

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 [The R.M.C. 803 session was called to order at 1108, 26 July  
2 2016.]

3 MJ [COL POHL]: The Commission is called to order. All  
4 parties are again present that were present when commission  
5 recessed except for Major Poteet. And, Mr. Nevin, you  
6 indicated that you are ready to proceed without Major Poteet?

7 LDC [MR. NEVIN]: Yes, sir.

8 LDC [MS. BORMANN]: Judge?

9 MJ [COL POHL]: Yes, ma'am.

10 LDC [MS. BORMANN]: I'm sorry, I would ask permission to  
11 have Major Seeger excused as well. I meant to do that earlier  
12 and I forgot.

13 MJ [COL POHL]: Sure. Now Major Poteet has joined us, so  
14 we're changing one major for another.

15 Mr. Connell.

16 LDC [MR. CONNELL]: Thank you, sir.

17 The motion before the military commission is 373A.  
18 It is a motion to compel discovery and to the -- an intrusion  
19 into the attorney-client relationship. It relates to the  
20 seizure of some attorney-client privileged DVDs in June of  
21 2015.

22 By way of background, I want to be clear that this is  
23 only the unclassified portion of this 373A. You issued an

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 order granting our 505(g) notice and there will be a separate  
2 classified version we expect to be argued on Friday. To be  
3 clear, the slides that I have coordinated with the CISO are a  
4 subset of the classified version of the slides. They're fully  
5 unclassified. And I made a redaction as requested by the  
6 CISO.

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: With that in mind, I have previously  
9 provided a copy of the slides to the parties and to the  
10 military commission and to the CISO. I would ask permission  
11 to display them to the public and ask for the feed from  
12 Table 4.

13 MJ [COL POHL]: Go ahead.

14 LDC [MR. CONNELL]: While that's coming up on the screen,  
15 by way of background, in September of 2014, as one of the  
16 investigative trips which my team has engaged in, I traveled  
17 to Kuwait, which is where Mr. al Baluchi was born, and to  
18 Dubai, which is where he lived from 1998 to 2001, to  
19 investigate both the factual and the sentencing aspects of the  
20 case.

21 During that time I took a number of video recordings  
22 on my phone of things both trivial and important so that I  
23 could discuss them with Mr. al Baluchi. Those recordings

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 happened to include on one day the water and light show which  
2 is at the Mall of Dubai, because at night after my duties for  
3 the day were done, I went to the mall and they had a water and  
4 light show which I recorded. It so happens that the tallest  
5 building in the world, the Burj Khalifa, is depicted, sort of  
6 the outline of it is vaguely visible in the background of the  
7 water and light show. I took the -- there were many much more  
8 important videos as well. That's just one that's going to  
9 become important in the conduct of this case -- or conduct of  
10 this motion.

11 I took those recordings and burned them to a disc  
12 to -- one of -- a separate disc, one from Kuwait and one from  
13 Dubai. Those are pictured on the screen, the actual discs  
14 which are now in the possession of the military commission as  
15 exhibits. We labeled them according to the requirements of  
16 AE 018U, submitted them to the privilege team -- you can see  
17 in red the privilege team's marking of 10018, Mr. al Baluchi's  
18 ISN number; PT8, who is the individual who marked the  
19 document; and LCM for lawyer-client material. They are  
20 otherwise properly labeled in accordance with AE 018U -- and  
21 took them, discussed them with Mr. al Baluchi. He had them in  
22 one of his legal bins.

23 Now, as the military commission has discussed before,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 there's an awful lot of legal material in this case, and  
2 the -- as I understand it, they don't keep all legal bins in  
3 their single cell at any time, that many of the legal bins are  
4 stored somewhere else in the facility, I don't know where, and  
5 when needed those legal bins are -- a guard will go get them  
6 and bring them to wherever they are needed, whether that be  
7 court or Echo II for an attorney visit or the defendant's  
8 cell.

9           On or about 18 June of 2015, the government seized  
10 the two discs which are pictured on the screen, and one more  
11 disc which was not attorney-client privileged communication  
12 but was rather other case-related material, which was labeled  
13 Ya Sin, Y-A, new word, S-I-N, and seized these from a legal  
14 bin which was not in Mr. al Baluchi's custody at the time. It  
15 was one of these which was being stored somewhere else. JTF  
16 did not inform counsel in any way of this seizure, did not  
17 consult with counsel as required by AE 018U; although  
18 according to Mr. al Baluchi's statement, which is already part  
19 of the record, when he insisted where are my discs, they  
20 falsely told him that they had -- he should talk to his  
21 lawyers because they had told his lawyers all about it.

22           On June 23rd, Colonel Thomas returned from an  
23 overseas trip and learned of this situation and began an

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 extensive campaign to pry loose some information about what  
2 happened to our attorney-client information. The e-mail which  
3 is depicted on the screen attached as an exhibit is just the  
4 opening salvo of what consumed Colonel Thomas' time for  
5 several weeks. It was an extensive e-mail and phone campaign  
6 to get some information about what had happened. The JTF  
7 never provided any useful information. What they did was  
8 refer us instead to the prosecution. All of that's heavily  
9 documented in AE 373 and 373A.

10 Now, on the 14th of July of 2015, the watch commander  
11 brought back two of the three discs, he brought back the one  
12 which was not pictured labeled Ya Sin and he brought back the  
13 one labeled Kuwait. He did not bring back the one labeled  
14 Dubai. After that time -- which totally confused us, I will  
15 tell you, why he would give back two discs and not the other.  
16 We tried to continue to get information from the prosecution,  
17 both informally through phone calls to try to find out what  
18 was going on and more formally. As we received new  
19 information, our requests became more and more formal.

20 By 25 July of 2015, we filed DR-222-AAA, discovery  
21 request seeking specific information. And then the next thing  
22 that happened was a few weeks later, on 11 August 2015, an  
23 assistant staff judge advocate returned the third disc, the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Dubai disc, to Mr. al Baluchi.

2           Having received no information about what was going  
3 on, on 21 September 2015 we filed the base motion currently  
4 held in abeyance at 373 and a day later we filed this motion,  
5 373A. The reason why I'm going through this in some detail is  
6 to explain how -- what discovery was provided and what  
7 discovery remains to be provided.

8           A few days later, on September 25 -- on 25 September  
9 2015, the government produced 79 pages of discovery, all of  
10 which is classified and will be discussed at a later time.  
11 But the important part for today, the unclassified portion of  
12 this is that the -- all of the witnesses who are described in  
13 that discovery use pseudonyms, that there is some sort of  
14 pseudonym which is used for them, whether it's sort of an  
15 on-the-fly pseudonym made up obviously for the purposes of  
16 this case or whether it's a -- you know, a sort of employee  
17 number which is not associated with an individual but rather  
18 is purely a pseudonym. The other thing is that much of the  
19 core of the discovery is heavily redacted and, as far as I can  
20 tell, not pursuant to authorizations from the military  
21 commission under Rule 505.

22           So immediately after that, on 29 September of 2015,  
23 we filed another discovery request with the prosecution,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 DR-222A, asking for identification of some of the witnesses.  
2 Our denial to that came about five, six, seven days later on  
3 5 October. We filed another discovery request, 222B-AAA on 14  
4 October. I will not describe in this forum the contents of  
5 it, but three months later in January, the government denied  
6 that request. Immediately after that, we filed yet another  
7 sort of omnibus request putting them all together, which was  
8 DR-222C, in which we laid out in detail the pseudonyms of the  
9 witnesses, requesting witness information for them. The  
10 government denied that request on 26 February of 2016.

11           The core of the unclassified part of this argument,  
12 Your Honor, is how witness pseudonyms are to be handled. The  
13 government takes the position that once they have provided  
14 discovery using pseudonyms -- that they know, right? It's not  
15 unidentified persons, it's identified persons that the  
16 prosecution knows -- then our only recourse is to request  
17 government assistance in either interviewing them or producing  
18 them as a witness.

19           The -- it is our position, however, given the  
20 importance recognized by the Supreme Court and reflected in  
21 the military commissions itself -- Military Commissions Act  
22 itself of witness information, the name and the contact  
23 information of a witness, that that is the discovery that we

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 are seeking to compel. The importance of that has been  
2 demonstrated in this courtroom many times.

3           Early in the case -- early in the case, we had filed  
4 or someone had filed a request to compel the government to  
5 produce a witness, and the military commission took us to task  
6 for not even having interviewed the witness or attempting to  
7 interview the witness before calling them. After that, we  
8 instituted a team policy, which I think is sound and has paid  
9 off, which is that before we ask any witness to be compelled,  
10 we either interview them or can have a -- can demonstrate to  
11 you, the military judge, why we have not been able to  
12 interview them for some particular reason, such as they -- we  
13 approached them, they declined to be interviewed.

14           The -- this principle, the access to witnesses  
15 principle, is reflected in not only in the Military  
16 Commissions Act at 949j, but also in Rule for Military  
17 Commission 701(j), which prohibits any party from unreasonably  
18 impeding the access of another party to a witness.

19           MJ [COL POHL]: Mr. Connell, have you -- has your  
20 experience of requesting to interview witnesses from the  
21 detention facility been positive?

22           LDC [MR. CONNELL]: You mean requesting from the  
23 government?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: No, I'm saying is -- the normal course of  
2 business ----

3 LDC [MR. CONNELL]: You mean, have I ----

4 MJ [COL POHL]: ---- is that when you want me to produce a  
5 witness, you've talked to the witness, the witness says X ----

6 LDC [MR. CONNELL]: Right.

7 MJ [COL POHL]: ---- and we determine whether the witness  
8 needs to be produced -- we're talking about live witnesses  
9 here, so we don't have to revisit what we talked about  
10 earlier.

11 LDC [MR. CONNELL]: We'll just bracket all of that.

12 MJ [COL POHL]: Okay. And then, you know, you have talked  
13 to the witness, he said X to me, and that's why it's relevant  
14 for this issue. Or I have this witness' statement from  
15 another place and here's what I got. I mean, that's, quite  
16 frankly, the way it's strongly encouraged in courts-martial.  
17 I can't speak for federal court, it's just an efficient way to  
18 do business. Understanding that witnesses don't necessarily  
19 have to talk to anybody pretrial, that's their choice.

20 LDC [MR. CONNELL]: Of course.

21 MJ [COL POHL]: So is it your experience when you want to  
22 talk to people on this kind of issue that the response is  
23 we're not going to talk to you?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. CONNELL]: No, it is completely mixed. We've had  
2 the full range of responses from sure, when can I meet you for  
3 coffee, to get away from me, never speak to me again. We've  
4 had the full range -- just like with any other kinds of  
5 witnesses, we get the full range of responses when we contact  
6 the witnesses. Some of them are willing to speak, some of  
7 them are not willing to speak. Some of them would like a  
8 lawyer. It's the full range of litigation experience.

9 MJ [COL POHL]: So would it be fair to say there does not  
10 appear to be -- I'm talking about the detention facility here,  
11 primarily, and there may be other witnesses out there. So  
12 it's your experience in dealing with the detention facility  
13 that if you can identify a witness, which is part of your  
14 argument here, is there's no blanket prohibition of talking to  
15 defense counsel or blanket discouragement, it's just an  
16 individual choice?

17 LDC [MR. CONNELL]: I have -- I can't speak to  
18 discouragement or encouragement. I know there's a discovery  
19 motion on that topic. I can say if there is discouragement,  
20 some people choose to disregard that discouragement and speak  
21 to us anyway.

22 MJ [COL POHL]: And if there is encouragement, some choose  
23 not to talk to you anyway.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. CONNELL]: Exactly right.

2 MJ [COL POHL]: Go ahead.

3 LDC [MR. CONNELL]: So nothing in the structure of the  
4 rules allows the government to impede our access to witnesses  
5 by using pseudonyms. Now, if they want to use pseudonyms in  
6 their report, that's fine. They can use -- they can call  
7 people whatever they want. But upon request, they need to  
8 identify who the pseudonyms refer to or we have no way of ever  
9 speaking to them.

10 This came up once before with respect to  
11 Mr. Mohammad's medical records, and the military commission  
12 compelled the government to produce the pseudonyms to  
13 Mr. Mohammad's team of the names or the numbers which were  
14 used in the medical records.

15 The -- this is not a request for, you know, a list of  
16 everyone who has worked at Camp VII. These are identified  
17 people. It is -- we listed them by their either number or by  
18 whatever other pseudonym was used in the report. It's, you  
19 know, it's clear from looking at the discovery what their  
20 actual significance to the case is. And the process of using  
21 unpenetrable synonyms -- pseudonyms, excuse me, by the  
22 government reasonably impedes our access to witnesses. We  
23 can't interview them, we can't even request to interview them

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 because they're invisible to us.

2           The second point that I want to make in open court is  
3 the -- the redactions which were placed in the discovery, even  
4 though it was classified -- you know, I know that we have  
5 ongoing discussion of what role for the military commission in  
6 506 unclassified discovery, but the one thing that is  
7 completely clear from 505 is that the military judge has to  
8 authorize deletions, withholdings, or substitutions when the  
9 government is going to do so on classified discovery. That is  
10 the situation here.

11           The government unilaterally redacted important  
12 information, information that would help us determine what  
13 happened in this invasion of attorney-client privilege without  
14 the military commission's authorization or even review of  
15 these redactions.

16           The -- I'd like to answer any other questions, but  
17 that's the unclassified portion of this ----

18           MJ [COL POHL]: Okay.

19           LDC [MR. CONNELL]: ---- presentation.

20           MJ [COL POHL]: Any other defense counsel left to be heard  
21 on this particular issue? It may be just related to  
22 Mr. Connell. Apparently not.

23           Mr. Ryan.

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

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

2 MJ [COL POHL]: Good morning.

3 TC [MR. RYAN]: Your Honor, I don't take issue with some  
4 degree of what counsel said. This was a situation where --  
5 and ultimately in their motion, they recount the course of  
6 three separate seizures going back to August 2014. This  
7 morning, counsel addressed the last of the three, which is  
8 18 June of 2015, and talks about the items that he seeks the  
9 commission to compel us on.

10 I do want to just sort of note for the commission's  
11 consideration that the discovery process was long, and I don't  
12 dispute the fact that there was a good deal of running around  
13 trying to get information from the -- to the prosecution that  
14 was for the most part sent over.

15 On a grand scale, I'll say this: The many items that  
16 were requested by counsel over the course of three separate  
17 seizures, we've turned over now what amounts to in the  
18 vicinity of about 100 pages or so. We do not -- the pages  
19 consisted of many things, but most significantly, any report  
20 having to do with any of the seizures, that is, the person  
21 taking it, the person who saw it, anybody who had made a --  
22 any sort of official sworn report out there has been turned  
23 over. In addition, other items counsel asked for, including

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 some internal documents to the camp operation, we've turned  
2 over, another sworn statement, a declaration that Your Honor  
3 has seen, and so on.

4 I'm raising this in part because a good -- some  
5 degree of it came after counsel's initial filing in 373A, so  
6 it was not accounted for completely in the pleadings. The  
7 final pleading on the subject of discovery came in the -- came  
8 from defense counsel responding to the government's reply.  
9 And as counsel's pointed out today, I think we've narrowed it  
10 down significantly to issues concerning pseudonyms and  
11 identification.

12 We turn over -- I'm sorry, we deny access to  
13 identifying information for two reasons. First, as I just  
14 stated, we've turned over a good deal -- or any reports  
15 germane to the issue of the seizures themselves by those  
16 persons involved, and some of them affect sworn statements.  
17 They correspond to the facts as best they exist, as best we  
18 know them; we know of nothing to indicate otherwise. And the  
19 reports we believe put counsel in a position of being able to  
20 argue his case to this commission. So we deny first on the  
21 grounds of relevance.

22 MJ [COL POHL]: Are the sworn statements with a name  
23 attached or is it the pseudonym.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 TC [MR. RYAN]: Pseudonym in the sense of identifying  
2 information peculiar to the camp.

3 MJ [COL POHL]: So it's the government's position that the  
4 defense has a sworn statement and that's all they are entitled  
5 to and they don't have the right to go talk to the person who  
6 made the sworn statement to flesh it out or talk to them?

7 TC [MR. RYAN]: In these circumstances, Judge, that is  
8 our -- that is our position.

9 MJ [COL POHL]: Okay.

10 TC [MR. RYAN]: Now, there's always, of course, the  
11 differences that will come up, but for this one, that's our  
12 position as we stand here today. The -- and I do concede that  
13 the identifying information I was just talking about within  
14 the reports themselves are not, you know, a middle initial or  
15 something that can somehow be traced to an actual person. For  
16 the most part they're identifiers within the camp, and you've  
17 seen this in terms of some of the people who have taken the  
18 witness stand.

19 But the more important reason besides relevance and  
20 cumulativeness that we deny is because of the nature of the  
21 information itself. Counsel seeks, the defense seeks  
22 identifying information for these persons. The persons we're  
23 talking about, of course, are Servicemembers in the course of

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 doing their duty at the camp in regard to the guarding of the  
2 five individuals, of course, charged in this case. This  
3 matter makes it different than, say, somebody, a lay witness  
4 as to some event.

5           As Your Honor knows, Protective Order 2 establishes  
6 that information relating to DoD personnel constitutes -- and  
7 force protection constitutes sensitive -- quote, sensitive  
8 discovery materials. More importantly, the information that's  
9 required -- acquired as part of the official duties of the  
10 person's working at the camp constitutes official government  
11 information pursuant to Army Regulation 27-40.

12           And the court's indulgence, just one moment.

13           MJ [COL POHL]: Does the Army regulation control?

14           TC [MR. RYAN]: Well, Judge, I cite it as an example. All  
15 of them are pretty similar when this comes to the aspect I'm  
16 citing to Your Honor right now. The glossary in the Army  
17 regulation states, "All information of any kind acquired by  
18 DoD personnel as part of their official duties or because of  
19 their official status within the department constitutes  
20 official government information."

21           That same regulation also provides -- and this is  
22 where we get back to the land of Touhy, sir. The same  
23 regulation provides if present or former Department of Army

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 personnel receive, and I'm paraphrasing, a request for an  
2 interview related to actual or potential litigation, the  
3 individual immediately should advise the appropriate SJA or  
4 legal advisor. Then there is another section as to the  
5 requester's responsibilities in terms of timing specificity  
6 and other matters relating to Touhy that we've discussed in  
7 detail before.

8 MJ [COL POHL]: Doesn't 27-40 address civil litigation?

9 TC [MR. RYAN]: Sir, I'm sorry?

10 MJ [COL POHL]: Doesn't 27-40 address civil litigation?

11 TC [MR. RYAN]: It pertains, Judge, to any situation which  
12 Servicemembers are called upon in potential litigation,  
13 including this. So as I said, Judge, this is the Army's  
14 version ----

15 MJ [COL POHL]: Let me ----

16 TC [MR. RYAN]: There are of course, ones that pertain to  
17 everyone else, every other agency within the federal  
18 government.

19 The prosecution, to facilitate what is now becoming  
20 akin -- or what is akin to a discovery request for, quote,  
21 official government information in the form of an interview  
22 has established a process. This process, we submit, is rooted  
23 in the law and it's an office-wide policy in the Office of the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Chief Prosecutor. Your Honor has seen it in the course of  
2 this litigation as AE 342 Attachment C. It's what's known as  
3 the government's briefing book regarding witnesses that was  
4 submitted in the Hadi case. It was submitted in Hadi al-Iraqi  
5 at the request of the military judge.

6 MJ [COL POHL]: I'm sorry, what's the source document for  
7 that?

8 TC [MR. RYAN]: It's AE 342 Attachment C, Your Honor.  
9 It's obviously another motion but it's been brought up in that  
10 situation.

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

12 TC [MR. RYAN]: That procedure that's laid out in great  
13 detail in that, in that pleading, and that is the policy of  
14 this office, calls for -- and we responded as such in the  
15 course of our discovery responses to the defense, that when  
16 they seek discovery in the form of information coming from a  
17 Servicemember that he acquired as part of his official duties,  
18 that the defense should put in an actual request for an  
19 interview as opposed to just a demand that a person's identity  
20 be made known.

21 If the person in fact has relevant material ----

22 MJ [COL POHL]: Excuse me.

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

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: When they do that, then what happens?

2 TC [MR. RYAN]: If the -- Your Honor, it's the policy --  
3 or I'm sorry, the process is established, I think, clearly in  
4 that pleading. This is what we set out to do. In the course  
5 of this litigation and probably an awful lot of others,  
6 there's an awful lot left to chance, an awful lot left -- an  
7 awful lot left to subjectivity in terms of how it goes.

8 Example: In this case, we've had situations,  
9 complaints where somebody shows up at a Reservist base, say in  
10 Louisiana, announces they're there from the government,  
11 quote/unquote, and it wants to ask questions. Now, lots of  
12 frantic phone calls ensue, lots of trying to determine who  
13 such a person is. And on occasion we've had persons who were  
14 the subject of interviews or ASJAs responding in very loud  
15 manners to such people requesting that this isn't the way to  
16 do business, and they have no right to just walk in, knock on  
17 a door, and say I want to talk to so and so.

18 So our process, Judge, we think is the fairest way  
19 that it occurs. We've produced many, many witnesses in this  
20 case -- I don't think Your Honor would argue with me on  
21 this -- for the defense, when they sought it. And there are  
22 times that we've come to Your Honor and say we don't believe  
23 it's necessary. And if Your Honor disagrees with us,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 obviously we put them up. On the other hand, there have been  
2 many witnesses where the government has agreed based on the  
3 pleadings itself that are relevant and their testimony is  
4 material and necessary and so on.

5 So this process ----

6 MJ [COL POHL]: What's the standard you apply if -- let me  
7 make sure I understand this, is you want the defense to submit  
8 a request for interview through the government?

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

10 MJ [COL POHL]: And then arrange the interview?

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

12 MJ [COL POHL]: Do you apply some standard of whether or  
13 not you're going to arrange the interview?

14 TC [MR. RYAN]: Yes, sir. Materiality under 701 and the  
15 Yunis standards as set up in the rules. We consider it a part  
16 of the discovery process. Because in this situation, I agree  
17 with everything counsel said, we can't impede each other's  
18 attempts to contact witnesses, and I'm sure they've contacted  
19 many, many I'll never know about.

20 On the other hand, in these situation -- in this  
21 situation as to these Servicemembers possessing this type of  
22 government information, the law allows for protection of it  
23 and requires a protection of it in the Touhy regs for whatever

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 the agency is that's involved.

2 MJ [COL POHL]: Now, I am not all that familiar with  
3 27-40, but somewhere in the back of my mind, I've heard that  
4 it excludes Touhy regulation, the Touhy requirement.

5 TC [MR. RYAN]: It what, sir.

6 MJ [COL POHL]: Excludes the Touhy.

7 TC [MR. RYAN]: Excludes?

8 MJ [COL POHL]: Yeah.

9 TC [MR. RYAN]: It establishes the Touhy regulations.

10 MJ [COL POHL]: No, I'm talking about for courts-martial.

11 TC [MR. RYAN]: It excludes it for court-martial?

12 MJ [COL POHL]: Yeah.

13 TC [MR. RYAN]: I'm not aware of that, sir.

14 MJ [COL POHL]: Back to the other point I made, though.

15 So, I mean, one of the problems that comes up is that, as I

16 told Mr. Connell, there's -- I can't say normal practice.

17 I'll just say my experience in doing this for a while ----

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

19 MJ [COL POHL]: ---- is that it generally saves a lot of  
20 time and efficiency and doesn't waste court time if witnesses  
21 are willing to -- potential witnesses are willing to talk with  
22 defense counsel, then they can come in and say, he said X, she  
23 said Y. And this applies to almost any situation.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           But we're running into the problem here, and it came  
2 up on one of Mr. Ruiz's motions, of the government -- or the  
3 witness refuses to testify and so now we have the position of  
4 we're not sure what the witness will say because they won't  
5 talk to me. And the only reason -- the only way we're going  
6 to know what they're going to say is if they come in.

7           TC [MR. RYAN]: I understand, Judge. I believe  
8 we've found a good compromise or a good method for trying to  
9 make the system more efficient. And, again, I'm in situations  
10 now concerning military Servicemembers in this case, the  
11 guards.

12           Now, we can't ignore that for that individual person,  
13 that individual guard member, Servicemember, he has  
14 obligations -- he or she has obligations under the regulations  
15 that have to be protected -- or authorize protection, require  
16 protection. They -- our process that's established in the  
17 briefing book, Judge, sets forth the manner and means by which  
18 people can be contacted. And then people, once they -- once  
19 it's been established they should be contacted, what happens  
20 at that point.

21           And this is where I think I get to Your Honor's  
22 concerns and questions. If you look through it, what we've  
23 done is put forth actual scripted advisements to the person as

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 to what's going on, what their rights are -- and I believe on  
2 three or four occasions in each of them, we say it's your  
3 choice, it's up to you, and so on, but also gives them the  
4 requisite knowledge for the purpose of knowing what they have  
5 to do and so on.

6           And most importantly, most directly to Your Honor's  
7 question, if you will notice, there are places in the actual  
8 scripted advisement where the prosecution submits that we  
9 actually tell or encourage the person to speak and tell them  
10 it will probably make the system -- or make the whole process  
11 go faster. Of course, it's still up to them, but that, I  
12 imagine, should be seen by the commission as our attempt not  
13 to stonewall but, in fact, to make it go smoother. This, of  
14 course, presupposes that, in fact, the witness or the person  
15 to be contacted has been determined to be material and  
16 relevant.

17           The net effect of it all, Judge, is that the  
18 prosecution puts itself in the position of being something of  
19 a mailman, as we've said before. It provides very clear,  
20 written language to govern these situations and to eliminate  
21 the problems of subjectivity, misheard messages, so on. And  
22 we've heard of that happening at times in the past, Judge, I  
23 think in pleadings in this case where it's been alleged where

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 a certain ASJA or a certain commander someplace leaned on a  
2 Servicemember not to testify or encouraged him too much to  
3 testify or to provide statements and so on. What we're trying  
4 to do is make the whole process cleaner in that sense and more  
5 efficient.

6 And, Your Honor, with that, as far as the matters  
7 that are pending now and that can be addressed in open court,  
8 I have nothing further subject, of course, to your questions.

9 MJ [COL POHL]: Hold on for a second.

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

11 [Pause.]

12 MJ [COL POHL]: Okay. Thank you, Mr. Ryan.

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

14 MJ [COL POHL]: Mr. Connell.

15 LDC [MR. CONNELL]: One thing I have to say that I  
16 appreciate is the government's straightforwardness in its  
17 claims today. Rather than trying to obscure the issue behind  
18 a claim that these witnesses aren't material or that they  
19 aren't exculpatory or they're not covered by Rule 701 or some  
20 other thing, the government instead advances the position that  
21 not only is it the gatekeeper for witnesses, but that it --  
22 for their testimony, but that it wants to be the gatekeeper of  
23 who we can interview as well. The -- this is not -- and I

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 have no doubt, as the government says, that it has established  
2 a policy internally giving it this power. But that doesn't  
3 mean that this military commission should countenance any such  
4 thing for one moment.

5           The first justification that the government presents  
6 is about the nature of the information. This military  
7 commission has established multiple procedures for handling  
8 information, both classified and unclassified. If the  
9 information is classified, it will be handled under Rule 505  
10 and Protective Order Number 1. That is what has happened so  
11 far with the information that the government has already  
12 produced.

13           If, on the other hand, it is not classified but is  
14 sensitive, then under Protective Order Number 2, all the  
15 government has to do is designate it as sensitive discovery  
16 and that brings the restrictions of Protective Order Number 2  
17 into play.

18           If there are -- is a class -- if there is a  
19 government information privilege, the government can invoke  
20 the government information privilege under Rule 506. If it is  
21 PII or FOUO, it can include appropriate handling restrictions.  
22 The -- all of that takes place within the framework  
23 articulated by the Military Commissions Act, the Constitution

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 of the United States, and the Rule for Military Commission.

2           The extrajudicial policy that the government will  
3 first use pseudonyms to hide all witnesses and then, second,  
4 require -- insert itself as a gatekeeper between the ability  
5 to investigate and the witnesses themselves clearly offends  
6 the principles of due process that the defense is entitled to  
7 create and investigate and present a defense.

8           Now, what -- interestingly, the government argued  
9 that our discovery requests 22A, B, and C, are akin to  
10 discovery requests. I decline the characterization. They are  
11 not akin to discovery requests, they are discovery requests.  
12 The discovery requests set forth the basis, both  
13 constitutional and rule based, as to why the government has to  
14 produce this information.

15           The witnesses, which it is clear -- I can't argue it  
16 in open court, but it is clear from the reports themselves  
17 that the witnesses are material and that they observed or  
18 participated in actions that were important to the resolution  
19 of this matter. And I think in 373F, which is the pleading  
20 that we filed encapsulating all of the facts in a secret  
21 manner after we had the 79 pages of discovery, we make a very  
22 strong argument that it is exculpatory.

23           This information will form the powerful basis for a

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 reply under 373, which is stayed pending the resolution of  
2 373A, because we can demonstrate, using the discovery which is  
3 already in our possession, what happened, which I won't  
4 describe further.

5           The idea that the government can establish an  
6 internal policy -- it can establish whatever internal policies  
7 it wants, but it cannot then force them on the military  
8 commissions and capital defendants. It cannot establish a  
9 policy that we don't have the right to knock on doors, that we  
10 don't have the right to ask people questions, that we don't  
11 have to find -- have the right to find out what really  
12 happened, was this statement accurate, were they pressured to  
13 write it, are there more details that are left out from the  
14 simple, bare statement.

15           That is the nature of all of the defense function  
16 envisioned under the Military Commissions Act or the UCMJ or  
17 the Sixth Amendment. The -- that's just the nature of the  
18 process is that it is possible to speak to witnesses. The --  
19 and an internal policy that says otherwise violates the rule  
20 against impeding access to witnesses for sure.

21           The last -- I mean, and I should probably stop there,  
22 but the last observation -- because this policy, without  
23 getting into its particulars of scripts and other things, the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 policy that we would be denied discovery under Brady and under  
2 Rule 701 because the government would rather have it some  
3 other way is simply not consistent with the rules.

4           What the -- but last I wanted to take issue with the  
5 idea that this could possibly in any way be more efficient.  
6 What it means -- so now what we have to do -- currently,  
7 before this new policy, what we have to do is we file a motion  
8 and then we have to file a motion to produce the witnesses  
9 that we have found who support the motions. All right, that's  
10 fine. That's two steps.

11           But what -- the government is asking for a third  
12 step. We have to file -- once they decide that our witnesses  
13 are not material -- because, of course, you know, they already  
14 had a report is what we just heard. Once they decide they're  
15 not material, then we have to file a motion to compel the  
16 government to let us interview them under their policy ----

17           MJ [COL POHL]: Let me back up, just so I understand.

18           Mr. Ryan indicated there's some written policy with a  
19 script and everything attached to it. Have you seen that?

20           LDC [MR. CONNELL]: Yes. I saw it attached to the -- one  
21 of their pleadings, yes.

22           MJ [COL POHL]: Okay. So ----

23           LDC [MR. CONNELL]: Its first appearance in this

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 particular motion, but it has surfaced in other fora.

2 MJ [COL POHL]: Yeah, I believe it's on 343.

3 LDC [MR. CONNELL]: Yes. I think that's it or maybe ----

4 MJ [COL POHL]: 342.

5 LDC [MR. CONNELL]: Yes.

6 MJ [COL POHL]: So isn't there a step even before you file  
7 motions to compel? If you want to interview a guard -- just  
8 so I understand the procedure, as I understand what Mr. Ryan  
9 said -- you put an RFI, request for interview, to the  
10 government and they decide whether or not they're going to  
11 arrange the interview on some type of a relevance and  
12 materiality basis.

13 LDC [MR. CONNELL]: Well ----

14 MJ [COL POHL]: I mean ----

15 LDC [MR. CONNELL]: I think that's what they're saying.  
16 It sounds like that's what they wanted.

17 MJ [COL POHL]: I think that's what he said.

18 LDC [MR. CONNELL]: Sure, that's what he says. So you're  
19 right, there's another step even at the beginning. I skipped  
20 over that step, assuming that they would be denied. But, yes,  
21 we have to go through that process. They have 28 days to  
22 respond. Then they respond, they deny it. Then we have to  
23 file a motion to compel. That takes however long it takes.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 That gets us as far as then we interview the witness, assuming  
2 they're willing to talk to us after having been through this  
3 process. Then that brings us to the -- after all that, we get  
4 to the point where we start now, which is the motion to compel  
5 the government to produce them as a witness. And then  
6 eventually sometimes we go down that road.

7 MJ [COL POHL]: But in this case, you've not -- we're at  
8 the motion to compel to produce the witness or motion to  
9 compel to interview the witness?

10 LDC [MR. CONNELL]: Right. Well, that happens first.  
11 Request, motion to compel to interview the witness, interview,  
12 motion to compel to produce the witness -- because they've  
13 already said they're not material and relevant, right?

14 MJ [COL POHL]: I'm just trying to figure out where on  
15 this issue -- are we at the motion to compel interview or  
16 motion to compel to produce?

17 LDC [MR. CONNELL]: On this particular motion, we are not  
18 on either of those scales because I declined ----

19 MJ [COL POHL]: Motion to identify the witness.

20 LDC [MR. CONNELL]: Yeah, motion to identify the witness  
21 because I declined to participate in the motion to request to  
22 interview. If I choose, I might send a request to interview  
23 someone and they can evaluate it and do whatever they want to

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 with it in their discretion because there's not a rule-based  
2 place for requests for interview. What there is instead was I  
3 have a discovery motion. The information about these  
4 witnesses are material to the resolution of a motion pending  
5 before this military commission and it's exculpatory and it's  
6 going to help me prove the facts that I need to prove. So  
7 the -- the information about these witnesses is itself Brady  
8 material and should be compelled, which is the basis of this  
9 motion.

10 MJ [COL POHL]: But on these witnesses, as we discussed  
11 earlier about motions to compel production of witnesses, if  
12 you have an opportunity to interview them, you can make a  
13 proffer of what they would say.

14 LDC [MR. CONNELL]: Right.

15 MJ [COL POHL]: Or if you have a statement by them, you  
16 could make a better proffer of what they could say, because at  
17 least as a starting point, you've got that. In this case, you  
18 already have the statements.

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

20 MJ [COL POHL]: You're saying, I've got the statement, tie  
21 it into the materiality analysis, let me know who this guy is  
22 so I can interview him.

23 LDC [MR. CONNELL]: Right. Do I want to call that person

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 as a witness? I don't know. He might have a bunch of other  
2 great facts for my motion, he might have a bunch of terrible  
3 things that he wants to say, I don't know. As an advocate, I  
4 can't choose who to call to testify if I can't investigate and  
5 interview them.

6 MJ [COL POHL]: Is it your understanding the government's  
7 position is, since you have the statement you don't need to  
8 interview them?

9 LDC [MR. CONNELL]: That's what I heard today.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: So you can understand their position  
12 as well as I, so ----

13 MJ [COL POHL]: Okay. Anything further?

14 LDC [MR. CONNELL]: Yes.

15 MJ [COL POHL]: Go ahead.

16 LDC [MR. CONNELL]: I just want to be clear that this is a  
17 discovery issue. Our -- is the government going to be  
18 compelled to produce witness information is itself a discovery  
19 issue.

20 The other process that the government wants to set up  
21 internally is completely extra rule. It does not find a home  
22 in the Rule for Military Commission or existing case law.  
23 The -- it is something else they want to put together. That's

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 fine, they can handle things within limits however they want  
2 to, but they can't enforce us to play by their internal  
3 policy. We, as the military commissions, have an internal  
4 policy and it is called Rule 701. Thank you.

5 MJ [COL POHL]: Mr. Ryan, anything further?

6 LDC [MS. BORMANN]: Judge, may I be heard?

7 MJ [COL POHL]: Ms. Bormann.

8 TC [MR. RYAN]: Your Honor, counsel didn't participate in  
9 the initial argument.

10 MJ [COL POHL]: This is something that -- I understand  
11 that, Mr. Ryan. But because this could certainly impact other  
12 issues -- other defense counsel, the nature of the  
13 government's position apparently applies to all witnesses, so  
14 I'm going to let her be heard.

15 LDC [MS. BORMANN]: Well, that's what I wanted to address.  
16 Because before the commission goes down the road of  
17 investigation and limiting the ability of capital defense  
18 lawyers to investigate on behalf of their clients, I want to  
19 narrow the issue before you.

20 I didn't participate in the argument earlier because  
21 I believed this to be framed as a motion to compel discovery,  
22 motion to compel specific discovery, being the identities of  
23 the various individuals who may have witnessed certain things.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           But now it seems like we're arguing about some sort  
2 of proposed rule that the government wants to impose on the  
3 ability of defense counsel to investigate on behalf of their  
4 clients. And if we're going to discuss that matter, then I  
5 would ask for the opportunity to brief it, because that does  
6 not seem to be germane here.

7           MJ [COL POHL]: Correct me if I'm wrong, is that 342?

8           LDC [MS. BORMANN]: Well, that's slightly different.  
9 That's in a motion to compel discovery stage two because we're  
10 looking for the underlying materials that may have gone into  
11 the formulation of any policy. So we don't even have  
12 everything on that issue.

13           But what I'm talking about -- that's 342. But what  
14 I'm talking about right now is if we're going to go down the  
15 road of the government wants us to have to request permission  
16 from them to interview any members of the guard force, and I  
17 don't know who else, I mean, maybe anybody ever on any piece  
18 of discovery, anybody in the city of New York on 9/11. I  
19 mean, I don't know where it goes after this. But if their  
20 position is that, in order to interview somebody, we have to  
21 go through them, then what we're forced to do is telegraph our  
22 lines of inquiry, everything that we want to ask, our very  
23 theories of defense, all in direct contravention of due

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 process and the right to effective representation.

2           So this -- when I heard the argument of Mr. Ryan, it  
3 struck me that if we're going to go down that road, you need  
4 more briefing on this particular issue because it's in  
5 violation of the Fifth Amendment, the Sixth Amendment, and the  
6 Eighth Amendment, as well as the Military Commissions Act,  
7 guarantee of effective representation, and due process.

8           So that's why I rose. If we're going to have that  
9 discussion, it ought to be fully briefed.

10          MJ [COL POHL]: Okay. I understand.

11          Mr. Ryan.

12          TC [MR. RYAN]: Your Honor, maybe the most interesting or  
13 most telling words were I don't know, coming from counsel.  
14 And I appreciate his candor in the sense that what they're  
15 suggesting to you is they want to look around. They want to  
16 wander around. They want to fish. They don't know what  
17 they're going to find; maybe it will be helpful, maybe it will  
18 not.

19           To that I say, as to the vast majority of persons who  
20 may or may not be witnesses in that case, that is fine. If  
21 they want to wander around lower Manhattan, as learned counsel  
22 seems to indicate, and ask if those towers really did fall  
23 that day, I have no objection.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. CONNELL]: Objection, Your Honor, that's --  
2 that's completely -- it's a gratuitous statement. It has  
3 nothing to do with what we're arguing about.

4 TC [MR. RYAN]: It's only gratuitous when it's the  
5 government saying the towers fell, not if it's torture.

6 MJ [COL POHL]: The objection is overruled. Go ahead.

7 TC [MR. RYAN]: As to anyone they want to go out and  
8 interview that does not possess protected information in one  
9 form or another, they are free to do that. Our analysis is on  
10 a very specific group of people. Counsel wants to talk to a  
11 certain person which he knows by -- he or she knows by certain  
12 reports. The subject of the reports is, by definition,  
13 protected government information, official government  
14 information. We are suggesting that, based on that, this  
15 process we have put in place is the far wiser move.

16 And here's the part I wanted to correct of myself,  
17 Judge. The term internal policy kept getting thrown at Your  
18 Honor, and I'm sure I did use it, and for that I apologize.  
19 This policy came about because in the Hadi case, Judge Waits  
20 saw the problems happening, probably similar to what Your  
21 Honor has seen in this case, and came up with a specific  
22 requirement from the government that they put forth a policy  
23 which he then accepted as what will be the policy in that

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 case. The Office of the Chief Prosecutor, based on judicial  
2 he recognition, has adopted that policy throughout.

3 MJ [COL POHL]: Okay. When did this policy get adopted?

4 TC [MR. RYAN]: The date, Judge -- can I have the  
5 court's ----

6 MJ [COL POHL]: Well, it's the Hadi litigation, so  
7 relatively recently.

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

9 MJ [COL POHL]: At least in the context of this  
10 litigation.

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

12 MJ [COL POHL]: And when this policy -- although it's a  
13 response to Judge Waits in Hadi, your office made a decision  
14 that this is a good approach for all the cases?

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

16 MJ [COL POHL]: It's not just a policy for Hadi. And my  
17 question is, has this policy been conveyed to the defense  
18 counsel in this case?

19 TC [MR. RYAN]: As you see, Judge, it's shown up in other  
20 pleadings. In fact, it's 354, counsel is seeking now the  
21 internal dialogue that went in ----

22 MJ [COL POHL]: Well, the only reason I ask that, because  
23 I got from Ms. Bormann's comment that this apparently was news

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 to her.

2 TC [MR. RYAN]: I don't know how they filed that motion  
3 then, asking for the ----

4 MJ [COL POHL]: Well, I just -- what I'm simply saying is  
5 that this is a written policy, it's not -- because I'm looking  
6 for it in the pleadings, and I understand how things get  
7 embedded in pleadings. Just so I'm clear, this is a written  
8 policy that you want to govern interviews for the defense  
9 counsel in any case to ----

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

11 MJ [COL POHL]: Okay. And is it written as an SOP or is  
12 it written just embedded in pleadings?

13 TC [MR. RYAN]: It's written as a formal document within  
14 our office that governs the way we're treating witnesses who  
15 fall within these categories.

16 MJ [COL POHL]: To your knowledge, has that formal  
17 document been given to the defense counsel and they know  
18 exactly what it says or is it just simply attached to the  
19 pleadings?

20 TC [MR. RYAN]: It's something that's been in the  
21 pleading, Judge. And I should point this out: It's governing  
22 our actions, but we don't consider it at all outside of a  
23 normal process in terms of the way things should happen in

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 these situations.

2 MJ [COL POHL]: But the only reason I keep mentioning on  
3 this point is that apparently it is not clear to the defense  
4 that there is a formal policy. So I'm simply saying, easy  
5 solution ----

6 TC [MR. RYAN]: Understood, Judge.

7 MJ [COL POHL]: ---- just give them a copy of the policy,  
8 and if it's not embedded in another pleading appropriately, we  
9 can address it as a separate AE.

10 TC [MR. RYAN]: To the extent it's not made known, we'll  
11 make sure it is made known. That's all I have, Judge.

12 MJ [COL POHL]: Ms. Bormann, you want to be heard briefly?

13 LDC [MS. BORMANN]: So that the record is clear, AE 342 is  
14 a motion to compel discovery regarding their internal policy.  
15 We have never seen that internal policy. The only thing we  
16 were provided was a JDG SOP Number 11 unclassified and for  
17 public release. It's found at AE 342 Attachment ----

18 MJ [COL POHL]: Just give me a page number.

19 LDC [MS. BORMANN]: I don't have the page number because  
20 ----

21 MJ [COL POHL]: Okay.

22 LDC [MS. BORMANN]: It's listed as discovery response  
23 WBA-500051, and it's JDG SOP Number 11, so -- which has some

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 witness policy information in it. That ----

2 MJ [COL POHL]: Just hold the phone.

3 LDC [MS. BORMANN]: Sure.

4 MJ [COL POHL]: Mr. Ryan, is that the policy we're talking  
5 about?

6 TC [MR. RYAN]: I'm sorry, sir. Could I ask what she's  
7 looking at?

8 MJ [COL POHL]: She said says JDG SOP Number 11.

9 TC [MR. RYAN]: No, sir. Judge, I'm talking about a  
10 document that was filed in the commission. It's AE 029A,  
11 United States v. Hadi al-Iraqi on 3 December 2014.

12 MJ [COL POHL]: Okay. The one that's titled a bench memo?

13 TC [MR. RYAN]: Correct, sir.

14 LDC [MS. BORMANN]: So is that attached here in a ----

15 MJ [COL POHL]: That's -- if you look at -- let me find it  
16 for you.

17 LDC [MS. BORMANN]: At any rate, our filing in AE 342 is a  
18 motion to compel discovery, so we don't have the answers yet.  
19 That's why -- that's why I wanted to interrupt the court  
20 before the commission went down the road of making a  
21 determination about whether or not any existence of any policy  
22 was appropriate because right now we don't have the discovery  
23 necessary to make an informed argument. So 342 and the motion

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 to compel should be argued before any decision is made  
2 regarding -- and any argument is made regarding this proposed  
3 blocking of the access to the defense witnesses.

4 MJ [COL POHL]: I asked you earlier, though -- I asked you  
5 earlier was your objection embedded in the 342 and you seemed  
6 to think that you hadn't seen it.

7 LDC [MS. BORMANN]: The objection -- we have not briefed  
8 the violations of the Fifth, Sixth and Eighth Amendment  
9 because we don't know the parameters of the policy. That's  
10 what we were requesting ----

11 MJ [COL POHL]: I got it.

12 LDC [MS. BORMANN]: ---- in AE 342 and that's what the  
13 government has denied us access to in AE 342. So that's why  
14 it's fashioned as a motion to compel discovery because we're  
15 trying to get at what the underlying policy is.

16 And so when we're discussing the policy, we are sort  
17 of operating in a vacuum.

18 MJ [COL POHL]: Just a second.

19 LDC [MS. BORMANN]: At any rate, I didn't think it was  
20 appropriate to go down that path in this conversation  
21 regarding a motion to compel the discovery of the identities  
22 of witnesses. I thought that was going to be saved for  
23 another day.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: But you have a copy of the bench brief  
2 dated 3 December 2014.

3 LDC [MS. BORMANN]: I remember seeing it way back when. I  
4 cannot tell you where it is. It is what ----

5 MJ [COL POHL]: I can tell you where it is. It's in your  
6 pleading.

7 LDC [MS. BORMANN]: It probably is. Our pleading is, I  
8 don't know, 150 pages long or something.

9 MJ [COL POHL]: Yeah, it's in your pleading.

10 LDC [MS. BORMANN]: It doesn't surprise me because that's  
11 what we -- once we discovered what had occurred in the Hadi  
12 al-Iraqi litigation, frankly, my head exploded because it  
13 violates our right and our duty to investigate.

14 So we requested further information from the  
15 government so that we could make an informed argument about  
16 why this impeded our investigation efforts, which is where you  
17 went down the rabbit hole with Mr. Connell and Mr. Ryan trying  
18 to figure out what this was. And I wanted to say hold on,  
19 let's talk about the motion to compel on AE 342 before we make  
20 any decisions about how this affects the defense function.

21 MJ [COL POHL]: Got it.

22 LDC [MR. CONNELL]: Your Honor, may I have one more word?

23 MJ [COL POHL]: Okay. Because we are making progress, I

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 will be more lenient today.

2 LDC [MR. CONNELL]: Can I take credit for the progress,  
3 Your Honor?

4 MJ [COL POHL]: Depends how long you talk.

5 LDC [MR. CONNELL]: The one point I wanted to make here is  
6 that you do not have to engage on the question of this policy  
7 in order to rule on 373A. You really only have a couple of  
8 decisions that you have to make.

9 Are you going to compel the information under Rule  
10 701(c)(1), the cause that involves papers, documents, or  
11 copies -- copies of portions thereof, which are in the  
12 possession, custody, and control of the government and are  
13 material to the preparation of the defense. The other  
14 decision you can make is, is it material, does it have to do  
15 with something in the case, and is it exculpatory, is it going  
16 to help us.

17 MJ [COL POHL]: Your position for your part of 373A is  
18 that the policy's not really before me.

19 LDC [MR. CONNELL]: Right.

20 MJ [COL POHL]: I got it. Okay. Thank you.

21 091E.

22 LDC [MR. CONNELL]: May I approach the clerk, Your Honor?

23 MJ [COL POHL]: You may.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. CONNELL]: Your Honor, 091E is a motion to  
2 reconsider in the light of newly decided precedent from the  
3 United States Supreme Court. The underlying motion brought to  
4 the military commission's attention the fact that the  
5 convening authority as designed in the civilian convening  
6 authority, an outside entity within the -- established by the  
7 Regulation for Trial by Military Commission, among other  
8 sources, executes both the responsibilities of a prosecutor  
9 and the responsibilities of a defendant.

10 I have prepared slides. They are AE 091H. I  
11 provided copies to counsel and previously to the court  
12 information security officer. I'd request permission to  
13 display them and have the feed from Table 4.

14 MJ [COL POHL]: Sure. Go ahead.

15 LDC [MR. CONNELL]: Thank you. I'm not going to repeat  
16 all of the arguments by any means that were originally  
17 advanced with respect to AE 091, but I do want to make a  
18 couple of specific points. May I have permission to display  
19 to the gallery, Your Honor?

20 MJ [COL POHL]: Yeah, go ahead and put it up on the big  
21 screen.

22 LDC [MR. CONNELL]: The first slide that I'm going to show  
23 you -- excuse me just one second.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           The first slide is actually the original slide from  
2 091C, which I have just -- where I originally noted the ways  
3 in which the convening authority acts as a prosecutor. The  
4 second of those was the decision of whether to refer a case as  
5 capital, which is established by the Regulation for Trial by  
6 Military Commission paragraph 4-3.a.

7           The federal courts have repeatedly referred to the  
8 responsibility of the convening authority to act as a  
9 prosecutor, such as in our controlling circuit, Curry v.  
10 Secretary of the Army at 595 F.2d 873, D.C. Circuit case from  
11 1979, as well as the military courts, a number of -- I won't  
12 repeat them, but in many military courts which are cited in  
13 the briefs. The military commission declined to accept this  
14 argument earlier, and the military commission's order in  
15 AE 091D, the relevant portion is shown on the screen. The  
16 military commission ruled that the discretion exercised by the  
17 convening authority is executive in nature and neither  
18 prosecutorial nor judicial.

19           The -- that I believe has changed, at least on the  
20 prosecutorial segment, with the case of Williams v.  
21 Pennsylvania. Williams v. Pennsylvania, one of the issues  
22 which had to be established en route to the holding in that  
23 case was whether the person who approves the seeking of the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 death penalty as person -- as opposed to the prosecutor who  
2 argues for the death penalty is exercising a prosecutorial  
3 function. And the Supreme Court of Pennsylvania Justice who  
4 was at issue in that case had not been involved in the  
5 original trial, but rather had simply been the chief  
6 prosecutor who had initialled approved or something like that  
7 on a memo requesting the death penalty.

8           And the Supreme Court explained that a prosecutor may  
9 bear responsibility for any number of critical decisions,  
10 including what charges to bring, which I note is exercised by  
11 the convening authority here, whether to extend a plea  
12 bargain, which I note is exercised by the convening authority  
13 here, and which witnesses to call.

14           As an initial matter, there can be no doubt that the  
15 decision to pursue the death penalty is a critical choice in  
16 the adversary process. After Williams v. Pennsylvania, there  
17 is not -- regardless of what the military commission thinks of  
18 other prosecutorial aspects of the convening authority's work,  
19 it seems pretty clear that this -- the decision to seek the  
20 death penalty is definitely a prosecutorial decision.

21           Now, it is -- I want to be a little more nuanced than  
22 perhaps I was last time, in that I want to talk about that  
23 there are many -- that these are not bright lines in the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 military commissions system between the duties of the  
2 convening authority, the military judge, and the chief  
3 prosecutor. There is significant overlap. For example, the  
4 question of expert resources, that decision begins with the  
5 convening authority. If the convening authority declines,  
6 then that responsibility rests with the military judge. The  
7 same is true for significant elements of the posttrial review.

8           In the military commission system, there are various  
9 decisions normally confined to the office of the prosecutor,  
10 such as plea bargaining and witness immunity, that in this  
11 case are -- because of the Military Commissions Act are the  
12 responsibility of the convening authority. Normally, a judge  
13 would not have -- not really have the authority to even review  
14 a decision to grant immunity because it would be in the  
15 exclusive province of the -- of the prosecution.

16           The chief prosecutor, however, shares a couple of  
17 responsibilities with the convening authority. One of those  
18 is what charges, as in the prereferral process, and whether  
19 the referral will be to a capital ----

20           MJ [COL POHL]: Shouldn't your witness immunity be in the  
21 MJ/convening authority ----

22           LDC [MR. CONNELL]: Yes, it should.

23           MJ [COL POHL]: ---- for that?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. CONNELL]: Yes, it should.

2 MJ [COL POHL]: Okay. I just wanted to understand where I  
3 fit in your diagram.

4 LDC [MR. CONNELL]: Absolutely. I will tell you the  
5 reason was, not really having done the research on witness  
6 immunity, I did not realize that the convening authority's  
7 decision was appealable when I made this slide ----

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

9 LDC [MR. CONNELL]: ---- but now I do. And witness  
10 production is an example of something shared between the  
11 prosecution and the military judge under this system. The  
12 point here is that these -- the exercise of these functions  
13 are not exclusively prosecutorial or judicial or whatever it  
14 is that the convening authority is. The -- and there are --  
15 that leaves really the argument of Williams v. Pennsylvania.

16 The second argument from the prosecution is that the  
17 convening authority does not exercise a judicial function. In  
18 fact, the convening authority exercises extraordinary judicial  
19 functions. They essentially act as a court of first instance  
20 in modifying findings or ordering rehearing, et cetera. At  
21 10 U.S.C. 950b(c) is the action of the authority -- the  
22 ability of the authority to modify findings if they wish.  
23 They also have the authority to modify a sentence under

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 10 U.S.C. 950b(c)(3).

2 But it is not simply an executive authority, such as  
3 parole, which is a traditionally executive function, or  
4 clemency, which is an executive function, because they have  
5 the ability to act as a court of first instance and send  
6 findings or a sentence back to the military commission.

7 Under 10 U.S.C. 950b(d), they can order a proceeding  
8 in it revision -- which as far as I can tell, it's not defined  
9 in the statute, but as far as I can tell is correction of  
10 procedural or nonprejudicial error in the record. And most  
11 significantly, just like the Supreme Court Justice in Williams  
12 v. Pennsylvania, they have the authority to order a rehearing  
13 of either the findings or the sentence, which is a judicial  
14 responsibility for certain.

15 The -- it is not simply my opinion that there's a  
16 judicial role for the convening authority. It is, in fact,  
17 Congress' opinion. In 949b(a)(2), the Congress actually  
18 refers to the judicial role of the convening authority. In  
19 the portion of the statute which prohibits unlawful influence  
20 over the convening authority, subsection (B) prohibits  
21 unlawful influence over the action of any convening authority  
22 or reviewing authority with respect to their judicial acts.  
23 It is essentially a finding by Congress that the convening

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 authority acts in a judicial role.

2           And I thought I would conclude with the case that I  
3 thought most summarized, within two sentences, the both dual  
4 prosecutorial and judicial nature of the convening authority,  
5 which is United States v. Fernandez at 24 Military -- MJ 77 at  
6 page 78, a C.M.A. case from 1987 where the Court of Military  
7 Appeals said, quote, in referring a case to trial, a convening  
8 authority is functioning in a prosecutorial role. In stark  
9 contrast, when he is performing his post-trial duties, his  
10 role is similar to that of a judicial officer. The military  
11 cases are rife with descriptions of the both prosecutorial and  
12 judicial roles of the convening authority.

13           Now, I want to conclude by the observation that the  
14 military commission does not have to rule on the role of the  
15 convening authority under the UCMJ in order to address this  
16 motion. Curry v. Secretary of the Army, the D.C. Circuit  
17 case, drew a sharp distinction between the many roles of a  
18 convening authority as commander in the -- under the UCMJ and  
19 the -- how that is a radically different situation, the needs  
20 of the military are radically different from the needs of --  
21 in that case, they were comparing it to a civilian court.

22           MJ [COL POHL]: Under your Williams analysis, though,  
23 wouldn't the Article I courts of the military suffer the same

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 deficiency?

2 LDC [MR. CONNELL]: No. And that is because of Curry.

3 The ----

4 MJ [COL POHL]: And Curry's date is '79?

5 LDC [MR. CONNELL]: Yes. Curry -- it's the only authority  
6 we have, right.

7 MJ [COL POHL]: I'm not saying -- just because it's old  
8 doesn't mean it's bad.

9 LDC [MR. CONNELL]: Right. Exactly.

10 MJ [COL POHL]: That's true of a lot of things, but go  
11 ahead.

12 LDC [MR. CONNELL]: The ----

13 MJ [COL POHL]: But what I'm saying is that if -- if in a  
14 capital referral in a military context in a court-martial,  
15 wouldn't you have the same Williams problem?

16 LDC [MR. CONNELL]: No.

17 MJ [COL POHL]: And, again ----

18 LDC [MR. CONNELL]: And I will tell you why. Can we go to  
19 slide 12, please?

20 And there is a substantial difference between a  
21 military convening authority and a Military Commissions Act  
22 convening authority. And these are laid out -- these are the  
23 factors that were actually discussed in that 1979 case, Curry,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 and they are that a -- they basically come down to the three  
2 reasons why Curry said that the convening authority structure  
3 could be saved in the military. None of those apply in this  
4 situation.

5           The -- an ordinary convening authority, that is the  
6 commander of a unit, has to choose -- pick and choose,  
7 exercise prosecutorial discretion as to their combat  
8 resources. They may let something slide because they want to  
9 keep a soldier in that slot. They may have some other policy  
10 goals in mind that are unique to their role as commander.

11           The second factor that Curry identified is that the  
12 courts-martial convening authority resources are limited.  
13 They are using combat resources that could otherwise be  
14 fighting an enemy in a court-martial, and so they have to make  
15 limited decisions which are not -- a constraint that is not  
16 required here in this robustly resourced environment.

17           The third is that the -- when a convening authority  
18 in a court-martial wishes to convene a panel, they have to  
19 take often senior officers, depending on who the defendant is,  
20 out of their unit and impeding their combat readiness. None  
21 of those factors apply in this situation. It is a bright ----

22           MJ [COL POHL]: Don't you have in this scenario, there's  
23 also something on the other side of the coin, that the court

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 members do not fall under the command of the convening  
2 authority and so, therefore, there's less influence?

3 LDC [MR. CONNELL]: Well, as far as ----

4 MJ [COL POHL]: I mean, you're kind of picking and  
5 choosing on both sides, but isn't there some ----

6 LDC [MR. CONNELL]: So, you're right, there's less  
7 influence. So when we are dealing with unlawful influence  
8 issues, that's definitely a factor to be considered. It's not  
9 a factor to be considered in the question of whether a single  
10 person is unconstitutionally exercising prosecutorial and  
11 judicial ----

12 MJ [COL POHL]: But why wouldn't -- how would this impact  
13 on your Williams analysis, though?

14 LDC [MR. CONNELL]: All right. So what the Curry  
15 analysis ----

16 MJ [COL POHL]: No, just so -- but how would this impact  
17 on your Williams analysis? Williams says very clearly that  
18 the authorization that seeks death penalty against Williams  
19 amounts to significant personal involvement and is a critical  
20 trial decision.

21 LDC [MR. CONNELL]: Right.

22 MJ [COL POHL]: Wouldn't that apply to every convening  
23 authority, at least that part of Williams when they decide to

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 refer a case capital?

2 LDC [MR. CONNELL]: Yes, it does. But it doesn't have the  
3 same impact under the UCMJ that it does here. And the  
4 military courts have done for this reason, the military courts  
5 have acknowledged for years and years -- I just read that  
6 Fernandez quote which sort of summed it all up in two  
7 sentences -- have acknowledged for years and years that there  
8 is prosecutorial aspect to the convening authority and there's  
9 a judicial aspect to the convening authority. Curry itself  
10 recognized that.

11 What Curry said was that in the military, because of  
12 these three factors, many combat resources which are limited  
13 and removed people from their primary combat role, that that  
14 combined prosecutorial and judicial function is authorized in  
15 the military. That's what Curry says. It doesn't deny the  
16 prosecutorial aspect of the convening authority, it doesn't  
17 deny the judicial aspect of the convening authority; what it  
18 does say is that having -- given those realities of the  
19 structure of this system, the exigencies of the actual  
20 military and an actual military convening authority require  
21 essentially sacrifice of that due process principle. And that  
22 is why Curry says that a convening authority structure is  
23 allowed in the military, because of these three factors.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           That is why I'm saying that -- your actual, specific  
2 question is: Does Williams change the aspect -- the analysis  
3 under UCMJ? The reason why it doesn't is that the military  
4 courts have recognized for years the prosecutorial role of the  
5 convening authority. So another case coming along and saying  
6 there is a prosecutorial role for the convening authority  
7 doesn't change that analysis at all.

8           MJ [COL POHL]: No, but in essence, both systems are set  
9 up by statute.

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

11          MJ [COL POHL]: Okay. And therefore -- assuming the  
12 statute is clear, and let's just assume for that, you would  
13 have a higher authority to say you couldn't do it. And you  
14 say Williams gives you that higher constitutional basis to  
15 invalidate it under the military commissions, but because of  
16 the differences between the commission convening authority and  
17 the military convening authority, Williams would not  
18 necessarily apply to them. And again, that's not the issue  
19 before me, so whether it applies to them or not is simply an  
20 analogy at best anyway.

21          LDC [MR. CONNELL]: I think that's mostly right. Just to  
22 be completely clear on my position, it's not that Williams  
23 doesn't apply to the UCMJ, it's that it doesn't have the same

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 implication under the UCMJ because they've already  
2 acknowledged the prosecutorial nature of the convening  
3 authority. What they've decided is that the impact on due  
4 process under the -- is required by the exigencies of the  
5 military, and those -- these three factors which are on the  
6 board right now, and those exigencies simply don't apply in  
7 our system.

8 MJ [COL POHL]: Got it.

9 LDC [MR. CONNELL]: Thank you.

10 MJ [COL POHL]: Thank you.

11 Mr. Harrington?

12 Mr. Ruiz, do you wish he to be heard on this issue?  
13 Apparently not.

14 Ms. Bormann?

15 LDC [MS. BORMANN]: No, Judge.

16 MJ [COL POHL]: Apparently not. Trial Counsel?

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

18 MJ [COL POHL]: Good morning.

19 ATC [Maj DYKSTRA]: I'm not going to seek to relitigate a  
20 lot of the stuff that Mr. Connell referred to, and I'll refer  
21 to our briefing and our initial response to the defense motion  
22 as far as the Curry argument and whether or not the military  
23 commission convening authority's linked as far as comparison

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 to the military justice system.

2 But what I would like to say is before in your order,  
3 you found that the role of the convening authority -- and this  
4 military commission is neither one, a prosecutor nor judge,  
5 the functions of the convening authority do not encroach upon  
6 the distinctive roles upon the prosecutor, military judge, or  
7 panel members. Now ----

8 MJ [COL POHL]: You would agree with Mr. Connell, though,  
9 there's a certain overlapping of roles here?

10 ATC [Maj DYKSTRA]: Pardon me, sir?

11 MJ [COL POHL]: Do you agree with Mr. Connell that there's  
12 a certain overlapping of roles, though?

13 ATC [Maj DYKSTRA]: Yes, sir.

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

15 ATC [Maj DYKSTRA]: Now, with respect -- with respect to  
16 the initial defense motion, that is what you found. And  
17 nothing with respect to those roles or functions has changed  
18 since that finding. And I would posit, Your Honor, that  
19 nothing within the defense motion to reconsider or the U.S.  
20 Supreme Court case of Williams v. Pennsylvania really changes  
21 this.

22 Now, I'll openly admit that when I read the opinion  
23 in Williams v. Pennsylvania, I really wondered why it even

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 made it to the Supreme Court. I think most people, to include  
2 nonlawyers, that it -- would agree that it is beyond  
3 appropriate for a judge to recuse himself from a case where he  
4 had an earlier involvement as a prosecutor in that very same  
5 case. And I would say that it's almost expected. But that  
6 ultimately did not occur in Williams, and the U.S. Supreme  
7 Court had to essentially step in and mandate what many  
8 jurisdictions already required.

9           And I'll point you to the ABA Model Code of Judicial  
10 Conduct Rules which are cited in the Williams opinion on  
11 page 1908, which state, "No judge may participate in any  
12 proceeding in which the judge's impartiality might reasonably  
13 be questioned, including where the judge served in  
14 governmental employment and in such capacity participated  
15 personally and substantially as a lawyer or public official  
16 concerning the proceeding." So as you can see, Your Honor,  
17 there's nothing really in -- which this new case did not  
18 already exist in many jurisdictions.

19           So what does a Supreme Court case about judicial  
20 recusal have to do with this case? Because certainly I  
21 haven't heard anything where -- implicating that you had  
22 previously occupied a position with the prosecution or  
23 otherwise. Well, the defense continues to contend that the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 convening authority is both prosecutor and a judge in this  
2 case, but, Your Honor, as I stated previously, you have  
3 already held otherwise. And Williams doesn't change anything  
4 of this. Williams merely clarified the already existing  
5 standard set forth by the Supreme Court that requires judicial  
6 recusal when the likelihood of a bias on the part of a judge  
7 is too high to be constitutionally liable.

8           Indeed, the court in Williams stated that its  
9 conclusion follows from the court's analysis In re Murchison,  
10 a case cited and dismissed within the commission's order.  
11 Williams -- pardon me, Your Honor. Williams and In re  
12 Murchison simply does not apply within the military commission  
13 system or the military justice system with respect to the  
14 convening authority because, as Your Honor found, contrary to  
15 the defense assertion, the convening authority is neither a  
16 prosecutor or a judge.

17           Therefore, as Williams speaks to when a judge must  
18 recuse himself, and where the convening authority is not a  
19 judge or a prosecutor, for that matter, like those sitting in  
20 the room, then the defense motion to reconsider should be  
21 denied.

22           And subject to your questions, Your Honor, I have  
23 nothing further.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

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

2 ATC [Maj DYKSTRA]: Thank you, Your Honor.

3 MJ [COL POHL]: Mr. Connell, anything further?

4 LDC [MR. CONNELL]: No, thank you, sir.

5 MJ [COL POHL]: That brings us to 018TT.

6 Ms. Lachelier, before you get started, is this a  
7 classified pleading?

8 ADC [MS. LACHELIER]: The pleading itself is not, Judge.  
9 Not to my knowledge.

10 MJ [COL POHL]: On TT?

11 ADC [MS. LACHELIER]: My version is not marked. We have  
12 been treating it as such because the government's is  
13 classified, the government's response.

14 MJ [COL POHL]: Let me make sure I've got this right.  
15 We're talking about TT, right?

16 ADC [MS. LACHELIER]: Right, sir.

17 TC [MR. SWANN]: Your Honor, I'm going to beg to differ.  
18 01800, 018TT, 018WW are all classified pleadings.

19 ADC [MS. LACHELIER]: I can treat it as such. Doesn't  
20 change -- I think there's an unclassified argument that can be  
21 made, so ----

22 MJ [COL POHL]: Well, yeah, I mean, it's -- the reason I  
23 asked this is because on my list it's classified and we've

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 already got it scheduled for a classified briefing.

2 ADC [MS. LACHELIER]: No, I understand. Just to be clear,  
3 so everyone is clear, I have had it in a classified binder and  
4 it has not left the SCIF.

5 MJ [COL POHL]: Okay.

6 ADC [MS. LACHELIER]: But ours was marked UNCLASS to my  
7 knowledge. That's all.

8 Actually, I wanted to start with that, Judge, just to  
9 clarify the record on this. 018TT is our pleading challenging  
10 the classification of 01800. 018WW is our reply or -- yes,  
11 and 018UU is the government's response. Just so that --  
12 because the numbering was a little off on this.

13 We filed 018TT, and the background of that is that we  
14 had started with 00 ----

15 MJ [COL POHL]: Let me back up. Is 018TT classified or  
16 not? What are we ----

17 ADC [MS. LACHELIER]: There's a legal argument in 018 --  
18 there's a legal argument in 018TT that is unclassified.

19 LDC [MR. RUIZ]: Your Honor, can we have a moment?

20 MJ [COL POHL]: Yeah. I'll tell you what we're going to  
21 do. We're going to put this until after lunch. I want to see  
22 the ----

23 ADC [MS. LACHELIER]: Our version is ----

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: I want to see the classified pleading.  
2 Because all I have is a placeholder here.

3 ADC [MS. LACHELIER]: Okay.

4 MJ [COL POHL]: Because I don't have the classified  
5 pleadings, so I want to see it. If there is unclassified  
6 portions that we can address, I don't have a problem with  
7 that.

8 ADC [MS. LACHELIER]: Right.

9 MJ [COL POHL]: But I want to see the pleadings first  
10 before we go down that road, okay?

11 ADC [MS. LACHELIER]: Okay, Judge.

12 MJ [COL POHL]: Okay. Now, Mr. Schwartz, do you have  
13 anything you wish to add on 321?

14 DC [MR. SCHWARTZ]: Good afternoon, sir.

15 MJ [COL POHL]: Good afternoon.

16 DC [MR. SCHWARTZ]: We do. So 321 is an issue we merged  
17 with 399. 321 was video teleconferencing with families. 399  
18 was in-person communications. And in fact, actually there was  
19 a section of 321 that was in-person filed by Mr. al Baluchi.  
20 The -- there are a number of issues that are preventing us  
21 from going forward on this. First, there is a -- I raised  
22 before you last hearing a question of my ability to reference,  
23 to cite, and quote statements contained in a sealed -- in

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 several sealed ICRC reports. These are reports that we moved  
2 for in, I believe, AE 108. The commission granted that  
3 discovery motion on the condition that the reports would  
4 remain sealed. And the use of those reports is only  
5 authorized with the commission's explicit permission, which we  
6 obtained in 321 -- I don't have the letter.

7           But for me to be able to quote the statements in open  
8 court is what I presented to you last hearing is sort of a  
9 question of first impression in this case and in this  
10 jurisdiction. We requested the government's position on that.  
11 The government's position, as I understand it, is that we may  
12 not quote statements from the ICRC reports. We may make  
13 arguments from our argument section of the motion, which is  
14 321D.

15           Our position is there is no rule preventing the  
16 open-court discussion of the statements in the ICRC reports.  
17 This is unclassified information. There's no question about  
18 that. This doesn't fall under 506 because it's not government  
19 information. This is simply material that the government  
20 doesn't want to address in open court because of the nature of  
21 the ICRC's opinion about the operation of Camp VII. So we're  
22 at a bit of a crossroads on that issue.

23           There is also an issue, another predicate issue if

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 you're ready.

2 MJ [COL POHL]: Go ahead, I'm listening.

3 DC [MR. SCHWARTZ]: AE 360 was a prerequisite discovery  
4 motion on 321. 360 was litigated last session. It was over  
5 production of recorded statements that Mr. Bin'Attash made for  
6 delivery to his family. You ordered that the video be  
7 discovered on June 10th following the last hearing. We  
8 received that video on either June 7th or -- I'm sorry,  
9 July 7th or 8th prior to coming down here. The translation of  
10 that video started immediately upon arriving here by our  
11 interpreter, but the point-to-point network, which is the only  
12 location where the video can be translated, has been so slow  
13 that the translation hasn't been completed. And so until we  
14 have that video, that's another -- I mean, that's a major  
15 component of the 321 discussion is ----

16 MJ [COL POHL]: So 360 has been complied with, but you  
17 need to review it and you wish to come back to 321 after  
18 you've reviewed it?

19 DC [MR. SCHWARTZ]: Yes, sir. But I do want to flag that  
20 ICRC issue.

21 MJ [COL POHL]: The other issue is you want to discuss the  
22 ICRC in open court in support of 321?

23 DC [MR. SCHWARTZ]: Yes, sir.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: Got it. Thank you.

2 Trial Counsel, do you wish to respond to those two  
3 issues?

4 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

5 MJ [COL POHL]: Good afternoon.

6 MTC [MR. TRIVETT]: In regard to the ICRC documents, we're  
7 certainly not -- it's not the USG's position that the defense  
8 counsel shouldn't be able to argue the salient points from  
9 those documents or ultimately what the conclusions were.  
10 We're simply asking for a balancing based on the important  
11 nature of the relationship between the Department of Defense  
12 and the International Committee of the Red Cross on this.

13 And that would, in our mind -- we would request the  
14 judge not allow for it to be published in court or directly  
15 quoted from, but obviously as the military ----

16 MJ [COL POHL]: What rule or case would give me that  
17 authority?

18 MTC [MR. TRIVETT]: We don't have one, sir. There is no  
19 rule and there is no case other than the fact that the ICRC's  
20 representatives came in here. The important relationship  
21 between the ICRC and the Department of Defense was certainly  
22 well articulated in the litigation surrounding whether or not  
23 they should have the ICRC documents at all. I think the judge

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 recognized that in ordering all of the documents sealed.

2 In other defense arguments, the judge has recommended  
3 to the -- or actually required the defense to simply argue  
4 salient points because Your Honor is in possession of those  
5 ICRC documents. And we've said this on several occasions, but  
6 there is no right to oral argument in these cases. You've  
7 granted that. That's appropriate and completely within your  
8 discretion, but we would ask ----

9 MJ [COL POHL]: You want me to deny oral argument to  
10 protect the public dissemination of information that I have no  
11 authority to prevent in an open hearing?

12 MTC [MR. TRIVETT]: We're not asking -- we're not asking  
13 you to not grant oral argument. We're simply asking you under  
14 your appropriate authorities to circumscribe the oral argument  
15 in this instance to not allowing for public display of the  
16 actual documents or actual citations from the ICRC as far as  
17 quotes or specific things they said.

18 The defense is certainly entitled to make oral  
19 argument if you so deem them to. They can certainly point to  
20 the points that are made within the documents, we're not  
21 trying to prevent that. But we think this is the best way to  
22 balance all of the interests in this -- on this issue,  
23 specifically with the understanding that oral argument is not

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 a right to begin with. Thank you, sir.

2 MJ [COL POHL]: Okay. Thank you. I understand.

3 Mr. Schwartz, anything further?

4 DC [MR. SCHWARTZ]: Only that this is not a question of a  
5 right to oral argument. This is a question about whether this  
6 trial is a public trial. Without quoting the ICRC documents,  
7 the ICRC summarily criticizes the government, the United  
8 States Government, for breaking the law with respect to family  
9 communications. Mr. Bin'Attash has the right to present that  
10 in court. The public has a right to hear it.

11 You know, this certainly isn't about oral argument,  
12 especially given that, you know, so far we have been unable to  
13 actually file these statements in open pleadings. So the  
14 question here is not oral argument, it's public trial.

15 MJ [COL POHL]: Thank you. Major Wichner, on 426 you said  
16 you needed time to review the slides before the argument.  
17 Have you had time or do you need more time? This deals with  
18 the -- I think you said you and Mr. Harrington were in transit  
19 when the briefing was done.

20 DDC [MAJ WICHNER]: Yes, Your Honor, that's correct. And  
21 we had also asked for a copy of the slides. And for the  
22 record, we were told that we could not have them. We were  
23 given a redacted version, that's why it was surprising to us

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 that General Martins could come in with them unredacted. And  
2 we have had time to review them and we appreciate that, and we  
3 don't have -- we don't need more time on that, sir.

4 MJ [COL POHL]: Okay. Do you wish to present additional  
5 argument on it or stand by what's already been said by the  
6 others?

7 LDC [MR. HARRINGTON]: We'll stand by the arguments,  
8 Judge.

9 MJ [COL POHL]: Okay. Brings us to 391. Mr. Ryan.

10 TC [MR. RYAN]: Excuse me, Judge, just one minute.

11 MJ [COL POHL]: Take your time.

12 [Pause.]

13 TC [MR. RYAN]: Your Honor, the government seeks to  
14 pre-admit the death certificates it has obtained and collected  
15 in this case. We seek to admit them as evidence that, in  
16 fact, the persons listed as victims of the attacks are, in  
17 fact, deceased and do so by name.

18 As Your Honor well knows, the attacks which lasted a  
19 grand total of about 102 minutes on the date of September 11,  
20 2001, resulted in the deaths of 2,976 people. The prosecution  
21 has provided to the commission certificates of authenticity --  
22 I'm sorry, sir. Before I do that, Judge, the relevant rule in  
23 this case -- I'm sorry, sir.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           Judge, the United States now seeks the admission of  
2 2,976 death certificates. And I just wanted to put on the  
3 record, I say it clearly, the breakdown of the records we're  
4 talking about. New York City, the medical examiner prepared  
5 1,627 certificates based upon remains that were positively  
6 identified. The remains were not found for 1,122 World Trade  
7 Center victims. The medical examiner prepared death  
8 certificates for these victims pursuant to court orders.  
9 Death certificates were issued outside of New York for World  
10 Trade Center victims who were transported and died later due  
11 to injuries sustained.

12           Of the 184 Pentagon victims, 178 death certificates  
13 were issued by the Commonwealth of Virginia pursuant to state  
14 law. Remains were not found for five of the victims, and,  
15 thus, the Commonwealth did not issue death certificates. On  
16 the other hand, the Circuit Court -- I'm sorry, I'm getting a  
17 slow-down, Judge. On the other hand, the Circuit Court for  
18 Arlington County issued court orders declaring four persons  
19 deceased. For purposes of this motion, these court orders  
20 should be treated as death certificates for these victims  
21 because death certificates in the traditional sense, Your  
22 Honor, were not issued. It is the court order that acts as  
23 the death certificate.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           For the fifth unidentified Pentagon victim, the  
2 Department of the Army issued a report of casualty, Form 1300,  
3 pursuant to U.S. law. Again for purposes of this motion, the  
4 casualty report should be treated as the death certificate.

5           The District of Columbia Medical Examiner's Office  
6 issued the death certificate for the 184th Pentagon victim who  
7 died in the District of Columbia on 17 September 2001 as a  
8 result of burns and other injuries sustained.

9           Finally, the Somerset County Coroner in Pennsylvania  
10 issued death certificates for each of the 40 Flight 93 victims  
11 pursuant to state and local laws. Investigators were able to  
12 identify remains for each of the 40 Flight 93 victims.

13          MJ [COL POHL]: Mr. Ryan, are you offering -- I don't have  
14 the certificates on my computer, so are you offering these  
15 simply to establish these people died on that date and not for  
16 any other reason, cause of death or anything else?

17          TC [MR. RYAN]: We are offering them to prove, in fact,  
18 that they died on that date as victims of the attacks of  
19 September 11th.

20          MJ [COL POHL]: No, no, but yeah, that's kind of my  
21 question, is that -- and again, I don't have the certificates  
22 in front of me because they're sealed and they're just not on  
23 this computer.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

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

2 MJ [COL POHL]: But -- and I know this is a sensitive  
3 matter, and I understand that, okay? But does the death  
4 certificate say John Smith died on September 11th, and then is  
5 there a causation or anything else on the certificate?

6 TC [MR. RYAN]: On many there are, Judge.

7 MJ [COL POHL]: Okay. Are you offering it for that  
8 purpose also?

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

10 MJ [COL POHL]: Okay. So the fact of the death, the fact  
11 of the date, and the cause of death.

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

13 MJ [COL POHL]: Okay.

14 TC [MR. RYAN]: The prosecution has provided to the  
15 commission certificates of authenticity signed by custodians  
16 of records attesting the certificates are copies of records  
17 within each of those offices.

18 Military Commission Rule of Evidence 901 is the first  
19 step in our analysis of these as records, and that has to do  
20 with authenticity, states that evidence shall be admitted as  
21 authentic if the military judge determines that there is  
22 sufficient basis to find that the evidence is what it is  
23 claimed to be and then provides that the jury is instructed

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 that they can attach whatever weight they see fit to that  
2 particular piece of evidence.

3 MJ [COL POHL]: Is the cause of death testimonial  
4 evidence?

5 TC [MR. RYAN]: I'm sorry, what's the last part, Judge?

6 MJ [COL POHL]: Is the cause of evidence ----

7 TC [MR. RYAN]: Cause of death?

8 MJ [COL POHL]: Excuse me. The cause of death, I'm sorry.  
9 One of the objections here is that this violates the hearsay  
10 rules of -- and I understand that the hearsay rules for the  
11 commissions are not necessarily the same -- rephrase that, are  
12 not the same, at least, as promulgated by the statute as would  
13 appear in a court-martial or federal court.

14 TC [MR. RYAN]: Right.

15 MJ [COL POHL]: So but for the sake of this question,  
16 simply is the cause of death testimonial evidence?

17 TC [MR. RYAN]: No, sir. You're talking about under a  
18 Crawford analysis, I believe.

19 MJ [COL POHL]: Yes.

20 TC [MR. RYAN]: No, sir, it is not and I'm going to get to  
21 that in a moment.

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

23 TC [MR. RYAN]: I certainly agree ----

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: Let me ask you, how much more time will  
2 you need?

3 TC [MR. RYAN]: It's probably 15, 20 minutes.

4 MJ [COL POHL]: Let's go ahead and break for lunch and  
5 we'll pick this up after lunch. The commission is in recess  
6 until 1400 hours.

7 [The R.M.C. 803 session recessed at 1249, 26 July 2016.]

8 [END OF PAGE]

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**