16 clarification we will do that. I think what I am telling the
17 commission, it's based on the best available evidence to me on
18 any given day, right. As you said, I have not been there for
19 each and every waiver, so I can't say on that particular day
20 Mr. al Hawsawi was suffering from pain and he chose not to
21 come because of the pain. Retrospectively I can.

22 MJ [COL POHL]: But on Tuesday, correct me if I am wrong,
23 didn't he come in the morning and then ask to leave in the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 afternoon?

2 LDC [MR. RUIZ]: He did.

3 MJ [COL POHL]: There you were in a perfect position to
4 see whether that was voluntary or not, right?

5 LDC [MR. RUIZ]: Yes.

6 MJ [COL POHL]: I understand. I think we addressed the
7 issue.

8 LDC [MR. RUIZ]: I think you see the pragmatic problem
9 here.

10 MJ [COL POHL]: No, I understand it.

11 LDC [MR. RUIZ]: I don't want a sick man to come to court.
12 Here is the real issue, right? Let's say Mr. al Hawsawi was
13 up all night coughing up blood and also in his bowel movements
14 he was reinserting his rectal cavity which is the reality of
15 his situation; it used to be, right? He gets up at 5 a.m.,
16 the SJA comes to his cell and says, hey, do you want to go to
17 court today?

18 And if he puts in his waiver, no, I am in
19 excruciating pain, I had to reinsert my rectum, I have been
20 coughing up blood so I don't feel well enough to go to court,
21 you're going to bring him here. He's going to go through the
22 entire process of being chained -- well, the process that goes
23 on, because obviously I can't talk about all the specifics,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 but it's an onerous process. He is going to go through all of
2 that, be put in the vehicle that causes him additional pain to
3 be brought here under those circumstances to answer to you
4 whether his waiver would be voluntary versus him saying, you
5 know what? I get the message. If I just sign my name on the
6 dotted line, the judge will have no problem with it, I can
7 stay here and recuperate. That's the pragmatic problem.

8 MJ [COL POHL]: What you are telling me, Mr. Ruiz, is I
9 should stop taking the waivers because there is no way to
10 ensure they're voluntary without him being here. That's what
11 you are telling me.

12 LDC [MR. RUIZ]: No, that's not what I am telling you. I
13 think the approach that I am telling you is the realistic
14 approach; I don't think we can bury our head in the sand and
15 not see that. But I take you for what you are saying, that we
16 will look at the other waivers and if there is an issue that
17 is significant, we will bring it to your attention in terms of
18 what entered into that decision.

19 These series of motions are aimed not at creating an
20 obstruction to this court but to try and solve a real issue,
21 which is his ability to come to court and to participate. And
22 it's unrealistic to think that those problems, real problems
23 that he suffered through, have not entered into these

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 decisions. What I am trying to do here and what I was getting
2 at when we started this discussion is that we were trying to
3 find ways that he could continue to participate fully in these
4 commissions short of stopping the entire process, right?

5 So when we filed this motion we could have just said
6 from the onset, Judge -- and we have heard motions like this
7 all the time, right? Judge, we need to stop everything,
8 right, we need to drop everything we are doing and we just
9 need to stop.

10 Back in August when we filed this motion, that's not
11 what we said, Judge. In August we tried to find a way, and
12 the method we were trying to find was the way he could view
13 the proceedings, that he could participate remotely, and it
14 wouldn't put a stop to these proceedings.

15 The same for the method of transportation. We didn't
16 say, hey, Mr. al Hawsawi is never going to come to court. We
17 said, we need to find another way so he can continue to come
18 to court, exercise his right, confer with his counsel, protect
19 his Sixth Amendment right, engage fully in his defense. And
20 that way the court could balance the public interests in
21 continuing to further these proceedings, which is really the
22 body of law that we are referencing in our pleading.

23 That gives you a number of examples of cases, Judge,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 where the court has had the authority and has, in fact,
2 engaged in that balancing. The court has balanced the effect
3 of the proceedings on the defendant's health, whether the
4 proceedings themselves would cause additional pain, suffering,
5 or would exacerbate the condition and then the court has acted
6 in many instances to make accommodations in order to balance
7 the two interests: the interest in furthering along the legal
8 proceedings, there is a real public interest in pursuing
9 orderly process in the disposition of these cases, and also
10 ensuring that the accused in the case, his condition is not
11 getting worse. And that's really what we are asking you to do
12 here.

13 And I would say to you, Judge, you have already shown
14 a willingness -- and the prosecution's argument is essentially
15 deference, deference, deference. It is Turner v. Safley. And
16 they throw up Turner v. Safley and say, Judge, you should
17 defer. Your authority should stop at the prison walls, and
18 that's where this ought to be. I don't really necessarily see
19 this as a case where I am coming to you on behalf of
20 Mr. al Hawsawi and challenging directly a prison regulation.

21 Turner itself was a case where the two regulations
22 that were challenged was, number one, communications between
23 post-conviction prisoners at different facilities and also the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ability of prisoners to marry each other. Those were real
2 longstanding prison regulations that were challenged in
3 Turner v. Safley. Here what I am asking you is to make
4 accommodation that is directly related to Mr. al Hawsawi's
5 ability to exercise his rights in his defense. Simple.
6 Method and means of transportation; second, his ability to
7 view and to listen and engage in the proceedings remotely.

8 Now, if I was asking you in the 1930s to have the
9 facility -- or to ask the facility implement a video
10 teleconferencing feed, I think the analysis would be very
11 different than what it is in 2017. You obviously have to take
12 into account the impact it would have on the facility to
13 implement the measures that we are asking to be implemented.
14 We are in 2017. Certainly I think you can take judicial
15 notice that, technical advances being what they are, this
16 would not be an onerous process.

17 But certainly the prosecution has presented
18 absolutely no evidence whatsoever in their pleading or
19 otherwise as to what the impacts on the facility would be if
20 you were to order that a teleconferencing feed or access to a
21 telephonic line so Mr. al Hawsawi can call and say, hey, I
22 have a question about this motion that you just argued. That
23 hasn't happened. The record is devoid of any such evidence in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 terms of what the impact is on the facility.

2 The other thing I think that's important, the other
3 countervailing interest that the court ought to take into
4 account is we are not just taking a look at an impact on the
5 facility. This is a capital case. And to some extent, that
6 argument seems to have become very commonplace and I'm not
7 sure that it has the impact that it ought to have. But when
8 you look at a case like Turner, when you look at a case like
9 Hatim, which is also another case that the prosecution sites
10 for their proposition that the courts are not to interfere,
11 Hatim is the case where -- it was the habeas case where the
12 court indicated that the meetings in Camp V and Camp VI and
13 deferred to the meetings in Camp Echo. That was a habeas
14 case, it was a noncapital case, and that case had a more
15 robust record.

16 The government actually put on evidence of the impact
17 on the facilities. But then again, a critical distinction,
18 one that I think the court needs to key on when assessing this
19 particular right that we are bringing to the court's
20 attention, which is the ability to carry out his defense,
21 Sixth Amendment right, is that in the habeas context that was
22 not the case. This is a pretrial defendant who is facing a
23 death penalty prosecution. Certainly in terms of the pretrial

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 detention, that is a factor that the court ought to consider.

2 The Campbell case that we cite in our brief indicates
3 that -- very clearly that the prison regulations are not to
4 impact the criminal process. But in this case that's not
5 really what we are saying, Judge. We don't mount a frontal
6 attack to the JTF's methods and means of transportation. We
7 are not challenging their regulation or their policy on
8 transportation, nor are we challenging their policy on any
9 other issue. What we are asking here is for you to make an
10 accommodation to help protect Mr. al Hawsawi's constitutional
11 and statutory rights to counsel.

12 And, Judge, as I was going to say, you have already
13 shown a willingness to cross those lines in instances where
14 they impacted rights of the accused in this case. One of the
15 clearest examples is the litigation on the legal mail
16 communications and the legal mail order. If we go back all
17 the way to those days of 2012 when we were talking about the
18 reviews in the JTF camps of the accuseds' legal bins, you may
19 recall that the prosecution at that time defended on a similar
20 basis, basically saying you need to defer to the facility in
21 terms of how to handle and how they inspect the belongings of
22 the accused.

23 And you made a ruling in that case, a very detailed

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ruling, about how the mail ought to be handled, how to be
2 viewed. And certainly we have had a great deal of litigation
3 on that. But the point here is you would not have made that
4 ruling if you did not recognize the importance of the
5 attorney-client communication and of exercising that right.

6 When Mr. al Hawsawi's medical condition impacts his
7 ability to meet with us, as it does, when it impacts his
8 ability to come to the court, as it has, the court can
9 properly intervene to make appropriate, carefully constructed,
10 narrowly tailored accommodations so that Mr. al Hawsawi can
11 continue to exercise that right.

12 You have also allowed us to have access to the
13 facility itself. Once again, that was over the government's
14 objection. You gave us 12 hours to enter into the facility
15 despite the government's objection to that where they argued
16 that we -- it was a threat to the safety and the security of
17 the facility. And in that case, again you issued a ruling
18 that allowed us the opportunity to go into the facility for 12
19 hours a day.

20 So I think you have already, Judge, exercised a
21 degree of authority when it comes to matters that you see as
22 impacting Mr. al Hawsawi's rights in this case.

23 And I guess I would be remiss if I didn't mention the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 order that you issued on Mr. Binalshibh's case in regards to
2 the conduct of the guards in the court. And you asked that an
3 order actually be placed on the doors in the facility and
4 asked that they refrain from engaging in any violations or any
5 noises. That, yet again, was another indication -- a proper
6 exercise of authority, in order to protect the rights;
7 something that affects one of these accused outside of the
8 context of the courtroom, the four corners of this courtroom,
9 but nevertheless can have an impact, obviously, on the course
10 of these proceedings. This is, I think, essentially the same
11 thing that we are asking you to do.

12 And you also did it as well and for a time with
13 regards to the female guard issue. I would say that was
14 more -- a more direct challenge on an established policy that
15 would affect accused across the board. You did issue an
16 interim order. You ruled against us ultimately, but I don't
17 think that this particular set of facts is the same set of
18 facts that we had before.

19 That's what we are asking you. We have now asked for
20 an alternative relief. We have sought to provide and ask for
21 relief that would be a middle ground at best, I guess, in
22 terms of Mr. al Hawsawi's ability to exercise these rights.
23 The prosecution has strongly opposed those measures that would

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 allow us to balance that kind of countervailing interest of
2 how Mr. al Hawsawi fully engaged and fully participated in the
3 proceedings. They say you don't have the authority and ought
4 not do that. If that's the case, you have the authority to
5 abate these proceedings or to dismiss his charges if, on the
6 factual record, you determine Mr. al Hawsawi cannot fully
7 exercise his Sixth Amendment right to counsel, statutory right
8 to counsel, and the effective assistance of counsel that goes
9 along with that.

10 The record as it stands right now, Judge, is
11 decidedly in favor of Mr. al Hawsawi. We have documented
12 medical records that show that he is currently and has been
13 taking narcotic medication. We have shown very recent medical
14 procedures necessitated by a continued bleeding, by continued
15 effects from his torture. We have provided the court with
16 information of a ready alternative about transportation to and
17 from the commission hearings as well as the attorney-client
18 visits. And that hasn't been rebutted with any evidence
19 whatsoever.

20 Major Dykstra, I expect, will come up here and have
21 some comments on these issues. But the state of the
22 evidentiary record is decidedly in favor of Mr. al Hawsawi.
23 There has been no testimony about any impact on the facility.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 There has been no testimony whatsoever about what any of these
2 measures would involve in terms of any additional burden or
3 stress or how it would be contrary to the policies that are
4 currently in place. And in the absence of that, I think you
5 can properly, and should, rule for these accommodations that
6 we are requesting, Your Honor.

7 That's all I have, Judge.

8 MJ [COL POHL]: Thank you, Mr. Ruiz.

9 Trial Counsel?

10 ATC [Maj DYKSTRA]: Good morning, Your Honor.

11 MJ [COL POHL]: Good morning.

12 ATC [Maj DYKSTRA]: Your Honor, the prosecution
13 respectfully requests that you deny the defense motion. In
14 filing their motion, counsel requests that you grant the
15 accused -- and by the accused, I mean all five of them because
16 they are all assumed to be joined in this case -- three
17 accommodations because of purported pain and discomfort
18 Mr. Hawsawi is, or at least was, experiencing at one point in
19 time.

20 However, it should be noted that since counsel filed
21 their motion and the prosecution filed its response back in
22 August 2016 outlining why the commission should deny the
23 requested accommodations in AE 442A, Mr. Hawsawi underwent

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 surgery for hemorrhoids, something the defense argues as its
2 primary factual predicate for their motion.

3 Given the testimony we heard during the December 2016
4 hearings from the senior medical officer in relation to
5 AE 362P (MAH), I refer you to transcript pages 1405 -- 14075
6 to 14128 wherein the defense requests a continuance because of
7 his medical condition in which -- which the commission denied
8 in Appellate Exhibit 362FF. There does not appear to be any
9 need for the accommodations at this point. At that time,
10 which was about five months ago, the senior medical officer
11 made clear that Mr. Hawsawi was healing well after his surgery
12 and that there were no post-procedural complications.

13 He also stated twice, once in response to trial
14 counsel's questioning, once to your own, Your Honor, that he
15 should have no problems sitting in this courtroom six or seven
16 hours a day. And that was approximately 50 days after having
17 a 50-minute surgery for his hemorrhoids.

18 We are now far more removed from the surgery in time
19 and there is simply no evidence on this record or within his
20 medical records -- and let me take a moment to talk about
21 those medical records. Mr. Ruiz alluded to additional
22 procedures or surgery since then. He has had a colonoscopy
23 and a surgery for kidney stones. There is simply no evidence

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 within those medical records that indicate that the requested
2 accommodations are necessary now.

3 And I would note that Mr. Hawsawi, on information and
4 belief, went to his attorney meetings on 10/11 May 2017.
5 Their supplement, that was filed only a little while ago,
6 mentioned attorney/client meetings on 9 May. And on
7 information and belief he also went yesterday. He also sat
8 nearly the entire day in this courtroom on Monday, despite
9 having the option to leave immediately.

10 Those indications are definitely not necessary now,
11 nor were they necessary in the first place at the time the
12 defense filed their motion as outlined in our response. Given
13 this, Your Honor, we believe you should deny their request and
14 deny their motion.

15 Subject to questions, that's all I have, Your Honor.

16 MJ [COL POHL]: How hard would it be to accommodate
17 Mr. Hawsawi by having a more comfortable vehicle transport him
18 to and from the commissions?

19 ATC [Maj DYKSTRA]: Your Honor, obviously that would
20 involve a completely different vehicle. I would point out
21 that we are arguing about cushioning. He has got cushioning
22 in one, he has got cushioning in another one. So if we are
23 to, say, use a different vehicle, it comes down to cushioning.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Now, if Your Honor would like us to supply additional
2 cushioning in the current vehicle, we can certainly look into
3 that.

4 MJ [COL POHL]: Okay. Thank you.

5 Mr. Ruiz, anything further?

6 LDC [MR. RUIZ]: Judge, I would just refer you back to our
7 classified exhibit in the argument on Wednesday. Not only
8 would it be feasible to do so, Judge, it has already occurred
9 and it has happened. That's unrebutted. So it is doable and
10 has been done. And I would presume that they would not have
11 engaged in the procedure that would have endangered the safety
12 or security of personnel or the facility and they, in fact,
13 chose to use an alternative form of transportation, which they
14 can, and which Mr. Hawsawi reports was much better in terms of
15 the transportation back and forth from the commissions. I
16 think that's undisputed, Judge.

17 Judge, the argument about asking you to create a
18 procedure for all accused in this case I suggest you should
19 dispense with very quickly. A ruling on this relief would be
20 narrowly tailored based on the specific facts of
21 Mr. al Hawsawi's case. And I would -- I'm sure you would
22 couch it in terms of the medical evidence before you as it
23 relates to Mr. al Hawsawi. That's what the record indicates.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 That's what the record supports. And certainly you are free
2 to narrow your ruling to Mr. al Hawsawi. And this litigation
3 has been exclusively about Mr. al Hawsawi. No other counsel
4 has asked for the same or similar accommodations, so I do not
5 think that argument should play strongly in your analysis.

6 In terms of the factual predicate for our motion, it
7 is true that we talk about this injury because it is the
8 injury that has caused him the most pain on a daily basis and
9 for the longest amount of time and continues to do so. It is
10 not enough to say he had a colonoscopy. You also have to look
11 at the reason that led to the colonoscopy, which was continued
12 rectal bleeding. That was the decision and that was the
13 reason for that procedure.

14 In terms of our factual predicate, Judge, if you look
15 at page 2 of our original filing, we also indicate that, in
16 addition to his painful injury, and I quote, Mr. al Hawsawi
17 suffers from cervicogenic disease, basically trauma that he
18 sustained to his neck from being thrown up against the wall,
19 the walling technique that was described in the CIA's FOIA
20 release and release of FOIA documents.

21 Mr. al Hawsawi has been given a child's neck brace.
22 His neck is relatively small to wear when the pain gets too
23 severe. He also suffers from chronic hearing loss and has

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 complete hearing loss in one of his ears, severe migraines,
2 blood in his urine, severely disruptive sleep patterns and
3 insomnia. These are factual predicates we raised on page 2 of
4 our motion. So to say that the factual predicate was this
5 particular surgery by itself is not factually supported and is
6 incorrect.

7 In terms of the testimony of the senior medical
8 officer, Judge, the senior medical officer did say that. The
9 senior medical officer also said this, he said,
10 "Mr. al Hawsawi's recovery would involve excruciating pain
11 until he is fully recovered."

12 I asked him, "At this time is Mr. al Hawsawi fully
13 recovered?"

14 He said, "He is not."

15 I think it is clear by the continued medical
16 treatment and procedures that he continues to not be fully
17 recovered. So if you are going to take the senior medical
18 officer's word in one regard, certainly take his word in the
19 second regard; which is, he did indicate on the record, you
20 have the transcripts available, that Mr. al Hawsawi would
21 experience excruciating pain until he was fully recovered. He
22 was not fully recovered then, he is not fully recovered now.
23 The fact he continues to be administered narcotic medication,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 undergoing medical procedures certainly corroborates that
2 analysis, Judge.

3 Second, the testimony about Mr. al Hawsawi having no
4 problem to sit for seven or eight hours a day, I
5 cross-examined the senior medical officer on that point and
6 the basis for his opinion on that. First of all, it bears
7 saying that the senior medical officer was not the specialist.
8 Right? The senior medical officer was a generalist testifying
9 on this issue. But I questioned him specifically on his
10 observations of Mr. al Hawsawi in his cell and I asked him,
11 "Have you observed how Mr. al Hawsawi sits in his cell during
12 the day? He doesn't. He lays on his side. He sometimes sits
13 on the floor on a pillow, but he minimizes the time he is
14 squarely sitting on an object in order to deflect the pain
15 away from that particular area."

16 He does the same in our counsel meetings, Judge. He
17 will lean to one side decidedly throughout the course of our
18 meetings and shift accordingly. There are times we will step
19 out and there will have to be times -- so to his credit -- I
20 will tell you, to his credit, he has not tried to maximize
21 this injury to his credit.

22 And I will tell you, Judge, in 2014 I learned of this
23 injury. I have been representing Mr. al Hawsawi since 2009.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Now, that can tell you a number of things. Maybe I am not a
2 good enough interviewer to have found out the extent and the
3 degree of his torture. I can tell you that my personal
4 experience with most criminal defendants is that the minute I
5 walk in the door, they want to tell me everything that's wrong
6 with them and everything the government has done badly to
7 them.

8 That's not the case with Mr. al Hawsawi. He suffered
9 silently for years until I saw the Senate's torture report and
10 went back in and said, hey, did any of this happen? Of
11 course, we weren't getting the medical records either, so it
12 was reasonable for us not to have seen the problems of
13 Mr. al Hawsawi.

14 But the point is, the unspoken inference here is that
15 this is some effort or some attempt to gain something that is
16 not necessary. And the fact that he comes and sits here,
17 number one, he is required to come on the first day. Number
18 two, he sits here and doesn't cause a disruption to the
19 proceedings. That doesn't mean the man is not suffering. He
20 is suffering and has continued to suffer. But to his credit,
21 he has not sought to make it a feature. He has left it to us
22 to try to deal with it through advocacy, through the law, and
23 try to get these accommodations.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 But since we are talking about information and
2 belief, he will tell you he is in pain. We talk about it. It
3 affects his ability to meet with us, the amount of time he can
4 focus, the number of times he can meet with us, and the number
5 of times he comes to court. From the end of last hearing to
6 this hearing, we had multiple visits scheduled. They were
7 canceled. We know he had multiple procedures during that
8 time. This is the reason we weren't able to meet personally
9 with Mr. al Hawsawi.

10 I will also tell you, Judge, it is not enough to have
11 communications through the mail. You have to have personal
12 contact, particularly in a case where you have a capital
13 defendant. And once or twice a month is something that is not
14 adequate. It wasn't adequate when I was a public defender in
15 state court with somebody who was facing a minor felony.
16 People got fired at the Public Defender's Office if they only
17 met their client once or twice a month and then went into
18 court to try to defend that person in a major felony trial.
19 This is in the context of hundreds of cases in a noncapital
20 trial.

21 But what the prosecution says here is that
22 Mr. Hawsawi met with us twice in the last month and a half and
23 sat through half a day of proceedings, so therefore everything

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 should be fine in a capital case and we should just move
2 along; the show must go on. We are not asking you necessarily
3 to stop this unless you think you don't have the authority to
4 order these reasonable accommodations. If you can't, if you
5 don't think you have the authority to do that, you certainly
6 have the authority to stop these proceedings. We are asking
7 you to do that.

8 Thank you, Judge.

9 MJ [COL POHL]: Mr. Dykstra, anything further?

10 ATC [Maj DYKSTRA]: Just a couple of points, Your Honor.

11 Counsel took the opportunity to supplement his
12 initial pleading with additional medical records and so forth.
13 And within those medical records, like I stated in my opening
14 arguments, he had three -- three essential issues. All of the
15 other issues that counsel just alluded to in his rebuttal
16 argument are not found in the medical records that you have
17 before you. There is just simply no evidence of that. There
18 is also no evidence that the mode of transportation is
19 adversely affecting with him meeting with his counsel or
20 coming to these commissions as outlined in our pleading.

21 And Your Honor asked what would -- how difficult
22 would it be to get a better vehicle with better cushioning and
23 so forth for Mr. Hawsawi. Here is the issue that presents

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 itself: What would happen if that one vehicle broke down for
2 a couple of days and this commission had hearings? If that
3 were the case, then would the commission cease, stop
4 indefinitely until that vehicle were fixed or would we ----

5 MJ [COL POHL]: Major Dykstra, I don't want to go too far
6 down this road. But if the argument is we are not going to
7 provide him another vehicle because it is going to break down
8 and, therefore, we don't give it to him to begin with seems a
9 little bit of a stretch.

10 ATC [Maj DYKSTRA]: Yes, sir.

11 MJ [COL POHL]: I mean, I will have faith in the Army or
12 the JTF mechanics to keep vehicles running. And if they
13 don't, there has to be an exception because it not running
14 that particular day. That's not a reason. I mean, that
15 strikes to me as any vehicle could break down, so that means
16 we put him in the back -- well, whatever. I understand what
17 you are saying, it just strikes to me as not being
18 particularly relevant. Go ahead. Do you have anything
19 further?

20 ATC [Maj DYKSTRA]: That's all I have, Your Honor.

21 MJ [COL POHL]: Thank you. That may or may not bring us
22 to 444. Just so it's clear on the record where we are at with
23 444, 444 was filed as an unclassified pleading. Upon review

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 by my court security officer, we had concerns that it may
2 contain classified information. We went to the OCA and the
3 OCA says it did and, therefore, I believe it has been
4 resubmitted as a classified pleading.

5 There is no -- I am assuming -- I have not received a
6 505(g) notice and I am not sure it's ripe to address 444 at
7 this time. I am willing to listen to the parties if they
8 believe that it is. Mr. Ruiz.

9 LDC [MR. RUIZ]: Judge, at the outset, I will tell you I
10 am not arguing the substance of 444, but the procedural and
11 the administrative part of it in terms of -- I would like to
12 address the court. Mr. Gleason has the substantive 444.

13 MJ [COL POHL]: Okay. But what I am saying is we now have
14 got a classified part of 444.

15 LDC [MR. RUIZ]: Sure.

16 MJ [COL POHL]: And it's not been portion marked.

17 LDC [MR. RUIZ]: Right.

18 MJ [COL POHL]: I think I know what it is, and we have no
19 505(g) notice, so I am saying at this point you don't want to
20 argue the classified portion of it.

21 LDC [MR. RUIZ]: In fact, we actually don't think the
22 classified portion really is that significant. So Mr. Gleason
23 would be prepared to argue the unclassified portion of that.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 We may not even argue, quite frankly, the unclassified -- at
2 least what we understand to be the classified -- potentially
3 classified portion of the pleading.

4 MJ [COL POHL]: Okay.

5 LDC [MR. RUIZ]: Or we may not even file that motion, the
6 505.

7 MJ [COL POHL]: You may not file the 505(g) notice?

8 LDC [MR. RUIZ]: Correct. I am not saying we won't, but
9 at least based on the initial information I have about what
10 may be classified, it doesn't seem to be -- it doesn't go to
11 the heart of the matter, which is -- the purpose of 444 is
12 simply to rebut the prosecution's statements about the
13 existence or nonexistence of evidence, and we think we can do
14 that in a nonclassified setting.

15 Now, I did receive a message from Mr. Swann
16 indicating that they were not going to argue their portion of
17 444; however, we would be prepared and want to argue our
18 portion. And if they want to reserve theirs, they are welcome
19 to do that. I would only just say one more other thing,
20 Judge, which just illustrates the difficulties we face. That
21 entire supplement was based on a public pleading in a federal
22 court website in their public pleading site. It was placed
23 there after it was submitted.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: I understand how it came up, Mr. Ruiz. I
2 got it. I just -- I mean, every document I get we go through,
3 the court information security officer looks -- and I assume
4 every document before you send out goes through your DSO.

5 LDC [MR. RUIZ]: Absolutely. And we did so in this case.

6 MJ [COL POHL]: Reasonable minds can differ. Understand,
7 we did not conclude it, the CSO said this might be it, and
8 then went to the OCA relevant to it and they said yes, it is.

9 LDC [MR. RUIZ]: Which was all otherwise a public pleading
10 on the federal court ----

11 MJ [COL POHL]: I got it. I know exactly your position.
12 But when the OCA tells me it contains classified information,
13 my inquiry now is done.

14 LDC [MR. RUIZ]: I understand.

15 MJ [COL POHL]: I mean, I know exactly how this happened
16 and I am not saying it's -- well, I know exactly how it
17 happened. But when I am told it contains classified
18 information, then I have to treat it accordingly until I am
19 told it's not.

20 LDC [MR. RUIZ]: Right.

21 MJ [COL POHL]: Okay. We got it.

22 LDC [MR. RUIZ]: We are prepared to argue our portion and
23 we ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Just to be clear, this is a supplement.

2 LDC [MR. RUIZ]: It is a supplement, a very short
3 supplement. And we can probably argue in ten minutes or less,
4 if not -- ten minutes or less? Yes. He might be able to do
5 it in ten minutes or less. I probably could not, but I think
6 Colonel Gleason could.

7 MJ [COL POHL]: Let me see what the trial counsel says.

8 TC [MR. SWANN]: Assuming the document has been accepted,
9 and I don't have any indication that that's happened, we will
10 be filing a written response, so it's not ripe.

11 MJ [COL POHL]: Okay. I understand your position,
12 Mr. Ruiz, but I am not a fan of piecemeal litigation or
13 piecemeal argument. The government has a right to file a
14 response to it in writing and it will be put on the calendar
15 for the next session of the commission.

16 That being said, is there anything else we can
17 address today?

18 Mr. Connell?

19 LDC [MR. CONNELL]: I just have one housekeeping question,
20 Your Honor. I read and received the ruling on 245 about the
21 change in expert procedure or the revision of the expert
22 procedure. There was a statement in there that I understood
23 that the military commission would be issuing a new ruling on

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 our -- or some sort of supplemental ruling on our underlying
2 request for experts that sort of prompted the reimagining of
3 the process in the first place.

4 I just want to make sure that I don't need to do
5 anything, I don't need to file a motion to ----

6 MJ [COL POHL]: Let me review it. Given the, as I call
7 it, the posture of that particular issue ----

8 LDC [MR. CONNELL]: Sure.

9 MJ [COL POHL]: ---- I will issue something on it. You
10 don't need to do anything at this point if that's your
11 question.

12 LDC [MR. CONNELL]: That's my question. I wanted to make
13 sure I didn't need to do something.

14 MJ [COL POHL]: The way I see it is that original request
15 has already gone under the second new procedure, would appear
16 to be ripe for me to decide.

17 LDC [MR. CONNELL]: Yes, sir.

18 MJ [COL POHL]: Okay. But again, before I wing that off
19 the top of my head, let me double-check. But for now, I will
20 make a note. If I need something from you, I will let you
21 know.

22 LDC [MR. CONNELL]: That's all I need, sir. Thank you.

23 MJ [COL POHL]: Just to be clear, Mr. Connell, what is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 your base motion on that?

2 LDC [MR. CONNELL]: 443. Your ruling was 443A.

3 MJ [COL POHL]: Okay. Thank you.

4 Mr. Harrington.

5 LDC [MR. HARRINGTON]: Judge, on the issue of 292 that we
6 discussed earlier today, would it be possible for us to submit
7 to the court a draft order? Obviously you said you were going
8 to consider ----

9 MJ [COL POHL]: You said 292. I believe you mean 152.

10 LDC [MR. HARRINGTON]: 152.

11 MJ [COL POHL]: I was going to suggest that. Submit a
12 draft order on me, serve it on the government, and see what
13 the impact is. I am not exactly sure how it would be
14 implemented, but go ahead.

15 LDC [MR. HARRINGTON]: And also, Judge, could we remain in
16 the courtroom for an extended period of time today?

17 MJ [COL POHL]: Okay. Yes. Yes. Until 12:30. And that
18 will give them time to get back to the camp for prayer.

19 Anything from the government?

20 MTC [MR. TRIVETT]: No, sir. I was concerned on the 152
21 issue. That's been resolved.

22 MJ [COL POHL]: Okay. Great. The commission is in
23 recess.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session recessed at 1020, 19 May 2017.]

2 [END OF PAGE]

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23