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1 [The R.M.C. 803 session was called to order at 1107,
2 11 October 2016.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present that were present when commission
5 recessed. Mr. Binalshibh remains absent.

6 Trial Counsel, who is the next witness?

7 CP [BG MARTINS]: Your Honor, we have everyone present who
8 was here before. Are you seeking the next witness?

9 MJ [COL POHL]: Yeah.

10 CP [BG MARTINS]: We'll bring up the next witness.

11 MJ [COL POHL]: Call the next witness, please.

12 LDC [MR. CONNELL]: Sir, I have a housekeeping matter I
13 was asked to put on the record.

14 MJ [COL POHL]: Sure.

15 LDC [MR. CONNELL]: Sir, I was asked to place on the
16 record that the -- because I didn't get to all of my exhibits,
17 the exhibit numbering on 119 got messed up, so what I referred
18 to as 119K has been remarked as 119J.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: Thank you.

21 MJ [COL POHL]: Thank you. Mr. Connell, just to clarify
22 things, you asked for a written order on AE 055, and the order
23 was January of 2013; is that correct?

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

2 MJ [COL POHL]: Thank you. Let's go ahead and call the
3 next witness.

4 CP [BG MARTINS]: Captain, could you please raise your
5 right hand for the oath.

6 CAPTAIN E, U.S. Marine Corps, was called as a witness for the
7 defense, was sworn, and testified as follows:

8 DIRECT EXAMINATION

9 Questions by the Chief Prosecutor [BG MARTINS]:

10 CP [BG MARTINS]: Please be seated. He will be known in
11 these proceedings as Captain E. Your witness.

12 Questions by the Learned Defense Counsel [MR. RUIZ]:

13 Q. Captain, good morning.

14 A. Good morning, sir.

15 Q. Captain, can you tell us your -- the dates which you
16 were assigned to Staff Judge Advocate's office in
17 Guantanamo Bay?

18 A. Yes. I got there in late August of 2014, and left
19 6 March of 2015.

20 Q. Can you tell us what your duties and responsibilities
21 were?

22 A. Yeah. I was an Assistant Staff Judge Advocate for
23 the Joint Task Force. I did a mix of non-HVD and HVD,

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1 primarily non-HVD related.

2 Q. Okay. So when you are saying non-HVDs, you are
3 talking about non-high-value detainees?

4 A. Correct.

5 Q. And HVD would be high-value detainees?

6 A. Correct.

7 Q. What percentage of your work would you say was
8 devoted to non-high-value detainees?

9 A. Probably around 75 percent.

10 Q. The 25 percent remaining be to the high-value
11 detainee, or were there other duties and responsibilities you
12 also had?

13 A. To the high-value detainees.

14 Q. Very good.

15 Now, in terms of the logistics of that, the
16 non-high-value detainees are housed in a separate facility,
17 correct?

18 A. Yes.

19 Q. So in terms of your interactions with them, it would
20 require you to go to a different facility from the one that
21 you would have to go to to interact with the HVDs, correct?

22 A. Correct.

23 Q. In terms of your actual -- your office, where you

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1 worked on a daily basis, it was not in Camp VII, correct?

2 A. Correct.

3 Q. It was, in fact, in a separate office at the Staff
4 Judge Advocate's office?

5 A. Yes.

6 Q. How much time of the 25 percent of the time you
7 devoted to the HVDs would you say you would spend in Camp VII
8 on a daily basis?

9 A. Daily basis -- so I only got my security clearance
10 about halfway through my time there, so first three months
11 would have been all non-HVDs, and then after that was a mix of
12 both.

13 Q. So just refresh my memory again, because I didn't
14 write it down, on the dates that you were in Cuba.

15 A. August -- August of 2014 to 6 March 2015.

16 Q. And you said you got your security clearance about
17 halfway through that.

18 A. Correct.

19 Q. And -- okay. So do you recall roughly what month
20 that would have been?

21 A. I think it was December.

22 Q. All right. In terms of your duties and
23 responsibilities in Camp VII, can you describe those?

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1 A. It was mostly delivering or picking up mail, legal
2 mail, between the attorneys and their clients. That was
3 almost all of it, as well as the -- I think the only other
4 thing I did out there would have been ICRC notifications, as
5 well as when someone didn't want to show -- didn't want to
6 attend commission sessions, filling out the paperwork with
7 them.

8 Q. Okay. Anything else that was part of your ----

9 A. That ----

10 Q. Sorry.

11 A. That's probably about it. That's probably
12 95 percent.

13 Q. What was the other 5 percent?

14 A. Probably things I don't remember.

15 Q. Okay.

16 A. There was probably a few other small things, but
17 that's most of it.

18 Q. Those are the major duties and responsibilities you
19 had?

20 A. Correct.

21 Q. I notice you did not list in that list that you were
22 required to issue prior authorizations prior to searches and
23 seizures being conducted.

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1 A. Say that again.

2 Q. Sure.

3 Prior authorization before a seizure took place, how
4 many of those were you involved in?

5 A. I'm not aware of any prior authorizations. I mean,
6 prior authorizations from who?

7 Q. From you, to engage in a search and seizure.

8 A. I didn't do any searches or seizures.

9 Q. No, I understand you didn't do any searches or
10 seizures, but were you ever asked for prior authorization
11 before a seizure could be conducted?

12 A. No, I was never asked.

13 Q. All right. In terms of -- I take it you've had an
14 opportunity to refresh your recollection on the searches and
15 the seizures that relate to today's proceedings, correct?

16 A. Correct.

17 Q. Can you please tell me what your recollection is of
18 the date that you were notified of that seizure?

19 A. It would have been early February. I think from
20 reviewing everything, the date things were seized was
21 5 February, so it would have been that day or, I think, the
22 next day. I was probably delivering mail and the watch
23 commander, one of the officers said, hey, we had seized these

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1 things previously, and they gave them to me to look at to see
2 if there were -- to verify that there were no markings on
3 them, legal markings to show that they were legal materials.

4 They then handed them to me. I reviewed them. They
5 were a couple of notepads. They were all in Arabic. There
6 were no markings on any of the notepads. I looked at each
7 page and then handed them back.

8 Q. When you say in terms of markings, what type of
9 markings were you looking for?

10 A. Any kind of official markings that they were legal
11 mail, that they were something that the detainee was allowed
12 to have, any kind of official markings. The only things that
13 those had were handwritten ISN numbers. Not a stamp, but they
14 were handwritten in.

15 Q. Okay. Do you know what the procedure was at the time
16 for stamping or handwriting the ISNs on the legal pads?

17 A. I know what the orders say about stamping, but I
18 don't know about notepads specifically or anything like that,
19 other than they would have to follow the normal procedures.

20 Q. Understood.

21 Once you returned the documents, what were your
22 instructions to the guards?

23 A. I didn't give any instructions. I just -- you know,

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1 I handed them back and said, there's no markings on these, so
2 then, you know, go through your normal procedures.

3 Q. What was your understanding what the normal
4 procedures were?

5 A. That they would get reviewed, and then if they
6 weren't contraband, then they would be stamped like they were
7 supposed to be and then given back.

8 Q. Right. But you had no part in that?

9 A. No, I had no part in that. Once I gave them back
10 after reviewing them, that was the end.

11 Q. Okay. But when you reviewed them, you could not read
12 them because I think they were in Arabic; is that correct?

13 A. Correct.

14 Q. Understood.

15 So you didn't have -- you were not involved in
16 determining whether those communications were of the nature to
17 be attorney-client privileged communications, correct?

18 A. Correct.

19 Q. Somebody else made that determination?

20 A. Correct.

21 Q. But it definitely wasn't you?

22 A. It wasn't me, and I -- as far as I know, there was no
23 one in the SJA's office that did it. I believe it was just

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1 the translator who, while translating, it seemed legal in
2 nature, and then stopped at that point so they could be marked
3 and given back.

4 Q. To your knowledge, is the translator a lawyer?

5 A. No, not to my knowledge.

6 Q. He was not a lawyer in the Staff Judge Advocate's
7 office, correct?

8 A. Correct.

9 Q. He's not a military member, correct?

10 A. Correct.

11 Q. In fact, he is a civilian contractor, correct?

12 A. I -- civilian of some kind. I assume contractor.

13 Q. Do you know who that translator's employer was or is?

14 A. I do not.

15 Q. Were you also involved in another search and seizure
16 of Mr. al Hawsawi's materials later in time?

17 A. I was not. That was the only one.

18 Q. Was there any time when you were asked to return any
19 other materials to Mr. al Hawsawi?

20 A. No.

21 Q. Or to Mr. al Hawsawi's attorneys?

22 A. No.

23 LDC [MR. RUIZ]: Judge, that's all I have.

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1 MJ [COL POHL]: Thank you. Colonel Thomas, do you have
2 anything related to your motion of this witness?

3 DDC [Lt Col THOMAS]: No, Your Honor.

4 MJ [COL POHL]: Trial Counsel.

5 **CROSS-EXAMINATION**

6 **Questions by the Trial Counsel [MR. SWANN]:**

7 Q. Captain E, I think you've indicated that you were
8 shown the documents by the assistant watch commander?

9 A. I don't remember who, sir. It was either an NCO or
10 an officer. I don't know who showed me.

11 Q. So he showed you the documents. You took a look at
12 them. They were all written in Arabic. Did they tell you
13 anything else about what was taken from the accused's cell?

14 A. They didn't tell me what else was taken. They told
15 me, you know, where they had found it and the circumstances
16 related to where it was. But I didn't know -- didn't know or
17 didn't pay attention to the other things that were taken.

18 Q. All right. You've seen a copy of a chain of custody
19 document regarding the 5th of February taking of this
20 material, correct?

21 A. Yes, sir.

22 Q. All right. On that particular document, did you --
23 do you recall if there was anything else, for instance,

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1 belonging to someone else that was taken?

2 A. I believe, yes, there was.

3 Q. Okay. So your purpose here was just simply to
4 examine whether the documents were legal in nature ----

5 A. Yes, sir, to look for the stamp, to look for any
6 stamps.

7 Q. All right. You found no stamps?

8 A. Correct.

9 Q. All you saw was an ISN number handwritten somewhere
10 on that particular series of documents?

11 A. Correct.

12 Q. You then let them follow their normal procedures,
13 which would include trying to figure out what it is, and
14 then ----

15 A. Correct.

16 Q. And then at some later point in time, because the
17 translator indicated they were legal in nature, did you ever
18 ask them what they were about?

19 A. No, sir. I mean, as soon as he said legal in nature,
20 it's okay, well, we'll treat it as legal and give it back to
21 him as quickly as possible.

22 Q. So you -- at that point in time, you directed that
23 the items be properly stamped?

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1 A. Yes, sir.

2 Q. So that they're not taken a second time?

3 A. Correct. That's the idea of it. We don't want, you
4 know, to keep doing this over and over again. We want to do
5 it once and then not to have to deal with it anymore.

6 Q. All right. During your time there as the Deputy
7 Staff Judge Advocate, did anybody ever come and ask you to go
8 seize material from any of the accuseds' cells?

9 A. No, sir.

10 Q. If they would have asked you to do that -- for
11 instance, let's just take me. If I would have asked you to do
12 that, what would you have told me?

13 A. No. And then I -- I mean, I have never been involved
14 in any seizures. I have never done anything like that, and I
15 guess I would have gone to my boss immediately and run it up
16 my chain of command because that would be weird.

17 Q. All right. I agree. That would be weird.

18 TC [MR. SWANN]: Thank you. No further questions.

19 MJ [COL POHL]: Mr. Ruiz, any further questions of this
20 witness?

21 LDC [MR. RUIZ]: No, Judge.

22 MJ [COL POHL]: Being no further questions for this
23 witness, Captain E, thank you for your testimony. You are

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1 excused.

2 WIT: Thank you, sir.

3 [The witness was permanently excused and the VTC was
4 terminated.]

5 MJ [COL POHL]: The next witness appears to be live?

6 Okay. Please stand in front of the chair. General Martins.

7 CP [BG MARTINS]: Please raise your right hand for the
8 oath.

9 ASSISTANT WATCH COMMANDER NUMBER 1482, U.S. Army, was called
10 as a witness for the defense, was sworn, and testified as
11 follows:

12 DIRECT EXAMINATION

13 Questions by the Chief Prosecutor [BG MARTINS]:

14 CP [BG MARTINS]: Please be seated.

15 WIT: Yes, sir.

16 CP [BG MARTINS]: You will be known in these proceedings
17 as Assistant Watch Commander Number 1482. If you could,
18 please speak up. Yeah, move the mic. Thank you.

19 MJ [COL POHL]: Mr. Ruiz.

20 LDC [MR. RUIZ]: Just have one moment, Judge.

21 MJ [COL POHL]: Sure.

22 [Pause.]

23 LDC [MR. RUIZ]: Judge, actually, I didn't know they were

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1 going to put the witness right on the stand, but actually, I
2 don't have any questions for him.

3 MJ [COL POHL]: Okay. You don't -- so we don't need this
4 witness is what you're saying?

5 LDC [MR. RUIZ]: I don't have any questions for him.

6 MJ [COL POHL]: Well, Mr. Swann, you have a question for
7 this witness, then?

8 TC [MR. SWANN]: Okay, Your Honor.

9 MJ [COL POHL]: Okay.

10 TC [MR. SWANN]: I think, as I understand the order of the
11 court, you directed this witness testify concerning these two
12 searches so you could understand whether they were following
13 your procedures.

14 MJ [COL POHL]: It was at Mr. Ruiz's request.

15 TC [MR. SWANN]: I understand, but we need to make sure
16 that the court understands.

17 MJ [COL POHL]: Okay. Are you adopting this witness,
18 then?

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

20 MJ [COL POHL]: Okay. I'll consider it a government
21 witness, and you're precluded from asking leading questions.
22 Go ahead.

23 ASSISTANT WATCH COMMANDER NUMBER 1482, U.S. Army, was called

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1 as a witness for the prosecution, was previously sworn, and
2 testified as follows:

3 **DIRECT EXAMINATION**

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

5 Q. What period of time were you assigned to
6 Guantanamo Bay, Cuba?

7 A. In 2015, sir.

8 Q. All right. So were you an assistant watch commander
9 during the months of February and March of 2015?

10 A. Yes, sir.

11 Q. All right. Now, you've had occasion to look at the
12 chain of custody documents in this case. Were you the
13 assistant watch commander on both the morning of the 5th of
14 February and again in March when cell searches of the accused
15 Hawsawi's cell was searched?

16 A. Yes, sir.

17 Q. All right. Can you tell the court why you conducted
18 the search of his cell on those two days?

19 A. According to SOP, cell searches were conducted on a
20 daily manner.

21 Q. So you were required to conduct a cell search every
22 day?

23 A. Yes, sir.

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1 Q. Now, these particular cell searches, were the
2 accused -- was the accused present while the cell search was
3 conducted?

4 A. No, sir.

5 Q. If you know, do you know where he was on both
6 occasions?

7 A. Legal appointments, sir.

8 Q. Now, did you personally conduct the search?

9 A. No, sir.

10 Q. But the search was conducted by a soldier under your
11 command?

12 A. Yes, sir.

13 Q. All right. Now, did you watch the searches on those
14 two days?

15 A. I did over CCTV, sir.

16 Q. And you're capable of seeing into the cell search to
17 observe what is taking place?

18 A. Yes, sir.

19 Q. On these two occasions, certain items were found.
20 Let's take the 5th of February first. Certain items were
21 found. If you recall, do you remember what was found?

22 A. Not offhand, sir.

23 Q. All right. But you -- from there, you took some

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1 pieces of paper that morning, correct?

2 A. Yes, sir.

3 Q. Okay. And the soldier -- what did the soldier do
4 after she took these pieces of paper from his cell?

5 A. She put them in a plastic bag and put them into
6 evidence after she gave them to me, and then I gave them to
7 the evidence custodians.

8 Q. Now, if you recall, the paper that was seized that
9 morning, what language was it in?

10 A. I am uncertain. It's a foreign language, sir.

11 Q. Okay. Foreign language, you couldn't read it?

12 A. Something that I have no idea, sir.

13 Q. Did these items have proper stamps in accordance with
14 the camp SOP requirements?

15 A. Negative, not if we took them, sir.

16 Q. Now, they may have had -- we have heard testimony
17 that they may have had an ISN number written on them; do you
18 recall that?

19 A. Yes, sir.

20 Q. What's the proper procedure with respect to having
21 documents properly marked?

22 A. There would be a stamped ISN number, not in
23 handwriting. It would be a stamped ISN number, sir.

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1 Q. Okay. Now, did they have any indication that they
2 were legal or nonlegal materials?

3 A. Not that I'm aware of, sir.

4 Q. Okay. If they had been properly stamped and marked
5 with, like, LEGAL or ATTORNEY-CLIENT INFORMATION, would you
6 have even touched that information?

7 A. No, sir.

8 Q. Now, if you recall, do you recall where the items
9 were found in his cell?

10 A. If I recall, they were out in the -- in a bin in some
11 sort, sir.

12 Q. Okay. Legal bin?

13 A. Possibly, sir.

14 Q. Okay. Again not properly marked, right?

15 A. Correct, sir.

16 Q. All right. The second instance that occurs in March,
17 are you the assistant watch commander again on that incident?

18 A. Yes, sir.

19 Q. Do you recall -- it's the same -- it's the same
20 soldier that did the search that morning, right?

21 A. Yes, sir.

22 Q. Okay. Were you -- again, were you watching the
23 search?

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1 A. Via CCTV, sir.

2 Q. Did anybody tell you to go do this search other than
3 your standard operating procedures?

4 A. No, sir.

5 Q. Again, you received something -- you took some
6 material that morning, right?

7 A. Yes, sir.

8 Q. And that material was turned over to you or handed to
9 you?

10 A. Yes, sir.

11 Q. Did you look at it?

12 A. I looked to make sure that it was improperly marked
13 or the markings that were on it, sir.

14 Q. Okay. And then you gave it to the evidence
15 custodian?

16 A. Yes, sir.

17 Q. Do you know what happened to the items on both the
18 5th of February and the 7th of March, whether those items went
19 back to the accused or not?

20 A. I am unaware, sir.

21 Q. Okay. Is the only reason you searched -- is the only
22 reason that you took those items that morning is because they
23 weren't properly marked?

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1 A. Yes, sir.

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

3 MJ [COL POHL]: Colonel Thomas.

4 DDC [Lt Col THOMAS]: Your Honor, before I begin any
5 questions, I want to point out to you that the assistant watch
6 commander has noted that he was on duty here December 2014 to
7 August of 2015. If you note from the record, we have brought
8 forward a motion, AE 373, where my client, Mr. al Baluchi,
9 complains of legal DVDs properly marked being seized.

10 We believe that this particular witness has
11 information related to that seizure, and we would ask that we
12 be allowed to ask him about that today, or that he be required
13 to return for the argument and presentation of testimony on
14 373.

15 It's a pretty straightforward piece of information.
16 He wasn't involved in the seizure, but -- on information and
17 belief, he has knowledge about the seizure of my client's
18 legal DVDs properly marked.

19 MJ [COL POHL]: Before we go to a new motion altogether,
20 are there any -- Mr. Ruiz, do you have any questions of this
21 witness on this motion?

22 LDC [MR. RUIZ]: I do now.

23 MJ [COL POHL]: Okay. Let's deal with one thing at a time

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1 then. Trial Counsel, I'll get your view of whether you wish
2 to explore 373 or not. We'll come back to you, Colonel
3 Thomas.

4 DDC [Lt Col THOMAS]: Thank you.

5 **CROSS-EXAMINATION**

6 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

7 Q. Good morning.

8 A. Good morning, sir.

9 Q. Now, you were assigned to Guantanamo Bay for a
10 specific tour of duty, correct?

11 A. Yes, sir.

12 Q. And that tour of duty, once it finished, you returned
13 back to your civilian occupation?

14 A. Yes, sir.

15 Q. So it's -- in terms of your background and your
16 experience, you are not a correctional officer in your
17 civilian capacity, correct?

18 A. Correct, sir.

19 Q. You've never worked in a prison institution?

20 A. No, sir.

21 Q. Or a jail?

22 A. No, sir.

23 Q. Or quite frankly, anyplace like Camp VII was, which

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1 is a detention facility?

2 A. Correct, sir.

3 Q. I believe, in fact, when we talked earlier, you said
4 that you were a mechanic?

5 A. Yes, sir.

6 Q. And I did that as well.

7 So in terms of your responsibilities in Camp VII, as
8 I understand it, you were more of in a supervisory capacity?

9 A. Yes, sir.

10 Q. Not so much in front line in terms of doing searches,
11 day-to-day searches and those kinds of things, correct?

12 A. Correct, sir.

13 Q. In this instance, you did not conduct the search, and
14 I know Mr. Swann said that a number of times. You did not
15 actually conduct the search, but you in fact observed it, and
16 not from where the search was being conducted but from a
17 different place.

18 A. Correct, sir.

19 Q. I think you indicated that after the materials were
20 seized, correct, the materials were seized from the -- there
21 was a search, correct?

22 A. Yes, sir.

23 Q. There was a seizure of the materials?

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1 A. Yes, sir.

2 Q. Then they were put in a container, and then they were
3 provided to you?

4 A. Yes, sir.

5 Q. All right. And you took those materials and you gave
6 them to the evidence custodian?

7 A. Yes, sir.

8 Q. The evidence custodian then held on to those
9 materials; is that right?

10 A. The evidence custodian held onto these materials,
11 yes, sir.

12 Q. All right. That was the end of your involvement.

13 A. Yes, sir.

14 Q. All right. At what point did you notify the Staff
15 Judge Advocate of the seizure?

16 A. I did not notice -- I notified the SJA, sir.

17 Q. All right. So just focusing on the 5th of February,
18 correct, you received certain documents on the 5th, correct?

19 A. Yes, sir.

20 Q. They were in a bag or sealed container, and then you
21 gave them to the evidence custodian?

22 A. Yes, sir.

23 Q. Did you have an opportunity to provide or have

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1 interaction with the Staff Judge Advocate on that day
2 regarding the items that were seized?

3 A. I did not recall, sir.

4 Q. You did not notify the Staff Judge Advocate's office?

5 A. Negative.

6 Q. You did not personally talk to the Staff Judge
7 Advocate prior to the seizure?

8 A. Correct.

9 Q. And as far as I can tell from your testimony, there
10 was no prior authorization from the Staff Judge Advocate prior
11 to the seizure, correct?

12 A. Correct.

13 Q. The items were seized, sealed and delivered to
14 evidence, and that was the end of your involvement?

15 A. Yes, sir.

16 Q. All right. All right.

17 In regards to the second search, the March search, as
18 I understand it, your involvement was essentially the same?

19 A. Correct, sir.

20 Q. You were an observer who received the documents and
21 then transferred them to the evidence custodian?

22 A. Yes, sir.

23 Q. In that instance, there was no Staff Judge Advocate

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1 that was consulted either, correct?

2 A. Correct, sir.

3 Q. The search was simply conducted, the items were
4 seized, and then they were provided to evidence for storage
5 and for translation?

6 A. Correct, sir.

7 Q. Once you determined that those documents were in a
8 foreign language, you sent them to evidence and you sent them
9 to be translated so a determination could be made, correct?

10 A. That's correct, sir.

11 Q. That was not made in consultation with any Staff
12 Judge Advocate?

13 A. Correct.

14 Q. On either one of those occasions?

15 A. Correct.

16 Q. The Staff Judge Advocate was only notified days after
17 the seizure so they could be involved, correct?

18 A. I am unaware when they got notified.

19 Q. You are aware that they got notified?

20 A. No, sir.

21 Q. Who would actually do the notifications?

22 A. The evidence custodians.

23 Q. All right. The evidence custodians are also military

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1 members; is that right?

2 A. Yes, sir.

3 Q. But the translators are not, correct?

4 A. Correct.

5 Q. The translators are civilian contractors?

6 A. To the best of my knowledge, yes, sir.

7 Q. They don't wear a uniform?

8 A. No, sir.

9 Q. You don't know who they reported to?

10 A. No, sir.

11 Q. Do you know who their employer is?

12 A. No, sir.

13 Q. But they did, in fact, have the appropriate

14 clearances to be in Camp VII?

15 A. Yes, sir.

16 Q. Mr. Swann referenced the custody evidence sheet for
17 both of these items. Do you have any knowledge in terms of
18 how long documents would normally take to be returned? Just
19 based on your work in Camp VII, did you have any knowledge in
20 terms of how long documents normally would take to be returned
21 either to the SJA or to attorneys?

22 A. No, sir.

23 Q. You have no idea.

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1 LDC [MR. RUIZ]: That's all I have, Judge.

2 MJ [COL POHL]: Thank you. Trial Counsel, anything on
3 018?

4 TC [MR. SWANN]: No, Your Honor.

5 MJ [COL POHL]: Do you have any objection to Colonel
6 Thomas discussing 373?

7 TC [MR. SWANN]: I have no objection to this witness
8 speaking with Colonel Thomas and providing him at some later
9 point in time. I don't think it's appropriate for these
10 proceedings.

11 I also don't recall -- because I took a look at this.
12 I don't recall that he's on any chain-of-custody documents
13 regarding those particular motions.

14 LDC [MR. RUIZ]: Judge, I'm going to object to him
15 testifying.

16 MJ [COL POHL]: No, it -- we're talking about 373 now, and
17 so I'll tell you what, Colonel Thomas, what do you think this
18 witness knows, if anything?

19 DDC [Lt Col THOMAS]: Your Honor, on information and
20 belief, this witness was the assistant watch commander when a
21 seizure of Mr. al Baluchi's property ----

22 TC [MR. SWANN]: I also note that with respect to AE 373,
23 there is no motion to compel witnesses in that case that I'm

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1 aware of.

2 DDC [Lt Col THOMAS]: Right. Just to clarify, Your Honor.
3 My client, Mr. al Baluchi, complained to AWC 1482 post-seizure
4 of the seizure of his three properly marked legal DVDs. I
5 want to talk to him about that, whether that information is in
6 his knowledge.

7 MJ [COL POHL]: Although it would appear to be efficient
8 or probably even economical to take a witness like this, I
9 just don't run a court that way. This is on a different
10 motion altogether, and sometimes, despite our best intentions,
11 we drift into something else.

12 Do you have any problem talking to the defense
13 counsel after -- during the noon recess?

14 WIT: No, sir.

15 MJ [COL POHL]: Okay. Stand by after the noon recess. If
16 you wish to interview him, do it at that point, but I'm not
17 going to conflate two separate motions at this time.

18 DDC [Lt Col THOMAS]: Understood, Your Honor. We're
19 trying to be efficient. Thank you very much.

20 MJ [COL POHL]: Understand your intent. Thank you very
21 much.

22 TC [MR. SWANN]: Your Honor, I'd like to remind you, 373
23 also makes reference to 365, which I think is a classified

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1 ex parte submission.

2 MJ [COL POHL]: Okay. Thank you for your testimony. You
3 are excused. But, again, stand by during the lunch break,
4 which will be in about an hour or so, and then if Colonel
5 Thomas needs to talk to you, talk to him then. Thank you.

6 WIT: Yes, sir. Thank you.

7 MJ [COL POHL]: Thank you for your testimony.

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

10 MJ [COL POHL]: Defense, do you have any further
11 witnesses? My understanding was there was three defense
12 witnesses which turned out to be two. But anyway, those are
13 the three that you requested.

14 LDC [MR. RUIZ]: Yes, that's correct, Judge.

15 MJ [COL POHL]: And, Trial Counsel, you indicated you
16 had -- in the 802 you indicated you had one government witness
17 you wished to call?

18 TC [MR. SWANN]: I do, Your Honor.

19 MJ [COL POHL]: Go ahead.

20 CP [BG MARTINS]: Major, could you please remain standing
21 for the oath. Raise your right hand.

22 MAJOR, U.S. Army, was called as a witness for the prosecution,
23 was sworn, and testified as follows:

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1 DIRECT EXAMINATION

2 Questions by the Chief Prosecutor [BG MARTINS]:

3 Q. Please be seated. You will be known in these
4 proceedings as Major.

5 A. Thank you.

6 Q. Are you the current Assistant Staff Judge Advocate?

7 A. I am.

8 CP [BG MARTINS]: Thank you.

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

10 Q. Major, when did you arrive at Guantanamo Bay, Cuba?

11 A. 31 December 2015.

12 Q. All right. And prior to that, there was another
13 Deputy Staff Judge Advocate that you actually got
14 right-seat/left-seat training from; is that correct?

15 A. That's correct.

16 Q. You know about these two instances that we're talking
17 about in February-March of 2015?

18 A. Just I've heard about the incidents. I obviously
19 wasn't here.

20 Q. Since February and March of 2015, and the controversy
21 seems to be that the material was looked at by someone then it
22 was returned to the accused, what's the current procedures
23 that have been in place for, say, the last 18 months?

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1 A. Oh, if there's an item that's retained by the camp
2 and given to the evidence custodian, the SJA is contacted,
3 Captain Swift or myself would show up. You would take
4 possession of the item after we reviewed it to make sure it
5 was something that we needed to take.

6 We would then return to the office, and then we would
7 prepare a form letter and return the form letter and the items
8 to the defense courier, and then the defense courier would
9 then return the items to the appropriate teams.

10 Q. All right. That means any item that's taken from the
11 individual cell that's not otherwise -- well, for instance,
12 some things don't belong to them that will found in the cell,
13 right?

14 A. That's correct.

15 Q. Let's say if something was found in one of their
16 cells that didn't belong to them, had an ISN number on another
17 individual, how would you handle that?

18 A. So that's happened. Those items would then be
19 retained by the camp, and the same procedure, we would get
20 contacted and then we would come and take possession of those
21 documents, create a letter and indicate in the letter
22 basically what happened. ISN Number 11, for example, may have
23 had documents that belonged to ISN 18. We would then return

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1 them to ISN 18's team through the defense courier, if that's
2 who they belong to.

3 Q. All right. So no translation of anything is done?

4 A. Negative.

5 Q. It's dropped into an envelope and returned?

6 A. Correct.

7 Q. Now, since that period of time -- and I know you've
8 only been here a year, but I also asked you to go back to see
9 if you had any records beginning in May of last year.

10 How many instances or letters of this nature have you
11 issued to all detainees in the camp?

12 LDC [MR. RUIZ]: Objection, relevance.

13 A. Between myself ----

14 MJ [COL POHL]: Overruled. You may answer the question.

15 A. Between myself and my predecessor, just over 70
16 letters.

17 Q. So that's 70 times something is found in the camp
18 that either didn't belong to them or wasn't properly marked,
19 and it went back to the proper attorney in the case; is that
20 right?

21 A. That is correct.

22 Q. Okay. Of those 70 letters, how many times has it
23 related to the five accused in this room?

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1 A. Just under 50.

2 Q. Just under 50?

3 A. Yes.

4 TC [MR. SWANN]: I have nothing further, Your Honor.

5 MJ [COL POHL]: Mr. Ruiz, any questions for this witness?

6 **CROSS-EXAMINATION**

7 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

8 Q. Good morning.

9 A. Good morning.

10 Q. So as I understand it, and correct me if I'm wrong
11 here, if any material is retained in the camp and given to the
12 evidence custodian, you are then contacted, you conduct a
13 review, and then it's returned after you draft a letter?

14 A. That's correct.

15 Q. All right. So my question is -- or actually my
16 understanding of the procedure you've described is that you
17 have no role in the actual search or the seizure of those
18 materials prior to the time you're contacted after the
19 materials have already been searched and seized, correct?

20 A. I believe the order references that the cell search
21 takes place and if those items are found, they're simply
22 retained by the noncommissioned officer in charge and placed
23 into a sealed container. The SJA would then be contacted, and

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1 then we come and actually take possession of those documents
2 or whatever the item is.

3 Q. All right. So I guess the part that I want to ask
4 you about in terms of how your office currently interprets
5 this portion of the judge's instruction or rule -- actually,
6 if you need to refresh your memory to read the ruling also,
7 please let me know.

8 But I'm referring to the language that says that
9 seizure of such materials -- now, I'll -- looking at
10 number 11, which I have on page 18. And we can look at either
11 11.c or 11.d. even though they deal with materials inside or
12 outside of the bins ----

13 A. I got.

14 Q. ---- I think they still have the exact same language
15 in terms of the prior authorization.

16 So my question to you is: The language in both of
17 those provisions that says seizure of those materials -- and
18 by seizure I mean -- I interpret that to mean materials are
19 seized from the accused from their cell, okay? Do you have a
20 different interpretation from that?

21 A. Well, I just reference the words that the judge used.
22 He uses the word "retained" by the noncommissioned officer if
23 those items are found, and then if that happens the SJA would

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1 be notified, and then he uses the word "seizure" of those
2 materials may occur upon prior authorization of the SJA.

3 Q. Right. So what do you take that seizure upon prior
4 authorization provision to mean, in terms of your practice and
5 how you implement the order?

6 A. All right. So if a cell inspection takes place and
7 items are found, then the noncommissioned officer in charge
8 will retain those items pursuant to the order, give them to
9 the evidence custodian. They're still there at the camp,
10 being retained by the camp. The SJA shows up, I review them,
11 and then I physically take possession or seize those
12 items ----

13 Q. I see.

14 A. ---- take them back to my office and then return them
15 to the teams through the defense courier.

16 Q. What would you interpret to be a seizure of those
17 materials?

18 A. Once I physically take possession of them and remove
19 them from the camp.

20 Q. So you do not interpret the guards taking the
21 materials from the cell as a seizure?

22 A. When they simply take the items from the cell and put
23 them in an envelope and they're left there at camp, it's just

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1 maintaining the status quo, they're still at camp. Until I
2 physically show up and remove the items would they then be
3 seized.

4 Q. You have -- you or other Staff Judge Advocates in
5 your office have no role in that process prior to the point in
6 time which you've described?

7 A. Correct. We don't get contacted every time if
8 there's a cell search every day, we don't get contacted every
9 day to sit and watch the cell search take place because, if
10 there's nothing found, then we're just there.

11 Q. But if there is something found -- let's say they do
12 a search, they have five documents. They think they need to
13 be, in my view, seized at that point and removed, taken to a
14 different place -- you're not contacted at that point to look
15 at the documents and say, okay, yes, you can properly seize
16 this, or you can retain this, whichever word you want to use?
17 You're not contacted at that point?

18 A. That's correct.

19 Q. No member of your office is involved at that point in
20 time?

21 A. We are not.

22 LDC [MR. RUIZ]: That's all I have. Thank you, Judge.

23 MJ [COL POHL]: Colonel Thomas.

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1 CROSS-EXAMINATION

2 Questions by the Detailed Defense Counsel [Lt Col THOMAS]:

3 Q. Good morning, Major.

4 A. Good morning, sir.

5 Q. You described a new process about retention and then
6 seizure that really just returns it to the detainee after it's
7 been stamped; is that right?

8 A. Well, we're just -- the retention and the seizure
9 words are words that are in the order itself.

10 Q. Right. I want to walk forward, then. You know that
11 detainees participate in their own legal defense, right?

12 A. Yes.

13 Q. So at times they create things that are going to be
14 part of the work that we do here, which is zealously represent
15 them?

16 A. I understand.

17 Q. In this new regime that you're describing, how are
18 the detainees supposed to mark their materials so they aren't
19 subject to this potential seizure?

20 A. Since I've been here I've had no role in marking any
21 documents.

22 Q. So is there some ruling or some advice that the SJA
23 has given saying if it's marked this way, you need not bother

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1 with it so we can make sure our clients are marking it that
2 way?

3 A. It's my understanding if the camp finds something
4 that's not marked either ATTORNEY-CLIENT PRIVILEGE, OTHER
5 CASE-RELATED MATERIAL, and the items that are in the SOP or
6 the order, those items would then be retained and then
7 myself -- I would come out and review the items.

8 MJ [COL POHL]: Major, are you aware of any procedure
9 where a notebook would be given to the detainee, marked with
10 his detainee number as well as the attorney-client number so
11 he has a notebook to work on?

12 A. I have no knowledge of that, Judge.

13 MJ [COL POHL]: Thank you. Go ahead.

14 DDC [Lt Col THOMAS]: Actually, I was going there.

15 Q. So when they have -- actually, you are referring to
16 ACP and OCRM, which are acronyms for attorney-client materials
17 and other case-related materials. But the attorneys don't
18 have access to those stamps. So when they take a notepad, for
19 instance, what are they supposed to put on the notepad to
20 indicate to the guard force don't touch this, these are my
21 legal materials?

22 A. Those papers -- if the papers are coming from the --
23 from the defense or from the camp, and if they're just blank

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1 pieces of paper, they should probably be stamped prior to if
2 they're going to be used for legal material only.

3 Q. And what stamp would be best suited to achieve the
4 purpose we are trying to accomplish here, which is to avoid
5 the review of the legal materials of our client?

6 A. I'm not sure which stamp -- I think I'll let you guys
7 hammer that one out. But obviously if it's marked prior to
8 the -- before the notetaking process, if they're taking notes
9 either in Echo II -- or just taking notes on the materials
10 that you guys send in, I agree there should be some way for
11 them to take notes and have those notes still protected, if
12 they have attorney-client privileged ----

13 Q. You would agree ---- I'm sorry, go ahead.

14 A. ---- or other case-related material, their stuff
15 they're preparing for their defense.

16 Q. So you would agree then that if they have blank paper
17 provided to them, that blank paper, whoever provided it to
18 them should have some sort of marking that the detainee
19 doesn't have to make that indicates I need not look at this
20 material any further, it's their legal material?

21 A. If those documents and those blank pieces of paper
22 that are marked are only going to be used for their legal
23 notes or their case-related material.

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1 DDC [Lt Col THOMAS]: Could I have a moment, Your Honor?

2 MJ [COL POHL]: Sure.

3 DDC [Lt Col THOMAS]: Thank you, Your Honor.

4 MJ [COL POHL]: Sure.

5 **CROSS-EXAMINATION**

6 **Questions by the Learned Defense Counsel [MR. NEVIN]:**

7 Q. Sir, David Nevin, one of the lawyers for

8 Mr. Mohammad.

9 A. Yes, sir.

10 Q. You still have Paragraph 11 of 018U in front of you?

11 A. I do.

12 Q. Pages 18 to 19?

13 A. I do.

14 Q. I just wanted to ask you, after the -- you focused on
15 the sentence that begins at the bottom of page 18 and
16 continues over to 19 about seizure. Do you recall that?

17 A. Yes.

18 Q. Right. A sentence after that begins "If the
19 materials are not properly marked." Do you see that one?

20 A. Two sentences after. So, yeah, "If the materials are
21 not properly marked, they would be retained by the SJA," that
22 one right there?

23 Q. Right. And I just -- and the language says, "And

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1 counsel for the accused shall be immediately notified."

2 I just wanted to ask: Has it been your practice to
3 immediately notify counsel that materials which were not
4 properly marked have been seized?

5 A. We contact -- we don't directly -- we don't contact
6 counsel directly, we contact the defense courier and let the
7 defense courier know that we have the items, and she will come
8 pick them up, and we provide her a letter and keep a copy of
9 that letter. And she takes the items from my office and then
10 presumably returns them to the teams that those items belong
11 to.

12 Q. Okay. So the notification has been of the defense
13 courier, not of -- directly to counsel?

14 A. That is correct.

15 Q. Thanks.

16 LDC [MR. NEVIN]: That's all I have. Thank you, Your
17 Honor.

18 MJ [COL POHL]: Mr. Swann.

19 **REDIRECT EXAMINATION**

20 **Questions by the Trial Counsel [MR. SWANN]:**

21 Q. Since Mr. Nevin inquired, of the 50 or so letters
22 that -- the combined total, do you know the number for
23 Mr. Nevin's team?

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1 A. I did. I don't have that information in front of me
2 to give a specific number.

3 Q. Would the range of the upper 20s ----

4 A. I think more than -- around half of the 50 items that
5 I referenced were returned to team 24.

6 Q. All right. I believe you told me that you got
7 another letter going back to him in the next day or so?

8 A. That letter has already been returned, the items that
9 were found in the book.

10 TC [MR. SWANN]: Okay. Thank you.

11 MJ [COL POHL]: Anything further?

12 Major, again, thank you for your testimony. You are
13 excused.

14 WIT: Thanks, Judge.

15 [The witness was permanently excused and withdrew from the
16 courtroom.]

17 MJ [COL POHL]: Mr. Ruiz, there is a 505(g) notice on this
18 issue in light of -- I think we deferred it until we heard
19 this testimony. In light of this testimony, do you still
20 believe there's a necessity for a potentially classified
21 portion of this? Would you like to defer that decision
22 until ----

23 LDC [MR. RUIZ]: I'll defer, Judge.

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1 MJ [COL POHL]: Okay. If you give me an answer by the end
2 of this week, and if the answer is no, then we can go ahead
3 and argue the motion. If the answer is yes, then obviously
4 we'll make other arrangements.

5 LDC [MR. RUIZ]: Thank you.

6 MJ [COL POHL]: That brings us to AE 013, and I believe
7 that's Mr. Connell's motion, although I'm not sure -- okay. I
8 guess Mr. Connell is going to argue.

9 LDC [MR. CONNELL]: Sir, the issues in AE 013XXXX have
10 been significantly narrowed by the government's response. The
11 original position of the government was that the Chief Defense
12 Counsel could not have access to classified information in the
13 course of his responsibilities to supervise and manage and
14 advise on ethical issues the constituent attorneys in the
15 Military Commission Defense Organization.

16 We proposed a solution to that. The Chief Defense
17 Counsel later proposed a different solution AE 013AAAAA and we
18 adopted -- we abandoned our original position, which would
19 require a lot of line edits. The position of the Chief
20 Defense Counsel in AE 013AAAAA is essentially to insert two
21 paragraphs instead of making a large number of line edits to
22 the protective order.

23 There are really only two issues that remain as I see

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1 it. The first is that the government's position is that the
2 protective order itself should not be modified but that we
3 should multiply the numbers of protective orders. There's not
4 really a reason for this. I think it's the aesthetic sense of
5 the government as to how many protective orders there should
6 be.

7 The protective order -- I will tell you that the
8 protective order 013BBBB is pinned to my wall and pinned to
9 the wall of an awful lot of other people because we consult it
10 so often. It gives us -- not perfectly, but it gives us a
11 good sense of what the rules are and how to follow them. I
12 myself consult it all the time and refer other attorneys to it
13 all the time. And if we are -- if the military commission is
14 changing in accordance with the new rule for -- Regulation for
15 Military Commission 9-1.a.4 -- if it's changing the rules,
16 then that should be compelled -- compiled in one place as
17 opposed to producing Protective Order Number 4, I suppose.

18 MJ [COL POHL]: So everybody would have to pin a new order
19 on everybody's wall, then.

20 LDC [MR. CONNELL]: That's right.

21 MJ [COL POHL]: Whereas the government procedure is the
22 only person who would have to pin it on his wall would be the
23 Chief Defense Counsel.

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1 LDC [MR. CONNELL]: No, because we have to follow it, too.
2 The government's position is that we'd have to pin two orders
3 to the wall. And in fact there's 014H as well that's also
4 pinned up on my wall as well. So there's already two orders
5 up there. The real question is should there be three.

6 The last modification from the government came in
7 AE 013RRR, but that's not the real issue. The real issue is
8 the question of supervisory attorneys. The military judge has
9 already, in closed hearings, permitted the Deputy Chief
10 Defense Counsel to attend closed proceedings, and the position
11 of the Chief Defense Counsel in AE 013AAAAA and Mr. al Baluchi
12 in AE 013XXXX would comport -- would change the regulation
13 which governs us all to comport with the practice which is
14 already in place.

15 MJ [COL POHL]: Let's make it clear is at the time there
16 was no objection.

17 LDC [MR. CONNELL]: Yes, of course.

18 MJ [COL POHL]: There was no objection and that's why I
19 didn't, but now we have an objection.

20 LDC [MR. CONNELL]: Of course.

21 MJ [COL POHL]: Okay. So that's -- I don't rule when
22 there's no real issue to rule before me, but go ahead.

23 LDC [MR. CONNELL]: Of course. But neither did the world

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1 come to an end because the Deputy Chief Defense Counsel was
2 able to exercise his supervisory responsibilities in a closed
3 hearing.

4 It is really an issue of three things. It's really
5 an issue of capacity, an issue of conflicts, an issue of
6 availability. With respect to capacity, the single person,
7 the Chief Defense Counsel cannot be at every closed hearing.

8 That's even true for the government. The head of the
9 Office of the Chief Prosecution couldn't be in two places at
10 one time and had to miss one hearing. These things happen.
11 There's a limited capacity that individuals have to be every
12 place at every time.

13 That capacity problem is aggravated by the fact that,
14 of course, you have to get on a plane and fly to another
15 country, but that capacity issue exists for everyone in the
16 world.

17 MJ [COL POHL]: Who proposed this change to the Deputy
18 Secretary of Defense?

19 LDC [MR. CONNELL]: Our office.

20 MJ [COL POHL]: Okay. So your capacity argument is -- I
21 mean, this was a request by the defense themselves to incur
22 this additional burden, if you want to call it that.

23 LDC [MR. CONNELL]: Yes, that's right. And the -- I don't

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1 think it's -- I think it's a burden that was already imposed
2 by the Regulation for Trial by Military Commission, which
3 already imposed a series of duties upon the Chief Defense
4 Counsel with respect to managing conflicts, supervising,
5 discussing issues with the convening authority, staffing,
6 resources, et cetera.

7 And the -- so I think that what this change did was,
8 rather than imposing an additional burden on the Chief Defense
9 Counsel, it allowed the chief counsel to carry out the
10 responsibilities that the Chief Defense Counsel already had.
11 But that said, there's still a -- a capability issue as there
12 is when any single individual is tasked with the
13 responsibility.

14 That situation is sharpened in the question of
15 conflict. The Regulation for Trial by Military Commission
16 specifically provides that, in appropriate cases, the Chief
17 Defense Counsel may, because of a conflict of interest,
18 deputize a deputy, a chief -- a deputy Chief Defense Counsel
19 to carry out the conflict management issues.

20 I, in fact, understand that that issue may -- is live
21 and may come up in another -- in another case other than this
22 one because of a relationship, a prior relationship between
23 Chief Defense Counsel and a new military judge. There could

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1 be a situation of the deputy Chief Defense Counsel being
2 required to supervise one of the defense teams to avoid the
3 appearance of any conflict of interest.

4 And finally there's simply the question sometimes of
5 availability. The Chief Defense Counsel, like the -- like
6 other people, do their best to be everywhere at once, but
7 sometimes the Chief Defense Counsel is in Washington and the
8 deputy Chief Defense Counsel is here for the hearing, and our
9 VTC doesn't support anything above secret level. So if we
10 have a question, such as has arisen this week about our
11 ethical or security responsibilities with respect to a matter
12 which is at TOP SECRET or better, there's simply the question
13 of availability of who is -- what ethical supervisor do we
14 have available that we can talk to.

15 MJ [COL POHL]: How many supervisory attorneys are there?

16 LDC [MR. CONNELL]: Two.

17 MJ [COL POHL]: How do I know that?

18 LDC [MR. CONNELL]: I'm sorry, sir?

19 MJ [COL POHL]: How do I know that, other than you just
20 told me? I mean, can't he appoint more?

21 LDC [MR. CONNELL]: Yes. The -- it is allowed under the
22 Regulation for Trial by Military Commission ----

23 MJ [COL POHL]: Clearly, it is. I mean ----

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1 LDC [MR. CONNELL]: ---- for the Chief Defense Counsel to
2 make the decision as to how many deputies that he needs. I
3 have been there five years. The whole time I have been there,
4 there have only been two. But there's always been a Chief
5 Defense Counsel and a deputy Chief Defense Counsel. I don't
6 know of any plans for that to change, but it is allowed by the
7 regulation.

8 MJ [COL POHL]: Okay. As a matter of just interpretation,
9 you say that -- and in fact I believe General Baker's comment
10 is it's irrational to need the memorandum to be limited to the
11 Chief Defense Counsel and not his subordinate supervisory
12 attorneys. If that's what you wanted, why wasn't that -- and
13 this came from the defense to begin with, why wasn't that put
14 in the regulatory change?

15 LDC [MR. CONNELL]: I'm not privy to that information,
16 Your Honor ----

17 MJ [COL POHL]: But I'm saying -----

18 LDC [MR. CONNELL]: ---- but I can explain ----

19 MJ [COL POHL]: Aren't I limited to what it says?

20 LDC [MR. CONNELL]: Well, the question is, you know,
21 normally a deputy is included in the principal. You know, a
22 deputy acts on behalf of a principal.

23 And so probably -- I was not privy to the

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1 conversation. I wasn't personally involved, but my
2 speculation is that the reason that it wasn't included was
3 that it was obvious to -- or the drafter felt that it was
4 obvious to themselves that a deputy, a person who acts on
5 behalf of the Chief Defense Counsel was included in the powers
6 and authorities of the ----

7 MJ [COL POHL]: Well, yeah, but now you're saying the
8 deputy and somebody else. Where does this end?

9 LDC [MR. CONNELL]: Somebody else, sir.

10 MJ [COL POHL]: Didn't you say there were two Chief
11 Defense Counsel?

12 LDC [MR. CONNELL]: Yes. Oh. Yes, this Chief Defense
13 Counsel and a deputy.

14 MJ [COL POHL]: There's nobody else?

15 LDC [MR. CONNELL]: Yeah. The two are the Chief Defense
16 Counsel and his deputy.

17 MJ [COL POHL]: I thought there was somebody else.

18 LDC [MR. CONNELL]: There are not two deputies. I mean,
19 the whole point of a deputy is that they are deputized with
20 the powers of the principal, and ----

21 MJ [COL POHL]: Yeah, I'm not second-guessing the
22 rationale here. You know my opinion of whether or not there's
23 a need to know. I have already issued an order on that. And

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1 apparently the defense wanted to go to the Secretary of
2 Defense and change it. That's fine. I got no problem about
3 that.

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

5 MJ [COL POHL]: I'm just saying but he had an option to
6 change it any number of different ways. He chose this way,
7 and now I'm supposed to read in an additional person to this
8 when, in my view -- you know what my view is, and, again, I
9 got it. They changed it. The rule now gives them
10 authorization, but the rule authorized the Chief Defense
11 Counsel. Didn't authorize his deputy, didn't authorize
12 anybody else, who are not -- I mean, they're not -- I know
13 you've withdrawn ----

14 LDC [MR. CONNELL]: I understand.

15 MJ [COL POHL]: I know you've withdrawn your part of the
16 motion but there's a disturbing part about that, so too, about
17 some type of privilege here.

18 The Chief Defense Counsel is not a party to this
19 litigation.

20 LDC [MR. CONNELL]: Correct, sir.

21 MJ [COL POHL]: So there's a limited -- his role, as far
22 as involvement in any individual issue, has got to be very
23 carefully balanced between the fact he is not a part of this

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1 and has no attorney-client relationship with any accused.

2 LDC [MR. CONNELL]: I agree, sir. Let me answer both of
3 the things that -- both the questions that you raised.

4 So the interpretation of the language is of course --
5 is really the question of whether the reference to the Chief
6 Defense Counsel includes the deputy defense counsel, that is a
7 person who the Chief Defense Counsel deputizes to act on his
8 behalf because of conflict of interest or capacity or whatever
9 authorized by the Regulation for Trial by Military Commission.
10 The -- so that's sort of a statutory interpretation question
11 or regulatory interpretation question.

12 The second one with respect to privilege has two
13 aspects to it. The first one is that although the Chief
14 Defense Counsel is not party to the litigation and does not
15 have an attorney-client relationship with any client, which is
16 required by the regulation itself, the regulation also allows,
17 in appropriate cases, people who do have an attorney-client
18 relationship to reveal privileged information to the defense
19 counsel for supervisory and ethical purposes without waiving
20 that privilege.

21 Now, that's not the same as acquiring attorney-client
22 privilege themselves. That is an attorney-client privilege
23 which is derivative of the attorney-client relationship

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1 between, say, learned counsel and their client. But the
2 second part of that is, yes, it is a responsibility of both
3 the attorneys who actually represent clients and the
4 leadership, the Chief Defense Counsel and his deputy, to
5 manage that sharing of information in a way that it does not
6 compromise any attorney-client material.

7 MJ [COL POHL]: Okay. Thank you. General Baker, do you
8 want to be heard?

9 CDC [BGen BAKER]: Good morning, sir.

10 MJ [COL POHL]: Good morning.

11 CDC [BGen BAKER]: Really to kind of answer the question
12 that you asked Mr. Connell, why was the regulation drafted the
13 way that it was, Paragraph 9-1.a in its entirety, which has a
14 bunch of subsections, lays out the duties and responsibilities
15 of the Chief Defense Counsel. Included in the duties and
16 responsibility of the Chief Defense Counsel is the ability to
17 appoint a deputy, and that -- and there was no need in the
18 specific paragraph that was modified to reference the deputy.

19 As Mr. Connell has made reference to, besides this
20 commission, there's other commissions that occur. There are
21 times when I am not here and my deputy is here. We make sure
22 that we coordinate our schedules so that one of the two of us
23 is always present when the commission is going on here, which

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1 often means one of us is up north.

2 The whole purpose of this regulation is to allow the
3 defense teams to consult with their supervisors, and the two
4 supervisory attorneys within the MCD0 are the deputy Chief
5 Defense Counsel and the Chief Defense Counsel.

6 MJ [COL POHL]: General Baker, and I guess my concern was,
7 and I think this was part of the government's concern, as
8 worded in both your pleading and Mr. Connell's pleading, it
9 says, "Chief Defense Counsel and his or her subordinate and
10 supervising attorneys," plural, which as I now have learned is
11 not really plural, it's singular.

12 CDC [BGen BAKER]: Well, I mean ----

13 MJ [COL POHL]: If what the request is, is the Chief
14 Defense Counsel and his deputy, that's one thing. But when
15 you say -- is that what it's limited to?

16 CDC [BGen BAKER]: Well, I can imagine a scenario -- we're
17 not there right now.

18 MJ [COL POHL]: All right.

19 CDC [BGen BAKER]: I can imagine a scenario where there is
20 a substantial conflict of interest. I don't know what it is.
21 Where me or the deputy is conflicted -- or I guess if it's
22 both, it's "are."

23 MJ [COL POHL]: Okay.

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1 CDC [BGen BAKER]: And there would be a requirement to
2 appoint -- somebody to stand in our stead for that particular
3 issue, or that particular case. The ----

4 MJ [COL POHL]: Couldn't you just come back then and say
5 now we want to include this person?

6 CDC [BGen BAKER]: I would be fine with that process, Your
7 Honor.

8 MJ [COL POHL]: I mean, the concern is who.

9 CDC [BGen BAKER]: Yes, sir, except that the -- I mean, I
10 take some issue with the fact that the concern is that somehow
11 I'm going to abuse my authority ----

12 MJ [COL POHL]: No, no, no. Nobody ----

13 CDC [BGen BAKER]: ---- that I can't be trusted with it.

14 MJ [COL POHL]: Nobody ever said that.

15 CDC [BGen BAKER]: But that's the implication.

16 MJ [COL POHL]: No, the implication is simply this -- the
17 implication is not that you're going to abuse your authority.
18 You do your job and everybody -- nobody's saying that. What
19 I'm simply saying is, I just want to know the field we're
20 talking about here, that's all.

21 You know, you're the one who wrote the multiple
22 supervisory secondary attorneys, and when I read it the first
23 time, I said, well, how many people are we talking about here?

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1 Now you tell me it's one. Fine. I'm not saying you're
2 abusing your authority or anything like that.

3 What I'm simply saying is what is the universe we're
4 talking about here. And really we're talking about a universe
5 of one. And then if somebody else needs it, we'll address
6 that issue when we come to it.

7 CDC [BGen BAKER]: That process works for me, Your Honor.

8 MJ [COL POHL]: Okay.

9 CDC [BGen BAKER]: The -- we -- you issued a ruling in the
10 fall time.

11 MJ [COL POHL]: Yeah.

12 CDC [BGen BAKER]: The regulation changed. Your ruling is
13 inconsistent -- the ruling that exists is inconsistent with
14 the regulation. We need to change your ruling. I think
15 everybody agrees with that.

16 Whether it's in a multiple ----

17 MJ [COL POHL]: How it's done is a different issue, but
18 then the only ----

19 CDC [BGen BAKER]: My position is it's easier for
20 everybody that we should have one protective order. That's
21 your call.

22 MJ [COL POHL]: Okay.

23 CDC [BGen BAKER]: I get that. But my -- what I'm most

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1 important -- what I'm most concerned about is that my deputy,
2 one ----

3 MJ [COL POHL]: One. Okay.

4 CDC [BGen BAKER]: ---- is able to do his job. If there's
5 a reason to have more, then we should -- I'm fine with coming
6 back to the ----

7 MJ [COL POHL]: Okay.

8 CDC [BGen BAKER]: ---- whether it's this commission --
9 obviously, this is an issue in multiple commissions. I'm fine
10 with going to the military judge to address this.

11 MJ [COL POHL]: All I'm doing is ruling for this
12 commission. You know that.

13 CDC [BGen BAKER]: I got that.

14 MJ [COL POHL]: No, I understand. I think we're ----

15 CDC [BGen BAKER]: Any other questions?

16 MJ [COL POHL]: No, I'm good. Thank you.

17 Trial Counsel, do you wish to be heard?

18 MTC [MR. TRIVETT]: Subject to your questions, sir, we
19 rest on brief.

20 MJ [COL POHL]: Okay. I have no further questions.

21 I believe that brings us to 152JJJ, Mr. Harrington.

22 LDC [MR. HARRINGTON]: Judge, may I make a request if we
23 could to defer this argument until tomorrow. I tell you why,

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1 we spent the last two days with Mr. Abu Zubaydah's
2 counsel ----

3 MJ [COL POHL]: Okay.

4 LDC [MR. HARRINGTON]: ---- and we need more time to
5 consult with him.

6 MJ [COL POHL]: He's here on the island?

7 LDC [MR. HARRINGTON]: Yes.

8 MJ [COL POHL]: No problem.

9 That brings us to the 227/336. I think this is more
10 of a status of where we're at with that. And that deals with
11 Mr. Hawsawi's motion.

12 ADC [MS. LACHELIER]: Judge, as you know, we filed an
13 update on 227. What we had asked for was documents about
14 those incidents that we could show Mr. al Hawsawi. What we
15 got were severely redacted documents that don't provide the
16 nature -- some of them, at least, in the vast majority don't
17 provide the nature of the alleged infractions. They've
18 redacted -- some of them have redacted the actual facts of the
19 allegations, and I believe the dates as well.

20 So it's very difficult for us to discuss the items
21 that are addressed in 227 with Mr. al Hawsawi, and we've
22 provided those as attachments to our notice to the commission
23 so that you could see what we're contending with in trying to

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1 discuss these matters with Mr. al Hawsawi.

2 In addition, we provided you earlier turned over
3 documents. So jointly in this notice we gave you the two
4 versions that we've gotten from the prosecution of these
5 supposed infractions of JTF-GTMO regulations.

6 And as you, I'm sure, noted, the two versions differ
7 greatly in the redactions that are in them, so we're left with
8 trying to figure out what can we and can we not show
9 Mr. al Hawsawi. None of these are classified, of course, but
10 the redactions make it difficult to know what we can and
11 cannot show Mr. al Hawsawi.

12 Even if the government were to clarify and claim, all
13 right, force protection, the last version we provided which
14 has the most extreme redactions, that's the one you have to
15 work off of, one, that version is not sufficient for us to
16 have discussions with Mr. al Hawsawi in any intelligent
17 fashion; and two, what exactly is the force protection issue,
18 when the first provided copy that they initially gave us that
19 is not Bates stamped doesn't have the same redactions and
20 doesn't appear to have the same concerns for quote/unquote
21 force protection.

22 So that's where we're left, Judge. And we -- I think
23 in this instance we're not dealing with national security

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1 matters. We're not dealing with an invocation of national
2 security. We're dealing with the government providing two
3 completely and inconsistently redacted documents and no
4 statutory regulatory basis for why the differences, and no
5 guidance to us on what we're supposed to do with
6 Mr. al Hawsawi in discussing these alleged infractions.

7 MJ [COL POHL]: Okay. I'm looking at some of the
8 attachments to 227, your notice.

9 ADC [MS. LACHELIER]: Right.

10 MJ [COL POHL]: 227E. Can you kind of direct me to an
11 example of your -- I mean, some of these appear to be PII
12 information, the redactions.

13 ADC [MS. LACHELIER]: Right. And, again, I'm saying again
14 because I know we addressed this at the July hearing.

15 MJ [COL POHL]: Yeah.

16 ADC [MS. LACHELIER]: We're not asking for guard names.
17 These are all guard pseudonyms. So when we say PII, I want to
18 be clear, we're not seeking guard names.

19 MJ [COL POHL]: Okay.

20 ADC [MS. LACHELIER]: We dealt with this today, Captain E,
21 Captain L.

22 MJ [COL POHL]: Give me an example of one that you
23 expressed your concerns that's not giving you the information

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1 you need.

2 ADC [MS. LACHELIER]: Yes, Judge. On attachment -- well,
3 okay. Attachment B are the Bates stamped documents. Those
4 are a little easier to refer to because they are Bates
5 stamped.

6 MJ [COL POHL]: You're looking at Appellate Exhibit 227E.

7 ADC [MS. LACHELIER]: Yes, Judge.

8 MJ [COL POHL]: Just give me the page number of the
9 appellate exhibit. That's much easier for a judge who has got
10 old eyes.

11 ADC [MS. LACHELIER]: The page number of the Appellate
12 Exhibit?

13 MJ [COL POHL]: It says page 15 of 55 of the lower
14 right-hand column -- lower right-hand corner.

15 ADC [MS. LACHELIER]: Judge, those are the ones that the
16 court marked. I have the one we filed. I think you're
17 referring to the court's markings.

18 MJ [COL POHL]: Okay.

19 ADC [MS. LACHELIER]: Sorry. I can refer to the Bates
20 number.

21 MJ [COL POHL]: Give me the Bates number then.

22 For example, we have the -- I'll just refer to the last
23 four, 2295, which is the second page of Exhibit B.

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1 MJ [COL POHL]: On Attachment B, got it.

2 ADC [MS. LACHELIER]: And if you compare it ----

3 MJ [COL POHL]: I got it. Okay.

4 ADC [MS. LACHELIER]: If you compare it, it's the second
5 page of Attachment C, which is the corresponding document that
6 was less redacted.

7 MJ [COL POHL]: Okay. Just a second.

8 What is the information that -- so you're saying they
9 gave you the same thing twice with different redactions?

10 ADC [MS. LACHELIER]: Well, yeah, the same thing,
11 different redactions. I hesitate to call them the same.

12 MJ [COL POHL]: Yeah, we don't want to get into what's
13 identical and not identical. We've had that discussion
14 before.

15 ADC [MS. LACHELIER]: Right.

16 MJ [COL POHL]: So you've got the same document with
17 different redactions, are the second redactions -- I don't
18 quite understand what you want me to do.

19 ADC [MS. LACHELIER]: Well, the most recently provided to
20 us are the ones with more redactions, which is completely
21 counterintuitive, and I think that this is confusing.

22 MJ [COL POHL]: It is confusing.

23 ADC [MS. LACHELIER]: So they've actually exceeded the

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1 redactions in the second production.

2 MJ [COL POHL]: So they're giving you this -- let me see
3 if I've got this straight. They gave you a redacted copy, and
4 then when I said let's see where we're at with this, they gave
5 you the same paper, same document, with more redactions.

6 ADC [MS. LACHELIER]: Actually, it wasn't really in
7 relation to your order.

8 MJ [COL POHL]: Okay. Pull me out of it.

9 ADC [MS. LACHELIER]: But let's -- leaving that out, yes,
10 that's correct.

11 They gave us this batch of incident reports with the
12 number of redactions, and they were not Bates stamped. Off
13 the top of my head, I don't remember when they provided them,
14 but it was some time ago. And then when we filed 227, we got
15 a second set that were Bates stamped, and those have greater
16 redactions.

17 MJ [COL POHL]: We're talking about the 227 series.

18 ADC [MS. LACHELIER]: The page -- the page I referred to
19 is just an example, and it's actually one of the minor ones,
20 but it's apt because it's quick to read. And I don't even
21 know -- I assume that I can say it because it's not
22 classified, but the redacted portion talks about hunger strike
23 protocol having been initiated. That's mentioned in

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1 Exhibit -- in the C piece, page two of the C exhibits. That
2 part was redacted in the part -- in the 2295 Bates-stamped
3 page that we received more recently. And it keeps going.

4 I mean, I don't want to bore the commission with
5 comparisons back and forth, but another one that was
6 particularly bad was 3 -- 2307, I think, or -- and, again,
7 it's difficult to refer to, because then I have to count pages
8 for Exhibit C to figure out what I'm referring to.

9 But the entire incidents -- in some of the more
10 recently provided Bates stamped incident reports, the entire
11 fact underlying the incident is redacted.

12 MJ [COL POHL]: Okay. I see it. Okay.

13 ADC [MS. LACHELIER]: It's just impossible to work with
14 Mr. al Hawsawi to find out anything from him, or much less to
15 try to ask the government can we talk to the guard who was on
16 duty that day when we don't know what we're referring to.

17 MJ [COL POHL]: Okay. Got it.

18 Now, does this -- is 336 the same issue?

19 ADC [MS. LACHELIER]: 336 is connected. It's not the
20 exact same issue, Judge.

21 MJ [COL POHL]: Okay.

22 ADC [MS. LACHELIER]: 336 has to do -- well, we're back
23 with DIMS.

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1 MJ [COL POHL]: Okay.

2 ADC [MS. LACHELIER]: We're back at DIMS. Our original
3 request in 336 was for unredacted DIMS that we can show
4 Mr. al Hawsawi to discuss anything that we want to in there,
5 not just incident reports because those are separate really.
6 Those are separately generated, as I understand it. Every
7 time there's an alleged incident, they generate what's in 227.
8 DIMS is the daily maintenance which might record an incident
9 also.

10 And we've asked for dates and any identifying
11 information for the guards, again using numbers or pseudonyms
12 or whatever, so that when we talk to Mr. Hawsawi, we can say
13 on this date do you remember this incident, or this -- I
14 shouldn't keep saying incident. It could be something
15 favorable. It could be something related to his health. And
16 we want to be able to discuss those date entries from DIMS.

17 The government, yes, has provided DIMS, but they're
18 giving us two sets of those. One is undated and all guards'
19 pseudonyms are redacted, and that's the one they say we can
20 show Mr. al Hawsawi. The other one they give us is only for
21 our viewing, is now classified, they've decided. They didn't
22 used to classify it. They started -- in April of this year
23 they classified them so, of course, we can't show them to

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1 Mr. al Hawsawi. The difference on the classified side is
2 they're dated and they have the guard pseudonyms in them.
3 That's the difference.

4 MJ [COL POHL]: Okay.

5 ADC [MS. LACHELIER]: So how do we have a discussion with
6 Mr. Hawsawi? We didn't really tell you what date and we can't
7 mention anything about the guards because the pseudonyms. I
8 said this in July. And the pseudonyms are guard numbers they
9 carry on their uniform. So Mr. al Hawsawi could very well
10 know which particular guard, yes, that guard came and talked
11 to me about my health. I remember because on that date it was
12 a particular religious holiday or something.

13 We can't have any of those kind of intelligent
14 discussions with him. And if we reveal the dates, they claim
15 it's a force protection issue, so ----

16 MJ [COL POHL]: Okay.

17 ADC [MS. LACHELIER]: ---- 336 has not been answered.

18 LDC [MR. RUIZ]: Judge, can we have a moment before
19 we ----

20 ADC [MS. LACHELIER]: Yeah.

21 LDC [MR. RUIZ]: --- cede our argument? If you want to do
22 it after lunch, that's fine. I notice you're checking the
23 time.

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1 MJ [COL POHL]: I always check the time.

2 LDC [MR. RUIZ]: All right.

3 MJ [COL POHL]: No, we're good.

4 ADC [MS. LACHELIER]: Mr. Ruiz reminded me that
5 Mr. Connell, and it's on the docket for today, is going to
6 discuss 161 with you, and the fact that the arbitrariness of
7 the government's redactions as exemplified here are causing us
8 to have discovery issues and case preparation issues.

9 So I just wanted to highlight that. I think
10 Mr. Connell is probably going to address it when he talks
11 about 161, but these -- going through those documents in
12 somewhat laboring fashion is worth your understanding -- to
13 help you understand, Judge, that the unilateral and arbitrary
14 fashion in which the judge is applying these redactions is
15 really debilitating to the preparation of our case.

16 It's not a classification issue. It's a supposed
17 force protection issue that is belied by the fact that when
18 they turned over Exhibits 227C the first time, they didn't
19 have the same redactions. So the force protections are a
20 disingenuous excuse to interfere with our case discovery and
21 case investigation obligations.

22 As to the DIMS, similarly, I want to reemphasize to
23 Your Honor and I mentioned this in July, that DIMS were

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1 provide to us with dates, and guard pseudonyms in unclassified
2 fashion until April. And it's when the 018U litigation came
3 up and the government decided that marking things releasable
4 and not releasable to the detainee is a little too labor
5 intensive for them, they're now classifying the very same DIMS
6 they were giving to us back before April unclass.

7 Thank you.

8 LDC [MR. CONNELL]: Sir, we filed a supplement. I don't
9 have any position on 227; but on 336, we filed a supplement,
10 336 (AAA Sup).

11 MJ [COL POHL]: Uh-huh.

12 LDC [MR. CONNELL]: When I learned we were going to be
13 doing this, I ordered a request, an exact list of what we had
14 and had not been provided by the government. I didn't know we
15 were going to be at 336 this morning, so it's on its way to
16 the courtroom right now. If I could ask to delay my argument
17 until after lunch, I could give you specifically ----

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: ---- way more specifics than I can at
20 the moment.

21 MJ [COL POHL]: Okay. Trial Counsel, what's your position
22 on 227?

23 TC [MR. SWANN]: When we were here in July, they were

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1 asking for a releasable copy to the accused. We did provide
2 two copies. And I will have to admit that Ms. Lachelier is
3 correct with respect to the Bates numbered 227 documents, she
4 gets less information. But if you take the earlier version,
5 you can talk to your client all day about these 24 instances
6 when he -- whatever they might be.

7 But that said, tomorrow she's going to get -- I think
8 I'm correct in this. They're going to get a full copy of 227,
9 for them, because all those markings that are at the lower
10 half of those documents are true names, and the true names are
11 not going to go over to the -- to the defense unless the court
12 were to direct otherwise.

13 So tomorrow might be a better time, once they see
14 what they get with respect to that. But you can certainly
15 take those documents and talk to your client intelligently
16 with the dates, the type of infraction. Because I sat down
17 and did all 24 of them and wrote them out myself.

18 MJ [COL POHL]: Well, I'm looking at one here,
19 Mr. Swann ----

20 TC [MR. SWANN]: All right, sir.

21 MJ [COL POHL]: ---- whether you do Bates stamp, it's
22 2312, or on the exhibit it's page 25 ----

23 TC [MR. SWANN]: Okay.

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1 MJ [COL POHL]: ---- of 227E.

2 TC [MR. SWANN]: Sir, do you know what the date is?

3 MJ [COL POHL]: 227E, the Bates stamp is 2312, last four.
4 You got the Exhibit. It's page 25 of the exhibit. The date
5 of the detainee report is 23 January 2012. Do you see what
6 I'm talking about?

7 TC [MR. SWANN]: I got it, sir.

8 MJ [COL POHL]: Okay.

9 TC [MR. SWANN]: That's why I said, we gave them two
10 versions.

11 MJ [COL POHL]: Okay.

12 TC [MR. SWANN]: So if you take the first version of what
13 they got -- they've had it for some time. That version
14 actually explains that that was an incident that took place on
15 what, 15 October 2010.

16 MJ [COL POHL]: Well, mine says 11 November 2010.

17 TC [MR. SWANN]: Okay. I've got the wrong one. 11
18 November 2010. "On 11 November 2010, he failed to follow
19 instructions by covering his camera up in his cell with the
20 food tray. When the guards were deployed and prepared to
21 forcibly extract him, he complied."

22 So that is on -- that is not on the version -- the
23 Bates numbered version, but the earlier version they were

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1 given. Now, I can't explain why there are more redactions on
2 the Bates numbered.

3 MJ [COL POHL]: My problem is I don't want to go through
4 every one of these things. Some of them talk about the
5 incident, and some are -- what happened is redacted out.

6 TC [MR. SWANN]: Okay, sir. I don't want to confuse you,
7 but if you take both of the documents, you can get to the --
8 you can get to what ----

9 MJ [COL POHL]: All these ones that redact out the
10 incident itself -- for example, Bates stamp 2311 on page 24 of
11 the exhibit.

12 TC [MR. SWANN]: All right, so 2311 would be 3 July 2010.

13 MJ [COL POHL]: Right. What I'm looking at here,
14 there's -- look at here has his ISN number and then
15 it's "Refused to comply."

16 TC [MR. SWANN]: Yeah.

17 MJ [COL POHL]: Refused to comply with what? And what
18 concerns me here, Mr. Swann -- I don't really want to sit down
19 and lay these side by side, but if I need to do it, I will.
20 There does not seem to be a consistent methodology of how this
21 is redacted.

22 TC [MR. SWANN]: Sir, I have no defense. You're
23 absolutely correct. There is no methodology.

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1 MJ [COL POHL]: Who is doing the redactions?

2 TC [MR. SWANN]: Well, in this particular instance, we
3 don't do redactions. We are not in the business of redacting
4 anything. These are redacted by a Department of Defense
5 declassification.

6 MJ [COL POHL]: Do you know what the redactions are?

7 TC [MR. SWANN]: I do know what the redactions are. In
8 this instance here, like I say, the last half of the document
9 is true named individuals.

10 MJ [COL POHL]: I'm not talking about that. I'm talking
11 about the bulk of the incident itself.

12 TC [MR. SWANN]: No, I -- I can't defend the second
13 grouping of Bates-numbered documents that redact the incident
14 because we clearly provided them the incident in the earlier
15 version.

16 MJ [COL POHL]: Of course, the detainee probably knows
17 what the incident is.

18 TC [MR. SWANN]: Well, he -- he's got both versions. I
19 mean, I don't want to ----

20 MJ [COL POHL]: He was also there. I mean what are we
21 keeping from him? But be that as it may, you don't want to
22 defend somebody else's work, so that's fine. But you're going
23 to be able to fix somebody else's work.

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1 TC [MR. SWANN]: I'm going to fix this work, these 24
2 pages, and I'll be more than glad to do that, so ----

3 MJ [COL POHL]: Okay. So you say the -- I have heard this
4 before. You're going to fix this, and then we'll see if the
5 defense thinks it's fixed.

6 TC [MR. SWANN]: I -- yes, sir.

7 MJ [COL POHL]: I got you. Thank you, Mr. Swann.

8 Oh. Mr. Swann, while you're up, even though you
9 weren't, Ms. Lachelier mentioned something about these are now
10 being classified secret?

11 TC [MR. SWANN]: No. She was talking about DIMS.

12 MJ [COL POHL]: Okay.

13 TC [MR. SWANN]: DIMS are always classified, okay? What
14 happened was we gave them a version -- now, I don't want to
15 revisit it, but it's a pre-MOU version.

16 MJ [COL POHL]: Okay.

17 TC [MR. SWANN]: We went three and a half years with not
18 having an MOU signed by them. So we thought it was unfair not
19 to give them DIMS because they were asking for them. Well,
20 they got the un -- they got an unclassified version of DIMS.

21 Now, we have given them, in the last -- the last few
22 months, they have a completely -- meaning the defense counsel,
23 have a completely unredacted set of DIMS, minus true names, at

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1 a SECRET level.

2 What they also get is they get a declassification
3 review board looking at the DIMS for documents that -- they
4 want to show them to their client. And we're talking 6,000
5 pages at least, now. So we have gone back and we have
6 redacted from the accused version what the DoD
7 declassification board has determined to be techniques,
8 tactics and procedures.

9 The combination of, say, a date and a guard number,
10 someone could put that together to try to figure out exactly
11 when is something going to happen. When is the rotation going
12 to take place, those kind of things. We don't give those to
13 the accused. We don't worry about giving those to the defense
14 because they can look through the DIMS unredacted and find
15 those little nuggets of information that they want.

16 MJ [COL POHL]: Are you saying that an OCA has determined
17 that the dates and the name of the guards are -- need to be
18 classified at the SECRET level?

19 TC [MR. SWANN]: I do. I have said that, yes, sir.

20 MJ [COL POHL]: Okay. You've told that to the defense?

21 TC [MR. SWANN]: I think it would be -- well ----

22 MJ [COL POHL]: Okay.

23 TC [MR. SWANN]: ---- they now know.

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1 MJ [COL POHL]: Okay. Okay. Thank you. I know we got --
2 we're not done with this issue because Mr. Connell has some
3 things.

4 ACC [MR. BIN'ATTASH]: There's no translation at all.

5 MJ [COL POHL]: That's okay, Mr. Bin'Attash, because we're
6 going to recess and hopefully get it fixed during the recess.

7 Commission will be recessed until 1400 hours.

8 [The R.M.C. 803 session recessed at 1235, 11 October 2016.]

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