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1 [The R.M.C. 803 session was called to order at 0905, 29 June
2 2017.]

3 MJ [Col RUBIN]: The commission is called to order. All
4 parties present when the commission last recessed are present
5 with the exception of Lieutenant Commander Lincoln and
6 Mr. Rushforth.

7 Lieutenant Commander Lincoln has my permission to be
8 absent from this session in accordance with R.M.C. 805(c). We
9 will cover Mr. Rushforth's absence in a moment.

10 The accused is present.

11 Trial Counsel, who is here to represent the
12 government?

13 TC [CDR SHORT]: Your Honor, as you noted, all members of
14 the government who were present are once again present with
15 the exception of Lieutenant Commander Lincoln. Also no longer
16 present is Sergeant First Class William Andreu, who has
17 retired from the United States Army. Your Honor, we do thank
18 Sergeant First Class Andreu for his service and his
19 exceptional work on this case.

20 Additionally, Your Honor, at counsel table is United
21 States Air Force Tech Sergeant Travis Parton, a government
22 paralegal.

23 MJ [Col RUBIN]: Thank you. Trial Counsel, would you

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1 please state for the record where the proceedings are being
2 transmitted to by closed circuit television?

3 TC [CDR SHORT]: Yes, Your Honor. These proceedings are
4 being transmitted stateside at Fort Meade, Maryland, and Fort
5 Devens, Massachusetts, pursuant to the commission's order
6 Appellate Exhibit 00I.

7 MJ [Col RUBIN]: Thank you. And who is here to represent
8 the accused?

9 DC [CDR COOPER]: Good morning, Your Honor. All counsel
10 present at the April 2017 session are again present at this
11 session with the exception of Mr. Brent Rushforth, and I would
12 also like to add that Lieutenant Commander Lofland and
13 Lieutenant Miller are present at this session. They were
14 absent in April.

15 MJ [Col RUBIN]: Thank you, Commander. Permission for
16 Mr. Rushforth's absence from all remaining commission sessions
17 scheduled for or added to calendar year 2017 was requested in
18 AE 087A. The commission granted permission for
19 Mr. Rushforth's absence from all remaining commission sessions
20 scheduled for or those that may be added to calendar year 2017
21 in AE 087B pursuant to R.M.C. 805(c).

22 I have in front of me a written waiver marked as
23 AE 087E executed by the accused prior to this hearing in

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1 accordance with Military Commission Rule Of Court 4.3.b(1)
2 consenting to the absence of Mr. Rushforth at all remaining
3 commission sessions scheduled in calendar year 2017, as well
4 as any additional sessions that may be scheduled for calendar
5 year 2017.

6 I will now advise the accused of his right to be
7 present at this hearing and to waive his presence.

8 Sir, good morning. You have the right to be present
9 during all sessions of the commission. If you request to be
10 absent from any session, your absence must be voluntary and of
11 your own free will.

12 Your voluntary absence from any session of this
13 commission is an unequivocal waiver of your right to be
14 present during that session. Your absence from any session
15 may negatively affect the presentation of the defense in your
16 case. Your failure to meet with and cooperate with your
17 defense counsel team may also negatively affect the
18 presentation of your case.

19 Under certain circumstances your attendance at a
20 session can be compelled regardless of your personal desire
21 not to be present. Regardless of your voluntary waiver to
22 attend a particular session of the commission, you have the
23 right at any time to decide to attend any subsequent session.

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1 For example, if you decide not to attend a morning session of
2 the commission but wish to attend the afternoon session, you
3 must notify the guard force of your desires. Assuming there
4 is enough time to arrange transportation, you will then be
5 allowed to attend the afternoon session.

6 You will be informed of the time and date of each
7 commission session to afford you the opportunity to decide
8 whether you wish to attend that session.

9 Do you understand what I just explained to you?

10 ACC [MR. HADI]: Yes, I understood very well.

11 MJ [Col RUBIN]: Thank you, sir.

12 ACC [MR. HADI]: Your Honor, if you allow me for one
13 minute. I just want to thank you for postponing the sessions
14 during the Ramadan holiday and allow me to spend that holiday
15 with my colleagues.

16 MJ [Col RUBIN]: You are welcome.

17 On 27 June 2017, I conducted an R.M.C. 802 session
18 with all counsel present. The accused was not present. The
19 counsel and I discussed the following matters:

20 The defense informed the commission that the accused
21 would provide a written waiver for the absence of
22 Mr. Rushforth for this hearing and the remaining 2017
23 hearings.

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1 I informed the parties that the motions pending
2 before the commission would be litigated in order by
3 AE number.

4 The defense indicated they intended to minimize or
5 not present any oral argument on AE 085 but provide slides
6 instead.

7 The counsel and I briefly discussed the draft order
8 submitted by the defense in AE 084.

9 The parties indicated they did not intend to call any
10 witnesses or introduce evidence beyond the attachments to the
11 written pleadings, but that they might use some demonstrative
12 slides during argument.

13 I asked the parties whether they were prepared to
14 conduct an M.C.R.E. 505(h) hearing on 28 June 2017, as
15 scheduled. The defense indicated they could proceed but
16 desired to wait until they had a chance to review additional
17 discovery. I proposed conducting an M.C.R.E. 505(d)
18 conference on 28 June 2017, in lieu of the scheduled
19 M.C.R.E. 505(h) hearing. Both parties agreed to conduct an
20 M.C.R.E. 505(d) conference, which will be summarized shortly.

21 The government informed the commission that
22 Lieutenant Commander Lincoln would be absent from today's
23 session.

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1 We discussed a connectivity issue related to an
2 e-mail outage.

3 We discussed briefly the mechanics of the accused
4 waiving his presence at an initial session of the commission.
5 The defense informed the commission that the accused would be
6 present today.

7 Counsel for either side have any corrections or
8 additions to the commission's summary of our R.M.C. 802
9 conference?

10 TC [CDR SHORT]: Nothing from the government, Your Honor.

11 MJ [Col RUBIN]: Defense?

12 ADC [MR. THURSCHELL]: **[Microphone button not pushed; no**
13 **audio.]**

14 One caveat which you may cover in the 505(d)
15 discussion is that the ultimate resolution of the handling of
16 805 turned out not to be as stated, as originally anticipated
17 at the 802. I believe we agreed at the 505(d) to put off the
18 argument until the other problem is resolved.

19 MJ [Col RUBIN]: Thank you, sir.

20 On 28 June 2017, the counsel and I conducted a
21 pretrial conference pursuant to M.C.R.E. 505(d). The accused
22 was not present. The counsel and I discussed the following
23 matters:

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1 I informed the parties that our 505(d) conference
2 would be captured on the record following the summation of the
3 R.M.C. 802 conference. The commission will allow the parties
4 to correct or add matters following the commission's summary.

5 The counsel and I discussed whether an
6 M.C.R.E. 505(h) hearing could and should be conducted during
7 the session of the commission and, if not, what needed to be
8 accomplished before the commission could conduct a productive
9 505(h) hearing. The counsel and I generally agreed that it
10 would be best to delay a 505(h) hearing until the August
11 session to more fully develop and brief the issues that needed
12 to be litigated. The parties indicated that if there was an
13 M.C.R.E. 505(h) hearing, they wanted to discuss issues
14 unrelated to the 505(g) notices provided in AE 070N and
15 AE 070FF.

16 The counsel and I discussed the possibility of having
17 a transcribed M.C.R.E. 505(d) conference as opposed to an
18 M.C.R.E. 505(h) hearing. We ultimately agreed that the
19 substance of our 505(d) conference could fairly be captured on
20 the record during this open session of the commission.

21 The counsel and I discussed the defense's recent
22 AE 070XX filing requesting to bifurcate the deposition of
23 Mr. al Darbi. I asked for the government's position on this

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1 issue, understanding that the government has not yet had an
2 opportunity to respond to the defense's motion.

3 I informed the counsel that I would be inclined to
4 allow for bifurcated deposition with the government's direct
5 of Mr. al Darbi to take place during the August session and
6 the defense's cross-examination to occur at a later date to be
7 determined.

8 Counsel and I discussed the timing of the al Darbi
9 deposition and related litigation. The commission asked the
10 parties to work on putting together a proposed schedule, most
11 notably regarding an additional defense 505(g) notice.

12 Counsel and I discussed Appellate Exhibit 085 and
13 whether the defense would like to delay argument on this
14 motion to a later date. Counsel and I concluded that AE 085
15 would unlikely, if not -- would not be litigated this session;
16 it would be delayed until a later session until a time that
17 the defense had a full opportunity to discuss that motion with
18 the accused.

19 Counsel, do you concur with my summation of our
20 M.C.R.E. 505(d) conference? And please feel free to add or
21 correct anything that I may have neglected or misstated.
22 Trial Counsel?

23 TC [CDR SHORT]: Nothing from the government, Your Honor.

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1 ADC [MR. THURSCHELL]: Nothing, Your Honor.

2 MJ [Col RUBIN]: Thank you.

3 During the M.C.R.E. 505(d) conference as summarized,
4 we discussed defense Appellate Exhibit 070XX filing.

5 Following up on that conversation, does the government intend
6 to file a written response to that defense motion? AE 070XX,
7 the bifurcated deposition request ----

8 TC [CDR SHORT]: Your Honor, we will waive our written
9 response. I think the way you summarized it was fine. The
10 ultimate relief is fine with the government for the
11 bifurcation. We do not, though, agree with the reasoning that
12 the defense had in their motion, but the ultimate relief is
13 fine.

14 MJ [Col RUBIN]: Very well. The commission intends to
15 rule on that without oral argument. As I stated, I am
16 inclined and will grant the bifurcated request, understanding
17 the government agrees to the end result but not necessarily
18 the reasons why.

19 So, Counsel, plan on, as we discussed yesterday, to
20 conduct the direct examination of Mr. al Darbi during the
21 August session with cross-examination to occur at a later date
22 yet to be determined.

23 Appellate Exhibits 087 and 087D, the commission's

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1 Docketing Order and Amended Docketing Order, lists six motions
2 for the commission to receive evidence and hear argument on as
3 required. These motions include Appellate Exhibits 070QQ,
4 070RR, 083, 084, 085 and 086. As stated during the
5 commission's summary of our R.M.C. 802 and M.C.R.E. 505(d)
6 conferences, AE 085 will not be litigated at this session.

7 Trial Counsel, the government concurs with postponing
8 the litigation of that motion until a later session?

9 TC [CDR SHORT]: Yes, sir.

10 MJ [Col RUBIN]: Very well. We will hold off on
11 litigating AE 085. The commission's intent would be to
12 litigate that at the next session if all issues have been
13 resolved prior to that. All right.

14 Counsel, let's start with AE 70QQ.

15 ADC [MR. THURSCHELL]: Judge, I may have misunderstood
16 your statement earlier. There are a couple of things we would
17 like to put on the record, including our agreement on dates as
18 to the filing of the next 505(g) notice, if I might.

19 MJ [Col RUBIN]: Yes, Mr. Thurschwell, please.

20 ATC [LCDR SPENCER]: Additionally, the government would
21 like to start with 070RR, only in that it logically precedes
22 in terms of argument and basis QQ. I know it's slightly out
23 of order from what we talked about yesterday.

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1 MJ [Col RUBIN]: That's fine. I agree with you. We will
2 start with RR once Mr. Thurschwell has placed some matters on
3 the record.

4 ADC [MR. THURSCHELL]: Thank you, Your Honor.

5 Just to begin, we have agreed -- the defense has
6 agreed to issue a 505(g) notice for all of the -- everything
7 but what I will call the very recently disclosed discovery as
8 of August 1st, and we will -- we are unable at this time to
9 give a date certain for our notice for the remaining
10 discovery, whatever else may be produced in the interim and
11 the recently disclosed discovery. And I want to just put on
12 the record, explain why that is. I think it's important going
13 forward because developments change rapidly and suddenly,
14 especially with respect to discovery in this case.

15 As of our filing an AE 070FF, the second and more
16 specific 505(g) notice, we had received at that point in
17 classified discovery about 310 documents totaling about 1700
18 pages, including 191 statements of the defendant. That was
19 what we addressed in FF, AE 070FF.

20 Since that time -- that was filed on 21 April -- we
21 have received over 450 documents totaling over 2,000 pages.
22 This all falls into the category of material that we are going
23 to process as we must do with legal input by lawyers, because

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1 this is legal strategy we are talking about, by August 1, and
2 give the government notice to.

3 We have not promised a date certain yet with the
4 other recently disclosed discovery because based on government
5 representations about quantity and our own calculations, we
6 estimate very, very conservatively about 600 person-hours of
7 work to process that in the most minimally meaningful review
8 and absorption kind of way; and that's about three-and-a-half
9 months of person hours.

10 We intend to file the notice as to that other
11 material prior to the session following the August session.
12 That is our intent, but we cannot promise at this time.

13 MJ [Col RUBIN]: Prior to the August session?

14 ADC [MR. THURSCHELL]: Not prior to the August session,
15 but prior to the session following.

16 MJ [Col RUBIN]: October?

17 ADC [MR. THURSCHELL]: The October session, which would
18 then -- hopefully, if we could do it in time for the
19 government to do the processing that they need to do, then we
20 would be prepared to go forward and hopefully will be able to
21 be prepared to go forward with a second 505(h) hearing at that
22 time.

23 And I will say -- I want to say a couple of other

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1 things. One is the separate issue that was addressed at the
2 closed conference yesterday and is the subject of
3 General Baker's unclassified memo is something that slows down
4 our process for reasons that we discussed, and that also again
5 goes into the timing of when we can actually produce what we
6 need to produce under the rule so that this deposition can
7 move forward as quickly as possible.

8 I want to, though, also emphasize the timing of the
9 discovery, and if we could put up the slide. I am going to
10 ask that AE 070ZZ be put on the screen. May we publish?

11 MJ [Col RUBIN]: You may.

12 ADC [MR. THURSCHELL]: Thank you. And now all I need to
13 know is how to do that. Thank you. Thank you.

14 This -- let me adjust so that the relevant material
15 could be illustrated.

16 This is a CID report that was compiled on 13 December
17 2016, based on an interview on 8 December 2016. Those dates
18 are significant for several reasons.

19 The motion to file -- the motion for a deposition in
20 this case was filed on either 20th or 21st December 2016,
21 within a week and a half or two weeks of this interview. This
22 was an interview conducted in direct anticipation of the
23 deposition.

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1 We did not receive this document until 16 June 2016
2 [sic], about a week and a half, two weeks ago now, close. In
3 the interim, and I will not recite the lengthy history of
4 discovery in this matter, but suffice it to say the government
5 has known about Mr. al Darbi's knowledge of Mr. Al-Tamir since
6 2014. We have been asking for relevant statements since 2014,
7 as is further documented in other filings that the court has
8 addressed. We only started getting meaningful discovery in
9 mass quantities beginning in March, mid-March of this year.

10 So I want to emphasize this for two reasons: One, to
11 highlight the kind of discovery delays that we have had, but
12 more important really at this stage of the game, because of
13 the content of this -- and I'm going to -- I need to -- is
14 there some way of getting this whole thing on the screen? And
15 this has been -- I should say, if I didn't mention before, has
16 been shown to the government.

17 This is a report, again -- thank you very much -- of
18 an interview conducted clearly in anticipation of the
19 deposition that was going to take place in 2016; that is
20 approximately 14 or 15 years since Mr. al Darbi was initially
21 captured by the United States Government. We have close to
22 400 statements of his, recordings of statements of his,
23 interviews beginning in 2002, early 2003 up to the -- close to

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1 the present day or up to 8 December 2016.

2 I direct the commission's attention to the first line
3 in the second paragraph. Mr. al Darbi provided the following
4 new information. This is information that he had not provided
5 for the preceding 14 years despite multiple interviews in
6 multiple settings and two years after his agreement to
7 cooperate was entered into, three, almost three years since.

8 And if you look then at the content of that, I can
9 say with assurance not only have we never seen this
10 information in any prior statement that he made, but it
11 directly contradicts numerous of those earlier statements.

12 Now, I am not here to impugn his credibility. We
13 will do that at the deposition. What I am here to say is the
14 very recent discovery that we have been getting, and discovery
15 is not yet complete, is highly likely to be extremely
16 significant. This interview was contemporaneous with the
17 information obtained in the other -- the other recently
18 disclosed discovery. There is likely to be extremely
19 important material, either substantively or from a Giglio
20 perspective in that.

21 And when I say 600 person-hours, lawyer-hours was
22 what it should be; it won't be, but it will be at least
23 600 lawyer-hours of review of these materials. This is not

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1 trivial, is not likely to be trivial stuff. I cannot say not
2 having examined it yet what it is, but this is the very, very
3 recent discovery that we have, you know, that we have been
4 provided with and have been able to review. And I say that
5 simply to explain the timing that I have laid out for our
6 proposed schedule for the 505(g) notices.

7 MJ [Col RUBIN]: Thank you, Mr. Thurschwell.

8 ADC [MR. THURSCHELL]: Unless you have questions, that's
9 all I have.

10 MJ [Col RUBIN]: No questions.

11 Just a question for the government. Has all
12 discovery at this point been provided to the defense regarding
13 Mr. al Darbi? Is there any outstanding discovery?

14 TC [CDR SHORT]: Yes, Your Honor, there is some
15 outstanding discovery, and we intend to get that out as soon
16 as possible. Interviews are ongoing however, and all the new
17 information will be provided in such format as this.

18 If I may address some of the things Mr. Thurschwell
19 just discussed?

20 MJ [Col RUBIN]: You may.

21 TC [CDR SHORT]: I think he was addressing a motion that
22 we basically argued the last hearing session. There has been
23 a ruling, and some of this -- your ruling was to defer and we

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1 will comply with your ruling very shortly, Your Honor.
2 Discovery is ongoing. We do have an ongoing discovery
3 obligation, we are well aware of that, and every time we
4 interview him and there is new information, that will be
5 provided to them. That's our obligation, Your Honor.

6 And obviously what Mr. Thurschwell just put up on the
7 board indicating that Mr. al Darbi had seen the accused
8 several times with senior al Qaeda leadership is very
9 relevant, and, you know, it was our first interview with him,
10 so that -- you know, that's why it kind of came out at that
11 time. So we are going to provide any new information as our
12 ongoing discovery obligation, Your Honor.

13 MJ [Col RUBIN]: Thank you.

14 TC [CDR SHORT]: Addressing some other points, Your Honor,
15 you know, these things are certainly fine for
16 cross-examination. I mean, we fully understand that, and we
17 will fully provide them with anything that they can for
18 cross-examination.

19 Your Honor, I do want to address one thing that
20 Mr. Thurschwell kind of averred and, you know, to some extent
21 talked about, you know, certain -- General Baker's memorandum,
22 Your Honor, any characterization regarding any intrusion into
23 the attorney-client relationship is misleading. The detention

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1 facility at U.S. Naval Station Guantanamo Bay, Cuba, operates
2 under the law of war.

3 The detainees are members of al Qaeda who are held as
4 unprivileged alien enemy belligerents under the Geneva
5 Conventions, U.S. law, and Department of Defense policies. A
6 detainee in this status who faces trial by military
7 commissions for war crimes is entitled to the assistance of an
8 attorney. Others who are not in pretrial proceedings may also
9 be entitled to legal counsel. The commander of the facility
10 implements the requirements of detainees' access to counsel by
11 designating a meeting place where the detainee can speak to
12 his attorney without being overheard.

13 MJ [Col RUBIN]: Commander, just slow down a little bit.

14 TC [CDR SHORT]: Yes, sir. The confidential nature of
15 attorney-client communications is strictly observed by the
16 military guard force in this location even as comprehensive
17 measures are in place to ensure the security of the facility
18 and the safety of all who enter.

19 Every attorney given access to a detainee at
20 Guantanamo is a licensed military or civilian member of the
21 bar who has a security clearance and must comply with U.S.
22 laws. Recently, efforts to accommodate attorney-client
23 meetings in a location other than the normally designated

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1 meeting rooms resulted in a small number of detainees, none of
2 them currently in contested military commissions trial
3 proceedings, unintentionally being overheard in their
4 communications with their attorneys. Upon learning this was
5 occurring, the commander of the facility put a stop to it and
6 self-reported the situation.

7 Appropriate remedial actions are being taken,
8 including the offer to the defense counsel of an opportunity
9 to inspect their meeting rooms to satisfy themselves that no
10 overhearing is occurring. No privileged attorney-client
11 communications have been heard by anyone in a law enforcement
12 or prosecution role. Any suggestion that this situation has
13 caused harm or that it demonstrates a lack of commitment to
14 the attorney-client privilege is mistaken, Your Honor.

15 I say that because I know that there was -- it
16 mentioned General Baker's unclassified memorandum that I think
17 most people know what it is, and I just wanted to make sure
18 that that was on the record, Your Honor.

19 MJ [Col RUBIN]: All right, Commander. Thank you for the
20 update. Obviously we are not here to litigate these issues
21 regarding ----

22 TC [CDR SHORT]: Yes, sir.

23 MJ [Col RUBIN]: We may litigate issues, but I appreciate

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1 the government's updating the commission on the status.

2 And Mr. Thurschwell, if you would like to place a
3 matter on the record, you may.

4 TC [CDR SHORT]: One more thing.

5 MJ [Col RUBIN]: Yes.

6 TC [CDR SHORT]: In the conference we did indicate this
7 would be fully briefed in anticipation for the August
8 hearings. I also want to just address the one thing regarding
9 the August hearings.

10 Mr. Thurschwell is correct, you had asked us in the
11 conference to come up with a date and August 1 was the one we
12 discussed yesterday. I think July 31 would give us a full
13 briefing cycle prior to the August hearings and, to the extent
14 possible, that should include all issues that would affect the
15 deposition in the August hearing, sir, and we will be ready to
16 do direct examination at the August hearing.

17 MJ [Col RUBIN]: All right. The 31st, the 1st ----

18 ADC [MR. THURSCHELL]: We would object to a set schedule
19 other than the terms that we discussed yesterday. Staying
20 within the square terms of the General Baker's unclassified
21 memorandum, we have absolutely obligated ourselves to ensure
22 that this is ripe for resolution at the next session, and we
23 will look into the other issues as well.

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1 MJ [Col RUBIN]: August 31 for the updated 505(g) notice,
2 that's fine.

3 ADC [MR. THURSCHELL]: That is correct.

4 MJ [Col RUBIN]: If you can get it a day earlier, so be
5 it, but 1 August is fine. We will have a 505(h) hearing. It
6 is my intent in August with the government's direct of
7 Mr. al Darbi to commence during that August session as well,
8 anticipating a subsequent 505(h) hearing during the October
9 session as well. All right.

10 Counsel, let's start with 070RR. In AE 070RR the
11 government requested the commission order the deposition of
12 Mr. al Darbi be closed to the public and remain under seal
13 until further order of the commission or other court of
14 competent jurisdiction.

15 In AE 070UU the defense requested the commission deny
16 the government's motion.

17 Trial Counsel, does the government want to present
18 oral argument?

19 DTC [CDR FLYNN]: Yes, Your Honor.

20 MJ [Col RUBIN]: You may proceed.

21 DTC [CDR FLYNN]: Good morning, Your Honor.

22 MJ [Col RUBIN]: Good morning.

23 DTC [CDR FLYNN]: Commander Kevin Flynn for the

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1 government.

2 Your Honor, the government's motion for appropriate
3 relief with respect to the deposition of Mr. al Darbi should
4 be granted for three reasons:

5 First, and most important, a deposition is not
6 considered a session under Section 949d of the Military
7 Commissions Act, nor is it -- or nor does it fall under,
8 Your Honor, R.M.C. 806, which is the public trial provision
9 regarding military commissions.

10 In other words, Your Honor, a deposition is a
11 preliminary proceeding to a trial and not part of the trial
12 process itself. As such, neither the public nor
13 representatives of the press have an outright or an absolute
14 right to be present at the deposition.

15 Second, Your Honor, granting the government's motion
16 will dissipate any damage caused by an unintentional
17 disclosure of classified information in the deposition, and
18 also, it would prevent any prejudice that may occur if the
19 public and/or press were allowed access.

20 And third, Your Honor, both of the active commissions
21 have actually ruled on this issue. Specifically the military
22 commission in Nashiri ruled on this exact issue with respect
23 to this exact deposition.

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1 Finally, Your Honor, and the last part of my
2 argument, I would just like to spend a few minutes kind of
3 going through quickly the defense's response, which is
4 AE 070UU.

5 Your Honor, I think the logical starting point in
6 analyzing this issue is obviously R.M.C. 806. R.M.C. 806
7 basically states that a military commission should, quote, be
8 publicly held. And I think, Your Honor, what R.M.C. 806 tries
9 to do is incorporate the common law right of the press and the
10 public to attend a criminal trial.

11 The critical question here in this case, Your Honor,
12 is whether a deposition, specifically the deposition of
13 Mr. al Darbi, is part of the criminal trial process. In other
14 words, is a deposition a session under military commission --
15 a session of the commission under the MCA? And in addition to
16 806, Your Honor, I think we also need to look at R.M.C. 702,
17 which is the rule that concerns depositions in military
18 commissions.

19 Now, R.M.C. 702 is silent on the issue, but in the
20 discussion it states that the accused himself does not have a
21 right to be present at a deposition. So I think you can
22 certainly make the argument that if the accused doesn't have a
23 right to be present at a deposition, then certainly the public

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1 and press would not have that as well.

2 But getting back, Your Honor, to R.M.C. 806, how do
3 we determine whether a deposition is part of the trial
4 mandating that it be open to the public? And I would submit
5 to you, Your Honor, that the best way to do that, since it is
6 unclear under 806, is to look at case law that addresses this
7 issue, and there are quite a few cases out there, Your Honor.

8 Now, in our original motion we cite a number of
9 federal cases that hold that the common law right of access
10 does not extend to a deposition taken pursuant to Federal
11 Criminal Rule of Procedure 15(a).

12 Now, Your Honor, I wasn't planning on getting into
13 the weeds of all of those cases. We do discuss them in our
14 motion -- unless you want me to, but I would like to point out
15 that most of them specifically found that a deposition was not
16 part of the criminal proceeding itself.

17 There is one case, Your Honor, I would like to
18 briefly discuss, and I apologize, we did not cite it in our
19 brief. We did not find this case until after we researched --
20 after we received the response from the defense. I have a
21 copy of it if you would like to look at it, sir. If not, I
22 can give you the cite.

23 MJ [Col RUBIN]: Give me the cite, please.

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1 DTC [CDR FLYNN]: Okay. I have a copy for you, Adam.

2 Just one second.

3 Sir, the cite is 2005 Washington at Lexis 1940.

4 August 3, 2005 is the date on it.

5 Your Honor, this was a Washington state case that had
6 made its way -- obviously started at trial, made its way up to
7 the Washington Court of Appeals and actually went to the
8 Washington Supreme Court. And the government would submit
9 that it's an interesting case because it specifically
10 addresses the issue raised by the defense in their response,
11 which is the accused's Sixth Amendment right to a public
12 trial.

13 Now, in this case, Your Honor, there were
14 preservation videotaped depositions taken of three witnesses
15 because those witnesses were not going to be -- they were
16 going to be out of the country at the time of trial, and
17 apparently what happened was the defendant's father requested
18 to attend these depositions, and the trial court denied that
19 request.

20 So on appeal, the government -- I'm sorry, the
21 defendant argued that his Sixth Amendment right to a public
22 trial was violated when his father was not allowed to attend
23 those depositions.

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1 The Court of Appeals specifically addressed this
2 issue and denied this assertion, holding that the defendant's
3 right to a public trial was not violated because the
4 depositions were later used in a public trial, and his father
5 had every right to attend that public trial. And, Your Honor,
6 the Supreme Court affirmed that holding basically finding the
7 same thing.

8 Now, in coming to the decision -- in this case,
9 Your Honor, there were two federal courts cited, and they are
10 in the opinion. I can give you those cites as well. So this,
11 the Supreme Court -- or, I'm sorry, the appellate court, which
12 this is the opinion I gave you, relied on these two federal
13 cases. The cites on those, Your Honor -- the first case was
14 United States v. Bertoli, B-E-R-T-O-L-I, and that's 854 F.Supp
15 975. It looks like it's a District of New Jersey case. And
16 the other case was United States v. Acevedo, A-C-E-V-E-D-O,
17 and that's 842 Fed 2d 5. So those are really the only cases
18 that the government found, Your Honor, that specifically
19 addressed the defense argument concerning the Sixth Amendment
20 piece of it.

21 Your Honor, what's pretty clear -- what's actually
22 very clear is that most, if not all, of the cases that address
23 this specific issue have ruled that a deposition is not part

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1 of the trial process to which the right of public access
2 attaches. So that's the first reason, Your Honor, that the
3 government is asking that you grant its motion for appropriate
4 relief.

5 There are a few other reasons that also support this.
6 First, there is a real possibility of prejudice, Your Honor,
7 to both the accused and possibly the government if a
8 deposition is open to the public. Now, as you know,
9 Your Honor, that all the deposition testimony may not be
10 received into evidence.

11 I mean, it is my understanding that at this
12 deposition no objections are going to be made -- or objections
13 will be made but no objections will be ruled on. At some
14 later point you, as the military judge, will have to determine
15 what to do with these objections. So some of al Darbi's
16 testimony from his deposition may not make it into the actual
17 trial, and if the public and the press are there at the
18 deposition, I mean, that may be a problem.

19 Second, no matter what the defense says in their
20 response, I mean, granting this motion will dissipate the
21 damage to national security should classified information be
22 inadvertently be disclosed. Now, we are not planning on, in
23 our direct of Mr. al Darbi, of getting into classified

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1 information, Your Honor, but, I mean, obviously there is a
2 possibility that that could inadvertently happen. And if it
3 happens in a closed session, obviously the damage to national
4 security, you know, would be less.

5 And the third reason to grant the motion, Your Honor,
6 is, as I mentioned in my opening, that two other active
7 commissions have ruled on this issue. Obviously you are not
8 bound by those decisions, but I would submit that they are
9 certainly informative.

10 Now, the Nashiri commission just ruled on this issue
11 about two weeks ago, and in that case the judge granted the
12 government's motion to not allow public access to this same
13 exact deposition. And that ruling, Your Honor, if you would
14 like to review it, is AE 369FF.

15 So, Your Honor, just if I could, I just want to spend
16 the last few minutes talking about the defense's response and
17 why the government believes that their position is not a
18 viable one.

19 When you read the response, Your Honor, I'm sure you
20 noticed that the defense spent a lot of time talking about how
21 the government has reversed itself on this issue, and the
22 reason why the government has flip-flopped on this issue is
23 because it's embarrassed about the treatment of al Darbi both

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1 before and after he became a cooperating witness.

2 Just a few things on that: When they say the
3 government has reversed themselves, I think what they are
4 trying to say is in another case the government had a
5 different position. Obviously this is the Hadi Al Iraqi case.
6 We haven't reversed our position. I didn't argue obviously
7 the motion in the other case. I'm not privy to what the
8 strategy was in that case. It's my understanding that in that
9 case the depositions had to do with victim witnesses mostly,
10 so it's a little bit different circumstances than what we have
11 here. The bottom line with respect to that, Your Honor, is
12 different circumstances, different facts and a different case.

13 With respect to the assertion that the government is
14 embarrassed for some reason, frankly that's nonsensical,
15 Your Honor. We are not hiding anything about al Darbi's
16 treatment both before or after he became a government
17 cooperating witness. His alleged mistreatment is public
18 record. He has made a declaration that was attached to a
19 motion in this case, and the reason the defense has that is
20 because we turned it over to them. With respect to his
21 treatment after becoming a cooperating witness, again, we have
22 turned that information over to the defense, and they have all
23 of that.

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1 Turning to their substantive argument, Your Honor,
2 they are basically arguing that because the accused is
3 invoking his Sixth Amendment right to a public trial, the
4 public is entitled to attend his deposition. There is one
5 huge problem with this, Your Honor: There is absolutely no
6 case to support that position.

7 Now, the defense relies on the Supreme Court case.
8 It's a 1984 case, Waller v. Georgia. Specifically,
9 Your Honor, the defense argues regardless of whether a
10 deposition is characterized as part of the trial or pretrial
11 proceeding, in order to justify closing the hearing, the
12 government must advance an overriding interest that is likely
13 to be prejudiced, demonstrate that the closure is no broader
14 than necessary to protect that interest, and to show that
15 reasonable alternatives to closing the proceeding are
16 inaccurate to protect that interest.

17 Your Honor, if you stop to think about this statement
18 and just reflect on it for a few minutes, the defense is
19 asking to make an incredible jump. The Waller case had
20 nothing to do with a deposition. The Waller case, in that
21 case the Supreme Court was -- they were supposed to decide,
22 quote, the extent to which a hearing on a motion to suppress
23 evidence may be closed to the public.

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1 So Waller involved a hearing, not a deposition.
2 Again, it involved a motion to suppress evidence, specifically
3 a motion to suppress wiretaps. A motion to suppress evidence
4 is not a deposition. I think reasonable minds can agree that
5 a motion to suppress evidence is obviously part of the trial
6 process.

7 I'm not sure I understand this argument, but the
8 defense seems to be arguing, Your Honor, that because the
9 defendant has invoked his Sixth Amendment right to a public
10 trial, which the government importantly does not concede he
11 even has here in this commission, but the fact that he has
12 done that, it magically transforms the deposition and becomes
13 a part trial process. And again, there is absolutely no case
14 law to support that, Your Honor.

15 The bottom line is the fact that the accused has
16 invoked his Sixth Amendment to right to a public trial, if he
17 even has one, doesn't change the calculation. The question
18 still remains whether a deposition is considered a session
19 under the MCA and whether it is part of the trial process, and
20 the answer to that question, Your Honor, is no.

21 Finally, the government doesn't like the cases that
22 we cited -- I'm sorry, the defense doesn't like the cases that
23 we cited in our motion, Your Honor, claiming that most of them

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1 talk about the First Amendment right, and that's true. Most
2 of the cases that we found had to do with the First Amendment
3 right of access, other than the Washington case that I gave
4 you. But what these cases do talk about, Your Honor, is they
5 address the issue of whether a deposition should be an
6 all-access event, and all of them say it should not be.

7 The defendant has a right to a public trial under the
8 Military Commissions Act, Your Honor, but he certainly does
9 not have a right to a public deposition.

10 If you have any other questions, Your Honor, that
11 concludes ----

12 MJ [Col RUBIN]: I do have one question, which as we
13 litigated at the last session of the commission,
14 Mr. al Darbi's deposition is going to functionally serve two
15 purposes: One, to capture testimony during trial on the
16 merits, and second, for the purpose of an anticipated defense
17 suppression hearing.

18 So understanding that a portion of that deposition
19 will be utilized during a suppression hearing, does that
20 change the government's analysis in any way?

21 DTC [CDR FLYNN]: Can I have one minute, Your Honor?

22 MJ [Col RUBIN]: Yes.

23 DTC [CDR FLYNN]: Your Honor, it would not, actually. So

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1 the deposition piece of it with respect to, you know,
2 preserving as evidence, that's to preserve as evidence; and
3 it's the same with the suppression piece of it as well. I
4 mean, that's going to be -- the only reason why we are doing
5 it that way is he is not going to be here.

6 So the government's position would be the same,
7 Your Honor. It's not open -- the public should not have
8 access to either one.

9 MJ [Col RUBIN]: Conceivably at the suppression hearing
10 the videotaped deposition could be played or the transcript
11 could be admitted into evidence in support of the defense
12 suppression motion?

13 DTC [CDR FLYNN]: Conceivably, sir, yes.

14 MJ [Col RUBIN]: So then the public's access or the
15 accused's Sixth Amendment right, if one exists, to a public
16 trial would be during the suppression hearing in which that
17 videotape was played or the transcript admitted?

18 DTC [CDR FLYNN]: Yes, sir. With respect, I just want to
19 make sure I was clear on the Sixth Amendment piece of it.
20 Again, the accused has a right to a public trial. It's a
21 statutory right, Your Honor. It's under the Military
22 Commissions Act. It's under the rule. We are in no way
23 conceding that an unprivileged enemy belligerent has a Sixth

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1 Amendment right to public access.

2 MJ [Col RUBIN]: And certainly the defense could comment
3 during argument during a suppression motion regarding the
4 content of Mr. al Darbi's deposition as it pertains to
5 suppression. So at that point it would be in the public
6 domain?

7 DTC [CDR FLYNN]: Yes, portions of it, Your Honor.

8 MJ [Col RUBIN]: All right. Thank you, Commander. Who
9 will be speaking for the defense?

10 ADC [MR. THURSCHELL]: I will, Your Honor. I really have
11 not had a chance to look at the case they handed out, much
12 less the two cases that are cited that I haven't -- the
13 federal cases cited in the Hacheney, H-A-C-H-E-N-E-Y, case. I
14 note that it's a Court of Appeals of Washington, Division II,
15 which means it's an intermediate appellate state court. I
16 would ask for the opportunity to respond in writing to that.

17 MJ [Col RUBIN]: You may.

18 ADC [MR. THURSCHELL]: I will actually be handing the
19 government another case that we found after the fact
20 anticipating some of their argument. If I end up addressing
21 it now, in citing it, I will give it to them.

22 I think the government in its response to our Sixth
23 Amendment objection raises a few threshold issues that have to

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1 be decided, and I would ask that those be explicitly made by
2 you in your findings and conclusions of law to clarify the
3 appellate record.

4 The first is the government's position that they have
5 taken now that the Sixth Amendment right to a public trial
6 does not apply to military commission. If we disagree on the
7 basis of the Boumediene standard that we discussed at the last
8 session, we think it is clearly not the case that it is
9 impractical or anomalous to have a public trial requirement at
10 Guantanamo Bay at a minimum on the terms that it has been --
11 all the hearings have been public so far.

12 That is all we are asking for in terms of the
13 deposition. We are not asking to move the deposition to a
14 location conveniently in the United States and to open the
15 gates to anyone who comes who doesn't ordinarily have access
16 to that in every other session that the commission holds,
17 including this one. So if the government truly believes that
18 this -- there is no Sixth Amendment right that applies here, I
19 would ask for you to make that finding as part of the record.

20 The other piece of this threshold piece that the
21 government emphasizes and places a great deal of weight on is
22 the distinction in Rule 806 that actually is not in Rule 806,
23 but they believe you have to read 806 to contain, between a

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1 deposition as such and a session or a formal part of the trial
2 itself.

3 Your Honor, you highlighted one paradox, given the
4 Sixth Amendment law, on this issue that part of this
5 deposition at the moment -- what we are going to call the
6 whole thing a deposition -- is designated as part of a
7 suppression hearing which the Supreme Court in the leading
8 case on the Sixth Amendment right to a public trial said not
9 that it was part of the trial; that's not what their holding
10 was.

11 Their holding was, though, that it was sufficiently
12 important and sufficiently resembled the kind of hearing that
13 is a trial and that -- to fall within the Sixth Amendment
14 public trial right, and that it served the same purposes that
15 the Sixth Amendment right to a public trial would serve to
16 allow the public to view it.

17 And if you apply that analysis to the current
18 situation, what we have is if the Sixth Amendment applies, the
19 section of this deposition that is devoted to the suppression
20 hearing then under Waller directly has to be public at the
21 time that it is conducted, but the rest of the deposition does
22 not.

23 The paradox of that, of course, is that the rest of

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1 the deposition is actually going to be part of the trial. And
2 the government has played back and forth with this as a trial
3 testimony, which is in fact what it's going to be, versus oh,
4 it's just a discovery mechanism, it's just a deposition, it's
5 not actually part of the trial.

6 And leaving aside the Rule 806, because I believe
7 that -- given that Rule 806 does not itself answer the
8 question, you have to read it against the constitutional
9 requirement, I'm going to focus on the constitutional
10 requirement and say that doesn't make any sense.

11 If a suppression hearing, which is testimony that is
12 not part of the trial, has to be opened to the public
13 contemporaneously -- and I will come back to this --
14 contemporaneously. So the witnesses and the government, and
15 for that matter the jailers who handle the defendant, know
16 that the scrutiny of the public is on them at the time, that
17 is exactly what the Supreme Court has repeatedly said is the
18 purpose of the public trial right.

19 And so if it applies to a pretrial session that is
20 not going to be part of the trial in any way, but merely
21 addresses important issues to the trial, then it is difficult
22 to understand how it could not apply to a deposition that is
23 intended to adduce actual trial testimony whether you

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1 characterize it as a pretrial session, a part of the trial, or
2 anything else you want to call it.

3 The Sixth Amendment doesn't make the fine
4 distinctions, terminological distinctions that Rule 806 does,
5 but if it applies equally under Waller whether it's pretrial
6 or during the trial. That's another decision that has to be
7 made. Actually, I back off that. We submit that's a decision
8 or a distinction that the government rests on that doesn't
9 matter for Sixth Amendment purposes.

10 One of -- another threshold question that's also very
11 pragmatic that the government's argument raised for me is in
12 attempting to argue that this is not going to be actually part
13 of the trial, they argue that the objections will not be ruled
14 on during the deposition. And I'm not -- it's not clear to me
15 how that is going to be the case, at least for many rulings.

16 An objection to foundation, it's important for
17 everyone to see the objection to the foundation. It's
18 important to see a witness have to back off and then describe
19 how they say what they -- they know what they say they know.
20 We're not going to -- I don't see how we can change that after
21 the fact. It's going to have to -- a witness has to reverse
22 course, change their testimony. And there are many other
23 kinds of objections like that, too. An objection to the form

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1 of the question, the witness is not going to be here to answer
2 the newly rephrased question.

3 So this is stuff, and again, these are things that
4 are actually important. They go to the witness' credibility.
5 The fact that there was an objection made, an objection
6 decided against the witness and they had to back off a broad
7 claim, and I frankly anticipate there will be some objections
8 of that type during direct. We will see, but that's my
9 anticipation.

10 So again, this is attacking even on their own terms
11 the distinction between this deposition and what the trial,
12 what the public gets to see at trial. But the more important
13 point -- the more important point is that the Sixth Amendment
14 right to a public trial is a right to, and I will quote
15 directly from the In re Oliver, the leading Supreme Court
16 case, one of the earliest Supreme Court cases on the right, to
17 a, quote, contemporaneous review in the forum of public
18 opinion.

19 And that word, "contemporaneous," is not a throwaway.
20 The purpose of public scrutiny is to keep the government
21 honest, to keep the witness honest with the knowledge that the
22 world or some part of the world gets to see them on the stand.
23 And in the case of Mr. al Darbi, he is going to be long gone,

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1 according to the government's current plans, by the time this
2 is played in actual open court.

3 That very, very significant piece of the Sixth
4 Amendment right cannot be served by a closed hearing that
5 receives de facto trial testimony by a leading government
6 cooperating witness who then, you know, is sent off later out
7 of the country and is not around to receive whatever
8 opprobrium he may or scrutiny by the government that they will
9 get to see on what we now understand will be a highly edited
10 tape, in any event.

11 So I think that the key flaw in the government's
12 argument that was signalled by their failure to reply is that
13 they are not taking seriously, as far as I can tell, the
14 distinctions amongst the rights granted by Rule 806, the
15 rights granted by the First Amendment, the common law right of
16 press access to judicial records -- these are three separate
17 things -- as opposed to the Sixth Amendment right to a public
18 trial that belongs only to the defendant.

19 And contrary to how the government characterizes its
20 cases very, very broadly, those cases don't deal with the
21 Sixth Amendment right to a public trial. In fact, none of
22 them do in its original brief. They deal exclusively -- I'm
23 sorry, in every one of those cases the defendant waived their

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1 Sixth Amendment right to a public trial in favor of their
2 Sixth Amendment right to a fair trial, one component of which
3 sometimes requires the judge to limit public access to certain
4 kinds of hearings where there is a significant and real danger
5 that pretrial publicity will taint the jury pool against the
6 defendant.

7 Mr. Al-Tamir waives his right against pretrial taint,
8 the Sixth Amendment right to a fair trial as to the pretrial
9 taint specifically with regard to this deposition. He invokes
10 his Sixth Amendment right to a public trial and demands that
11 Mr. al Darbi be subject to public scrutiny at the time he
12 testifies.

13 So none of their cases apply. And in fact, most of
14 them deal with a nonconstitutional right that belongs solely
15 to the press and the public at large, not to the defendant, of
16 access and its common law right of access to judicial records.

17 In all by one of the cases that the government cites,
18 leaving aside for a moment the military commission cases, the
19 request was to get a copy of a videotaped deposition of
20 President Clinton, of various other high-ranking luminaries in
21 highly publicized cases so they can be broadcast by the press,
22 and that was the right at issue. The defendant again waived
23 his right to public trial with respect to that and asked the

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1 court to not allow the press to do that.

2 The two military commission cases are completely
3 inapposite. In one the point of citing the government's
4 position in the Mohammad case was less for their tactical
5 change of view about the importance of publicity -- of a
6 public deposition than the fact that they explicitly
7 recognized in that case that -- and I am going to quote from
8 the government's, the court's ruling, AE -- Mohammad AE 022E
9 ruling at page 3, paragraph 1(f), where Judge Pohl was
10 characterizing the government's position was that, quote, any
11 potential taint from pretrial publicity caused by the
12 deposition can be explored and remedied by voir dire and
13 proper instruction from the military judge.

14 We have heard no explanation. We have heard citation
15 to various forms of prejudice but no explanation why if that
16 would work in that case, it won't work in this case as an
17 alternative to closure.

18 And so the government's cases do not address the
19 actual issue here. And likewise, let me finish with Nashiri,
20 which did very recently hold that the parallel deposition of
21 al Darbi in the Nashiri case is going to be closed.

22 And I would just say this is a case, Judge, frankly
23 where the argument that I sometimes make and that the

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1 government has been gleefully highlighting recently that you
2 do not have to follow the rulings of another commission. I
3 will make it with an extra kick now, and the kick is that I am
4 not going to characterize whether Mr. al Nashiri has waived
5 his right to a public trial or not; that's not our case.

6 But I will say it was not raised in his motion or the
7 government's motion or his response to the government's motion
8 in any way. It was not cited. There was no discussion of
9 Waller. There was no invoking of the right to a public trial.
10 The judge in his opinion made no reference to it, and in fact,
11 the language, the most applicable language which is cited in
12 our brief speaks in the terms of the common law right of
13 public access that belongs to the public, not even the
14 constitutional right, although I think he made mention of the
15 First Amendment.

16 I would submit to follow that ruling simply as --
17 even as persuasive authority in this case would be to de facto
18 allow Mr. al Nashiri to waive Mr. Al-Tamir's right to a public
19 trial, and we would strongly object to any -- making any use
20 of that case as persuasive or binding precedent.

21 Let me briefly talk about and -- the real issue in
22 the case, which is whether the government's asserted interests
23 satisfy the actual test under the Sixth Amendment. They have

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1 cited the taint issue, and they have cited the question of
2 whether pretrial publicity -- I'm sorry, whether the risk of
3 disclosure of classified information warrants in this
4 situation a closure.

5 The pretrial taint issue can be put to rest. First,
6 Mr. Al-Tamir waives his right to an untainted jury pool with
7 respect to this deposition and the information that will be
8 disclosed publicly in it.

9 Second, the government has no such right and doesn't
10 even have an interest, and to the extent it does have an
11 interest under the alternative -- reasonable alternatives
12 branch of the Waller test, it is clear that the government's
13 original proposal in Mohammad of voir dire directed to it is
14 more than adequate in this case to satisfy that.

15 So I want to put aside, unless you have questions,
16 this whole notion of taint and prejudice. It's a red herring.

17 MJ [Col RUBIN]: No questions.

18 ADC [MR. THURSCHELL]: The other thing they ask about
19 is -- they point out is that there is some marginal additional
20 risk of disclosure of classified information by not holding --
21 making this public.

22 And we point this out -- I am not going to belabor
23 it -- that argument proves far too much. To the extent you

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1 agree that under the Sixth Amendment this deposition stands on
2 the same footing as the trial itself for Sixth Amendment right
3 to public trial purposes, which we submit is the only
4 conclusion you can reach given the law, then that argument
5 would require closure of the entire trial because the very
6 same elaborate procedures to avoid the inadvertent spill of
7 classified information will be in place in the deposition,
8 the, quote, public deposition that we are requesting as we are
9 in every other session and the trial itself: The 40-second
10 delay; there is the whole 505 minimization procedures,
11 substitution procedures, declassification if possible
12 procedures to ensure that no such spill occurs.

13 And I want to come back and speak to this concern a
14 little bit more generally because it applies in other contexts
15 today. The citation of classified information is not and
16 cannot ever be enough for this commission to rule on what
17 happens during the proceedings that it presides over.

18 The citation of classified information occurs in a
19 very specific context. The context is the invocation of the
20 classified information privilege under M.C.R.E. 505(a)(1). It
21 requires certain procedural apparatus that the government
22 supply, including various kinds when it's different
23 invocations, declarations from the relevant OCA authorities.

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1 But once that has been authorized, then the court's
2 hands are tied and it is obligated to make findings in only
3 one very narrow respect, which is that it is not allowed to
4 authorize disclosure -- specifically authorize disclosure to
5 certain classes of people, and we are going to come back and
6 talk about the meaning of that later when we talk about open
7 and closed sessions.

8 But what that means and what the cases hold and what
9 in particular the case I am handing to the government -- the
10 case that I am handing to the government now and will supply
11 to the court as well, United States v. Rosen, R-O-S-E-N,
12 487 F.Supp.2d 703.

13 What the Rosen case says, and this is consistent with
14 what the Supreme Court has said in other contexts, is that --
15 and I will quote from pages 716 through 720. The language is
16 highlighted in the government's copy -- that it is true as an
17 abstract proposition that the government's interest in
18 protecting classified information can be a qualifying,
19 compelling and overriding interest. The court goes on to say
20 it is also true that the government must make a specific
21 showing of harm to national security in specific cases to
22 carry its burden.

23 That case dealt with the question of whether a

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1 proceeding could be closed in a certain context, but the issue
2 it was addressing specifically was the first prong of the
3 Waller test in which the party seeking to close the hearing
4 must advance an overriding interest that is likely to be
5 prejudiced.

6 The government cited the classified nature of the
7 information in order to justify the closure procedure that it
8 wanted, and the court went on to say in the same regard,
9 quote, the government's ipse dixit that information is
10 damaging to national security is not sufficient to close the
11 courtroom doors.

12 And the reason for that, as the court explained and
13 held, CIPA in that case does not override the Sixth Amendment.
14 It can't. This court has an independent obligation under the
15 Constitution not just to protect national security; it has
16 that statutory obligation as well, but it has a constitutional
17 obligation to protect the constitutional rights of a criminal
18 defendant.

19 And accordingly, the court goes on to say, and I
20 apologize for not having seen this earlier, classified status
21 must inform an assessment of the government's asserted
22 interests under the relevant constitutional test, but
23 ultimately trial judges must make their own judgment about

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1 whether the government's asserted interest in partially
2 closing the trial is compelling or overriding under the
3 Constitution.

4 And in light of the protections already in place, we
5 would submit that there is -- it is not possible for the
6 government to justify with a cavalier ipse dixit that it would
7 probably provide some additional, you know, assurance that
8 classified information would be disclosed for us just to close
9 the whole thing to the public. Okay.

10 Now, I'm not going to address the cases that they,
11 that they have cited in their argument. I do ask for the
12 opportunity to respond to that in writing, and I'm happy to
13 respond to obviously any questions you have, Judge.

14 MJ [Col RUBIN]: No questions, Mr. Thurschwell. How much
15 time do you need to respond in a supplemental written product?

16 ADC [MR. THURSCHELL]: I will by -- there is the holiday
17 weekend. I'm going to aim at getting it out on Friday. Let's
18 just say that.

19 MJ [Col RUBIN]: That's fine. Thank you, sir.

20 Trial Counsel, any additional oral argument?

21 DTC [CDR FLYNN]: Just briefly, Your Honor.

22 MJ [Col RUBIN]: Yes.

23 DTC [CDR FLYNN]: Your Honor, with respect to the case,

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1 the United States v. Rosen, obviously I haven't had a chance
2 to -- I mean, I have read this for something else, but it's
3 been a while, so -- I haven't read it for this motion, so I
4 would like the same courtesy that's been extended to the
5 defense.

6 MJ [Col RUBIN]: Yes.

7 DTC [CDR FLYNN]: Okay. Thank you.

8 Your Honor, the defense makes a passionate argument
9 for his client. The problem is there is still no case that he
10 has cited that supports his position. A deposition is not a
11 session, Your Honor. A deposition is not a hearing,
12 Your Honor. The main case that the defense relies on, again,
13 has to do with a motion to suppress a hearing. A deposition
14 is not part of the trial process.

15 And the reason, Your Honor, the Nashiri judge ruled
16 the way he did, if you look at his order, he cites cases that
17 have addressed this issue, and those cases again say that a
18 deposition is not part of the trial process. So obviously we
19 disagree with the defense counsel's request that you ignore
20 that order.

21 What defense counsel was trying to do, Your Honor, is
22 deflect basically. It doesn't matter -- it doesn't matter if
23 this is a Sixth Amendment right to a public access or not.

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