

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 [The R.M.C. 803 session was called to order at 0903,  
2 14 October 2016.]

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

4 Trial Counsel, any changes in the trial counsel team  
5 since we last were in open session on Wednesday?

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

7 MJ [COL POHL]: Mr. Nevin?

8 LDC [MR. NEVIN]: No, Your Honor.

9 MJ [COL POHL]: Ms. Bormann?

10 LDC [MS. BORMANN]: No changes, Judge.

11 MJ [COL POHL]: Mr. Harrington?

12 LDC [MR. HARRINGTON]: No changes, Judge.

13 MJ [COL POHL]: Colonel Thomas?

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

15 MJ [COL POHL]: I will note that all detainees are present  
16 except for Mr. al Hawsawi.

17 Mr. Swann.

18 CP [BG MARTINS]: Captain, if you could proceed to the  
19 witness stand and keep standing, raise your right hand for the  
20 oath.

21 CAPTAIN, U.S. ARMY, was called as a witness for the  
22 prosecution, was sworn, and testified as follows:

23 **DIRECT EXAMINATION**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**1 Questions by the Chief Prosecutor [BG MARTINS]:**

**2 Q.** Are you the current Assistant Staff Judge Advocate?

**3 A.** Yes, sir.

**4 Q.** Thank you. Your witness.

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

**6 Q.** All right. Do you have what's been marked as  
**7 Appellate Exhibit 458A** presently in front of you?

**8 A.** I do, sir.

**9 Q.** All right. What time did you advise Mr. al Hawsawi  
**10 of his right to attend this morning's hearings?**

**11 A.** 6:08 this morning, sir.

**12 Q.** All right. And how did you do that? Did you use the  
**13 Arabic version or the English version?**

**14 A.** I read the English version and had the English  
**15 version translated to him in Arabic, sir.**

**16 Q.** All right. The translator read that to him?

**17 A.** Yes.

**18 Q.** Did you follow the version? Did you follow it  
**19 exactly as it is contained on the pages?**

**20 A.** I did, sir.

**21 Q.** At the end of that, did he indicate that he wanted to  
**22 attend or not attend?**

**23 A.** He indicated that he did not want to attend.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Q. Did he execute the waiver of his attendance?

2 A. He did execute the waiver, sir.

3 Q. All right. His signature appears on the Arabic  
4 version at page 3; is that correct?

5 A. That is correct.

6 Q. All right. Do you believe that he voluntarily  
7 understood and agreed to waive his attendance?

8 A. I do, sir.

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

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

11 LDC [MR. RUIZ]: No, thank you, Judge.

12 MJ [COL POHL]: Thank you, Captain. You are excused.

13 [The witness was excused.]

14 MJ [COL POHL]: Commission finds that Mr. Hawsawi has  
15 knowingly and voluntarily waived his right to be present for  
16 the hearing for today.

17 One bit of a housekeeping. Mr. Connell, yesterday  
18 you indicated that on AE 255 that when you initially received  
19 it, it was two attachments were sealed because of the MOU  
20 issue. Since that's no longer an issue, you're requesting  
21 they be unsealed.

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

23 MJ [COL POHL]: Okay. That request is granted. An order

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**1 Questions by the Military Judge [COL POHL]:**

**2** Q. Sergeant, are you the same sergeant who testified  
**3** here a few days ago?

**4** A. Yes, sir.

**5** Q. I remind you that you are still under oath.

**6** A. Yes, sir.

**7** MJ [COL POHL]: Colonel Thomas.

**8** DDC [Lt Col THOMAS]: Thank you.

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

**10** Q. You were identified earlier as S00 1482.

**11** A. That's correct.

**12** Q. You indicated earlier that you served here as an  
**13** assistant watch commander for a period of time?

**14** A. Yes, sir.

**15** Q. When was that?

**16** A. 2015.

**17** Q. When did you begin?

**18** A. We started December 2014, and left in August of 2015.

**19** Q. Can you tell us in general what your roles were as an  
**20** assistant watch commander?

**21** A. As assistant watch commander, my roles were to manage  
**22** the tier supervisors and the guards and make sure that the  
**23** SOPs were being conducted.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Q. All right. Were you serving as an assistant watch  
2 commander in June of 2015?

3 A. Yes, sir.

4 Q. There are various shifts. Do you remember which  
5 shift you were working in June of 2015?

6 A. I was on the night shift, sir.

7 Q. Do you know my client, Mr. Ammar al Baluchi?

8 A. I know him as detainee numbers. I don't know him as  
9 names, sir.

10 Q. Okay. So you would know him as Detainee 18?

11 A. Yes, sir.

12 Q. Do you know Detainee 18?

13 A. I know of him, sir. Yes, sir.

14 Q. Can you describe your interactions with Detainee 18?

15 A. Detainee 10018 was -- he spoke better English than  
16 some of the others. He's generally pretty cordial.

17 Q. So you would say fairly positive interactions with  
18 him?

19 A. Yes, sir.

20 Q. Do you recall taking a complaint from Ammar  
21 al Baluchi, you know him as Detainee 18 about the DSMP taking  
22 some legal DVDs from him?

23 A. I vaguely remember that, yes.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Q. Can you tell us what you recall about that?

2 A. At some point in time when I was working night shift,  
3 I got a call to talk to Detainee 18 regarding some legal DVDs.  
4 He asked me if I knew anything about it. I said no. He said  
5 that DSMP took some legal DVDs from him, do I know what  
6 happened to them. I said no, and I can check on that.

7 Q. Okay.

8 A. That was the end of the conversation.

9 Q. After that conversation with Mr. al Baluchi, what did  
10 you do to determine what had happened to Mr. al Baluchi's  
11 legal DVDs?

12 A. The next day I asked the operations OIC and NCOIC if  
13 they knew what happened to them and they said they would get  
14 back to me, or another AWC if they were that shift.

15 Q. Do you recall your OIC or your NCOIC getting back to  
16 you about what happened to Mr. al Baluchi's DVDs, his legal  
17 DVDs?

18 A. Not that I recall, sir.

19 Q. Did you ever hear anything more about what happened  
20 to Mr. al Baluchi's three legal DVDs that were seized from  
21 him?

22 A. No, sir.

23 Q. All right.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

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

3 MJ [COL POHL]: Sure.

4 DDC [Lt Col THOMAS]: Thank you, S00 1482.

5 MJ [COL POHL]: Any other defense counsel have any  
6 questions for this witness related to this motion? Apparently  
7 not.

8 Trial Counsel, any questions of this witness?

9 TC [MR. RYAN]: Your Honor, we thank the sergeant. We  
10 have no questions.

11 MJ [COL POHL]: Thank you, Sergeant. You are excused.

12 WIT: Thank you, sir.

13 [The witness was permanently excused and withdrew from the  
14 courtroom.]

15 MJ [COL POHL]: That brings us to 266.

16 TC [MR. RYAN]: Your Honor, can I just interrupt briefly?

17 MJ [COL POHL]: Yes.

18 TC [MR. RYAN]: I have some answer on the issue of the  
19 slides that you had tasked me with.

20 MJ [COL POHL]: About the FOUO issue?

21 TC [MR. RYAN]: Yes, sir. I can report now or whenever  
22 the court wants.

23 MJ [COL POHL]: No. Let's go ahead and get that out of

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 the way.

2 TC [MR. RYAN]: Good morning, sir.

3 MJ [COL POHL]: Good morning.

4 TC [MR. RYAN]: Your Honor, the -- I've returned the  
5 package of slides to the court security officer. It was put  
6 back through the review by an OCA. Changes have been made. I  
7 can report to you now as to those changes.

8 There were ten separate items within the full  
9 package. Nine of them were groups of slides. One of them was  
10 a one-page document. I believe they all came from learned  
11 counsel for Mr. Ali.

12 As to that one-page document, it was an FOUO  
13 document, and after review the OCA retained the FOUO  
14 classification on it. It was a document that had been FOUO  
15 before it got to the OCA.

16 The other packages were, as I said, slides totaling  
17 nine. Within those packages, two of them had, again, FOUO --  
18 previously marked FOUO documents within the group of slides.  
19 The OCA has re-marked that -- those two groups as releasable  
20 to the public if -- without the previously marked FOUO  
21 document contained therein. I think I'm saying -- I hope I'm  
22 saying this clearly enough.

23 As to a total of six, the FOUO marking was removed

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 completely, so they are releasable to the public. And as to  
2 one of the groups of slides, the FOUO title marking remains in  
3 effect.

4 To explain what happened, I can say that the original  
5 OCA, to do the review, treated them as one big package, not  
6 ten different groups within a package.

7 MJ [COL POHL]: Okay.

8 TC [MR. RYAN]: And found that within -- since there were  
9 FOUO documents within what they thought one big package, whole  
10 thing became FOUO. That's changed, as I just reported.

11 MJ [COL POHL]: So going forward they will mark FOUO an  
12 individual slide, which would not make the whole slide deck  
13 FOUO?

14 TC [MR. RYAN]: Going forward, sir, if we are consistent  
15 with today ----

16 MJ [COL POHL]: Yeah.

17 TC [MR. RYAN]: ---- a group of slides, one group of  
18 slides ----

19 MJ [COL POHL]: Yeah.

20 TC [MR. RYAN]: ---- if it has an FOUO document, the FOUO  
21 document retains that. The other pages, at least as we have  
22 done today, would be releasable.

23 MJ [COL POHL]: Okay. Just so that -- just so I'm clear,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 going forward is when you have a document with one paragraph  
2 that's classified -- and FOUO is not classified, I've got  
3 that -- that makes the whole document as treated as the  
4 highest classification contained therein.

5 TC [MR. RYAN]: Yes, sir. Yes, sir.

6 MJ [COL POHL]: But on this FOUO issue, it will only be  
7 individual, in this case slides, that would be FOUO. But if  
8 you have one FOUO in a slide deck of five, the only FOUO will  
9 be the one slide. The slide deck itself will not be. Is  
10 that ----

11 TC [MR. RYAN]: That was certainly today's decision,  
12 Judge, and we would encourage that that remain consistent  
13 throughout.

14 MJ [COL POHL]: Okay. Fine.

15 TC [MR. RYAN]: The -- I believe that's all I had to  
16 report, Judge, other than to inquire, does that satisfy the  
17 commission's tasking?

18 MJ [COL POHL]: Well, let's see what Mr. Connell has to  
19 say.

20 TC [MR. RYAN]: Oh, I'm sorry. One last thing I wanted to  
21 say was there was the issue raised of at least one such FOUO  
22 page had been displayed previously in another, I think,  
23 argument, and it was then -- and it was releasable to the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 public or was released out to the public. The best anyone  
2 could say is that was inadvertent or ----

3 MJ [COL POHL]: All right.

4 TC [MR. RYAN]: That's all I have, sir.

5 MJ [COL POHL]: Sure.

6 LDC [MR. CONNELL]: The result of that makes sense. I  
7 understand. It's the process that I want to address.

8 The -- what I understand happened here is that  
9 someone, perhaps a court security officer, gave slides that we  
10 had not yet used in court to the prosecution. And then  
11 Mr. Ryan tells me, and I accept his representation, that he  
12 did not look at the slides, he merely passed them on. But I  
13 have always been assured that the pre-hearing review process  
14 for those slides was privileged in that we could safely send  
15 the documents that we intended, or hoped or might or might not  
16 use in court, through that process.

17 It surprised me very much to hear this morning that  
18 slides that we had not used -- in fact, the prosecution asked  
19 me, hey, can I have a copy of the full set of slides? I said,  
20 no, you can deal with the ones that we have used in court.  
21 The ones that we haven't used in court are still privileged  
22 because we have the option to use them or not use them.

23 The -- it sounds like this was an anomaly, but I do

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 just want to be clear going forward that we consider the  
2 pre-judicial review process for slides, which we have -- still  
3 haven't decided whether we wanted to use in court or not.

4 MJ [COL POHL]: I understand that. Of course, I'll  
5 clarify with the CISO, but there is the secondary issue of  
6 that if you -- and this covers anything that we get, quite  
7 frankly, is that if there's a question about its  
8 classification, we have to run it by ----

9 LDC [MR. CONNELL]: Yes, I understand that, sir.

10 MJ [COL POHL]: ---- the OCA, and I think that maybe is  
11 where the disconnect is.

12 LDC [MR. CONNELL]: Well, the disconnect is with the  
13 involvement of the prosecution, one of the parties in this  
14 case. What the CISO told me was that the CISO had submitted  
15 them for classification review. I have no problem with that.  
16 I know that's what they do and that's the way it's supposed to  
17 work.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: It's the inclusion of the prosecution  
20 in the slides we haven't used is the problem.

21 MJ [COL POHL]: No, I got you. But I just wanted to make  
22 it clear is that we are not an OCA ----

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

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: ---- the CISO.

2 LDC [MR. CONNELL]: I understand.

3 MJ [COL POHL]: Sometimes we got it on the face of it,  
4 that's all. I think both sides need to understand that, is  
5 that just like your DSO is not -- so we can -- and we use --  
6 quite frankly, I use the court information security officer  
7 similarly as I think you use the DSO. Look at it. Based on  
8 your training and experience, does this appear to be  
9 classified or not, and if you have got a question, you have to  
10 go to the OCA. How you get to them for us may be a little  
11 different than you. I will double check to make sure -- I  
12 don't know what happened in this case. But if you agree with  
13 me that the CISO may have to coordinate with the OCA.

14 LDC [MR. CONNELL]: Of course.

15 MJ [COL POHL]: I don't know how it got back there. I  
16 don't know whether it happened before or after the hearing the  
17 other day.

18 LDC [MR. CONNELL]: Right.

19 MJ [COL POHL]: I agree with you is, until they're used,  
20 they're ----

21 LDC [MR. CONNELL]: Privileged.

22 MJ [COL POHL]: ---- privileged, right.

23 LDC [MR. CONNELL]: Thank you, sir. I also understand --

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 I'm not asking for relief other than ----

2 MJ [COL POHL]: No, I understand. Understand, we're just  
3 trying to make sure the procedure ----

4 LDC [MR. CONNELL]: Is tasked with answering this  
5 question. But that doesn't give them access to privileged  
6 information. And when they coordinated with me about it, I  
7 said you can use the ones I've already given you. In fact, I  
8 gave General Martins a copy of the 447 slides in advance.  
9 The -- but that doesn't give the government access to the  
10 slides.

11 MJ [COL POHL]: Submitting them to the CISO for  
12 pre-publication review ----

13 LDC [MR. CONNELL]: Right.

14 MJ [COL POHL]: ---- does not put them in the loop.

15 LDC [MR. CONNELL]: Right. I also understand that no one  
16 in the prosecution looked at the slides other than to count  
17 them, and I don't think there's anything else.

18 MJ [COL POHL]: And, of course, at the end of the day, you  
19 used them anyway.

20 LDC [MR. CONNELL]: Some of them.

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

22 LDC [MR. CONNELL]: But not all.

23 TC [MR. RYAN]: Just to re-state that, Judge, the only

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 thing that was done, because of the tasking, of course, from  
2 Your Honor, was to try and get the answers as to it, and I  
3 wanted to be -- make sure my answer was complete. I counted  
4 my groupings. I've made my representation to counsel. He  
5 accepts it. I think we're done.

6 MJ [COL POHL]: Okay. That brings us to 266.

7 DDC [MAJ SEEGER]: Good morning, Your Honor. Major Seeger  
8 for Mr. Bin'Attash.

9 MJ [COL POHL]: Good morning.

10 DDC [MAJ SEEGER]: In AE 266, we asked the commission  
11 issue a proposed protective order to help protect the right to  
12 a fair trial. This would be in addition to the protective  
13 orders you've already issued, one regarding unclassified  
14 information and one to protect classified information.

15 The proposed protective order would require members  
16 of the prosecution to sign an associated MOU, much as the  
17 classified information protective order requires members of  
18 the defense to sign an MOU. This would be a reasonable  
19 measure. It would not do any conceivable harm. It can only  
20 help. And it would increase the appearance of fairness in  
21 these proceedings because what's good for the goose is good  
22 for the gander.

23 The scope of the protective order and of the proposed

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MOU includes prosecution disclosure and discovery obligations,  
2 overclassification and misuse of classification standards,  
3 critical matters of witness production and access to  
4 witnesses. And it would help serve as a curb against  
5 prejudicial extrajudicial statements that could be made by the  
6 prosecution and affiliated entities.

7           The government has argued and probably will argue  
8 again today that this measure would be unnecessary and  
9 superfluous because it's designed to guard against things  
10 that they're not doing anyway or are not doing anymore or are  
11 not doing to a degree that warrants this measure. However,  
12 this is the same argument -- one of the same arguments that  
13 the defense made against the requirement to sign an MOU  
14 pursuant to the classified information protective order.

15           The defense argued, among other things, that that MOU  
16 was at best duplicative of requirements already imposed upon  
17 the defense by the commission and by the U.S. Government,  
18 requirements that they already understood and were complying  
19 with.

20           That MOU -- we lost on that issue, and I'm not here  
21 to relitigate that. You will notice, of course, that the  
22 proposed protective order and the proposed MOU include a  
23 provision that's now overcome by events to eliminate the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 requirement for that defense MOU, but mutatis mutandis,  
2 necessary changes being made, we stand by the protective order  
3 and MOU proposal as an appropriate and potentially useful  
4 measure.

5           Even though, as the government might argue, our  
6 proposed protective order and proposed MOU may seem like a  
7 belt-and-suspenders measure, that was also true of our MOU and  
8 protective order. As this commission itself noted in  
9 AE 013000, order to show cause dated 17 September 2014  
10 ordering the prosecution to show authority for the MOU  
11 requirement, quote, The MOU requirement is not mandated by any  
12 source the commission is aware of. It appears to be a  
13 belt-and-suspenders approach to reinforce security  
14 requirements counsel are already aware of and are already  
15 required to agree to in the course of receiving classified  
16 information and their security clearances.

17           So, Your Honor, the military commission has already  
18 endorsed a belt-and-suspenders approach to MOUs that are  
19 duplicative of previously existing requirements. The defense  
20 MOU was imposed on defense counsel, who were already obeying  
21 all applicable requirements, whose trousers were already  
22 secured where they belonged.

23           Your Honor, opinions may differ as to how the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 prosecution's trousers are hanging. Members of the defense  
2 teams may suggest that they're sagging a bit. Members of the  
3 prosecution probably think they're hanging exactly where they  
4 belong.

5 But there is no harm, Your Honor, in taking a  
6 belt-and-suspenders approach to prosecution obligations, too.  
7 One benefit, Your Honor, of the proposed MOU is that it  
8 reminds prosecution team members who don't appear in the  
9 courtroom of their obligations as well.

10 The prosecution argued in the past in their response  
11 to your order to show cause, AE 013PPP dated 26 September 2014  
12 at page 14 as follows: Requiring each member of the defense,  
13 as opposed to just the defense counsel, to execute the  
14 proposed MOU will prompt each member of the defense team to  
15 read, digest, and confirm the commission's protective order  
16 and their obligations thereunder. Because there are likely  
17 members of the defense teams that may never appear before this  
18 commission whose jobs might not ordinarily require them to  
19 read court's or commission's orders, the MOU ensures that  
20 these nonlitigators are effectively placed on notice of their  
21 independent obligations that they have read the order, and  
22 have confirmed that they understand them, unquote.

23 Your Honor, helping members of the prosecution team

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 remember their obligations, obligations to which they're all  
2 subject, requirements they're aware of, requirements which, to  
3 a large degree, they may feel they are in compliance, can only  
4 help. It can't do any harm, and it will increase the  
5 appearance of fairness because what's good for the goose is  
6 good for the gander.

7           You have the authority, Your Honor, to issue this  
8 protective order and require the signing of the MOU. Like  
9 defense counsel, trial counsel fall under the inherent  
10 supervisory authority of the court, and military commissions  
11 under R.M.C. 701(f) are empowered to issue additional  
12 protective orders unrelated to classified matters as may be  
13 required in the interests of justice.

14           This protective order and this proposed MOU, we  
15 submit, are required by the interests of justice. They can  
16 only help. They can do no conceivable harm. And they will  
17 increase the appearance of the fairness of this forum and  
18 these proceedings because what's good for the goose is good  
19 for the gander.

20           MJ [COL POHL]: Anything further?

21           DDC [MAJ SEEGER]: Nothing further, Your Honor.

22           MJ [COL POHL]: Thank you, Major Seeger. Any other  
23 defense counsel wish to be heard on 266?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 DDC [MAJ SEEGER]: May I have a moment, Your Honor?

2 MJ [COL POHL]: Sure.

3 DDC [MAJ SEEGER]: Your Honor, if I may just add a word.

4 MJ [COL POHL]: Sure.

5 DDC [MAJ SEEGER]: I want to be clear that counsel for  
6 Mr. Bin'Attash, Mr. Bin'Attash do not waive their objection to  
7 the MOU that we've been required to sign in the past, and when  
8 I said protective order and MOU are potentially necessary and  
9 valuable measures, I was referring to our proposal, not to the  
10 protective order and MOU applied to the defense, which we  
11 think still are superfluous and duplicative of already  
12 existing requirements with which we have always been in  
13 compliance.

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

15 Any other defense counsel wish to be heard on this?  
16 Apparently not.

17 Trial counsel wish to be heard?

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

19 MJ [COL POHL]: Thank you. That brings us to 359. This  
20 is a government motion.

21 TC [MR. RYAN]: Good morning, sir.

22 MJ [COL POHL]: Good morning.

23 TC [MR. RYAN]: Your Honor, 359 is in fact the United

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 States' motion. In this motion, sir, we seek military  
2 commission's intervention into an area that we've identified  
3 as a possible conflict of interest that might arise in the  
4 future in regard to counsel, their clients, and this joint  
5 representation.

6 Based upon statements that have been made in this  
7 commission, mostly from -- mostly in the 292 litigation that  
8 we have referenced and specifically quoted in our motion,  
9 there is apparently in existence at least one joint defense  
10 agreement in the course of the representation in this case.

11 We, the prosecution, but far more importantly, the  
12 military commission, do not know the extent of that agreement  
13 or agreements. Joint defense agreements are not uncommon,  
14 certainly; however, they do present certain dangers that have  
15 arisen in many different contexts, have been cited in many  
16 different cases, many of which are in the various pleadings.

17 I wanted to just raise to the commission's attention  
18 a few cases in the course of my argument. The first one was  
19 the Henke case, H-E-N-K-E, from the Ninth Circuit. In that  
20 case, which was a multi-defendant case, there was a joint  
21 defense agreement in place among the various counsel and their  
22 clients. During the course of the representation preceding  
23 trial, various joint meetings took place in which information

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 and statements were shared between the various defendants as  
2 well as their attorneys.

3 Over the course of the pretrial proceedings leading  
4 up to trial, one of the defendants, a man named Gupta,  
5 G-U-P-T-A, decided to cooperate with the government, not an  
6 uncommon matter by any means.

7 In his case, in that particular man's situation, his  
8 own attorneys, that is the attorney who represented him  
9 specifically, objected to co-counsel, that is counsel for the  
10 other defendants, using any statements or any information  
11 gathered in the course of the joint representation as being a  
12 violation of the joint defense agreement, violation of ethics  
13 rules and so on.

14 The other attorneys took the position that they were  
15 now quite concerned about this claim, especially since the  
16 cooperators' attorneys were being so aggressive and being so  
17 strong in their position that the co-defendants' attorneys  
18 could not use any such information, threatening even to bring  
19 the attorneys to bar complaints and so on.

20 The attorneys going to trial who have the prospect of  
21 cross-examining Mr. Gupta through the various proceedings  
22 decided at some point that they would try to withdraw. That  
23 was denied. And then ultimately found themselves having to do

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 it in the course of the trial itself.

2           The attorneys, feeling like they could not  
3 compartmentalize that which they knew about the cooperator  
4 through privileged communications versus what they knew  
5 otherwise, feeling they couldn't separate it out, chose, they  
6 believed under their ethical obligations not to cross-examine  
7 whatsoever, that is, the cooperator.

8           The conviction that ultimately resulted from this was  
9 reversed on the grounds that they hadn't received -- the  
10 defendants hadn't received their own counsel's proper  
11 effective representation. They couldn't cross-examine this  
12 important witness. Presumed within it, or if not presumed,  
13 fully known, was that there had been statements made in the  
14 course of the joint defense meetings and so on in which the  
15 cooperator said things that were in variance with his ultimate  
16 trial testimony. So the appellate court's decision on this  
17 was certainly understandable.

18           MJ [COL POHL]: Mr. Ryan, in that particular case, in the  
19 Henke case, there was not an issue about whether or not the  
20 trial judge was fully informed of the issue. As I read the  
21 case, it's that Gupta said something in the course of the  
22 joint defense agreement that he later on contradicted at  
23 trial.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 TC [MR. RYAN]: Yes, sir.

2 MJ [COL POHL]: And the his attorneys then wrote a letter  
3 saying, don't you dare mention this to the other side.

4 TC [MR. RYAN]: Yes, sir.

5 MJ [COL POHL]: And the judge was fully informed of this  
6 and said that was fine.

7 TC [MR. RYAN]: Yes, sir. The trial judge.

8 MJ [COL POHL]: The trial judge.

9 TC [MR. RYAN]: Yes, sir.

10 MJ [COL POHL]: The trial judge. And that then got  
11 reversed. But if you go back to some of the other cases, in  
12 the Gupta example, when he testifies, don't the other cases  
13 say he's now waived that privilege against self-incrimination  
14 so they could have asked him about it? And, therefore, the  
15 error is not in the joint defense agreement, the error is  
16 precluding them from asking him about it, that they could have  
17 asked him about it. I'm just looking at the other cases, and  
18 they say once the cooperating witness is testifying he waives  
19 the privilege.

20 TC [MR. RYAN]: Yes. Specifically, Your Honor, I think,  
21 is referring to the Almeida case, which is in the Eleventh  
22 Circuit, which there may have been others as well.

23 MJ [COL POHL]: Uh-huh.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 TC [MR. RYAN]: In Almeida, an Eleventh Circuit case, you  
2 were correct in the sense that the -- Eleventh Circuit  
3 eventually made the decision that once he decided, once that  
4 cooperator decided to turn state's evidence in seeking a  
5 reduced sentence, he had in effect waived his rights under the  
6 privilege -- the privilege under any joint defense agreement,  
7 essentially saying this is the way it's going to be. This is  
8 the rule going forward. Now, that's the Eleventh Circuit.

9 The Ninth Circuit, as you can see from the Henke  
10 case, comes out a little bit differently.

11 MJ [COL POHL]: You don't think you can reconcile those  
12 positions? By that I mean is that in Henke, apparently with  
13 the blessing of the judge, the defense was permitted to assert  
14 the privilege for the cooperating witness and therefore not  
15 cross-examine him. Where you take the Eleventh Circuit  
16 position would be the error is that in the Henke Court,  
17 although it doesn't address it as explicitly as the Eleventh  
18 Circuit does, the appellate opinion said there's error because  
19 it limited the right of cross-examination, which would seem to  
20 be -- dovetails in because they did not ask him about the ----

21 TC [MR. RYAN]: Yes, sir.

22 MJ [COL POHL]: I'm not sure the cases are necessarily in  
23 conflict, although they're not explicitly the same reasoning.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 TC [MR. RYAN]: Yes, sir. I understand. And in the Ninth  
2 Circuit case, in the Henke case, ultimately -- the trial court  
3 ultimately concluded it was harmless error because of what  
4 he -- what the judge called a withering cross-examination  
5 anyway at some later point, as I recall.

6 The -- I raise it, sir, for the proposition, though,  
7 that there's an inherent tension. And when you go through all  
8 of the cases, number one, it's -- they're all -- it's a  
9 difficult area to sort of wade through. There's lots of  
10 competing doctrines at work.

11 And at the end of the day, neither one of them  
12 addresses this in any great detail. And this had is really  
13 why I'm bringing this -- one of the reasons we're bringing it  
14 to the commission's attention right now is ultimately what's  
15 in the accuseds' understanding of any such agreement should be  
16 playing an important role in this whole thing because they'll  
17 be making decisions and so on as to what they do, how they  
18 handle it, what confidences, what information they put forth.

19 So to the extent, and I think this is without a doubt  
20 throughout all of these cases, to the extent that this can be  
21 handled up front and handled in a way that we're suggesting to  
22 Your Honor, we could avoid a lot of these issues going  
23 forward, as opposed to hoping down the road we can just apply

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 a certain rule.

2 MJ [COL POHL]: What issues -- in thinking about this,  
3 whether you are aware or the court's aware, the commission's  
4 aware of the joint defense agreement and it's written out or  
5 not ----

6 TC [MR. RYAN]: Yes, sir.

7 MJ [COL POHL]: ---- does it really solve any problems at  
8 the back end?

9 TC [MR. RYAN]: Yes, sir, I believe it does. I absolutely  
10 believe it does.

11 MJ [COL POHL]: Okay.

12 TC [MR. RYAN]: The agreement, just like a colloquy, which  
13 is actually part of what we're asking Your Honor to do, just  
14 like a colloquy and say a waiver of something else puts on  
15 record everyone's understanding in very black and white terms.

16 MJ [COL POHL]: What's your understanding of the scope of  
17 the -- and maybe -- I know it's not a precise -- it's not a  
18 precise attorney-client privilege, okay, so I'm going to call  
19 it a joint defense agreement privilege. What is your  
20 understanding of the scope of said privilege?

21 TC [MR. RYAN]: I mean, that's the difficult part, Judge,  
22 is it's argued about to a great extent, and certainly -- let  
23 me say it this way. Certainly, there is a duty of

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 confidentiality. How far up it goes from there is a matter of  
2 some degree of argument. We would contest or we would state  
3 that it ends right there, that it's only a duty of  
4 confidentiality, it doesn't go to a duty of loyalty or  
5 anything like that. But nonetheless, a duty of  
6 confidentiality does bring with it certain obligations within  
7 a joint defense agreement. And as one of the attorneys said  
8 in this case, the privilege, that one-attorney/one-client  
9 privilege in a joint defense agreement just gets bigger. So  
10 now it involves everyone who's within it. That's a view.

11 But what does that mean? How far does it entail?  
12 It's our position, sir, that that's the -- the dangers are  
13 there. And very much the accused will have some ability to  
14 argue, I don't know what the Eleventh Circuit or Ninth Circuit  
15 says. I know what I believed, and I know what I was told.  
16 And from examining these case, you can see that the behavior  
17 in different instances and different cases could be very  
18 varied. That's why we're saying there's a danger involved,  
19 sir.

20 So that was the Henke case. There have been other  
21 cases where courts have ruled an attorney may be disqualified  
22 if a client's interests require an attorney to cross another  
23 member of a joint defense agreement in regard to classified

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 information.

2           The areas that I see this coming up as a danger are  
3 as follows, Judge: One is the one that we saw in Henke and I  
4 believe in Almeida as well, that is, where one defendant seeks  
5 to cooperate with the government in hopes of a reduced  
6 sentence and provides classified information. This is a  
7 common scenario and many pitfalls involved.

8           The defense, I believe, in both cases, or both  
9 defendants who filed responses, say there's very little chance  
10 of that happening in this case. I will say right up front  
11 that I think that's probably correct. I don't think either  
12 the United States or any of the defense have any interest in  
13 such a scenario occurring.

14           But number one, as to this possibility, Your Honor,  
15 and I think the parties, too, always have the obligation to be  
16 on guard for what might happen, even if it seems very, very  
17 unlikely.

18           MJ [COL POHL]: Okay. But, Mr. Ryan, what I'm -- let's  
19 assume we have that scenario ----

20           TC [MR. RYAN]: Yes, sir.

21           MJ [COL POHL]: ---- for whatever reason.

22           TC [MR. RYAN]: Yes, sir.

23           MJ [COL POHL]: Okay. Why can't I address it then?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 TC [MR. RYAN]: You can address it then.

2 MJ [COL POHL]: I mean, the issue ----

3 TC [MR. RYAN]: Go ahead, sir. I'm sorry.

4 MJ [COL POHL]: Okay. What I'm saying is like in the  
5 Henke case, again, I think the judge addressed it, and I think  
6 the Ninth Circuit said he got it wrong, the trial judge got it  
7 wrong. I mean, if you have the same scenario here, it can be  
8 addressed at that time.

9 I just don't know what can be addressed at this time  
10 to prevent something at the other end.

11 TC [MR. RYAN]: Simply this, Judge, that what comes down  
12 the road, no doubt that Your Honor can -- would handle as it  
13 comes up, if that comes up, and certainly we would be  
14 advocating a very strong position as to it, that they entered  
15 into this at their own risk. And to the extent they bargained  
16 or contracted for something greater than the law says should  
17 happen, that's on them.

18 However, in this -- what we would submit, sir, is the  
19 better practice is to deal with it up front, especially now  
20 that it has been raised to you. If in fact -- if in fact  
21 there are defense agreements or one agreement in place, we  
22 don't -- that we don't know the terms of, accused might very  
23 well -- and I'm not saying it's happening, but could very well

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 be relying on an understanding of it that's inconsistent with  
2 Henke, slash, Almeida and the rule Your Honor is proposing.

3 Now, does Your Honor have the power ultimately to  
4 say, well, that's not the law? Certainly. But it doesn't  
5 change the fact that it could have effects that we can't see  
6 going forward or we don't expect going forward. And to the  
7 extent Your Honor is aware of at least a concern that accused  
8 might be operating under a misconception, I'd submit the  
9 better practice is to handle it up front. And what we are  
10 proposing in this case, that is an ex parte in camera review  
11 of a written order, is the better practice so as to make sure  
12 we don't hit these issues.

13 One other possibility, not just the accused's  
14 expectations, Judge, but also I'll bring out that in some of  
15 these cases you've seen lawyers themselves become very  
16 concerned about their own ethical obligations under their  
17 various state bar rules and so on. And you could find  
18 yourself in a position of saying, well, I say this is the law  
19 and lawyers who have to do what you're supposed to do and the  
20 lawyers essentially saying, well, that's not what my personal  
21 ethics rules might require. It's -- and this will feed in a  
22 moment, but ultimately that's why I believe the Bar -- the  
23 American Bar Association put forth a sample and said this is

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 the model of how it should be done, so that none of these  
2 problems do come up. So that's what we're proposing, Your  
3 Honor.

4           So I noted the one possibility, that being a  
5 situation where somebody begins to cooperate, may be unlikely  
6 in this case, no question. But secondly, and I think a far  
7 more possible situation, is where one of the accused just  
8 decides to -- one or more of the accused decides to testify on  
9 his own, for his own benefit. If in fact that were to occur,  
10 we'd be facing some of the same types of concerns, same types  
11 of questions.

12           It is as common as can be that an accused in a joint  
13 trial could testify -- could take the witness stand and  
14 testify to essentially shift the blame to someone else to say  
15 that person put me in this position, to say he's a lot worse  
16 than I am and so on.

17           As we've seen in many, many hearings in this case,  
18 counsel for their clients often feel obligated to cross  
19 witnesses even if they don't seem centrally connected to their  
20 own specific positions. So if someone were to get on the  
21 witness stand in this case, one of the accused, you can  
22 almost -- in this joint enterprise case, conspiracy case, you  
23 can certainly count on the possibility, make it the almost

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 certainty, that all of the other lawyers would want to  
2 cross-examine.

3           Also, Judge -- so that's cooperator, testify for  
4 yourself. But number three, and this is now a reality in this  
5 case, we have got one of the accused seeking severance. So  
6 that would indicate that there seems to be at least some lack  
7 of cohesiveness between them, although counsel in their  
8 pleadings have said there is none. It would seem that that  
9 has changed at least -- at least to some degree through the  
10 years. We don't know.

11           Helpful case, Your Honor, for your consideration, we  
12 feel, is United States v. Stepney. I concede it has no  
13 authoritative value. It is a district court case from the  
14 Northern District of California, but it is -- I think it's  
15 certainly got some persuasive value. It's got some warning  
16 value, if I will. It was a 26-defendant case involving a  
17 street gang. It was described by the judge in that case as  
18 extraordinarily complex and involved 20,000 pages of  
19 discovery. She called it challenging, and maybe now in  
20 comparison it doesn't look so bad to her, at least to our  
21 case.

22           But nonetheless, in the time-honored tradition of a  
23 trial judge, she sought to control her courtroom, and at some

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 point in the pretrial proceedings became alerted to the fact  
2 that there was a joint defense agreement going on. In her  
3 opinion that we have cited, Judge Patel does a very thorough  
4 analysis of joint defense agreements in general, the law  
5 surrounding them, the problems, the pitfalls that can arise.

6 She then, in her discretion, requires that a written  
7 product be produced for her review. She analyzes it and sees  
8 that it is in fact the worst case scenario. And this is what  
9 I was referring to before, Judge, in the sense of what the law  
10 says and what parties might agree to and contract for can be  
11 different things. And Judge Patel in that case quickly comes  
12 to the conclusion that what the law might -- she might think  
13 the law is far different from what this particular agreement  
14 said. It essentially involved a full duty of loyalty and an  
15 inability to withdraw from the joint defense agreement.

16 Judge Patel rejects it and puts in place her own  
17 based on that ABA model that I referred to before. She  
18 rules -- and I'll read it, because I think it is helpful, is  
19 number one, any joint defense agreement entered into by  
20 defendants must be committed to writing, signed by defendants  
21 and their attorneys, and submitted in camera to the court for  
22 review prior to going into effect. Each joint defense  
23 agreement submitted must explicitly state that it does not

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 create an attorney-client relationship between an attorney and  
2 any defendant other than the client of that attorney. No  
3 joint defense agreement may purport to create a duty of  
4 loyalty.

5 Three, each joint defense agreement must contain  
6 provisions conditionally waiving confidentiality by providing  
7 that a signatory attorney cross-examining any defendant who  
8 testifies at any proceeding, whether under a grant of immunity  
9 or otherwise, may use any material or other information  
10 contributed by such client during the joint defense.

11 Finally, each joint defense agreement must explicitly  
12 allow withdrawal upon notice to the other defendants.

13 Your Honor -- and we were speaking a moment ago about  
14 Almeida, and Almeida was a good example on the other hand of  
15 the circuit court controlling their circuit in the sense that  
16 Judge Tjoflat said, here's the rule and here's what should  
17 have happened. And I think Your Honor is correct to say that  
18 that's an example of what can be done from the court, if a  
19 problem arises later.

20 However, even -- first of all, Almeida, as I said  
21 before, was a situation of a cooperator. There's no  
22 discussion about what would have happened, might have happened  
23 if it was a defendant testifying of his own volition just

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 seeking to put his side of the story in evidence. I don't  
2 know that it could turn out differently, but Judge Tjoflat  
3 basically said, if you take the stand for the government in  
4 hopes of a benefit, you don't get to claim the benefits of  
5 being part of the defense anymore.

6 For someone who is still part of the defense, that  
7 does change the equation, I think, a little bit. So we have  
8 to look at Almeida in that sense. Also, Judge Tjoflat at the  
9 end basically adopts the Stepney rule and says defense  
10 attorney should insist their clients enter into joint defense  
11 agreements.

12 In this case, Your Honor, all we know, there is an  
13 agreement of some sort, and we also know that at various times  
14 the accused and their attorneys are occupying this courtroom  
15 without anyone else being present, having meetings on their  
16 own certainly as they're free to do and as Your Honor has  
17 allowed them to do.

18 What we don't know is the following: We don't know  
19 if there's a written agreement, we don't know the number of  
20 accused who may be party to it. We don't know if there is a  
21 full-fledged duty of loyalty within it, which is, as  
22 Judge Patel found, to be the worst case scenario. We don't  
23 know if it's just duty of confidentiality which seems to be

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 what every court recognizes it does involve.

2 On the other hand, if there is a duty of  
3 confidentiality does that mean there's a derivative use of it,  
4 too, such as items -- a lawyer can't tell what he has learned  
5 in the course of the joint defense agreement, but on the other  
6 hand can he go out from that and find other evidence, sort of  
7 a Kastigar on the defense side situation?

8 Is there a work product aspect to it? Is there the  
9 ability to withdraw? If so, if there is an ability to  
10 withdraw, what duty of loyalty remains to the other members of  
11 the agreement? Is there a waiver provision if someone  
12 testifies? And maybe most important, do the accused know  
13 about it, and what do they think about it? What is their  
14 understanding of it?

15 For the reasons that we've stated both in our  
16 pleading and here today, sir, we ask that the commission  
17 require that any joint defense agreement be set forth in  
18 writing, that it be submitted ex parte in camera, like so many  
19 other things from the defense, to the military commission for  
20 review.

21 We ask that the military commission ensure that such  
22 joint defense agreement be consistent with the ABA model cited  
23 in Stepney, or otherwise ensure no potential for conflicts

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 exist. And finally, Judge, we ask that you conduct a colloquy  
2 with the accused who are in fact signatories to such  
3 agreement.

4 Absent any questions, Judge, that's all I have.

5 MJ [COL POHL]: No. Thank you.

6 TC [MR. RYAN]: Thank you, Your Honor.

7 Your Honor, can I have one moment, please.

8 [Pause.]

9 MJ [COL POHL]: Sure.

10 TC [MR. RYAN]: Thank you, sir. That's all I have.

11 MJ [COL POHL]: Thank you.

12 Defense.

13 DDC [Lt Col THOMAS]: Good morning, Your Honor.

14 Lieutenant Colonel Thomas for Mr. al Baluchi.

15 MJ [COL POHL]: Good morning, Colonel Thomas.

16 DDC [Lt Col THOMAS]: I have previously provided a copy of  
17 slides related to AE 359 to the court security officer, and I  
18 believe you may have them in your hands at this time.

19 MJ [COL POHL]: Okay.

20 DDC [Lt Col THOMAS]: I'd like permission to publish the  
21 feed from Table 4, Your Honor, as you've had a chance to  
22 decide whether you approve of us doing so.

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

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 DDC [Lt Col THOMAS]: Thank you. We provided these slides  
2 to the defense counsel and to the prosecution. I'd like to  
3 note also that subject to the discussion earlier, this is one  
4 of the sets of slides that was addressed in the FOUO issue.

5 MJ [COL POHL]: Uh-huh.

6 DDC [Lt Col THOMAS]: Due to the late notice, not casting  
7 aspersions at anybody, we learned of the removal of the FOUO  
8 only after the court session began, and therefore, the slide  
9 decks that you see before you on the overhead still have the  
10 FOUO, but we understand that we are permitted to post them,  
11 and they are permitted to be tweeted out, if we care to do so.

12 MJ [COL POHL]: Go ahead and publish them. After that,  
13 they're public documents. I got it.

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

15 Your Honor, 359 is our response to the government's  
16 request that we submit to their request to have you look at an  
17 alleged joint defense agreement. Now, what they're asking us  
18 to do ultimately is to reveal to you, if a joint defense  
19 agreement exists, the potential contents of that.

20 Now, what are those contents? Potentially joint  
21 defense agreements include defense strategy, who a defendant  
22 may choose to work with, who a defendant may choose not to  
23 work with, attorney work product, and the roles and

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 responsibilities which may exist within an alleged joint  
2 defense agreement.

3           Slowing down.

4           MJ [COL POHL]: Uh-huh.

5           DDC [Lt Col THOMAS]: Joint defense agreements may have  
6 independent evidentiary value. It could contain, in some  
7 instances, explicit or implicit admissions. And almost all  
8 courts recognize that it is highly prejudicial to even  
9 disclose the existence of a joint defense agreement.

10           Joint defense agreements do not have to be in  
11 writing, and joint defense agreements are privileged.

12           MJ [COL POHL]: If they're not in writing, how do your  
13 clients know what they say?

14           DDC [Lt Col THOMAS]: If they exist, Your Honor, that  
15 would be a subject of discussion between the clients and the  
16 attorney.

17           MJ [COL POHL]: That's not the question I asked. My  
18 question is, if they're not in writing, how -- if there's an  
19 issue down the road of what they entail, what do we do? Just  
20 go back to what we remember my attorney told me?

21           DDC [Lt Col THOMAS]: In those instances where the court  
22 has to explore that ----

23           MJ [COL POHL]: Again, I'm not -- don't conflate the issue

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 of whether it needs to be reviewed or not. That's a separate  
2 issue. Okay. I'm simply saying is if there is one -- and I  
3 don't know whether there is or isn't. There's been  
4 representations by at least two defense counsel that there is  
5 one, okay?

6 But, I mean, if there's an agreement between or among  
7 the accused, and it's not in writing, how does -- how does  
8 anybody, if we have to look at it down the road, know what was  
9 agreed to?

10 DDC [Lt Col THOMAS]: Well, that would be something -- as  
11 I'll go back to my earlier comment, that would have to be a  
12 discussion between that accused, that hypothetical accused,  
13 and his defense attorney. And that goes, I believe, to a  
14 later slide we'll talk about, how we manage an ethical issue  
15 that comes up like that.

16 I think part of what's been glossed over here is that  
17 the system that's been built from the legal team perspective  
18 upward addresses this very issue. And if you give me leave, I  
19 believe we'll come back to something that will satisfy you.

20 MJ [COL POHL]: Okay. Well, I saw your subsequent slides,  
21 but go ahead.

22 DDC [Lt Col THOMAS]: So what the prosecution's proposing  
23 is basically a judicial work product review. And what that

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 creates is improper and potentially prejudicial review of the  
2 quality of an attorney's work product, a role typically  
3 reserved for appellate counsel when they're looking to  
4 determine whether ineffective assistance of counsel has  
5 occurred. The government's request for this attorney work  
6 product review should be balanced against a substantial need,  
7 and there is none here.

8           A government work product review -- excuse me, a  
9 judicial work product review would also produce evidence.  
10 Now, that could again go back to evidence of whom a particular  
11 defendant or his legal team has chosen to work with and why.  
12 It could, in a conspiracy case, be an admission.

13           MJ [COL POHL]: Don't I already see a lot of that stuff  
14 ex parte? You showed me -- you asked to have an expert  
15 witness, expert assistance, and I see that stuff all the time  
16 ex parte.

17           DDC [Lt Col THOMAS]: And that's when the defense has  
18 actually volitionally come to you and said we need your  
19 assistance often because we're seeking some sort of aid from a  
20 party ----

21           MJ [COL POHL]: No, I understand that. What you seem to  
22 be saying here by giving it to the court somehow it's going to  
23 be disclosed to third parties. When you give me things all

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 the time ----

2 DDC [Lt Col THOMAS]: I'm stopping short of that -- I'm  
3 sorry, Your Honor.

4 MJ [COL POHL]: No, but I'm saying, you give me stuff all  
5 the time disclosing defense theories of the case and other  
6 things.

7 DDC [Lt Col THOMAS]: In fact, the prosecution notes that  
8 we submitted our theory of defense to you. I'm stopping short  
9 of saying that you are going to somehow pass this out to the  
10 prosecution. But one of the things we have to concern  
11 ourselves with is whether something we have put into an  
12 alleged joint defense agreement might somehow impact your  
13 review of this case later.

14 Now, I don't for a moment believe that as a  
15 gatekeeper of evidence you can't remove yourself from  
16 something you've heard. You make those decisions all the  
17 time. But it is without question that it is implicit -- it is  
18 impossible to unring a bell, and, therefore, that is a concern  
19 for us. We don't want to even create the issue, but what the  
20 prosecution is doing is taking a hypothetical problem and  
21 creating an existential issue for you by asking us to produce  
22 evidence that will create that forever-rung bell.

23 And as I noted earlier, the existence of a joint

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 defense agreement is privileged. Their request to know if a  
2 joint defense agreement exists amounts to current government  
3 attempts at interference in our relationship with our clients,  
4 government interference in our conflict-free representation of  
5 our clients, government interference into our attorney-client  
6 privileged information and into our defense strategy.

7           And this attempt to have you audit our work, Your  
8 Honor, attempts to address a conflict that doesn't foreseeably  
9 exist, as Mr. Ryan for the prosecution admits.

10           Now, much of the government's argument rests on  
11 U.S. v. Stepney. Stepney can be distinguished from the  
12 instant case. The Stepney defendants were not entirely  
13 consonant in the charges that they faced. There were varying  
14 degrees of charges levied against these men. That sort of  
15 disparity in the charges doesn't exist here.

16           The judge in that particular case ordered the joint  
17 defense agreements be reduced to writing and produced. And  
18 those joint defense agreements dictated specific waiver  
19 provisions with regard to cross-examination and if a  
20 co-defendant testified. And they dictated that if a signatory  
21 to the joint defense agreement cooperated, they lost  
22 protection of it.

23           But here the charges are the same, they're consonant

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 in between the defendants that are before you in this  
2 courtroom and there's no immediately apparent conflict based  
3 on the charges. That was an immediate issue that the Stepney  
4 court could see. And as the government even admits, there's  
5 no substantial likelihood of cooperation.

6 MJ [COL POHL]: Let me ask you about this scenario,  
7 though, is -- and it's addressed in the judge's ruling in  
8 Stepney. The cooperating witness issue is -- I think Henke  
9 addressed, and the other cases talk about that, I think about  
10 the waiver of the privilege, if you become a cooperating  
11 witness. I mean, that's not something I'm talking about.

12 What I'm talking about here is cross-examining a  
13 co-accused. Okay. Is there any limitations on that? Here's  
14 my concern, Colonel Thomas. Apparently I'm not making myself  
15 clear.

16 DDC [Lt Col THOMAS]: Yes, sir. I'm waiting for the  
17 question.

18 MJ [COL POHL]: Well, I thought I gave it to you, but I'll  
19 try again. Okay.

20 If one of the accused in this case were to testify in  
21 his own defense, and a co-accused attorney wished to  
22 cross-examine him, are there any limits on that  
23 cross-examination because of a joint defense agreement?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 DDC [Lt Col THOMAS]: Well, let me start with you know  
2 that our position is that we have not revealed the existence  
3 of any joint ----

4 MJ [COL POHL]: I know your position, so I got it. You  
5 don't need to keep repeating it.

6 DDC [Lt Col THOMAS]: Thank you, sir.

7 MJ [COL POHL]: I got it. The judge in the Stepney case  
8 addresses that and seems to say that if they choose to  
9 testify, becomes fair game by the co-counsel. Maybe it says  
10 that, maybe it doesn't.

11 But what is your position on that?

12 DDC [Lt Col THOMAS]: Effectively ----

13 MJ [COL POHL]: I know I keep asking a question on top of  
14 a question and I don't let you answer, but that's okay.

15 What you're saying is I don't even get to know if  
16 there is a joint defense agreement, so I don't even get to  
17 know what the terms are. So in a hypothetical situation, if  
18 there was a joint defense agreement, does it any way from a  
19 legal perspective limit the cross-examination of a  
20 co-accused -- of a co-accused?

21 DDC [Lt Col THOMAS]: Returning to the facts of this  
22 particular case, Your Honor, it's a hypothetical that will be  
23 very unlikely. However, in the event that that arose, it

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 would really depend on the terms of that agreement. And since  
2 I'm not at liberty even to disclose whether such an agreement  
3 exists, I would rather not proffer you an advisory opinion, to  
4 borrow a phrase.

5 MJ [COL POHL]: Well, you kind of want it both ways here,  
6 is -- what I'm hearing you say is we're not going to tell you  
7 anything that's in the agreement and we're not even going to  
8 tell you what we think the law is that controls any  
9 hypothetical agreement, and in the middle of trial, if  
10 Mr. Mohammad were to testify on direct and Mr. Connell or  
11 yourself wants to cross-examine him, at that point, we start  
12 discussing what the joint defense agreement says. Is that  
13 what you're telling me?

14 DDC [Lt Col THOMAS]: Actually, I'd like to correct  
15 myself. I believe a moment ago -- a note was slipped to me to  
16 correct my understanding. One of the things that would be  
17 permitted by a joint defense agreement is cross-examination.  
18 It's not limited by a joint defense agreement according to the  
19 law as it stands.

20 MJ [COL POHL]: So you could -- okay.

21 So if -- let's go back to the Henke situation and  
22 let's assume Gupta, instead of being a cooperating witness was  
23 a -- was uncooperating. So you had -- okay.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           You've got three accused. Accused number one  
2 testifies in his own defense, okay? During the course of the  
3 joint defense agreement accused number one says something that  
4 is inconsistent with his testimony that hurts accused number  
5 two.

6           DDC [Lt Col THOMAS]: Understood. Now, is this a  
7 cooperating ----

8           MJ [COL POHL]: No, this is a noncooperating witness. The  
9 cooperating witness I think is easier. The noncooperating  
10 witness. So they're joined together.

11          DDC [Lt Col THOMAS]: Understood.

12          MJ [COL POHL]: And so accused number two's attorney wants  
13 to cross-examine accused number one on something that was said  
14 in the confines of the joint defense agreement. Is it your  
15 understanding that that would be permitted?

16          DDC [Lt Col THOMAS]: Yes, sir.

17          MJ [COL POHL]: Okay. So anything said in the course of  
18 the joint defense agreement that can benefit a co-accused at  
19 the expense of another co-accused is fair game, if that  
20 co-accused testifies?

21          DDC [Lt Col THOMAS]: Can I back up to ask you about your  
22 hypothetical? So anything developed within the investigation,  
23 anything within the confidence ----

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: I'm not even into the derivative part yet.  
2 I'm simply saying is -- and, again, I won't bring you to this  
3 case.

4 Accused number one says something that's revealed in  
5 the scope of the joint defense agreement ----

6 DDC [Lt Col THOMAS]: Right.

7 MJ [COL POHL]: ---- that hurts accused number two, and  
8 accused number one testifies. Can accused number two use that  
9 statement and cross-examine accused number one, even with the  
10 joint defense agreement?

11 DDC [Lt Col THOMAS]: If that occurred during that  
12 person's testimony, it is my understanding that they could,  
13 with cross-examination.

14 MJ [COL POHL]: Okay. So you believe that -- we discussed  
15 this earlier with Mr. Ryan, that if there's a waiver, that  
16 once they -- once an accused testifies, then he's fair game of  
17 anything that's in the joint defense agreement, that was said  
18 during -- while they had a joint defense agreement, whether or  
19 not that accused is a cooperating witness or remains as one of  
20 the primary defendants?

21 DDC [Lt Col THOMAS]: I want to make sure I understand.  
22 The portion where you said anything within the -- let's say  
23 ten years of the cooperation between defendants ----

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: No, my question is, is that the case law  
2 seems to be clear that when a cooperating witness withdraws  
3 from the joint defense agreement and testifies, he's now  
4 waived his privilege ----

5 DDC [Lt Col THOMAS]: Yes.

6 MJ [COL POHL]: ---- of what was said during that thing.  
7 Does that same rule apply to any testifying  
8 defendant, even who is not a cooperating witness?

9 DDC [Lt Col THOMAS]: I believe it's going to be --  
10 cross-examination would not be limited by the joint defense  
11 agreement but it would be related to what they've said within  
12 the confines of that testimony.

13 MJ [COL POHL]: Well, I mean, you're ----

14 DDC [Lt Col THOMAS]: I'm keeping it narrow.

15 MJ [COL POHL]: Yeah, but again we're talking about an  
16 accused here, though. And once the accused testifies, doesn't  
17 he put his credibility -- my question is, is there any limit  
18 on your cross-examination of a co-accused?

19 DDC [Lt Col THOMAS]: Right.

20 MJ [COL POHL]: And if you keep -- if you're telling me  
21 that, well, yeah, there is some limit because of the joint  
22 defense agreement, that's what I'm asking you.

23 DDC [Lt Col THOMAS]: So we've certainly established

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 within the person who has withdrawn that it's not limited.

2           And if you give me just a moment, I want to make sure  
3 that I'm understanding correctly. Could I have just a moment,  
4 Your Honor?

5           MJ [COL POHL]: Sure.

6 [Pause.]

7           DDC [Lt Col THOMAS]: Your Honor, to correct my earlier  
8 statement, in the uncooperating witness scenario that you've  
9 described, if a defendant has elected to testify, then he  
10 would be able to be subject to cross-examination by that  
11 formerly co-defendant attorney about anything that took place  
12 during the existence of the joint defense agreement.

13           MJ [COL POHL]: Now, you said formerly co-defendant.  
14 They're not formerly co-defendant. They're current  
15 co-defendant.

16           DDC [Lt Col THOMAS]: Current co-defendant. Then they  
17 would be able to cross-examine him about that.

18           MJ [COL POHL]: So all members of the joint defense  
19 agreement understand that anything that they say in that  
20 context, if they choose to testify, can be subject to  
21 unfettered cross-examination by any of the other members of  
22 the joint defense agreement.

23           DDC [Lt Col THOMAS]: To push it back to the hypothetical,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 yes, Your Honor. Because it sounded like you were trying to  
2 assert that there was a JDA in existence.

3 MJ [COL POHL]: No, my concern was this: My initially  
4 asked question -- and perhaps I didn't word it very clearly.  
5 You said, well, as long as the question was limited to the  
6 direct, and I come back to the fact ----

7 DDC [Lt Col THOMAS]: I ----

8 MJ [COL POHL]: ---- we're talking about, well, every  
9 witness puts their credibility on the line.

10 DDC [Lt Col THOMAS]: Yes.

11 MJ [COL POHL]: Consequently, there's a broad range  
12 of ----

13 DDC [Lt Col THOMAS]: Yes.

14 MJ [COL POHL]: ---- potential cross-examination.

15 DDC [Lt Col THOMAS]: And perhaps it's my prosecution  
16 training, but I was trying to narrowly limit it as possible,  
17 Your Honor, but the correct application of it would be  
18 anything that occurred during the joint -- any of the evidence  
19 that they have about themselves and others during the course  
20 of that joint defense agreement.

21 MJ [COL POHL]: So the waiver of the privilege that we  
22 talked about before for the cooperating witness would also  
23 apply to noncooperating currently charged co-defendant?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 DDC [Lt Col THOMAS]: In that scenario, yes, Your Honor.

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

3 DDC [Lt Col THOMAS]: Well, coming back to the Stepney  
4 argument that the prosecution made a moment ago, the indicia  
5 of conflict that seems to be their focus doesn't really exist  
6 here. What we're talking about in the Stepney case was 30  
7 co-defendants with varying levels of charges against them.  
8 And in this instance, we have very consonant charges,  
9 defendants, men like Mr. al Baluchi and his co-accused, who  
10 all have been in step with each other in terms of their  
11 defense, at least for the past ten years. They have kept  
12 their communal relationship going for the past ten years and  
13 there's been no indication in the evidence that says that this  
14 would be a fact in evidence.

15 Stepney, really under that particular case -- you  
16 have to look at these charges and say they're consonant and  
17 they weren't in the Stepney case, that the evidence against  
18 these men is consonant and it wasn't in the Stepney case. And  
19 there's no testimony or evidence here that seems to back up  
20 with what the prosecution seeks. Really looking at the  
21 Stepney case, it's an outlier when compared with the vast  
22 majority of practice related to the matter.

23 Now, the joint defense agreement request of the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 prosecution to be brought before the military judge, the  
2 commission, is unnecessary for a number of reasons. Now, you  
3 see before you a wire diagram of some of the outlay of the  
4 office of what's called the Military Commission Defense  
5 Organization.

6           The very concerns that are raised by the prosecution  
7 about an ethical impasse are supervised. Those conflicts are  
8 supervised by our ethical supervisor. You have seen General  
9 Baker in the back of the courtroom for many days of this  
10 hearing, and he is, and his deputy are available to us when we  
11 have ethical issues such as this arise. Now, even beyond  
12 that, each team in the capital cases has a learned counsel and  
13 those learned counsel are charged with being ethical  
14 supervisors as well.

15           So what the prosecution is seeking to do is to step  
16 into the role of the defense again and try and interfere with  
17 us in the conduct of our work.

18           MJ [COL POHL]: Do you think General Baker has an  
19 affirmative duty to inquire about a joint defense agreement to  
20 make sure there are no conflicts, or is his job to sit there  
21 and wait until a conflict comes up to resolve it?

22           DDC [Lt Col THOMAS]: I think it's the duty of the learned  
23 counsel and the lead counsel for each of these teams to know

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 what the issues may be and raise them as they feel is  
2 appropriate.

3 MJ [COL POHL]: Okay. Let me try the question again  
4 because you did not answer the question I asked, which is not  
5 unusual in these proceedings, but I'll try again.

6 Does General Baker have an affirmative duty to review  
7 or -- the joint defense agreement to ensure there is no  
8 conflict, or is his role just to wait until a conflict is  
9 raised by somebody else and then address it at that time?

10 DDC [Lt Col THOMAS]: I have to disagree with the  
11 construct of the question, Your Honor.

12 The chief defense counsel's roles include the  
13 management of any ethical issue that might arise within his  
14 organization, and of course, these teams, all of the teams  
15 that defend the men in this courtroom, all fall under his  
16 ethical supervision. So he has an affirmative duty to look  
17 for those and to manage conflicts and has actually done that  
18 kind of work before. I mean, this is part and parcel of what  
19 he does.

20 MJ [COL POHL]: Does he have an affirmative duty to review  
21 any joint defense agreement? That's my question. I mean,  
22 what you're saying is the government's concern here is that  
23 you have this -- you may or may not -- when I say you, there's

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 some evidence there's a joint defense agreement, okay, that  
2 was presented in court, okay?

3 DDC [Lt Col THOMAS]: Yes, sir, I saw.

4 MJ [COL POHL]: Nobody knows what's in it, and as the case  
5 law shows, a lot of times when you get to the end, then the  
6 issue comes up and they're just -- they're asking that let's  
7 see what it says now so we can avoid some issues at the end.  
8 For example, the question I just asked you about testifying  
9 co-accused. Okay.

10 DDC [Lt Col THOMAS]: Right.

11 MJ [COL POHL]: You're saying that that's General Baker's  
12 responsibility to resolve any conflicts.

13 DDC [Lt Col THOMAS]: Yes.

14 MJ [COL POHL]: And a joint defense agreement does not  
15 create conflicts, but it certainly creates issues that could  
16 rise to conflicts.

17 DDC [Lt Col THOMAS]: Yes.

18 MJ [COL POHL]: If there's misunderstanding between the  
19 parties, for example. You may -- I haven't heard from your  
20 co-counsel yet here, but your view of this may not be the same  
21 as theirs.

22 DDC [Lt Col THOMAS]: It would not surprise me.

23 MJ [COL POHL]: Okay. Well, but would it surprise if you

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 had a joint defense agreement where people didn't agree to  
2 what the terms were?

3 DDC [Lt Col THOMAS]: Your Honor ----

4 MJ [COL POHL]: Let me say, as a lawyer it would surprise  
5 me if there's an agreement and nobody -- but there's  
6 disagreement what the terms are.

7 DDC [Lt Col THOMAS]: That should be clear between the  
8 parties to it.

9 MJ [COL POHL]: Okay.

10 DDC [Lt Col THOMAS]: If such an agreement exists.

11 MJ [COL POHL]: Okay.

12 DDC [Lt Col THOMAS]: It would be something that he, the  
13 chief defense counsel -- and I want to be clear, the  
14 disagreement I'm referring to is we often have disagreements  
15 within this courtroom, not disagreements in the JDA, if one  
16 exists.

17 MJ [COL POHL]: If one exists, I got it.

18 DDC [Lt Col THOMAS]: So what I'm saying is if that issue  
19 arises. He is well equipped, the organization is well set up  
20 to address just such a thing. We have organized our  
21 situation, our teams, our organization in a manner to address  
22 when those conflicts arise. And does he have an affirmative  
23 obligation to go ask about these things? I don't believe that

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 he has to do that. That is something that within the learned  
2 counsel and the lead counsel, when those issues arise, if they  
3 feel they can't resolve it, they could take it to him.

4 MJ [COL POHL]: So he's really not managing any joint  
5 defense agreement. All he's doing is he's waiting to hear  
6 from you guys, if you've got a problem.

7 DDC [Lt Col THOMAS]: It's managing the ethical issues as  
8 they arise. Of course, any leader looks forward to see what  
9 could be around the corner.

10 MJ [COL POHL]: No, but I'm saying that the government is  
11 asking me, I'm not -- the term manage is probably  
12 inappropriate, to review the joint defense agreement and make  
13 sure everybody understands what it says and it comports with  
14 the law and the clients understand it. You put this slide up  
15 that says, no, it's not unnecessary because the chief defense  
16 counsel is in charge of supervising conflicts. Okay.

17 But, again, that comes back to the issue that they  
18 want to avoid -- they being the government -- is that we want  
19 to avoid the conflicts if we can by making sure the agreement  
20 is -- comports with the law.

21 DDC [Lt Col THOMAS]: I think that turns right around into  
22 the question that we raised at the beginning of our argument.  
23 We're taking a hypothetical problem and creating an existing

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 problem by asking us to either create something that doesn't  
2 exist or turn over something that would reveal potentially  
3 privileged information, defense strategies, or create evidence  
4 that could be used against them.

5           Now, I understand your argument about the you've  
6 given me stuff before.

7           MJ [COL POHL]: No, I got you there. But my point being,  
8 is you put up this slide that says, Judge, you don't need to  
9 do it implicitly because the chief defense counsel will do it.

10          DDC [Lt Col THOMAS]: Yes.

11          MJ [COL POHL]: But you're telling me that the chief  
12 defense counsel will do nothing until the issue is raised to  
13 him, so we're back to square one.

14          DDC [Lt Col THOMAS]: I disagree with that  
15 characterization. I said we bring it back to that he manages  
16 issues and conflicts well beyond what a particular team is  
17 aware of. I think that undersells what the chief defense  
18 counsel's role is when you characterize it that way.

19          MJ [COL POHL]: I'm only talking about this particular  
20 issue.

21          DDC [Lt Col THOMAS]: Understood.

22          MJ [COL POHL]: And what I'm hearing you tell me is that  
23 if there is a joint defense agreement, whether you're a party

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 of it or not -- I'm not -- okay.

2 DDC [Lt Col THOMAS]: Little more, Your Honor.

3 MJ [COL POHL]: ---- is that we should just assume it's  
4 done and comporting with the law, that it is in accordance  
5 with the, quite frankly, somewhat unclear nature of joint  
6 defense agreements anyway, in that everybody understands it  
7 and there are no issues that need to be resolved by anybody,  
8 whether the commission or the chief defense counsel?

9 So everything's fine. Don't need to worry about it.  
10 If an issue comes up, we'll talk to him or maybe bring it to  
11 you.

12 DDC [Lt Col THOMAS]: The very thing -- yes, Your Honor,  
13 and the very thing they're asking you to do creates problems  
14 as opposed to solving them. I mean, this feigned interest in  
15 our clients' rights is yet another contrived attempt to  
16 interfere in the relationships that we've spent literally  
17 years cultivating with our clients. Mr. al Baluchi,  
18 Mr. Connell and I have spent years developing a relationship,  
19 and these attempts go straight to the heart of our ability to  
20 protect our attorney-client privileged information.

21 Subject to your further questions, Your Honor.

22 MJ [COL POHL]: No, that's it. Thank you.

23 Any other defense counsel wish to be heard on this

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 issue? Mr. Harrington.

2 LDC [MR. HARRINGTON]: Judge, I agree with Colonel Thomas  
3 on some issues, and I have some disagreements with him. I do  
4 agree with him on his characterization here of the injecting  
5 of big brother into the supposed concern of our clients'  
6 rights here. Their motivation -- well, proper motivation for  
7 them is, one, to avoid appeal issues rather than to protect  
8 our clients.

9 But, Judge, other than the case that was cited, I  
10 have never in my practice -- and I have been in many, many  
11 joint defense agreements, and I can tell you some of them are  
12 really loose, some of them are very specific, some in writing,  
13 some are not in writing.

14 Joint defense agreements and the particularity of  
15 them is almost exclusively for the person who leaves and  
16 cooperates. That's what the -- what the protection in the  
17 joint defense agreement is, where the person leaves. And as  
18 Colonel Thomas said, we have a situation here where that's  
19 extremely remote, that that would happen.

20 The issue about -- which is an interesting one,  
21 because in my experience the joint defense agreements, the  
22 likelihood of any of those clients testifying is absolutely  
23 not going to happen. It just -- most of the time we're

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 talking about drug cases or gang cases and stuff like that,  
2 and defendants don't take the stand in those kind of cases, so  
3 it's kind of a remote problem.

4 But in this particular case, the focus is on the  
5 leaving of the agreement. So I disagree with Colonel Thomas  
6 that the person takes the stand who has been in the joint  
7 defense agreement and testifies, that it's open season on the  
8 person. If the person gets up and testifies in accordance  
9 with what was said during the joint defense agreement, I don't  
10 think that opens him up to cross-examination with respect to  
11 the things that are said within the joint defense agreement  
12 because the person is still in the agreement.

13 There's nothing that says when you testify on your  
14 own behalf, that you've left the agreement. But if the person  
15 gets up, though, and testifies to things that are outside of  
16 what was said in the agreement, the argument would be made  
17 that the person, at that point in time, has left the agreement  
18 and should be subject to cross-examination, at least with  
19 respect to those particular statements that are contrary to  
20 the statements that were given within the agreement.

21 MJ [COL POHL]: Mr. Harrington, doesn't this -- doesn't  
22 your point just illustrate the problem, in that Colonel Thomas  
23 believes the joint defense agreement permits this type of

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 cross-examination, and you say it doesn't?

2           Now, I'm not -- I don't know whether you guys are  
3 part of the same agreement or not, but if you are, there seems  
4 to be a fundamental disagreement between the members of this  
5 agreement as to the scope of the agreement. Do you see what  
6 I'm -- I mean, you're contradicting what Colonel Thomas says  
7 was in -- and, again, I don't know whether you're in one or  
8 not. But he says this is the scope of cross-examination.  
9 You're saying it's this. And if you are members of the same  
10 agreement, you can't agree on that.

11           LDC [MR. HARRINGTON]: Well, Judge, I mean, the problem  
12 here is we present to you a written agreement. What is your  
13 role with respect to that agreement? Do you critique it? Do  
14 you say it's not sufficient? Do you say it's okay? Are we  
15 seeking your imprimatur? What is the role that you play with  
16 respect to that agreement, where we have the right to enter  
17 into whatever agreement we want to?

18           MJ [COL POHL]: But isn't one of the issues here, we'll  
19 talk about this, who gets it? The one thing is, one of the  
20 government's concerns, and I think it's legitimate, is that if  
21 there is a joint defense agreement, that all of the accused  
22 and the attorneys all understand what's in the agreement.

23           LDC [MR. HARRINGTON]: Yes.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: Okay. So if it's reduced to writing and  
2 everybody looked at it and they understood it, I'm not  
3 saying -- okay, the review is -- you're putting it, well,  
4 then, give it to me and maybe look at it.

5 What I'm saying is what about putting it in writing,  
6 and then everybody -- so if an issue becomes later on down the  
7 road, we have to see what it is, at least we know what  
8 everybody agreed it to be.

9 LDC [MR. HARRINGTON]: Right.

10 MJ [COL POHL]: That's kind of the ----

11 LDC [MR. HARRINGTON]: Okay.

12 MJ [COL POHL]: I understand your concern about the terms  
13 of the agreement and who should judge it, whatever it is. But  
14 one of the biggest concerns is, as we talk about today in  
15 2016, what the understandings of the agreement is, if there's  
16 a dispute later on of what was included, but there's no  
17 memorialization of it, then what do we do?

18 LDC [MR. HARRINGTON]: And like any other issue, you make  
19 a decision based on whatever facts you have in front of you.

20 And there may well be issues that come up that the  
21 agreement doesn't cover. That's not unheard of. Many of  
22 these agreements don't cover all of the issues, and the courts  
23 have to deal with them, whether they're in writing or not.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           What do you do if you have an agreement in writing  
2 and an issue comes up during trial that has some impact on the  
3 co-defendants which is not covered in the agreement? Then you  
4 make a decision about it.

5           MJ [COL POHL]: Well, let me ask you this, Mr. Harrington,  
6 though, is -- don't you think -- or do you think that all --  
7 everybody should understand the scope of cross-examination of  
8 a testifying co-accused?

9           LDC [MR. HARRINGTON]: Yes.

10          MJ [COL POHL]: And your understanding seems to be  
11 different than Colonel Thomas.

12          LDC [MR. HARRINGTON]: Well, I think it ----

13          MJ [COL POHL]: Again, I'm not saying for me to monitor.  
14 I'm just saying is if you've got an agreement, wouldn't it be  
15 helpful if everybody agreed to what the agreement terms were?

16          LDC [MR. HARRINGTON]: Yes. And what I'm saying to you is  
17 there may well be some issues that are not specifically in the  
18 particular agreement, which does not prohibit you from still  
19 having the agreement.

20                 I mean, for example, let's say that you get an  
21 agreement and it doesn't have anything about the person  
22 testifying in there. What do you do then? Do you say,  
23 Harrington and Nevin, you guys haven't covered this issue.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 You have to go cover this issue.

2 MJ [COL POHL]: Don't you think that's kind of a critical  
3 issue, though?

4 LDC [MR. HARRINGTON]: No.

5 MJ [COL POHL]: I mean, some things are, but I'm saying is  
6 whether or not an accused testifies ----

7 LDC [MR. HARRINGTON]: Yeah.

8 MJ [COL POHL]: You've done this -- we've all done this  
9 for a great period of time, perhaps some of us longer than we  
10 really were planning to, but that's neither here nor there.

11 But I'm saying the decision of the accused to testify  
12 is a critical decision and one that goes into there, I  
13 suspect -- it's been a long time since I have been on that  
14 side, is to prepare him for cross-examination. And wouldn't  
15 the accused have to know where the cross-examination is coming  
16 from, whether it's going to be friendly fire or just the  
17 government?

18 LDC [MR. HARRINGTON]: Sure, but it goes back to the point  
19 that I made at the beginning of where joint defense agreements  
20 come from. It comes because of cooperation, right? That's  
21 the motivation for the joint defense agreements. It's never  
22 been about somebody testifying in their own defense.

23 Judge, go through and look at the number of trials

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 that are held in the United States and get the percentage of  
2 them where the defendants testify on their own behalf. It's  
3 infinitesimal. It's rare that the defendants testify in  
4 their own defense unless they have an affirmative defense or  
5 some aberration.

6 MJ [COL POHL]: Uh-huh.

7 LDC [MR. HARRINGTON]: We as defense counsel, we don't  
8 look at cases that way, we just don't, because of the  
9 practice. I'm not saying that you don't cover that in  
10 general, but you don't. It's a remote possibility.

11 But the agreement is about leaving the agreement, and  
12 what I'm saying to you, and I know that I'm saying something  
13 contrary to what Colonel Thomas says -- and maybe he's saying  
14 the same thing that I am, I don't know -- that when the person  
15 leaves the agreement, which means it's contrary -- goes  
16 contrary to what the agreement is ----

17 MJ [COL POHL]: Uh-huh.

18 LDC [MR. HARRINGTON]: ---- then the person is fair game.  
19 But until then, the person, he can go and testify. Suppose he  
20 gets up and testifies and everything is exactly the same as it  
21 came in the joint defense agreement. You can cross-examine  
22 him about anything you want, but there's no contradiction in  
23 what he's given before in the joint defense agreement.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: What if there is?

2 LDC [MR. HARRINGTON]: Then the argument is that he's left  
3 the agreement.

4 MJ [COL POHL]: I'm sorry, I -- what I'm saying is if an  
5 accused testifies ----

6 LDC [MR. HARRINGTON]: Right.

7 MJ [COL POHL]: ---- inconsistent with or something that  
8 came up -- well, let's just go this way.

9 You develop something -- he said something during the  
10 course of the joint defense agreement that is inconsistent  
11 with what he testified to, is your cross-examination, assuming  
12 that you are a co-accused attorney, limited in any way?

13 LDC [MR. HARRINGTON]: No. That's a separate issue.  
14 Totally separate issue. It's not something that came in  
15 through the agreement, through that person. We all understand  
16 that.

17 Judge ----

18 MJ [COL POHL]: Let me try one more time, because we may  
19 be talking across each other.

20 LDC [MR. HARRINGTON]: Right.

21 MJ [COL POHL]: Defendant A says -- during the course of  
22 the joint defense agreement, defendant A says that I was there  
23 and I saw X, and this -- and during the trial he says I wasn't

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 there, I saw -- so I didn't see X there. Okay. Attorney for  
2 accused B says, I want to cross-examine him about his  
3 inconsistent statement, and the only way I got that  
4 inconsistency is part of the joint defense agreement  
5 cooperative investigation.

6 Is that fair game for cross-examination by the  
7 attorney for the defendant B?

8 LDC [MR. HARRINGTON]: Yes, because you come into the  
9 joint defense agreement -- any joint defense agreement, it's  
10 assumed that when you give your cooperation, that you are  
11 giving truthful and accurate information, just like if you  
12 cooperated with the government.

13 MJ [COL POHL]: Okay.

14 LDC [MR. HARRINGTON]: Judge, you raised the question also  
15 about General Baker's role in this. And my position is,  
16 Judge, General Baker has no role in this whatsoever. None.  
17 He does not have a client.

18 He's our supervisor in helping us administer this  
19 program. His conflict -- the conflicts that he deals with are  
20 assigning people to our teams who may have a conflict because  
21 they represented somebody else. He is not a supervisor of  
22 this.

23 MJ [COL POHL]: Okay.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. HARRINGTON]: Judge, one final point is that what  
2 the prosecution proposes here is -- it drives a wedge between  
3 us and our clients in terms of having a joint defense  
4 agreement because our clients look at it as they have to do  
5 something and it has to be submitted for the approval of the  
6 court or for some action, some action by the court. That's a  
7 discouraging thing about them engaging in something that  
8 protects them.

9 And the last point I would make, Judge, is that in  
10 joint defense agreements, and this is whether it's drug cases  
11 or whatever it is, the defendant's information that goes into  
12 the agreement is extremely rarely from their mouth to the  
13 people in the agreement. The information flows from them  
14 through their attorneys into the agreement. So you've got a  
15 different person who's bringing the information in.

16 So the cross-examination of somebody who takes the  
17 stand, whether as a cooperator or as a person testifying in  
18 their own behalf, has that obstacle where, is this accurately  
19 what the person said, when did they say it, and all of the  
20 rest of the things that you -- go to statements.

21 Most of the information here, there's a funnel that  
22 gives the attorneys the ability to work together using  
23 information from their individual clients together to help to

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 formulate strategies to do whatever you do. So it's not like  
2 you sit down with the five defendants and they all sit around  
3 the table and they all make statements about what it is that  
4 they did or didn't do on a particular issue. It's really for  
5 the benefit of the attorneys to work together in their  
6 defense.

7           So I think that the problems that we're talking  
8 about, the hypothetical problems we're talking about are  
9 extremely remote. And I agree with Colonel Thomas, there's  
10 not a need to do anything here.

11           MJ [COL POHL]: Thank you, Mr. Harrington.

12           Any other defense counsel wish to be heard?

13           LDC [MS. BORMANN]: Judge, with respect to Mr. Bin'Attash,  
14 we filed a response to this. We would just simply rest on our  
15 pleadings and adopt Mr. Harrington's argument.

16           MJ [COL POHL]: Okay. Mr. Ruiz and Mr. Nevin, anything  
17 further? Okay.

18           LDC [MR. RUIZ]: No, thank you, Judge.

19           MJ [COL POHL]: Mr. Ryan.

20           TC [MR. RYAN]: Yes, sir.

21           Your Honor, the phrase that might give you some  
22 cause -- or I suggest should give you some cause for concern  
23 is "if it exists." They're telling you essentially that this

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 isn't really part of your concern. Everything else, when they  
2 need something certainly is, but until -- and for that they'll  
3 give you theories of defense and all sorts of privileged  
4 information. And it's their right. I don't quarrel with it.

5           But this particular issue raises concerns that it is  
6 your business because, as the old saying goes, it's your  
7 courtroom, we just work here. Your Honor has a very specific  
8 and unique obligation to protect the proceedings both as  
9 stated by the Supreme Court, as stated in various rules. And  
10 one of those, as has been cited to you many times, is the  
11 obligation, responsibility, to ensure conflict-free counsel.  
12 So "if it exists" is not something that should be said to a  
13 court who has a very strong obligation to know if it exists.

14           Number two, sir, Your Honor's hypothetical was, I  
15 think, a very telling point here. It's been said to you in  
16 this courtroom that when -- as a joint defense agreement, the  
17 privilege just gets bigger. It doesn't go to the outside. It  
18 just gets bigger; I think those are the exact words. So that  
19 all of the parties in it are operating under the same  
20 privilege when it comes to communications.

21           Now, Your Honor's hypothetical was if something's  
22 gathered, if some information is gathered in the course of  
23 those meetings, those joint defense agreement sessions, which

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 later is contradicted or is different from trial testimony,  
2 the real point of the question is simply this: One of the  
3 lawyers in that agreement where the privilege just gets  
4 bigger, can he then use those privileged statements to hurt  
5 the person that's on the stand who essentially he's  
6 representing during the course of that agreement?

7           Colonel Thomas says sure, he can. Mr. Harrington  
8 says no, he can't. Here's an interesting question: What do  
9 the accused think? What do they know? And all of this,  
10 Judge, just points, I believe, to the need for the whole  
11 thing. We can't have people operating from such different  
12 situations.

13           Third, as to the chief defense counsel, General  
14 Baker, and you heard different statements as to him, too, but  
15 he is not a party to these proceedings. He is not privy to  
16 privileged information as far as I know, so presumably, he  
17 can't see it either for the same reasons they don't want you  
18 to see it.

19           On the other hand, General Baker, although we  
20 certainly don't dispute that he has significant, serious role  
21 within the case and responsibilities, but it's Your Honor's  
22 obligation sua sponte to ensure conflict-free counsel, not the  
23 chief defense counsel's.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           And last, Judge, as to this matter of intrusion,  
2 Judge Patel went through the same kind of analysis and  
3 recognized, I believe, in her words, that there was some  
4 slight intrusion involved in the sense that she was asking for  
5 something that was going on between the parties; however, she  
6 noted that it was overborne by her responsibility to the  
7 larger case as a whole, and her unique responsibility, as I  
8 noted, to ensure conflict ----

9           MJ [COL POHL]: To be fair, I understand there's a lot in  
10 that case, but in that case, she was starting out from a  
11 premise that there were conflicts of interest between the  
12 defendants sua sponte. Some were pleading guilty, some  
13 weren't. One apparently had been murdered. I mean, there  
14 was -- there was a lot of ----

15          TC [MR. RYAN]: Oh, yeah, Judge.

16          MJ [COL POHL]: There's a lot of ----

17          TC [MR. RYAN]: Oh, yeah.

18          MJ [COL POHL]: You've got lawyers representing various  
19 parties. I understand the law in it, but the facts are a  
20 little ----

21          TC [MR. RYAN]: Oh, there's no question, Judge, one of  
22 those ----

23          MJ [COL POHL]: I sympathize with her trying to resolve

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 all of those things ----

2 TC [MR. RYAN]: Yeah, well -----

3 MJ [COL POHL]: -- and the 20,000 pages of FBI stuff ----

4 TC [MR. RYAN]: And one of those large -----

5 MJ [COL POHL]: -- factually complex cases.

6 TC [MR. RYAN]: One of those large street gang cases,  
7 Judge, the issues are fast and furious and wide and varied, no  
8 question about it; however, and no question that in that case,  
9 she could see the writing on the wall that there was going to  
10 be a lot of flipping and cooperating and so on and so forth.

11 Where I disagree with counsel is to this issue of  
12 whether people are going to testify. And his answer to you is  
13 essentially, eh, don't worry about it, we'll burn that bridge  
14 when we get to it, I think it's wrong. I think it's wrong in  
15 light of the things you've heard in the course of the case.

16 There have been statements made indicating that at  
17 least one of the accused may very well in fact testify. We've  
18 seen evidence where the accused -- one or more of the ----

19 MJ [COL POHL]: Well, I can't make a ruling based on a  
20 proposition that they won't testify.

21 TC [MR. RYAN]: No, you can't. You can ----

22 MJ [COL POHL]: I mean, I have to assume they might or  
23 they might not, but ----

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 TC [MR. RYAN]: And we don't care either way and the  
2 commission probably doesn't, either. But it is Your Honor's  
3 obligation and our obligation as well to guard against all of  
4 the possibilities that can come up as best we can see them  
5 down the road, which is certainly very difficult. But one of  
6 those things, and it's come up now, Judge, is when that  
7 happens, when and if that happens, what is going to be the way  
8 that it's handled.

9 Not an awful lot in this case has gone exactly as  
10 planned, and I don't think Your Honor can sort of -- should  
11 whistle past the graveyard as to the issue of somebody taking  
12 the witness stand who has already been part of a joint defense  
13 agreement. It's going to raise a lot of issues.

14 Based on all of the arguments today, sir, I think the  
15 government's motion is well taken.

16 MJ [COL POHL]: Thank you.

17 TC [MR. RYAN]: Thank you, sir.

18 MJ [COL POHL]: Colonel Thomas, anything further?

19 DDC [Lt Col THOMAS]: Your Honor, not based on that.

20 MJ [COL POHL]: Mr. Harrington?

21 LDC [MR. HARRINGTON]: Judge, just to carry the  
22 hypothetical one step further, based on what Mr. Ryan says,  
23 what if you get a joint defense agreement and you say to

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 yourself, okay, I'm going to have a questioning of the  
2 accused, say, outside the presence of the prosecution, to make  
3 sure that they understand it; and there's nothing in there  
4 about whether they testify. You've got all sorts of other  
5 provisions and agreements and you go through, right, and  
6 there's nothing in there about them testifying or somebody  
7 leaving and testifying. And they say they understand that.  
8 And you say -- that question is up in the air, it's open.  
9 What happens then? Do we still have a joint defense  
10 agreement, or does it have to have some provisions in there?

11           Do you have a checklist that you're going to go  
12 through and ask them -- and say, I've considered all of these  
13 problems that you may have in this case, and I'm just saying  
14 to you, do you understand that's not in the agreement? They  
15 say yes. Do you understand that's a problem for you? They  
16 say yes. Okay.

17           And the case goes on. What do you say, there's no  
18 joint defense agreement then because it doesn't meet my  
19 standard or the ABA standard or somebody else's standard, and  
20 therefore you guys can't have a joint defense agreement?

21           Or do you say, okay, what's going to happen at trial?  
22 One of the accused gets up and testifies and there's nothing  
23 in the agreement about it. What happens then? We try to

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 object? What are we going to object on, that it's not in the  
2 agreement but it's fair game, whatever it is?

3 MJ [COL POHL]: No. I think the concern is, it comes up  
4 in the middle of the trial, and just hypothetically -- and I  
5 want to keep this out of personalities because I don't want to  
6 confuse the issue -- but defendant A testifies, attorney for  
7 defendant B wants to cross-examine him, and saying it's fair  
8 game, and the attorney for defendant A then says, no, it's  
9 not, now what do we do?

10 That's what I'm saying is -- I understand what you're  
11 saying, it's not in the agreement. But I'm saying if you guys  
12 don't all know what the terms are, how do you know -- that  
13 scenario happens at trial, what happens next? And how do you  
14 put your client on without knowing what cross-examination he  
15 may be subject to?

16 LDC [MR. HARRINGTON]: Right. But that goes to the point  
17 I'm making. That goes to the quality of the agreement and  
18 that goes to the notion that it covers all sorts of  
19 contingencies. And you may say, that is the most important  
20 contingency you can cover. And we make a conscious decision  
21 we're not going to cover it and our clients understand that,  
22 do we still have a joint defense agreement ----

23 MJ [COL POHL]: Okay.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. HARRINGTON]: ---- and my answer is yes.

2 MJ [COL POHL]: That goes to the scenario we just talked  
3 about. If it's not in the joint defense agreement, there's no  
4 limit otherwise on the cross-examination, or there is  
5 limitation because it's not in the agreement? Do you  
6 understand what I'm saying?

7 LDC [MR. HARRINGTON]: Yes.

8 MJ [COL POHL]: Anything not in the agreement, then  
9 anything is just as if there is no agreement. And that would  
10 include, for example, nothing in the agreement addresses  
11 cross-examination of a co-accused member of the agreement,  
12 therefore, cross-examination of the co-accused within the  
13 agreement would be just the same as if it's not in the  
14 agreement.

15 LDC [MR. HARRINGTON]: No. What I'm saying is you would  
16 have to look at the four corners of the agreement and say is  
17 there some basis to the objection of this testimony? And  
18 somebody may say yes, there's a privilege problem, and you  
19 would have to address that, right.

20 MJ [COL POHL]: Four corners of what, if it's not in  
21 writing?

22 LDC [MR. HARRINGTON]: The joint defense agreement.

23 MJ [COL POHL]: But how do I know what's in the agreement?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 How do I know that?

2 LDC [MR. HARRINGTON]: Because somebody's going to raise  
3 the privilege, and at that point in time, you would have to  
4 say what's the privilege based on? And at that point in time,  
5 the attorney would have to articulate to you.

6 MJ [COL POHL]: Saying this is in the joint defense  
7 agreement that we didn't write down, and this is what I  
8 remember it to be?

9 LDC [MR. HARRINGTON]: Could be. Could be.

10 Judge, just one last thing. The -- you know, the  
11 agreement that -- cited by Mr. Ryan before, part of the  
12 problem with the agreement, the real overbearing one, was that  
13 nobody could leave the agreement or nobody could cooperate.  
14 That goes to a fundamental right that the person has, whether  
15 to testify or not testify on their own behalf, which is  
16 something that's just -- is not involved in this situation.

17 MJ [COL POHL]: Okay. Thank you, Mr. Harrington.

18 Mr. Nevin, you said you wanted to be heard?

19 LDC [MR. NEVIN]: Well, and Mr. Harrington may have  
20 covered this, Your Honor, but -- and certainly Stepney -- it's  
21 interesting to me that Stepney, I believe it's true, is the  
22 only reported case in which a judge has said you will in  
23 advance of trial write this down and give it to me for my

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 perusal, approval, rejection, whatever.

2           And I think that Stepney is a case which is -- and I  
3 don't mean to say that this is not a complex case we're in  
4 here. Of course it is. But Stepney is complicated in another  
5 way, as the military commission has said. It's a street gang  
6 drug case with different levels of culpability, different  
7 charges, different loyalties, people hired by different --  
8 lawyers hired by different entities and agencies and all of  
9 these things weaving in and out.

10           And I know Mr. Ryan knows plenty about this. I think  
11 there was a period of his career where he did lots of these  
12 cases, or maybe nothing but these kinds of cases; and we've  
13 all worked on these kinds of cases as well. And those  
14 problems are written all over those kinds of cases. And I  
15 think it's interesting that -- and to be expected that Judge  
16 Patel wanted to resolve that on the front end. But that's the  
17 only case I know of where that's ever happened.

18           And I think that there is no such thing as a joint  
19 defense agreement that is like some model joint defense  
20 agreement that has to be followed in every case by every  
21 defendant. Defendants are capable of entering into joint  
22 defense agreements that say all sorts of things.

23           And it's interesting to me that if -- finally, that

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 if you take a look at cases that get reversed on appeal or on  
2 habeas, you're going to find an awful lot more of them getting  
3 reversed on appeal or on habeas because of ineffective  
4 assistance of counsel than you are because of something --  
5 some finely wrought detail that arises out of a problem with a  
6 joint defense agreement.

7           But I take it the military commission is not going to  
8 begin inquiring with each defense team: What have you told  
9 your client about his right to present mitigation? What have  
10 you done for him on the matter of mitigation? Whom have you  
11 spoken -- to whom have you spoken? What experts have you  
12 retained? Why haven't you retained an expert who says this?  
13 Why haven't you traveled to this place to talk to this  
14 witness?

15           I mean, the way we set this system up is that we put  
16 counsel representing the interests of these individual  
17 defendants, and there's no way for the military commission to  
18 wade in to even the things that are to most likely cause a  
19 problem on appeal, never mind a joint defense agreement.

20           And I think what Mr. Harrington maybe was saying is  
21 that you get yourself on a little bit of a slippery slope here  
22 when you start saying bring me your joint defense agreement,  
23 let me make a judgment about what it says, whether it's

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 sufficiently complete or not, or whether it needs  
2 additional -- and when you impose those things, you inject  
3 yourself into the process here in a way that I think is not  
4 workable in a larger sense, and is really not necessary, which  
5 you see by virtue of the fact that you really only have one  
6 reported case where it ever happened.

7           So I wanted to say that. Thank you.

8           MJ [COL POHL]: Do you think it would be useful that it be  
9 in writing, even though it's not reviewed by anybody?

10          LDC [MR. NEVIN]: Well, I think sometimes it might and  
11 sometimes it mightn't. I have done both. Sometimes you don't  
12 have time. Sometimes you're in the middle of trial and you  
13 turn back and you say, could we talk for a second and you  
14 don't -- you can't write it down.

15          MJ [COL POHL]: Do you think you have time in this case?

16          LDC [MR. NEVIN]: Well, yes, Your Honor, I suppose I  
17 probably do, but ----

18          MJ [COL POHL]: I'm not saying ----

19          LDC [MR. NEVIN]: And look -- no, no, but, I mean, it's --  
20 I agree.

21          MJ [COL POHL]: I'm just trying to -- not necessarily to  
22 be reviewed, I'm saying so if three years from now there's a  
23 dispute of what the agreement was ----

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. NEVIN]: I understand.

2 MJ [COL POHL]: ---- I'm not even saying that it gets  
3 reviewed, just put it in writing and everybody sign it, so we  
4 know that as of October or whatever 2016, this is what we  
5 agreed to be.

6 So I'm concerned about Mr. Harrington's hypothetical  
7 that at trial all of a sudden we're going to -- there may be a  
8 disagreement what's in the agreement and we look at the four  
9 corners, as he said, of an oral agreement, and that ----

10 LDC [MR. NEVIN]: You know.

11 MJ [COL POHL]: ---- may be difficult.

12 LDC [MR. NEVIN]: I think, obviously, a contract is more  
13 approvable if it's in writing than if it's not, typically.

14 MJ [COL POHL]: Yeah.

15 LDC [MR. NEVIN]: But really, I think viewed more broadly,  
16 the same problem exists -- I may have a tactical, intentional  
17 reason that it not be in writing and -- if I decide to enter  
18 into a joint defense agreement. And I could say more about  
19 that in an ex parte environment if the military commission  
20 were interested, but there could be very valid tactical  
21 reasons to not have this thing be in writing. But that's a  
22 choice, a situational choice that counsel have to make along  
23 with approximately a million other things a day or a year that

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 have to be decided that I know the military commission doesn't  
2 have any intention of being involved in. And I say why this?

3           And yes, when we -- when and if we try this case some  
4 day, somebody's going to stand up and say objection a lot, and  
5 military commission obviously is going to be in the position  
6 of sorting that out. And 99.999 percent of cases that have  
7 been litigated successfully in this world have been done  
8 without doing what the prosecution is asking you to do. None  
9 of those worlds have come to an end and it's not very likely  
10 to happen here.

11           MJ [COL POHL]: Thank you. Assuming there's nothing  
12 further, I'll take that issue under advisement and issue a  
13 ruling in due course. Given the time, we will recess the open  
14 session now.

15           ADC [MS. LACHELIER]: Judge, I have one matter, if I can  
16 address it?

17           MJ [COL POHL]: Yes.

18           ADC [MS. LACHELIER]: We got a copy of your order on 505s  
19 with respect to closing proceedings and what will be heard in  
20 closed session, and that included closing an argument on a  
21 motion that you asked to be -- to undergo a classification  
22 review, 018TT. Every paragraph in that motion is  
23 unclassified. And while the exhibits attached are

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 classified -- some of them remain classified, that argument  
2 can be held in an 806, the remainder, the legal arguments in  
3 the motion are unclassified and can be discussed in an open  
4 session.

5 MJ [COL POHL]: We'll discuss this at the 806 if we can  
6 cut part of it out. I don't want to discuss in open session  
7 why.

8 ADC [MS. LACHELIER]: Okay. We just wanted to raise our  
9 objection.

10 MJ [COL POHL]: I understand. We can certainly adjust  
11 fire if necessary, but I don't think we can adjust fire  
12 without necessarily discussing the classified information  
13 itself. We're not going to do that in an open session.

14 Okay. The commission will be in recess for this last  
15 open session. The detainees can stay here until 1200. At  
16 that time, they'll return to their detention facility. At  
17 1300, we will have a closed session to discuss classified  
18 evidence under Military Commission Rule 806.

19 Commission is in recess.

20 [The R.M.C. 803 session recessed at 1054, 14 October 2016.]

21 [END OF PAGE]

22

23

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**