

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

3 AYMEN BATARFI, et al, .
4 Plaintiffs, . CR No. 05-409
5 v. .
6 GEORGE BUSH, et al, . Washington, D.C.
7 Defendants. . Wednesday, April 1, 2009
8 12:20 p.m.
9

9 TRANSCRIPT OF STATUS HEARING
10 BEFORE THE HONORABLE EMMET G. SULLIVAN
11 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

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P R O C E E D I N G S

COURTROOM DEPUTY: Please remain seated and come to order.

Civil action 05-409, Aymen Batarfi versus Donald Rumsfeld, et al.

Will counsel please identify yourselves for the record?

MR. WARDEN: Good afternoon, your Honor. Andrew Warden on behalf of the government.

THE COURT: Mr. Warden.

MR. WARDEN: With me at counsel table is Sean O'Donnell and Jack Lohrer.

THE COURT: Good afternoon, counsel.

MR. CONNOLLY: Good afternoon, your Honor. John Connolly and William Murphy on behalf of the petitioner, Aymen Batarfi.

THE COURT: I want to talk for a few minutes before I get responses from counsel.

Because the Court received the parties' joint motion for a stay of proceedings in view of the government's determination that Dr. Batarfi has been approved for transfer from Guantanamo, this hearing was scheduled by the Court for today to discuss that motion to stay and also to address an issue that arose at the very end of the hearing that I presided over on March 19th, and that was on the petitioner's motion for

1 supplemental relief regarding the government's compliance with
2 the discovery order, and also my order to show cause why the
3 government and its attorneys should not be held in contempt for
4 violating my January 29th, 2009 order, and also orders to
5 produce exculpatory information.

6 As part of Dr. Batarfi's reply brief in support of his
7 motion for supplemental relief regarding the government's
8 compliance with discovery orders, counsel informed the Court
9 that they had discovered amid the medical records of Dr. Batarfi
10 produced to counsel pursuant to this Court's order a highly
11 exculpatory record that pertained not to Dr. Batarfi but instead
12 to another detainee, "ISN," for purposes of this proceeding,
13 "blank." He's one of the government's fact witnesses the
14 government intended to rely on in its case against Dr. Batarfi.
15 Dr. Batarfi's counsel informed the government that this document
16 had been produced and that counsel believed they were entitled
17 to all other similar records regarding "ISN blank," the
18 government took this position that this had been a, quote,
19 inadvertent production, end quote, and sought to, in the
20 government's words, sequester the document. Counsel asked the
21 Court for an order that they could use the document and that the
22 government should have to produce all other similar records for
23 "ISN blank" or that the government should be precluded from
24 relying on "ISN blank" in this case. At the March 19th hearing
25 the Court granted petitioner's request and directed the

1 government to produce the remaining documents. The discussion
2 at the end of the hearing focused on whether the petitioner's
3 counsel could share this information with counsel for other
4 petitioners and in whose habeas cases the government was also
5 relying on "ISN blank" as a fact witness. When that question
6 was addressed to the government, Mr. Henry informed the Court
7 that because this Court had now ordered that those records be
8 produced to Dr. Batarfi's counsel, Dr. Batarfi's counsel could
9 share those with the other attorneys pursuant to the protective
10 order. Upon reflection and after reviewing the pleadings, the
11 government's response to the Court's order to show cause and the
12 transcript of the hearing, the Court now has additional
13 questions for the government regarding this document. First the
14 Court notes that in Mr. Henry's declaration the government finds
15 exculpatory evidence, and I quote, "as evidence tending to
16 materially undermine the information in the factual return as
17 the basis for the petitioner's detention as well as any evidence
18 tending to materially undermine the credibility of any fact
19 witness relied upon to justify petitioner's detention." End
20 quote. And that's the government's language. The Court
21 therefore will require an explanation from the government as to
22 why the exculpatory evidence, the document, was not produced
23 pursuant to this Court's September 22nd, 2009 order to produce
24 exculpatory evidence. Moreover, the Court will require an
25 explanation as to why the government took the position that this

1 document was, quote, "inadvertently produced," end quote, and
2 refused to produce the document or related documents until the
3 Court's order at the March 19th, 2009 hearing. Finally, the
4 discussion at the March 19th, 2009 hearing revealed information
5 that this Court had not been aware of previously, that is, that
6 "ISN blank" apparently is a fact witness in a number of other
7 cases, habeas cases. Was this document and any other produced
8 as exculpatory evidence in those cases? And if not, why not?
9 If it was, why was it not produced in this case before this
10 Court, and why should the government and its attorneys not be
11 held in contempt for failure to produce it pursuant to this
12 Court's orders? It is significant that this entire discussion
13 occurred at a hearing convened in part to discuss the Court's
14 order to show cause as to what the government acknowledges were
15 failures to comply with the Court's orders, including a failure
16 to produce other exculpatory evidence. It is also significant
17 that this entire revelation was apparently made only, quote, in
18 the words of the government, "inadvertently." End quote. We've
19 already had a hearing on cross-motions for judgment of the
20 record, and until this information was revealed, the government
21 was moving forward with the merits determination on April the
22 6th where it was again asking this Court to find that Dr.
23 Batarfi should continue to be detained as a, quote, "enemy
24 combatant." End quote. To hide, and I don't use that word
25 loosely, to hide relevant and exculpatory evidence from counsel

1 and from the Court under any circumstances, particularly here
2 where there is no other means to discover this information and
3 where the stakes are so very high and due indeed include
4 indefinite detention, is fundamentally unjust, outrageous, and
5 will not be tolerated. Fortunately, Dr. Batarfi's counsel have
6 been diligent and tireless in their efforts, but no one, Dr.
7 Batarfi and not this Court, should have to rely on luck to
8 discover evidence critical to a just resolution or an
9 inadvertent disclosure, as the government says. In the face of
10 repeated failures to comply with this Court's orders, to produce
11 exculpatory evidence, even after orders to show cause and the
12 requirement of no fewer than four declarations from officials at
13 the highest levels of our government, how can this Court have
14 any confidence whatsoever in the United States government to
15 comply with its obligations and to be truthful to the Court?
16 The parties have asked this Court to stay the merits
17 determination scheduled for April the 6th and the 7th in view of
18 the government's determination that Dr. Batarfi is cleared for
19 release and to allow the government to, quote, "initiate," end
20 quote, the diplomatic process related to his transfer. While
21 the Court on the one hand applauds the government's belated
22 decision to transfer Dr. Batarfi, the Court must note the
23 disturbing pattern in this and other cases. Time and again we
24 have seen that only once finally pressed to present evidence to
25 justify a petitioner's detention does the United States

1 belatedly, quote, "withdraw," end quote, charges or allegations
2 and/or transfer the detainee. Dr. Batarfi's ill. No one
3 disputes that. He's been at Guantanamo for seven years, longer
4 than most of the men detained there. This Court wants to ensure
5 that his case does not yet again return to a state of limbo or
6 that he linger in Guantanamo while the government conduct its,
7 in its words, quote, "diplomatic process." End quote. The
8 Court will therefore require a status report in 14 days and
9 every 14 days thereafter and expects to hear that this matter
10 has been resolved or that significant progress has been made.

11 Now, let me just say this: It was a tremendous effort
12 on this Court's part in moving other matters from this Court's
13 calendar to afford Dr. Batarfi his fair day in court on April
14 the 6th and April the 7th, and now being told at the eleventh
15 hour, which appears to be fairly customary for the United States
16 these days, that he'll be repatriated or returned to his country
17 of origin or another country, my time is very precious, it's
18 more precious than the time of the attorneys at the Department
19 of Justice, I can assure of you that. And I don't take very
20 lightly a suggestion at the eleventh hour, especially after this
21 man has been detained without due process for seven years, that
22 this Court's effort to afford him his fair and appropriate day
23 in court are for naught. I'm not going to let this case drag
24 on, or any of the other cases on my calendar, indefinitely while
25 the government embarks on what it calls its diplomatic process

1 because I have seen in the past that that diplomatic process can
2 indeed span months and years, and I have some serious concerns
3 as to whether it's yet and still another ploy not to return Dr.
4 Batarfi to his country of origin but to continue with his
5 deprivation of his fair day in court, and I'm concerned about
6 that so I want status reports every 14 days. I will not extend
7 the time for those status reports, and if I don't see that
8 there's progress in returning not only Dr. Batarfi but anyone
9 else on my calendar who's been cleared for return, then I'm
10 scheduling a merits determination, and at the least at this
11 level in this judicial process affords that detainee, whether it
12 be Dr. Batarfi or anyone else, his fair day in court. I'm not
13 going to continue to tolerate indefinite delay on the part of
14 the United States government. I mean, this Guantanamo issue is
15 a travesty. It ranks up there with the determent of Japanese
16 American citizens years ago. It's a horror story in the
17 American system of juris prudence, and quite frankly, I'm not
18 going to buy into an extended indefinite delay of this man's
19 stay at Guantanamo, or anyone else on my calendar.

20 Who wants to respond for the Court's concerns?

21 MR. WARDEN: Thank you, your Honor. Let me take up
22 the stay matter if I could first initially. We are certainly
23 cognizant of the Court's time and effort that it's put into this
24 matter.

25 THE COURT: And the government should also be

1 cognizant of the fact this man has been there for seven years.

2 MR. WARDEN: Understood, absolutely. And consistent
3 with the President of the United States priority, which he
4 issued an executive order the day after he took office, we want
5 to close Guantanamo within a year, and we are undertaking
6 efforts to do that across all federal agencies, and in
7 particular, in this case the committee that has been set up by
8 the president reviewed Dr. Batarfi's case and approved him for
9 transfer, and everybody here I think agrees that he should get
10 out of Guantanamo --

11 THE COURT: Absolutely.

12 MR. WARDEN: -- as soon as possible.

13 THE COURT: Absolutely. Why does it take him so long?
14 Why did it take the presence of a judge affording the litigant a
15 trial of the merits, why did it take that to spark this
16 decision?

17 MR. WARDEN: Well, certainly the process by way the
18 Executive Order Committee was, is assembling information. We've
19 got two hundred cases to deal with, and prioritizing the review,
20 obviously every detainee's case is important, but not everybody
21 can go first.

22 THE COURT: Right. But those cases -- I'm not trying
23 to tell the Department of Justice how to conduct its business --
24 but these cases have to be the most important cases at the
25 Department of Justice and people ought to be working around the

1 clock. You can't prioritize one Guantanamo case over another
2 one. These men have been in custody. It should be important
3 and there should be a nonstop 24/7 decision to do whatever
4 they're doing over there and make decisions in a timely manner.
5 It shouldn't be only after a federal judge says I'm not going to
6 tolerate any more, I'll call the case up and down on the merits,
7 and all of a sudden this process unwinds, we want to send him
8 back after seven years.

9 MR. WARDEN: We were certainly cognizant of your
10 Honor's order. We were also very cognizant of your Honor's
11 concerns that a review be conducted after the merits
12 determination in the sense that this Court and the parties and
13 the litigants spent a significant amount of time and resources
14 into an endeavor that for all intents and purposes may not be
15 productive for everybody, so we were cognizant of that, and we
16 informed the Court minutes after the review board made its
17 decision so that the Court could adjust its calendar
18 appropriately on Friday, Friday morning. We had conversations
19 with your staff, and so we're certainly very cognizant of that,
20 and we want to make sure that we are simply not trying to
21 manipulate the system or play games. We take this matter very
22 seriously. The review of all of the detainees is a very serious
23 /WEUZ. The President made it clear that he wants a collection
24 of information to be assembled, that he wants new individuals to
25 take the review of that to ensure that all his positions are

1 appropriate, and petitioner's case was one of the first to be
2 reviewed, and we have given it appropriate, we think, priority
3 here, and so we are all in agreement that he should be released
4 from Guantanamo.

5 Now, with respect to the diplomatic effort, the
6 process by which the United States government obviously engages
7 with other nations to transfer detainees is a very complicated
8 one. We certainly understand your Honor, again, that this not
9 be put on the back burner, and I can assure you that it will not
10 be, but I also want to emphasize, and I know it's frustrating
11 and it's frustrating to the United States' system, but the
12 situation in which we repatriate and detainees, it's not as
13 simple as in a prison context where you can simply open up the
14 prison doors and allow someone to walk out. We have to engage
15 other nations. Those nations, like this government, have
16 various agencies. Often they are fractured among themselves.
17 They have various concerns, so the State Department and other
18 offices at the government are certainly going to be working
19 diligently here in this matter, but the process --

20 THE COURT: So then there's no prejudice then to the
21 government if, pursuant to the joint motion to stay proceedings,
22 recognizing the government's intention to return Dr. Batarfi to
23 his country of origin, that this Court order that he be
24 returned? There's no prejudice then with an outstanding Court
25 order, then, is there?

1 MR. WARDEN: I wouldn't agree with that. We --

2 THE COURT: What's the prejudice?

3 MR. WARDEN: Well, we're the process by which the --
4 we're not conceding that there's no lawful basis here to detain
5 him. What we're saying is that the President's Executive Order
6 Committee has decided that he should be among the detainees to
7 be transferred.

8 THE COURT: Absolutely. And if I totally agreed with
9 that, then why shouldn't I follow it up with a Court order in
10 recognition of the efforts of the United States government to
11 return Dr. Batarfi to his country of origin, "It is so ordered,"
12 why shouldn't I do that?

13 MR. WARDEN: Well, we would --

14 THE COURT: Otherwise, otherwise, this process --

15 MR. WARDEN: Well, certainly, your Honor --

16 THE COURT: -- unravels upon the timing of the United
17 States. Why shouldn't there be a Court order in place to ensure
18 that this is all done in a timely manner?

19 MR. WARDEN: Well, I think certainly --

20 THE COURT: -- and there be some penalty if it's not
21 done in a timely manner? Here's my point: You can't just say,
22 All right, Judge, we're not going to go to trial. He should be
23 returned. You can focus on other matters on April the 6th and
24 7th. We're done here.

25 He's going to be returned when?

1 Well, we don't know that, Judge. It's a diplomatic
2 process, and now we have to enlist the aid of our diplomates to
3 talk to other diplomats from other countries and we don't know
4 how long it's going to take. I guess we could look at other
5 cases on your calendar and recognize it could take over a year
6 or so, but it's going to happen. Trust us, trust us.

7 Do you know what? Unfortunately I can't trust the
8 government, so why shouldn't I follow it up? You're asking me
9 to take this matter off my calendar, and I can't follow-up with
10 a Court order saying I agree with you, I'm going to grant your
11 motion, so return him? What's the prejudice? I don't see what
12 the prejudice is. I'm not saying return him overnight. I
13 understand you can't do that, but by the same token, I'm not
14 going to tolerate months of delay. I'm simply not going to
15 tolerate that in this case or the other cases. I'm going to
16 schedule this case for a merits determination, and if I find
17 that the evidence is insufficient to hold him, I'm going to
18 order him to be forthwith released.

19 MR. WARDEN: I understand everyone agrees he should be
20 released. As far as a Court order, as far as the status report
21 the court requires takes care of that. This is not a situation
22 that will be put to the back burner, but I think it is important
23 to recognize the limits of that that are in place on all the
24 parties with respect to the transfers of the detainees. The
25 Court of Appeals has held the Court cannot order detainees to be

1 released into this country. That's the law in --

2 THE COURT: And that means that the Weavers are still
3 being held, even though everyone recognizes there's no lawful
4 basis to hold him?

5 MR. WARDEN: Still there, your Honor.

6 THE COURT: Still locked up.

7 MR. WARDEN: They're at priority to be reviewed, along
8 with the situation here.

9 THE COURT: So I should have confidence in this
10 review process then?

11 MR. WARDEN: You should have confidence in the review
12 process. It is one that is certainly robust, but as far as the
13 remedy goes for these cases, the Supreme Court certainly was
14 less than clear as to what the appropriate remedy would be for
15 habeas. The Court of Appeals has now spoken very clearly that
16 release into the United States is not appropriate.

17 THE COURT: And to put the record clear, I'm not
18 suggesting that at all. I'm not suggesting that at this
19 juncture. I'm not doing that at all, but, I mean, is the
20 government addressing alternatives? I mean, suppose it's not
21 feasible to repatriate him to his country of origin, then what
22 do you do? The man is ill. Why shouldn't he be in a hospital?
23 If you recognize that he shouldn't be detained in Guantanamo,
24 why shouldn't he be in a hospital getting the best medical care
25 that can be afforded him?

1 MR. WARDEN: Well, I can assure you, as your Honor
2 knows from other matters, the medical staff at Guantanamo is
3 certainly very -- is very competent; they're well-staffed. Your
4 Honor has been provided with declarations in other cases, and
5 independent medical examiners have gone down in your other
6 cases, and so he's certainly receiving appropriate medical care.
7 Again, we are all working towards the same goal here, I think,
8 which is to get him out of Guantanamo. He was cleared for a
9 transfer on Friday, and so obviously the State Department has
10 been working for years talking with multiple countries to
11 convince them to accept detainees.

12 THE COURT: That makes my point: been talking for
13 years. So why should I have any confidence in this process?

14 MR. WARDEN: Well, you should have confidence it for
15 the following --

16 THE COURT: Essentially he wouldn't have been cleared
17 had the government not been under the notion that he is and have
18 evidence finding that he is an enemy combatant?

19 MR. WARDEN: Please repeat your question, say it again
20 to make sure I understood it.

21 THE COURT: The government couldn't have cleared him
22 for release from Guantanamo had there been evidence sufficient
23 to support a finding that he is indeed an enemy combatant, is
24 that not correct?

25 MR. WARDEN: I think I would take issue with that

1 slightly in the sense that we're not conceding here right now
2 that there's no lawful basis to hold Dr. Batarfi. What the
3 executive order has recommended is that, consistent with the
4 foreign policy interests, the national security interests, the
5 United States, he should be transferred to an appropriate
6 country, and I think that just gets back to your question about
7 the Court order.

8 THE COURT: And not be detained, correct?

9 MR. WARDEN: Well, that would be -- again, I can't
10 predict what another country would do.

11 THE COURT: Because we don't know which country will
12 take him.

13 MR. WARDEN: We don't know that. Those countries
14 obviously have their own systems of laws.

15 THE COURT: Why shouldn't this case proceed on a dual
16 track then? Let the government, if the government wants to
17 release him, that's fine. Why should I interfere with what I
18 planned for April 6th and 7th?

19 MR. WARDEN: We'll be in the same place at the end of
20 the day.

21 THE COURT: Oh, I'm not so sure about that, because if
22 I find there's no evidence to hold this man, that indeed he's
23 not an enemy combatant, as a matter of law I'm going to order
24 his release, and there will be significant sanctions if he's not
25 released. Here it's up to the whim of the United States and its

1 diplomatic process, whatever that means.

2 MR. WARDEN: Your Honor has certainly put a mechanism
3 in place to have appropriate oversight of those efforts, and I
4 would just --

5 THE COURT: I'm not an overseer. I administer
6 justice, and do you know what? I don't have any problems
7 staying this case, but it's not going to be stayed indefinitely,
8 and I see the handwriting on the wall because that's happened in
9 other cases on my calendar, and it's not consistent with the
10 fair administration of justice. I'm not an overseer.

11 MR. WARDEN: Of course you're not, your Honor. What
12 I'm saying is if your Honor has concerns --

13 THE COURT: I do have concerns.

14 MR. WARDEN: -- about the process that's being
15 undertaken here --

16 THE COURT: Absolutely I do.

17 MR. WARDEN: -- the status reports can address those.
18 What I would say is that the process, the diplomatic
19 process that the government undertakes necessarily is a very
20 sensitive one. Often the country that we are trying to --

21 THE COURT: It could be months or years for diplomats
22 to sit around and drink tea and try to reach an accord, and
23 that's fine for diplomates to do that. I'm not a diplomat.
24 What I should say is, what I'm inclined to do at this point is,
25 that's fine if you want to embark on your diplomatic process,

1 that's fine, more power to you, but I'm going to proceed with
2 the merits determination on April 6th because that's my job.

3 MR. WARDEN: I understand the concern. I think we
4 should at a minimum let the process play out. If your Honor has
5 concerns that it's not moving --

6 THE COURT: Counsel, I do have concerns because it
7 just strikes me as very suspicious, very suspicious on the eve
8 of trial all of a sudden out of the clear blue, you know, two
9 months after the government took an adamant position that this
10 man should be held, that the evidence would sustain a finding of
11 him being an enemy combatant, all of a sudden I'm supposed to
12 put the brakes on, put a halt to the proceedings, find something
13 else to do on April the 6th and 7th because the government tells
14 me that, you know, we want to sit around a diplomatic table and
15 talk about what we're going to do with Dr. Batarfi. There's no
16 end in sight.

17 MR. WARDEN: We don't know that at the moment, and
18 that's why I think --

19 THE COURT: Tell me what day he'll be transferred
20 then.

21 MR. WARDEN: I don't know.

22 THE COURT: Oh.

23 MR. WARDEN: I do not know the answer to that because
24 it necessarily requires --

25 THE COURT: If you can tell me he'll be out of

1 Guantanamo in 30 days.

2 MR. WARDEN: Unfortunately I cannot make that
3 representation because --

4 THE COURT: You can't tell me he'll be out of
5 Guantanamo this year, can you?

6 MR. WARDEN: I can't say that either.

7 THE COURT: Then what's accomplished by this then? I
8 should give him his fair day in court, and if he doesn't win, he
9 can take it to the Circuit and if the government loses they can
10 take it to the Circuit but at least I will have discharged my
11 responsibilities as a United States judge to decide cases in a
12 prompt manner to the best of my ability, and if the government
13 wants to embark on some diplomatic process that may take months
14 or years, more power to them.

15 MR. WARDEN: I think that the problem with that
16 approach is that again, we're all in agreement here that Dr.
17 Batarfi should be released.

18 THE COURT: And he's sick too. The man's sick, right?
19 Everyone agrees he ought to be in the hospital, he ought not
20 behind bars. He ought to be in a hospital getting treatment.
21 This is barbaric treatment of this man without any regard to his
22 rights whatsoever and I'm not going to be a part of it. I'm not
23 going to sit back and just scrutinize some progress reports
24 every two months and say I guess the diplomatic efforts are
25 unwinding, again, slowly but surely. I have no doubt that at

1 some point in time he'll be returned somewhere. Hope springs
2 eternal. Counsel, I'm just not going to do it.

3 MR. WARDEN: Let me suggest this: I think the process
4 that your Honor has put in place is certainly prudent and
5 incremental given I think that everyone here agrees that a
6 common goal should be achieved.

7 THE COURT: Justice. Justice, that's the common goal,
8 and I don't see it by just approving this joint motion and
9 getting some reports every two months, every two weeks.

10 MR. WARDEN: If let's say after thirty days that the
11 Court decides that it needs to recalendar this motion, we can
12 address that. I think, though, to give the process a fair
13 shake, it's only been two days.

14 THE COURT: Fairness? You're talking about fairness?
15 This man's been in jail for seven years and the government now
16 says it's time to look at fairness?

17 MR. WARDEN: We certainly are -- we agree, your Honor,
18 he should be out of Guantanamo. The process has to be
19 diplomatic. I understand your frustration.

20 THE COURT: No, it doesn't either.

21 MR. WARDEN: It can be consistent with the fair
22 administration of justice. That's another route and diplomacy
23 can unravel at its pace. But if he wants Dr. Batarfi out of
24 Guantanamo, just practically speaking here, we cannot open the
25 door and have him walk across the line to Cuba. That is just

1 not an option. It's not the D.C. jail. We can't put him in a
2 boat and give him free meals and say good luck to you, we hope
3 you find an island.

4 THE COURT: Maybe you can't do that but I can
5 certainly do whatever is consistent with the fair administration
6 of justice. If I find that there's no factual predicate and
7 insufficient evidence to hold this man as an enemy combatant, I
8 can be as creative as my judicial imagination will allow me. I
9 can find a remedy and I can enforce that remedy.

10 MR. WARDEN: I understand --

11 THE COURT: And I will enforce that remedy.

12 MR. WARDEN: Of course you will. But I think
13 necessarily the most constructive solution, I think, I mean, I
14 haven't heard petitioner's counsel, for everyone is to find an
15 appropriate place for Dr. Batarfi. It's not to stick him in a
16 boat.

17 THE COURT: No one's suggesting that. No someone's
18 suggesting that at all. The most effective thing is to close
19 that place down, that's the most effective thing, and find some
20 other place to put these people and give them their fair day in
21 court. If the government wants to at its leisure send out
22 diplomats or whoever, but I'm not going to sit back and wait for
23 that process to unravel. I didn't take an oath to say I'll
24 administer justice after efforts at diplomacy have failed.
25 That's fine if the United States wants to, after seven years,

1 repatriate this ill man who on all accounts is ill, and that's
2 fine, this has been set for a trial. I've spent a heck of a lot
3 of time putting this case in a posture, fighting with government
4 attorneys, dealing with the failures of the government to
5 produce exculpatory evidence, and now we have more failures to
6 produce exculpatory evidence and someone's going to pay a price
7 for that, for not having disclosed that document that everyone
8 knows is exculpatory, and the sanction is going to be high.
9 I'll tell you quite frankly if I have to start incarcerating
10 people to get my point across I'm going to start at the top, I'm
11 not going to start at the bottom. I'm going to start at the
12 top.

13 MR. WARDEN: Understood, your Honor.

14 I think just to close the issue on --

15 THE COURT: Close it. All right, go ahead.

16 MR. WARDEN: If your Honor wants to keep discussing
17 it, I think the mechanism that your Honor has put in place is
18 appropriate, I think for everyone's concern, everyone's goal is
19 to get Dr. Batarfi out of Guantanamo, to avoid an unnecessary
20 use of party resources, judicial resources, we think to give the
21 process some time. If it does not bear fruit, then we can take
22 next steps, but at the end of the day we're all going to be
23 working towards getting Guantanamo --

24 THE COURT: Take time and bear fruit? We're talking
25 about a man's liberty interest. Time? The government hasn't

1 been concerned about time for the past seven years.

2 MR. WARDEN: Your Honor, with respect, since January
3 21st, there has been absolutely a new change in policy.

4 THE COURT: I applaud the changed attitude.

5 MR. WARDEN: And we are really trying -- working to
6 try to close the place. I cannot emphasize that enough.

7 THE COURT: I applaud the attitude of the new
8 administration. I'm all for that but I can't just say this
9 diplomatic process that may take an indefinite period of time,
10 just continue to do so. That's not consistent with fairness.

11 MR. WARDEN: We're not asking for an indefinite stay,
12 and indeed the parties have come to what we thought was a
13 reasonable solution in that regard, and that requires the status
14 reports. Obviously the petitioners have reserved their right to
15 recalendar this matter, but we all thought in the collective
16 interest of the parties and the Court it made sense to let this
17 process proceed. We understand your concerns. And we would ask
18 that the Court adopt the stay motion consistent with your
19 Honor's modification for 14-day status reports. I would just
20 note that the status reports, at least as far as the government
21 is concerned --

22 THE COURT: I just thought of another way to deal with
23 that. I'm not going to have some bureaucrat type up something
24 and file it and go on to do something else. There will be
25 status hearings before me and people will have to tell me

1 exactly face-to-face what they're doing, and I want high-level
2 officials from the Department of Defense here to tell me, so
3 forget about the status reports. There will be hearings every
4 14 days if I approve this motion, and I haven't decided whether
5 I'm going to do that or not.

6 But the other point is, even if I approve it, that
7 doesn't preclude me from commencing this trial on April the 6th.

8 MR. WARDEN: Understood, your Honor, and I think if
9 that's the course the Court accepts, I think it would be perhaps
10 beneficial certainly to hear from representatives at the
11 Department of State so your Honor can hear the difficulties, the
12 issues that are being faced, and the efforts that have gone into
13 that, and elucidate some of these issues for you.

14 THE COURT: I said Department of Defense. Department
15 of State as well, somebody who is in charge of whatever the
16 diplomatic process is there. I'll figure out who I'll require
17 to be at the hearings.

18 What about the exculpatory evidence? I am really
19 concerned about that. I am very disturbed.

20 MR. WARDEN: Understand, your Honor.

21 THE COURT: And that's putting it mildly, counsel.

22 MR. WARDEN: I understand.

23 THE COURT: I am really upset about that.

24 MR. WARDEN: Let me just preface this by saying
25 because this issue was not raised in the minute order, I did not

1 bring the document, I did not know that this issue was going to
2 be raised.

3 THE COURT: I have the document. Do you want to see
4 it? You know the document I'm talking about.

5 MR. WARDEN: I know the document you're talking about.
6 If we could submit something in writing to your Honor.

7 THE COURT: I want an answer right now from the United
8 States government. Right now. If you want to supplement it,
9 that's fine, but I want your answer right now. And no one
10 disputes this is exculpatory evidence, correct?

11 MR. WARDEN: I'd have to go back and look, but let me
12 explain what the context of it is.

13 THE COURT: Do you want to take a look at the
14 document? I have it.

15 MR. WARDEN: I do recall the document.

16 THE COURT: Wait a minute. Is the United States
17 disputing this is exculpatory evidence? Be very careful what
18 you say.

19 MR. WARDEN: I'm not in a position right now to
20 concede that in the following sense: That particular witness,
21 so your Honor knows --

22 THE COURT: I think Mr. Henry conceded that at the
23 last hearing, but the record speaks for itself. I don't think
24 there is any doubt whatsoever that that document is exculpatory.
25 It goes to the credibility, the veracity indeed of "ISN blank."

1 MR. WARDEN: Agree. Agree with that.

2 THE COURT: And undermines his credibility, does it
3 not?

4 MR. WARDEN: It does, and let me explain.

5 THE COURT: Right. So therefore it is exculpatory.

6 MR. WARDEN: It is, and we have turned over
7 information to the petitioner's counsel about that particular
8 witness that includes again my, because I don't have all of the
9 documents --

10 THE COURT: Be careful now. Be careful now. Because
11 one of your attorneys said that document was inadvertently
12 produced.

13 MR. WARDEN: It was. It was.

14 THE COURT: Which is outrageous, first of all. It was
15 inadvertently produced. Secondly, it's just as outrageous that
16 it wasn't produced as exculpatory evidence, and I find that
17 unconscionable.

18 MR. WARDEN: I'm not sure that we necessarily agree
19 that that individual's entire medical file --

20 THE COURT: I'm talking about that document, and if
21 you have questions, do you want to take a look at it? Be very
22 careful what you say now.

23 MR. WARDEN: That's why I would like to consider this
24 in reference to all of the filings that have been made, because
25 I did not know this issue was going to arise. I understand your

1 concern.

2 THE COURT: Counsel, we're talking about one precise
3 document that the government maintains was inadvertently
4 produced. There is no question whatsoever that document is
5 exculpatory. First of all, it wasn't produced, and secondly,
6 for the government to say it was inadvertently produced and
7 wants it back, "sequestered" in the government's words, is just
8 as outrageous.

9 MR. WARDEN: Well, that process was just consistent
10 with Rule 26, which is well established that if inadvertent
11 documents are turned over, we ask that they not be distributed
12 until we raise it with the Court, and that is what we did in
13 this particular case.

14 THE COURT: The case law says inadvertent disclosures,
15 that's too bad.

16 MR. WARDEN: We agree. That's just consistent with
17 the rules.

18 THE COURT: How can exculpatory information be
19 inadvertently released?

20 MR. WARDEN: I don't know how that document was
21 included within the production. But what I can say without
22 getting into --

23 THE COURT: I just need an answer to my question. Why
24 wasn't that document produced as exculpatory evidence?

25 MR. WARDEN: "I don't know" is the short answer, your

1 Honor. I truly don't. It was inadvertently disclosed in the
2 production of that petitioner's medical records. We, consistent
3 with our --

4 THE COURT: That's a sad commentary, that
5 notwithstanding Judge Sullivan's order to produce exculpatory
6 evidence, its very clear plain English order to produce it, it
7 nevertheless was not produced and then subsequently
8 inadvertently disclosed.

9 MR. WARDEN: That information, the information that
10 was in the document, my recollection of all of the productions
11 that have been made was disclosed to petitioner's counsel
12 through other documents for that particular witness we have
13 provided. We're well aware of the issues.

14 THE COURT: Was that document produced in the other
15 cases on my colleagues' calendars?

16 MR. WARDEN: No, I don't believe it was.

17 THE COURT: Has it been produced yet?

18 MR. WARDEN: To?

19 THE COURT: To all my colleagues.

20 MR. WARDEN: Other cases?

21 THE COURT: This isn't a cat-and-mouse game. Right.
22 I know it's exculpatory.

23 MR. WARDEN: I don't believe it has been produced only
24 in the sense that since your Honor's order came out, it could be
25 shared with all the other counsel.

1 THE COURT: Is there a reason why I shouldn't direct
2 the government to file a notice on all my colleagues' calendars
3 and inform my colleagues that this document exists so they can
4 take whatever action is appropriate?

5 MR. WARDEN: I think that can be taken care of through
6 the distribution among the parties, I assume.

7 THE COURT: Why shouldn't it be the United States'
8 burden to say, Judges, we didn't disclose this; it was
9 inadvertently disclosed. We sought to get it back from counsel
10 and asked the Court to sequester it, but we think we should let
11 you know that it was never produced, especially since you may
12 have issued orders requiring exculpatory evidence be produced as
13 well. Why shouldn't the United States do that in each and every
14 case on my colleagues' calendar?

15 MR. WARDEN: If your Honor thinks that's appropriate.

16 THE COURT: Absolutely, and so ordered, and that's a
17 Court order. I want that done forthwith.

18 So you can't give me an answer as to why the
19 exculpatory evidence was not disclosed?

20 MR. WARDEN: I do not know the process, again.

21 THE COURT: Who at the Department of Justice can give
22 me that answer today?

23 MR. WARDEN: I'll have to go back and confer with
24 colleagues who were involved in the document production.

25 THE COURT: No one at counsel table can give me an

1 answer?

2 MR. WARDEN: No. As your Honor knows, there's been a
3 number of details.

4 THE COURT: How do you know? Did you ask them?

5 MR. WARDEN: I'm aware that they weren't involved in
6 that production, that process, because, as your Honor is aware,
7 the staffing of the Guantanamo cases has had some changeover, so
8 I'll need to confer with the attorneys who were working on the
9 matter at the time.

10 But we will, consistent with your Honor's order,
11 provide that notice.

12 THE COURT: I want it spelled out that way. In the
13 notice to my colleagues I want each one of my colleagues
14 informed that that document, and I want that attached to the
15 notice, was not produced pursuant to any judge's order requiring
16 production of exculpatory evidence. Subsequently, it was,
17 quote, in the language of the government, "inadvertently"
18 produced to the attorneys in this case. Thereafter the
19 government requested its return in my case and requested the
20 Court to, quote, using the government's words, sequester, that
21 document pursuant to Court order of Judge Sullivan, this
22 document is being afforded, being provided to, being brought to
23 the attention of whoever the judge is, for whatever action, in
24 whatever consideration may be appropriate.

25 MR. WARDEN: Understood.

1 THE COURT: All right.

2 Anything further?

3 MR. WARDEN: No, thank you.

4 THE COURT: How do I get an answer to my question
5 about exculpatory?

6 MR. WARDEN: We will submit something.

7 THE COURT: When?

8 MR. WARDEN: Before the end of the week.

9 THE COURT: Well, we'll talk about the timing.

10 Let me hear from petitioner's counsel. Why don't you
11 want to go forward on April the 6th? I can approve this or I
12 can just let it unwind as the diplomatic process and you get
13 your fair day in court and I can call the case up and down on
14 the merits. At least I can sleep comfortably at night knowing
15 I've discharged my judicial responsibility and not have to worry
16 about when this man will ever be repatriated into some country,
17 if at all.

18 MR. CONNOLLY: Your Honor, first of all, the
19 petitioner is very grateful for all that you have done and your
20 staff has done in this case. I want to make that absolutely
21 clear.

22 And incidentally, we were able to speak with our
23 client this morning and indicate to him that the news that the
24 government announced just last Friday, and we were actually
25 grateful for the government for facilitating that, and of course

1 our client it hopeful, but as your Honor points out, he's not
2 out until he's out. I must say I have to concede this is a
3 joint motion for stay. I actually drafted it and I submitted it
4 and we believed when we drafted it and submitted it that the
5 Court would take it a little bit differently. We had hoped that
6 we would be saving some judicial resources as well, and honestly
7 I --

8 THE COURT: And certainly I'm hard pressed, I'm
9 concerned about what's going to happen, if anything, in this
10 case, because I've seen other cases where people are still
11 languishing in Guantanamo. I guess the diplomatic process had
12 hit a snag or is proceeding at a snail's pace.

13 MR. CONNOLLY: Your Honor, we've been involved in this
14 case for four years and we've watched all the cases come and go
15 and we've watched many of the petitioners who been ordered
16 released remain languishing in Guantanamo after the court's
17 issued writs, so that was part of our thinking. I'm not going
18 to argue against our case because we absolutely agree with the
19 general sentiment that the Court is expressing this morning. We
20 feel like it is in our client's interest at this point in time
21 to work with the government rather than against them, and for
22 the first time in four years we feel like we have an opportunity
23 to work with the government. That didn't come out until the
24 announcement was made last Friday our client was going to be
25 returned. And because of the things that we can't go into on

1 the public record, there are concerns about repatriating our
2 client, and it would be greatly to our benefit, we believe, and
3 to our client's benefit, to have the resources of the United
4 States of America, particularly the Department of State, working
5 on our behalf in an effort to repatriate our client. Now, we
6 fully understand that those resources have not been directed
7 with full fervor with respect to some other detainees in the
8 past and we're very much concerned that that might happen again.
9 I think your Honor has made this Court's position very, very
10 clear this morning. I think the government has heard where your
11 Honor stands on this. I believe the Department of State will
12 hear it from us and not from the government counsel and I think
13 that that we ought to at least give that process a few days to
14 see where it goes.

15 Now, one other suggestion I had is, while thinking
16 about this, is that if the procedure bogs down, as it has in so
17 many other cases, one thing that we had suggested at our last
18 hearing was argument on our motion for judgment, which we think
19 is now -- we think have been -- there is no reason to reconsider
20 that because the government has taken a new position on its own
21 authority to detain because there has been substantial new
22 evidence that has been disclosed since we briefed that and for
23 other reasons as well, so we thought, or I was thinking just now
24 that if your Honor is dissatisfied with the progress of the
25 repatriation efforts and if indeed we are dissatisfied with

1 those repatriation efforts, perhaps in as little as 14 days we
2 can could ask your Honor to schedule a hearing on what is in
3 fact a fully briefed motion and perhaps your Honor could reach a
4 resolution very quickly in the order.

5 THE COURT: Hang on one second.

6 (There was a pause in the proceedings.)

7 THE COURT: Go ahead.

8 MR. CONNOLLY: So in any event, I thought that one way
9 to proceed might be if the Court is dissatisfied after 14 days
10 and we think that the process is going to bog down, just set a
11 date for an immediate hearing.

12 THE COURT: You've asked for 30 days in your motion,
13 though; is that correct?

14 MR. CONNOLLY: We did, because we thought that frankly
15 we didn't know how long it was going to take.

16 THE COURT: Look, I'm not trying to upset this plan in
17 place. I'm not trying to do that at all. It's just very
18 frustrating from where I sit presiding over these cases and to
19 see the false hope that I've already seen on some of these other
20 cases, it's like more of the same.

21 MR. CONNOLLY: Right.

22 THE COURT: Noncompliance with Court orders. The
23 government says it's going to do something and it doesn't.
24 Judges order the government to do things. They don't. At some
25 point, you know, it's just hard to accept representations of the

1 party when there is continued noncompliance with orders.

2 MR. CONNOLLY: I appreciate that, your Honor, and your
3 frustration is heard loud and clear. I will say this: that
4 your work has borne fruit in a way in this case and in other
5 cases as well. I don't know if you recall, but the last thing
6 that happened at our last hearing, your Honor used or threw out
7 the possibility of, as to whether or not the case would be
8 resolved in some way, and you immediately recognized that that
9 was not like an ordinary civil case where you could go to a
10 mediation, but in fact the government took that to heart. We
11 took that to heart. And we prompted this process that resulted
12 in the stay motion that we had filed today because of the
13 Court's orders, and I think, you know, I'm not privy to the
14 internal deliberations of the government, neither counsel here
15 today or the executive review team, but we do think that your
16 Honor's suggestion had some effect, and certainly if our side
17 has aggravated your Honor by filing this motion --

18 THE COURT: Oh, I'm not aggravated. I may raise my
19 voice. I'm not aggravated. It's nothing personal. I have the
20 highest regard for the attorneys in the well of the court and
21 everyone else at the Department of Justice. It's never
22 personal. It may be frustrating, but it's never personal.

23 MR. CONNOLLY: What I'm hearing that I was surprised
24 at and I shouldn't have been perhaps is that your chambers, your
25 Honor has put so much work into the case, that you and the court

1 would like to see a resolution as well, a judicial resolution
2 rather than a diplomatic one, and perhaps that was, you know,
3 not very pressured to me not to have foreseen that, but --

4 THE COURT: I don't think people sitting at my left in
5 the courtroom is going to say that either. In fact, I know they
6 didn't because it wasn't until I started talking and thinking
7 something about this is not right. I mean, we're at the whim of
8 the United States and I just don't want to be in that posture.

9 MR. CONNOLLY: I can say the government I know is not
10 trying to aggravate you by filing this joint motion to stay
11 since it really came from me and not us.

12 THE COURT: Counsel, I'm not annoyed with this. It's
13 Dr. Batarfi I'm concerned about.

14 MR. CONNOLLY: Look, your Honor, we are extremely
15 thankful for your concern and we are hoping --

16 THE COURT: I want it clear, I'm not annoyed that
17 someone filed a joint motion. I'd be hard-pressed to deny it.
18 I'm not going to deny a joint motion. I'm just saying it's
19 frustrating. I'm just raising a question. I can let the
20 process unwind and also give him his fair day in court.

21 MR. CONNOLLY: And we would be prepared to, I think,
22 with the government's consent, to say more in a private setting
23 as to why there are concerns. There are a couple of areas of
24 concern as to why we believe that the government's working with
25 us at this point as far as preferable to us coming to court and

1 asking for orders and so forth because, as Mr. Warden points
2 out, there's problematic case law in the D.C. Circuit as to the
3 Court's authority, frankly, as to what can be done, so all of
4 that went into consideration for why we filed a joint motion to
5 stay.

6 THE COURT: I'm not giving you a hard way. You didn't
7 annoy me. No one annoyed me. I just want this man to have a
8 fair resolution of his case, a fair resolution of his case in a
9 timely manner, and I'm not so sure that's going to be
10 accomplished with this, you know, this potentially never-ending
11 diplomatic process.

12 MR. CONNOLLY: And we appreciate that and we agree
13 and --

14 THE COURT: But do you know what? I'm willing to give
15 it a chance. Thirty days, that's what the parties have asked
16 for.

17 MR. CONNOLLY: Well, your Honor, you suggested
18 fourteen days in terms of the status report.

19 THE COURT: I think I said 14-day status reports.

20 MR. CONNOLLY: Is that correct?

21 THE COURT: I think what I had in mind was 14-day
22 status reports after the 30-day period, but do you know what?
23 Maybe it should be 14 days, 2 weeks from today. And I query
24 whether it should be, you know, a bureaucrat just typing out
25 something and giving it to the attorney to file. I want someone

1 here to tell me what's going on. This man is still
2 incarcerated.

3 MR. CONNOLLY: That's certainly acceptable to us, your
4 Honor.

5 THE COURT: It sounds better to say he's detained, it
6 doesn't sound as draconian, but bottom line is, he's in a jail
7 cell in Guantanamo.

8 MR. CONNOLLY: That's right, and, you know, we have
9 to --

10 THE COURT: And he's been deprived of due process of
11 law for seven years.

12 MR. CONNOLLY: In any event, your Honor, I would hope
13 that you would grant the motion subject to us all returning in
14 14 days with a status report, and I think that if we're --

15 THE COURT: I think it would probably be a combination
16 of both, a status report filed and followed by a status hearing
17 the following day or two days after, after I've had a chance to
18 reflect on what's been filed and to think about any questions I
19 want to ask. I'm sure I'm going to have questions. If I
20 approve this I intend to keep it on a speedy trial and it's not
21 going to be acceptable to have someone high-level, and I'm
22 talking about high level, it's not going to be acceptable to
23 have some high-level person from the Department of State and
24 Defense to tell me that the process is continuing. I want to
25 know what's going on. Maybe that information can be given to me

1 in-camera, that's fine, but I'm not going to accept the
2 representations that, Judge, we're pleased to report that the
3 process is working.

4 MR. CONNOLLY: And we will be the first to point it
5 out that it's not working if we so believe.

6 THE COURT: Right.

7 MR. CONNOLLY: So I would ask, I'm not asking at this
8 point in time to schedule any motions or hearings, but if we
9 believe that the process is not working, I would suggest that
10 the Court set it in for immediate hearing on our motion for
11 judgment. But we can face that when and if it comes to that.

12 THE COURT: What about the exculpatory evidence issue?

13 MR. CONNOLLY: The only thing I would have to add on
14 the ex- --

15 THE COURT: Do you agree it's exculpatory? Maybe I'm
16 wrong.

17 MR. CONNOLLY: No. Of course I filed a long brief
18 talking about how exculpatory I thought it was. Of course we
19 don't see the whole picture. We only see one document and, of
20 course, your Honor's order.

21 THE COURT: The broadest order in the case.

22 MR. CONNOLLY: The Court would give us the rest of the
23 picture if there's some other picture here. But following the
24 hearing, I made the document available to other counsel subject
25 to the terms of the protective order, and I don't know frankly

1 whether it's surfaced anywhere else in other cases, but it has
2 been at least provided. I don't think I have anything else to
3 say about that. Your Honor knows from our classified filing how
4 we got the document and what we did with it once we got it, and
5 I don't think I can speak about that on the public record
6 anyway. I mean, if your Honor is asking me whether these
7 counsel had anything to do with it, not as far as I know.

8 THE COURT: No. I'm not asking you to defend them,
9 no.

10 MR. CONNOLLY: So in any event, we would ask that the
11 joint motion for stay be granted.

12 THE COURT: All right. We'll take a short recess.

13 Mr. Warden, anything further from any of your
14 colleagues?

15 MR. WARDEN: No, your Honor.

16 THE COURT: I want to take a short recess. I need to
17 put an order in place. I do want a response to the questions I
18 asked.

19 MR. WARDEN: I would agree that we are all in
20 agreement here that generally Mr. Connolly is suggesting I think
21 after the status report process I think it does make sense to
22 proceed to the motion for summary judgment, at least take that
23 up on the papers without getting into the classified
24 information. I don't think there are any factual disputes in
25 this case among the parties, and I think it's something that the

1 government has revised on its legal authority. When your Honor
2 first heard that motion it was under the prior administration.

3 THE COURT: Here's what's really troubling, though:
4 When I first considered essentially the cross-motions, the
5 document that had not been produced was just as relevant then as
6 it is now. The government, at that time I considered the first
7 cross-motions, was relying upon the testimony of "ISN blank,"
8 wasn't it?

9 MR. WARDEN: Yes.

10 THE COURT: Correct. And, you know, there could have
11 been a serious miscarriage of justice, because had that document
12 surfaced prior to the Court's consideration of the cross-
13 motions, that would have afforded not only the Court but the
14 attorneys for the petitioner, Dr. Batarfi, an opportunity to
15 make significant arguments, that would have been a miscarriage
16 of justice, do you agree with that?

17 MR. WARDEN: Certainly the fact that not only that
18 document but additional discovery has been provided since then,
19 I think that completes the picture more so.

20 THE COURT: So you agree it could have been a
21 miscarriage of justice had the Court focused on those pleadings
22 at that time not knowing that there was exculpatory evidence
23 that has a dramatic impact on the credibility of one of the
24 government's principal witnesses?

25 MR. WARDEN: I think I would put it this way: that

1 the credibility of that particular witness, information about
2 him, and I'm using the term "information" carefully and I use
3 that distinctly from the word "document," but information --

4 THE COURT: Right.

5 MR. WARDEN: -- about the credibility of that witness.

6 THE COURT: There were two documents.

7 MR. WARDEN: My time frame may be off here, but we
8 have produced information about the credibility of that
9 particular witness to petitioners in this case and every case
10 before the judges of this court in which that particular person
11 was a witness.

12 THE COURT: Right, right, but that document would have
13 been the icing on the cake, though, wouldn't it, from a
14 petitioner's counsel point of view?

15 MR. WARDEN: I think the information that's in the
16 document, and again I don't have all of the discovery in front
17 of me, but the information that's in that document is either
18 completely or largely subsumed in all of the other information
19 about that witness' credibility.

20 THE COURT: But you're not arguing that it would have
21 been cumulative, though, are you?

22 MR. WARDEN: It might be, and again, I don't know
23 without seeing the entire production, and your Honor hasn't seen
24 all that because this was just discovery among the parties, but
25 certainly the credibility of that witness we're aware of and we

1 are cognizant of it and we have disclosed documents and
2 information. Now, you know, it could be the sense that there
3 is, your Honor pointed out, cumulative-type information out
4 there. But --

5 THE COURT: I don't think that was cumulative,
6 actually. I really don't. I think it was a smoking gun. It's
7 powerful evidence.

8 MR. WARDEN: Understood.

9 THE COURT: Undermines his credibility.

10 MR. WARDEN: I think the motion-for-judgment option,
11 in short the motion-for-judgment option, given I think we've had
12 significant subsequent events since your Honor took that up and
13 it could be that if the process is not -- Dr. Batarfi is not out
14 of Guantanamo in an appropriate length of time, that before we
15 get into I think what could be a very lengthy and complicated
16 merits adjudication, live witnesses and all that, that at the
17 first instance we take up a matter on the papers, and since it
18 was briefed to your Honor previously, it's something that
19 probably could be briefed and decided on in a relatively
20 expedited time frame. It would be a way in which this case
21 could be moved forward without significant judicial resources
22 and party resources being marshaled to perform the merits-type
23 proceeding, but I think we can talk about that among the parties
24 and figure out a joint statement of facts and all that kind of
25 thing can be worked out if the process doesn't work, but I'd

1 like to give the process a shot.

2 THE COURT: All right. Let me take a ten-minute
3 recess. No need to stand. Thank you.

4 COURTROOM DEPUTY: This Honorable Court now stands in
5 a brief recess.

6 (Recess taken at about 1:15 p.m.)

7 COURTROOM DEPUTY: Please remain seated and come to
8 order.

9 (Back on the record at about 1:35 p.m.)

10 THE COURT: All right, counsel. I'm not going to say
11 much more. I do want to see, and the government can e-mail me a
12 draft of the notice that it plans to file in the other cases, I
13 want to see a draft of that because I want to make some changes,
14 so e-mail me your draft by five o'clock today, and we'll give
15 you the e-mail address after we go off the public record.

16 I want a response to the Court's concern about this
17 inadvertently-released exculpatory evidence by noon on Friday.
18 I'm not going to extend the time, and I want whoever the high-
19 level person declarant is to sign something under penalty of
20 perjury, explaining the circumstance surrounding why that
21 document had not previously been produced, notwithstanding my
22 Court orders. It's Friday. If the petitioner's want to file a
23 response they can file by Tuesday at noon. Actually, I'm
24 interested in a response, so I want a response to the
25 government's submission by noon on Tuesday. Since the

1 government is essentially conceding that Dr. Batarfi should be
2 returned to his country of origin, it seems to me that the
3 parties should address -- well, let me back up. The Circuit's
4 position with respect to impediments to considering conditions
5 of confinement have to do with the finding that a petitioner or
6 petitioners are indeed enemy combatants, and the rationale is
7 because they're enemy combatants district judges are powerless
8 to address conditions of confinement. In view of the parties'
9 concession that Dr. Batarfi should be returned to his country or
10 repatriated, the question I have is whether or not there will be
11 a change in his conditions of confinement. In other words, if
12 someone is changed to a wall 24 hours a day because he's an
13 enemy combatant, the parties subsequently agree that he should
14 be returned, it seems to me there should be a change in the
15 conditions of confinement, he's no longer an enemy combatant,
16 but I'll leave it to the parties to address that. The question,
17 the precise question is: Will there be a change in his
18 conditions of confinement, and if not, why not? And I want
19 that, I want the government's submission a week from today.
20 That will be the 8th at noon, addressing the condition of
21 confinement issue.

22 And also by the 8th at noon I want the parties,
23 actually the government to address, and I want to be careful
24 because I think this order may be sealed, I want the government
25 to address the applicability of the rationale and Judge

1 Huvelle's order, sealed order, which may be unclassified now.
2 The government should be aware of what I'm talking about. Maybe
3 the petitioner's attorneys are aware of it as well. I want the
4 government to inform this Court whether her rationale that she
5 articulated in that case is applicable in this case. Does the
6 government have any concerns as to which order I'm referring to?

7 MR. WARDEN: Your Honor, because Judge Huvelle -- I
8 was present in the courtroom and was there for the reading of
9 that. If we're sealed I can give your Honor an answer now and I
10 think take care of that, but I don't want to run afoul of any
11 sealing that Judge Huvelle has done, but I think I can give you
12 a short answer in probably two paragraphs or less.

13 THE COURT: I don't think I'm speaking out of school
14 to say there may be efforts now to unclassify that, so --

15 MR. WARDEN: If we're sealed I feel much more
16 comfortable because I don't want to be before Judge Huvelle
17 later this afternoon.

18 THE COURT: I'm not trying to get you in trouble with
19 anyone or me either. File what you believe is appropriate. And
20 I'm mindful that it's sealed, I'm mindful, and there may be
21 portions unsealed, but I think there's something in that order
22 that's directly germane here and the government's --

23 MR. WARDEN: If we go sealed.

24 THE COURT: -- and the government's concession also
25 with respect to certain issues, and I think we all know what

1 we're talking about. Do petitioner's attorneys have any idea
2 what we're talking about?

3 MR. CONNOLLY: No, your Honor, we do not. We've not
4 seen --

5 MR. WARDEN: I don't know, again --

6 THE COURT: You know which case I'm talking about?

7 MR. WARDEN: I was there. I know exactly which case
8 you're talking about, and because part of this sealing was at
9 petitioner's counsel request, I'm not sure I can even -- it may
10 have to be an ex parte submission.

11 THE COURT: That's fine. Look, I'm sensitive to that,
12 so you file what you believe is appropriate. I'm sensitive to
13 that. I'm not going to give you a hard way to go. I'm not
14 going to do that, all right?

15 MR. WARDEN: Understood.

16 THE COURT: I'm not trying to get you to run afoul of
17 Judge Huvelle's orders, etcetera, just that I'm aware of what
18 was said and I think there may be portions that are highly
19 germane.

20 MR. WARDEN: I can say this: We have not received a
21 transcript, and Judge Huvelle's court reporter informed us we
22 would probably not receive one for ten days, so I'm probably
23 not, going off memory --

24 THE COURT: Two weeks is fine, counsel. Why don't I
25 do that?

1 MR. WARDEN: Okay.

2 THE COURT: Two weeks from today.

3 And to the extent that you can respond, petitioner's
4 counsel, I want your response. You may not be able to.

5 I think that's all I have. Judge Huvelle's order, the
6 exculpatory.

7 I'm extremely displeased, let me say that again, I'm
8 extremely upset about this exculpatory evidence issue. That's
9 all I have to say.

10 The condition-of-confinement issue, I think it's
11 highly relevant.

12 I think that's it. Wasn't there a four? There must
13 be. The notice issue. I do want to see your draft of the
14 notice. Just e-mail that to me by five o'clock. I may want to
15 change that. We'll give you the e-mail address.

16 Anything further?

17 MR. CONNOLLY: Motion to stay is granted, subject
18 to --

19 THE COURT: I don't want -- I want to hear some more
20 argument. It's granted, counsel.

21 Look, let me tell you something. We all take our jobs
22 seriously. The things I say aren't personal. Look, you guys,
23 you gentlemen are veterans, but these are serious issues, hiding
24 the ball, you know, in a court of law? It's not to be taken
25 personally, and you didn't annoy me by filing a joint motion.

1 MR. CONNOLLY: No, your Honor. All I meant to say was
2 to the extent that we understand the terms of the motion, do you
3 want us to -- excuse me, of the orders staying proceedings, do
4 you want us to submit an order based on the transcript, what you
5 said earlier, or, I mean, you had modified one term to say 14
6 day?

7 THE COURT: Well, let's talk about it. I mean, look,
8 we all have other matters. Believe me, we all have other
9 matters.

10 MR. WARDEN: If I could.

11 THE COURT: We talked about the 14 days.

12 Yes, counsel?

13 MR. WARDEN: If I could, before the hearing we were
14 discussing this amongst ourselves, and I think one thing we want
15 to work with petitioners here on this matter, and I think we had
16 suggested sitting down with petitioner's counsel, including with
17 representatives from the Department of State, to discuss some of
18 these issues that are in play here. If I could, I think before
19 we do a status report and have somebody from the Department of
20 State appear, and maybe it makes sense for the parties to have a
21 discussion next week. We'd certainly cognizant of not delaying
22 things unduly, but, you know, have a status report in three
23 weeks or my preference would be thirty days so we can talk and
24 then we can present a status report and if your Honor thinks
25 it's appropriate we can have somebody come down.

1 THE COURT: I can't seriously disagree with that. If
2 you want to submit a revised proposed order, that's fine. Why
3 don't you do that?

4 MR. CONNOLLY: That's fine, and we're happy to work
5 with the government, as I indicated. We do want to keep the
6 Court involved.

7 THE COURT: Oh, I'm going to be involved. Yes.

8 MR. WARDEN: We'll submit a proposed order.

9 THE COURT: That's fine, that's fine, but I would like
10 to get it before the 6th. I still have that block of time, not
11 that I'm going to bring you in and make you put on your case in
12 chief, but that order, the proposed order regarding the stay of
13 proceedings, I should have that.

14 MR. WARDEN: We can submit that this week, sure.

15 THE COURT: Thank you. Everyone have a wonderful
16 afternoon. Thank you.

17 Anything further?

18 MR. CONNOLLY: No.

19 THE COURT: Thank you.

20 (Proceedings concluded at about 1:52 p.m.)

21 - - -

I N D E X

WITNESSES:

None .

E X H I B I T S

None .

1 CERTIFICATE

2 I, JACQUELINE M. SULLIVAN, Official Court Reporter,
3 certify that the foregoing pages are a correct transcript from
4 the record of proceedings in the above-entitled matter.

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