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1 [The R.M.C. 803 session was called to order at 1405, 26 July
2 2016.]

3 MJ [COL POHL]: Commission is called to order. Any
4 changes, Trial Counsel, in the trial counsel team?

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

6 MJ [COL POHL]: Mr. Nevin?

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

8 MJ [COL POHL]: Mr. Harrington?

9 LDC [MR. HARRINGTON]: No, sir.

10 MJ [COL POHL]: Mr. Connell?

11 LDC [MR. CONNELL]: No, sir.

12 MJ [COL POHL]: Mr. Ruiz?

13 LDC [MR. RUIZ]: No changes.

14 MJ [COL POHL]: And Ms. Bormann?

15 LDC [MS. BORMANN]: No changes.

16 MJ [COL POHL]: During the -- here you go, Jeff.

17 During the recess, I looked at 018TT and 01800.

18 There may be a way to discuss some of the matters in an open
19 session, but quite frankly, I'm not sure they can be, so we
20 will continue with the previous schedule to discuss it in a
21 closed session. And then if we can and if it's necessary, we
22 can have a subsequent open session discussion about it, but I
23 want to start it in closed session, because I am ----

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1 ADC [MS. LACHELIER]: Okay, Judge. Am I to understand
2 that you will allow for an open session on 018TT if that
3 proves to be possible?

4 MJ [COL POHL]: If it proves to be possible and necessary,
5 okay?

6 ADC [MS. LACHELIER]: Well, it's our position that there
7 are absolutely legal -- straight-up legal arguments on this
8 motion that do not warrant a closed session.

9 MJ [COL POHL]: Let me see it for a second. Jeff, let me
10 see it again, please.

11 Well, I have it sitting in front of me with a TS
12 cover sheet, and it's not portion marked. So until I know
13 which part is TS and which is not -- and I'm not saying it
14 should have been necessarily, because I think it came from you
15 guys -- I don't know which part is TS and which part isn't;
16 and, therefore, I cannot make an intelligent determination of
17 what part can be discussed in an open session and what cannot
18 be.

19 ADC [MS. LACHELIER]: Understood. We'll just reserve the
20 possibility of having an open session once we're done with the
21 806.

22 MJ [COL POHL]: Sure. Mr. Trivett, you are standing and
23 so is General Martins.

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1 CP [BG MARTINS]: Your Honor, we're going to tag team here
2 a little bit. First, I want to take up 426E. You had asked
3 me to report relating -- or come back to the commission
4 relating to the sealing of that provisionally for seven days.

5 I have given the clerk and parties a copy of the 32
6 slides that don't need to be sealed. It's identical. They've
7 just been reviewed and marked by the owners of the info, the
8 inspector -- Navy Inspector General.

9 MJ [COL POHL]: Okay.

10 CP [BG MARTINS]: So I would move that this become 426E
11 and be part of the record.

12 And then ----

13 MJ [COL POHL]: Just so it's clear, it says REDACTED FOR
14 PUBLIC RELEASE. Are there any redactions?

15 CP [BG MARTINS]: The only ones are in a couple of the
16 slides relating to photos and labels on the photos. And
17 they're identical to the ones you had. They're a little bit
18 cleaned up because there was some metadata markings on those
19 other ones.

20 MJ [COL POHL]: Okay.

21 CP [BG MARTINS]: But I've gone through them. They're
22 identical in terms of the information they provide. So we'd
23 move that this become 426E.

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1 And then, Your Honor, you had asked within 30 days or
2 within a month I come back and provide you a status on their
3 public posting. So these can be used by counsel right away in
4 any case-related matter. That was a concern counsel had
5 expressed. They can use this now and use it in any
6 case-related matter they want and show it to third parties.

7 MJ [COL POHL]: Okay.

8 CP [BG MARTINS]: I would ask that then this just be
9 pushed into the normal process for web posting ----

10 MJ [COL POHL]: Okay.

11 CP [BG MARTINS]: ---- and that I no longer need to come
12 back to you within 30 days.

13 MJ [COL POHL]: No, no, you're done. It says REDACTED FOR
14 PUBLIC RELEASE, so I would assume that would include -- you
15 don't need extra permission to put it on the website. You
16 just give me a status of it.

17 CP [BG MARTINS]: Do you want a status of it ----

18 MJ [COL POHL]: Oh, no. No.

19 CP [BG MARTINS]: ---- within 30 days?

20 MJ [COL POHL]: I asked you how long it will take to do
21 this, and apparently it's all done.

22 CP [BG MARTINS]: Okay. So you've got what you need,
23 then.

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1 MJ [COL POHL]: Absolutely. Thank you for telling me.

2 CP [BG MARTINS]: Okay, great. And now Mr. Trivett had
3 something for you.

4 MJ [COL POHL]: Okay, Mr. Trivett.

5 MTC [MR. TRIVETT]: Afternoon, sir. You had asked the
6 question before on 321 regarding what case or rule we were
7 relying on. I said that I didn't have one for you. That was
8 perhaps inartful.

9 I did want to just remind the military commission of
10 the previous litigation that we've had on this issue and
11 specifically in 108EE, the prosecution set forth the position
12 that the ICRC documents should be protected under the
13 privilege on 506, on M.C.R.E. 506. The judge found in
14 013BBB/108T that Protective Order Number 2 would govern the
15 ICRC documents, and that ultimately Protective Order Number 2
16 was drafted in part relying on the M.C.R.E. 506 authority.

17 So we believe that that is the additional authority
18 under which we would ask you to handle the ICRC documents
19 consistent with what we said before.

20 MJ [COL POHL]: Okay.

21 MTC [MR. TRIVETT]: Thank you.

22 MJ [COL POHL]: Thank you. That brings us to 391.

23 TC [MR. RYAN]: Good afternoon, Judge.

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1 MJ [COL POHL]: Good afternoon, Mr. Ryan.

2 TC [MR. RYAN]: Your Honor, when we broke, I was just
3 about to get into the substance of the entire motion. And
4 just to inform the court of the direction of the argument, I
5 see it as a three-part analysis. First is authentication
6 under traditional evidence; and second, I see it as the
7 traditional hearsay analysis under the rules or other
8 authorities; and then finally, as Your Honor raised, I think
9 it necessary that we take up the Crawford analysis, because
10 that has changed an awful lot of evidence, especially hearsay,
11 significantly in any court case and certainly in this one,
12 too.

13 But starting with basic authentication, Military
14 Commission Rule of Evidence states that, "Evidence shall be
15 admitted as authentic if the judge determines there is
16 sufficient basis to find that the evidence is what it is
17 claimed to be. The jury is then instructed that it can attach
18 whatever weight it sees as fit." And that is the only
19 requirement under the Military Commission Rule of Evidence. I
20 acknowledge, and I'm sure Your Honor knows it very well, that
21 this is different than other rules and different than
22 court-martial; nonetheless, those are the rules we have that
23 we are working from.

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1 In this case, we have gathered the death certificates
2 from various locations. I noted, I think, each of them
3 individually before. We have taken the death certificates in
4 the traditional sense, but we have also obtained functionally
5 equivalent documents such as court orders which bear the
6 necessary indicia of authenticity and reliability all by
7 themselves; that is, the documents can be looked at and judged
8 as being it is what we say it is and it can be submitted for
9 the jury's consideration with, of course, as I said, Your
10 Honor's instruction to them that they attach the weight they
11 see fit. So it could certainly be challenged as defense
12 counsel sees the opening.

13 As further support for our authenticity argument,
14 Your Honor, we have provided certificates of authenticity of
15 public records, pursuant -- and I think almost all of them,
16 wherever they come from, have a statement along the lines of,
17 these documents have been prepared pursuant to -- or with an
18 aim towards satisfying Federal Rule of Evidence 902(4) and
19 Military Rule of Evidence 902(4) also, which I believe to be
20 identical or close to it. And those certificates come from
21 persons stating they are, in fact, the proper custodian of
22 state records in these areas, specifically vital statistics,
23 and therefore should be admitted as such. These come from New

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1 York, New Jersey, Massachusetts, Missouri, Pennsylvania,
2 Virginia, D.C., and the Department of Defense.

3 So for all of those reasons, Your Honor, the
4 documents themselves, the certificates that accompany them, we
5 submit satisfies the requirements under 901, thereby making
6 the documents authentic for purposes of being admitted into
7 evidence.

8 Now, secondly, as to the traditional hearsay
9 analysis, we of course seek to admit this as a public record,
10 a well-recognized exception historically to the hearsay
11 prohibition. In our case, Military Commission Rule of
12 Evidence throws it back to the Military Rules of Evidence. It
13 states as follows, "Hearsay evidence may be admitted in trials
14 by military commission if the evidence would be admitted under
15 the rules of evidence applicable in trial by general
16 courts-martial and the evidence would otherwise be admissible
17 under these rules or this manual."

18 And in turn, since it throws it back to the Military
19 Rules of Evidence, we see that Military Rule of Evidence
20 803(9) that governs courts-martial specifically allows for the
21 record -- for records of death as competent evidence,
22 specifically reads -- and the title of it is Records of Vital
23 Statistics, Records or data, compilations in any form of

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1 births, fetal deaths, deaths, or marriages would be accorded
2 the exception and allowed to be admitted under that analysis."
3 So I think those are the fairly easy analyses of this matter.

4 The last part, of course, is now the Crawford
5 analysis. Crawford being the Supreme Court case that changed
6 some -- to some degree hearsay analysis, states that -- or
7 prohibits, rather, records and statements from being
8 introduced regardless of hearsay exception, so regardless of
9 what a rule says, if, quote, the primary purpose of it is
10 testimonial. Crawford led to, of course, cases to come after
11 it, and one of the progeny was Melendez-Diaz which has been
12 cited in the documents. And Melendez-Diaz said it this way,
13 quote, a document created solely for an evidentiary purpose
14 made in aid of a police investigation ranks as testimonial.
15 And I quoted that because I think this is the heart of the
16 analysis, and I think it's going to -- it provides us great
17 analysis or great direction for purposes of our motion.

18 That case, Melendez-Diaz, concerned a report as to a
19 substance being tested in a state crime laboratory and being
20 found to be cocaine. Now, the testing of an alleged
21 controlled substance and its finding that it was, in fact, a
22 controlled substance really only exists -- the analysis is
23 only done and the record or the report is only done for the

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1 purpose of later criminal prosecution, or at least with a
2 strong idea of it. So its primary purpose if not its only
3 purpose is to aid in a future criminal prosecution.

4 We do not have that situation here. Death
5 certificates fall within a very normal business of state and
6 local governments, agencies, and courts. The preparation of
7 such is required by state and local laws. The examiners
8 perform functions regarding certificates for all deceased and
9 not just in criminal cases.

10 At this point, Your Honor, I think I'm finally
11 getting to your question about the death certificates and
12 testimonial and then also the information contained therein.
13 And I'll start with this statement, that the analysis should
14 not be the individual bits of information contained therein,
15 the analysis should be on the record itself. And if the
16 record itself passes muster under Crawford, then the record
17 comes in with the items -- the information that's contained
18 within the record, of course, once, as I said, it's been
19 determined it's a proper record under these circumstances.

20 And the records that we've submitted to Your Honor, I
21 submit, demonstrate that principle all by themselves. The
22 death certificates are preprinted state forms with great
23 deal -- with a great deal of boxes to be filled in. The forms

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1 are not unique to homicide cases. In fact, in New York City,
2 the boxes are for -- allow for -- the cause of death allows
3 for things like suicide, homicide, natural, accident,
4 et cetera. All of the boxes, all of the items of information
5 to be filled out in the course of a certificate like that are
6 of interest for a state's recordkeeping and official duties.
7 That, I submit, Judge, shows the sort of nontestimonial aspect
8 of it. It's for a wide range of state interests.

9 And in looking at just some of them, again, it's
10 further proof of how far removed it is from something like a
11 drug analysis report in the sense that it shows, among the
12 information that's filled out in many of these death
13 certificates, things like race and nationality, a mother's
14 maiden name, the decedent's occupation, the place of burial,
15 their marital status, their education, and even if, in fact,
16 they're a veteran.

17 Now, compare that to some of the other case law we
18 have seen and have cited where it talks about, you know, the
19 purpose of why a certain report, say, for example, an autopsy
20 report was being performed. If it's in the course of and as
21 part of a criminal investigation or even significantly related
22 to such, then Crawford becomes a problem, and probably takes
23 it out of the situation of being admitted just based on the

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1 public record aspect of it. Of course, the government in
2 those cases is free to put the witness on the stand and be
3 subject to cross, which solves all of the problems. But for
4 this, what we're talking about, as I said, is a state form
5 with a great deal of information that is the subject of
6 various state interests.

7 And among the purposes, I would suggest, that a death
8 certificate can be used for that have nothing to do with a
9 later criminal prosecution includes the release of remains to
10 the families, in this case sometimes many different times;
11 allowing to -- the family to conduct a burial; allow for death
12 benefits such as insurance to be received. And that also is
13 of special significance in this case because there were
14 various funds set up for purposes of giving to the families of
15 those left behind certain financial benefits recognizing their
16 significant loss. So -- and that's the basic point of it,
17 Judge, as to why Crawford does not bear on this -- on what
18 we're seeking in this case.

19 The one last thing I wanted to say about it is I kept
20 making reference to actual death certificates themselves. I
21 readily admit and stated to you early on in my argument that
22 although the bulk will be death certificates, there are going
23 to be situations which I made reference to where courts

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1 entered orders that became the functional equivalent of the
2 death certificate, that is, establishing that the person is,
3 in fact, deceased. This also bears no burden to the Crawford
4 analysis because, again, coming back to that primary analysis
5 situation, the primary purpose test under Crawford, I would
6 submit that a court order, even more so or at least even as
7 much so as a plain old death certificate, shows there is no
8 nature of it being related to criminal prosecution. There's
9 nothing about a judge's order that would suggest that. In
10 fact, quite the opposite, judges, as Your Honor certainly
11 knows, sit in a neutral capacity and, therefore, for purposes
12 of establishing one's death, it had nothing to do with an
13 investigation, but rather, with just arbitting the facts and
14 circumstances presented for it.

15 For all of those reasons, Your Honor, we seek
16 admission at this time. Subject to your questions, that's all
17 I have.

18 MJ [COL POHL]: I have none. Thank you.

19 TC [MR. RYAN]: Thank you, Judge.

20 MJ [COL POHL]: Defense. Mr. Perry.

21 DC [MR. PERRY]: Good afternoon, Your Honor.

22 MJ [COL POHL]: Good afternoon.

23 DC [MR. PERRY]: Your Honor, what the prosecution is

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1 seeking to do in this case is cut corners and do an end-around
2 the Sixth Amendment and the confrontation clause. And
3 preadmission, the motion, their argument is it's
4 nontestimonial hearsay, therefore, the Crawford prohibition
5 should not apply.

6 That argument, however, has been rejected by the very
7 court that just a couple days ago Your Honor cited as having
8 controlling authority in this proceeding, the D.C. Circuit.
9 And as we cited extensively in our brief, 391A, the
10 D.C. Circuit has rejected that a death certificate or an
11 autopsy report is nontestimonial hearsay and, therefore, does
12 not require a witness to be present and subject to
13 cross-examination in order for it to be admissible.

14 So quite simply, this is not a situation where we're
15 saying the government doesn't have an opportunity to prove its
16 case and shouldn't be allowed to, it just should be allowed to
17 do it in the proper format.

18 MJ [COL POHL]: Is there a distinction between an autopsy
19 report and a death certificate?

20 DC [MR. PERRY]: Effectively under the law, no.
21 Basically, if the -- and this goes to the primary purpose
22 behind it which the prosecution says, well, because these
23 things can be used for other purposes, therefore, their

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1 primary purpose is not for criminal prosecution, that is not
2 what the primary purpose test is.

3 In Davis v. Washington, the Supreme Court explained
4 what the primary purpose test was, and that is essentially
5 that when the circumstances objectively indicate that there is
6 no such ongoing emergency and the primary purpose of the -- in
7 the situation of Davis was an interrogation, is to establish
8 or prove past events potentially relevant to later criminal
9 prosecution is testimonial hearsay. So in other words, if
10 this can be used at some point down the road to prove a past
11 event or a past fact, prove something, then it's testimonial
12 hearsay.

13 MJ [COL POHL]: Even though that 99 percent whatever of
14 death certificates aren't used for criminal prosecution, that
15 has no weight in your analysis?

16 DC [MR. PERRY]: No. Because at the moment the
17 prosecution seeks to use the death certificate to prove a
18 fact, then that triggers ----

19 MJ [COL POHL]: But that ----

20 DC [MR. PERRY]: ---- the confrontation clause.

21 MJ [COL POHL]: That rationale would make everything
22 testimonial then, right? Because you're saying that the
23 moment the prosecution wants to use the purported hearsay, it

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1 becomes testimonial. And if it's nontestimonial to begin
2 with, if the government introduces it, it immediately becomes
3 testimonial under what you just told me. Is that the
4 analysis?

5 DC [MR. PERRY]: Well, that's -- that's why at the end of
6 the day, it matters not whether it would be admissible under a
7 hearsay exception.

8 MJ [COL POHL]: No, I understand that. But what I'm
9 saying is you seem to have just told me that once the
10 government decides to use any piece of evidence in court, it
11 now becomes testimonial.

12 DC [MR. PERRY]: Well, in other words, if they want to put
13 a piece of evidence into the record, they need to have someone
14 to establish that ----

15 MJ [COL POHL]: Then wouldn't all evidence be testimonial,
16 then because, by definition, it's being introduced in court?
17 Is that your argument?

18 DC [MR. PERRY]: Is all evidence testimonial.

19 MJ [COL POHL]: I mean, if you take Crawford as an example
20 of nontestimonial evidence ----

21 DC [MR. PERRY]: Adduced by ----

22 MJ [COL POHL]: No, I'm just saying, I just want to make
23 it clear? Is the standard if the government is going to

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1 introduce this into evidence, regardless of what the evidence
2 is, even if it's one of the most clear exceptions that
3 Crawford talks about, it now becomes testimonial; is that your
4 position?

5 DC [MR. PERRY]: The position is when the government is
6 seeking to put into evidence a record that has within it
7 statements -- that's what's important to remember, these death
8 certificates have statements in them, statements of what
9 occurred, when it occurred, how it occurred, go into detail in
10 our pleadings, that requires someone to be subject to
11 cross-examination at that point. It is not enough that there
12 may be a hearsay exception.

13 MJ [COL POHL]: So each person who prepared the death
14 certificate would have to come in and testify?

15 DC [MR. PERRY]: The author of the document would have to
16 come in and be available for cross-examination, yes, before it
17 would be admissible.

18 MJ [COL POHL]: Could a supervisor who's familiar with the
19 practice of the office come in?

20 DC [MR. PERRY]: No. In fact, we cite authority in our
21 pleadings that it is not enough to bring in a surrogate to
22 parrot whatever that person would have said had that person
23 been available but that person is no longer available.

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1 There is a small exception that the Supreme Court has
2 fashioned for expert testimony. But when the government seeks
3 to do that to avoid the confrontation clause concerns because
4 the author of the document is no longer available, that expert
5 is only allowed to give his or her expert opinion, the actual
6 documents are not admissible.

7 MJ [COL POHL]: So who would be -- you don't have to
8 answer this if you don't want to because you're not the
9 proponent of the evidence, but you just want to go ahead.

10 I heard Mr. Ryan say that some of these documents are
11 court orders.

12 DC [MR. PERRY]: Right.

13 MJ [COL POHL]: Okay. So who comes in for those, the
14 judge?

15 DC [MR. PERRY]: The author of the document and ----

16 MJ [COL POHL]: The judge signs it, then the judge comes
17 in?

18 DC [MR. PERRY]: Consider the affidavits or evidence that
19 was presented in order to issue that order.

20 MJ [COL POHL]: So it would be ----

21 DC [MR. PERRY]: That would be the judge of that circuit
22 court.

23 MJ [COL POHL]: Okay. Understand. Go ahead. When I say

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1 understand, I understand your position.

2 DC [MR. PERRY]: Don't necessarily agree. I understand.

3 MJ [COL POHL]: You understand that that's what I mean by
4 understand. We're good.

5 DC [MR. PERRY]: Right.

6 MJ [COL POHL]: Go ahead.

7 DC [MR. PERRY]: So I think, Your Honor, when considering
8 this analysis and whether to reject the government's position
9 here, it's important to remember that, just as I mentioned
10 yesterday, it's -- the panoply, the umbrella under which this
11 all operates is the Military Commissions Act, which specifies
12 that the opportunity to obtain witnesses and evidence shall be
13 comparable to an Article III court, which our position means
14 the Sixth Amendment and the confrontation clause applies in
15 full force. And the government may have a different view of
16 that and they can certainly say so.

17 But what I'm presenting to Your Honor this afternoon
18 is, in order to agree with their position, you would have to
19 rule contrary to that, that this is not going to be comparable
20 to an Article III court and that this is not going to involve
21 the full effect of the Sixth Amendment and the confrontation
22 clause. Because otherwise, Your Honor, there's no other way
23 to get around the D.C. Circuit and other courts that have held

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1 that death certificates and autopsy reports and similar
2 reports are testimonial hearsay.

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

4 DC [MR. PERRY]: With that, Your Honor, unless you have
5 some questions, I'll ----

6 MJ [COL POHL]: I do have a question, but I'm looking for
7 a cite first.

8 Now, you said when Congress set up the military
9 commissions, they intended that all of the Sixth Amendment
10 rights apply. Did they really do that or did they make some
11 hearsay exceptions that clearly would not meet Sixth Amendment
12 analysis?

13 I mean, the government offered this under 803(a), but
14 there's also 803(b) that's predicated on the statutory
15 Section 949. There's a lot of subparagraphs, but basically
16 the -- because it's been discussed a lot, the hearsay
17 exceptions that they permit. Don't you think when Congress
18 wrote that in the statute that evidenced some congressional
19 intent -- and, again, I'm not saying it carries the day, but
20 some congressional intent that pure Sixth Amendment analysis,
21 particularly under Crawford, wouldn't apply?

22 DC [MR. PERRY]: No, Your Honor, I wouldn't agree with
23 that. And -- and that's simply because at the end of the day,

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1 the Sixth Amendment is the primary precedent, right?

2 MJ [COL POHL]: No, but you said earlier ----

3 DC [MR. PERRY]: The statute ----

4 MJ [COL POHL]: Again, I'm not saying it carries the day,
5 I'm just trying to clarify your position.

6 DC [MR. PERRY]: Yeah.

7 MJ [COL POHL]: I thought you said earlier the part of the
8 MCA that says normal rules are access to evidence, like
9 Article III courts, evidence of congressional intent that the
10 Sixth Amendment would apply with its full panoply of rights
11 and whether it does or not is one issue. But when I read the
12 statute, it seems to be a clear congressional intent or
13 appears to be a clear congressional intent that the
14 Sixth Amendment rights under Crawford that would apply in a
15 court-martial or federal court, they do not want to apply in
16 these proceedings.

17 Now, the government relied on a strict
18 Sixth Amendment analysis, but there's another provision that
19 says it would not necessarily apply, so ----

20 DC [MR. PERRY]: So it comes to first principles.

21 Congress cannot enact a statute that provides less than the
22 Sixth Amendment. The Sixth Amendment is primary. Congress in
23 10 U.S.C. Section 949j made it clear what it intended to do to

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1 the military commissions, in other words, make it comparable
2 to Article III federal courts. So that's their -- I suppose
3 an articulation of their design, but they can't give less than
4 what the Sixth Amendment provides.

5 And so if the Sixth Amendment confrontation clause
6 applies because it's testimonial hearsay, it matters not that
7 there are hearsay exceptions that at the end of the day were
8 generated and promulgated in the Rules for Military
9 Commissions.

10 MJ [COL POHL]: No, I understand your argument. I just
11 take issue with your assertion that Congress did not intend --
12 or Congress intended when it wrote the MCA that the
13 Sixth Amendment applies in whole cloth just like in
14 Article III courts when there's specific provision in the
15 statute that would run contrary to that.

16 DC [MR. PERRY]: Could they have been more explicit?
17 Sure. But I would submit that they can't give less ----

18 MJ [COL POHL]: It may be an unconstitutional provision,
19 I've got that.

20 DC [MR. PERRY]: Right.

21 MJ [COL POHL]: I just take issue with you saying Congress
22 at least didn't intend to have a hearsay exception for this.
23 That's not recognized in federal court or courts-martial.

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1 Anything further?

2 DC [MR. PERRY]: No, Your Honor.

3 MJ [COL POHL]: Thank you very much.

4 Any other defense counsel want to be heard?

5 Mr. Connell.

6 LDC [MR. CONNELL]: Your Honor, I support the analysis of
7 Bin'Attash, and I won't repeat any of it. The one thing I do
8 have to part company is that I -- I don't -- you know, I don't
9 read too much into the military commissions question, so I
10 don't want to attribute positions to you, but it is our
11 position that 949a(b)(3)(D), which is the hearsay provisions
12 in the Military Commissions Act, is unconstitutional because
13 it provides less than full Sixth Amendment protection.

14 I agree with the position of Mr. Bin'Attash that the
15 Sixth Amendment does apply and that rules of procedure which
16 do not comply with it are unconstitutional, but I do have to
17 part company on the congressional intent question.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: Nothing further.

20 MJ [COL POHL]: Mr. Harrington? Mr. Ruiz?

21 Mr. Harrington.

22 LDC [MR. HARRINGTON]: Judge, there's a middle road here
23 that can be used, and that is that the death certificates can,

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1 in fact, be redacted, taking out the information that is
2 something that's not the primary purpose of the death
3 certificate. I mean, a death certificate is going to be
4 received by any court that I've ever practiced in, certainly,
5 for establishment of the fact that the person died. But I've
6 never seen any court accept statements in there of the cause
7 of death based upon -- just upon the death certificate.

8 Many times death certificate may list a cause of
9 death suicide, when it's a homicide discovered later or other
10 things. That doesn't alter the fact that the person died.
11 But when you get to those categories which are really
12 secondary to the purpose of the death certificate, which is
13 establishing that a person died on a particular day at a
14 particular time, that's the main purpose of the death
15 certificate and the one that's, I think, meant to be included
16 by any rule with respect to a business record.

17 MJ [COL POHL]: So would you take issue with it, if I
18 understand Mr. Ryan's position, is that you don't look -- you
19 look at the document as a whole and not parts of it for
20 testimony versus nontestimonial?

21 What I'm saying is, can a document -- if I understood
22 Mr. Ryan correctly, you don't parse the document between
23 testimonial and nontestimonial pieces. Do you agree with

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1 that?

2 LDC [MR. HARRINGTON]: No, I don't agree with that at all,
3 Judge. When you're admitting it into court as a business
4 record, if it's being offered to prove something, then it's
5 hearsay. Then the question is, is it an exception to the
6 hearsay rule. I suppose you could challenge the fact that the
7 person died on a particular day if you wished, but that
8 business record is still coming in because -- as an official
9 business record because the purpose of the authority that
10 grants them is to record that.

11 MJ [COL POHL]: What I'm kind of focusing on is your
12 distinction between some data meets the primary purpose and,
13 therefore, could come in as nontestimonial hearsay, if I
14 understood you correctly.

15 LDC [MR. HARRINGTON]: Correct.

16 MJ [COL POHL]: Other data doesn't meet that and cannot
17 come in because it's testimonial hearsay within the same
18 document. Is that your position?

19 LDC [MR. HARRINGTON]: No. Actually, it's all testimonial
20 hearsay.

21 MJ [COL POHL]: Okay.

22 LDC [MR. HARRINGTON]: Even the fact that somebody died,
23 it's being admitted for that purpose. But the business record

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1 exception is that -- you know, the purpose of the entity is to
2 record this document. As long as it's done properly in the
3 normal course of business, it comes in.

4 MJ [COL POHL]: Okay.

5 LDC [MR. HARRINGTON]: But that's the purpose of it,
6 that's the primary purpose. And when you get to the secondary
7 purposes, then you have the Crawford problem.

8 MJ [COL POHL]: Okay. I understand. Thank you,
9 Mr. Harrington.

10 Mr. Ruiz.

11 LDC [MR. RUIZ]: Judge, the only point I want to make
12 about this particular motion is that it's a convenient time to
13 comment on the approach to admissibility of evidence or
14 preadmissibility of evidence in terms of what the court's
15 procedures are going to be.

16 The position that we took and that we added in
17 addition to the analysis that has been presented to the court
18 is that piecemeal litigation of preadmissibility of evidence
19 issues at this stage of the proceedings is not something
20 that's going to be constructive to a longer -- the path
21 forward in this case.

22 And what I want to ask the court to do in the context
23 of this motion is to think about how the court wants to

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1 address issues of preadmissibility of evidence. This is the
2 first instance where the prosecution has sought to do this.
3 Of course, we're in the midst of pretrial litigation that has
4 protracted now, as you know, for the past three and a half,
5 four years. We do not know what the path forward will be in
6 the context of additional litigation in terms of discovery.
7 We're still in the discovery stages of the proceeding. And I
8 sense that the prosecution is not only going to seek to
9 preadmit this evidence, but there will be other motions to
10 preadmit this evidence.

11 What I'm going to ask the court to consider doing in
12 terms of those issues is to wait on those issues so that we
13 can address them all at once in terms of issues of
14 preadmission of evidence before the trial, which would be more
15 appropriate, quite frankly, as we get closer to what appears
16 to be a trial date when we've resolved more legal issues and
17 when we understand the landscape of the litigation a little
18 bit better.

19 It doesn't necessarily affect it that much in terms
20 of this issue, but my worry is that we're going to get into a
21 piecemeal litigation of preadmissibility of evidence issues,
22 and I do not think, and I submit this to the court, that that
23 is a constructive or orderly way of going forward with the

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1 process that we have right now. That's the only issue that I
2 wanted to bring to the court's attention.

3 MJ [COL POHL]: Thank you, Mr. Ruiz.

4 Mr. Nevin, do you have anything to add?

5 LDC [MR. NEVIN]: I have nothing. Thank you, Your Honor.

6 MJ [COL POHL]: Mr. Ryan, anything more?

7 TC [MR. RYAN]: Subject to the commission's questions, I
8 have none.

9 MJ [COL POHL]: I have none.

10 DC [MR. PERRY]: Your Honor, I have one more thing I'd
11 like to add.

12 MJ [COL POHL]: Okay. Tell you what, Mr. Perry. I'm
13 going to give it -- this is the last time I'm going to do
14 this. If they don't respond -- this is not I get to sit there
15 and think a while -- rephrase that. I get to think a while if
16 I want to bring something else up. There's five of you guys,
17 and I know if you think of something, so if you have a very
18 quick comment, you can, but you can't rebut yourself, if you
19 understand what I'm saying.

20 DC [MR. PERRY]: It's a clarification. When I stated
21 earlier I -- if I said something other than this, I misspoke.

22 When Congress fashions in the MCA hearsay exceptions
23 and the Rule for Military Commission have hearsay exceptions

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1 that would be contrary to the Sixth Amendment, that would be
2 unconstitutional. I think I wasn't clear about that in my
3 response earlier, and Mr. Connell seized upon that and made
4 sure his position was made known. We agree with that
5 position.

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

7 DC [MR. PERRY]: Thank you.

8 MJ [COL POHL]: And just so we don't have an endless
9 stream of clarifications, I got your argument. If I disagree
10 with it or there needs clarifications, I'll take it under
11 advisement.

12 That being said, let's bring this to 391 -- I'm
13 sorry, 301.

14 LDC [MR. CONNELL]: Sir, that's been overtaken by events.
15 We withdraw 301.

16 MJ [COL POHL]: Okay. 313. Just to be clear, Mr. Connell
17 is 301 moot?

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

19 MJ [COL POHL]: Okay. Mr. Harrington.

20 LDC [MR. HARRINGTON]: Judge, 313 is in the same
21 situation. It's been resolved by other events at this point.

22 MJ [COL POHL]: Okay. Just for my purposes, I can
23 consider it moot then?

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1 LDC [MR. HARRINGTON]: Until tomorrow, Judge, yes. I'm
2 just kidding. Yes.

3 MJ [COL POHL]: Don't raise my hopes, Mr. Harrington.
4 342. Mr. Schwartz.

5 [Conferred with courtroom personnel.]

6 DC [MR. SCHWARTZ]: Good afternoon, Your Honor.

7 MJ [COL POHL]: Good afternoon, Mr. Schwartz.

8 DC [MR. SCHWARTZ]: So the size of this binder in 342 is I
9 think what misled us earlier regarding what 342 is actually
10 about. So this is a very narrow question, very narrow piece
11 of relief we're requesting here. This access to witnesses
12 obviously is a significant problem that has arisen in a
13 variety of contexts here. At some point there will be a
14 challenge to the government's policy to the extent a policy
15 exists on this question, but 342 isn't that.

16 And when you began to question Ms. Bormann earlier
17 about the nature of 342, I actually had the same thought you
18 did, and then I went back and I noticed, 342 is simply a
19 discovery request that is directed at oral communications
20 between members of the prosecution's office and JTF-GTMO
21 regarding defense access to witnesses.

22 So this isn't a challenge to any kind of policy
23 that's in place. There's a lot of law discussing what

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1 policies would violate the Constitution, what policies would
2 violate the MCA, but that's not this. That's a future
3 discussion. This really, I think, is the last piece of
4 discovery, the last piece of evidence that we'll need to rely
5 on to bring that future motion.

6 What we have here is a discovery request that went to
7 the prosecution seeking information about any kind of guidance
8 that was being provided to potential witnesses, any kind of
9 policy that was in place. What came back in discovery other
10 than some responsive documents was the statement that the
11 prosecution declined to provide records of these oral
12 communications between prosecutors and JTF-GTMO personnel as
13 being protected by the deliberative process privilege; not
14 that it wasn't material, not that it wasn't relevant, but that
15 it was protected by privilege. That's all 342 is addressing.

16 There's a lot of information, a lot of ripe
17 information in what we were referring to this morning as the
18 bench brief filed in Hadi. There are e-mails on this subject
19 that will be brought to the commission's attention before we
20 can resolve this witness access issue that has been an
21 impediment to our preparation for so long.

22 Here, this narrow focus on oral communications is so
23 important in light of where we've come in terms of discovery

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1 battles in this case, thinking all the way back to the issue
2 over asbestos remediation, which substantively was very off
3 point from this issue, but ultimately the commission ordered
4 e-mails to be provided to the defense and those e-mails
5 exposed bad faith on behalf of government actors.

6 MJ [COL POHL]: Let me ask you this, and I think I know
7 the answer to it, but I want to clarify it. You're asking for
8 oral communications, and obviously you really want records of
9 oral communications. So you'd rely on a conversation between
10 the prosecution and JTF and then somebody memorializing that
11 in some way, shape, or form; and if they didn't memorialize
12 it, it wouldn't exist.

13 DC [MR. SCHWARTZ]: That's right.

14 MJ [COL POHL]: That's what you're asking for,
15 memorialization of oral conversations?

16 DC [MR. SCHWARTZ]: That's right.

17 MJ [COL POHL]: Okay.

18 DC [MR. SCHWARTZ]: We know something exists here just by
19 the nature of the government's response to the discovery
20 request. It wasn't that there's nothing out there, it wasn't
21 that whatever is out there is immaterial, I'm paraphrasing,
22 it's there's something out there but you can't have it because
23 of this privilege. That's really the fight here.

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1 That's why our alternative relief is there's an
2 in camera review of whatever does exist. If there's some kind
3 of argument that we shouldn't have it because of this
4 privilege, certainly the commission could review the discovery
5 at issue and weigh in on that. But I'll get to why the
6 privilege doesn't exist here or should be pierced.

7 More recently than the asbestos abatement e-mails is
8 something we discussed this morning, and that's the e-mails
9 underpinning Change 1 that was going to have military judges
10 based permanently in Guantanamo. On its face, there were
11 problems with Change 1 and those problems were attacked, but
12 it wasn't really until the e-mails came out that the, you
13 know, significant bias was able to be understood by all the
14 parties.

15 That's where we've seen in the past in this unusual
16 case communications records in the government's possession can
17 be very informative on important subjects like this. And when
18 it comes to access to witnesses, we're talking about the
19 defendants' ability to prepare for pretrial motions and
20 ultimately for trial. Specific example of that here --
21 because we're talking about, obviously, conversations that led
22 up to the current policy, but, you know, information
23 addressing former policies or, you know, consideration that

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1 went into the development or the changes of policies over time
2 is relevant here to get at any motivations people might have.
3 And I'm not suggesting, you know, bad faith or bad conduct on
4 the part of the prosecutors here. What we're talking about
5 is, you know, what are JTF personnel doing that has caused us
6 to have such limited access to witnesses?

7 So when we submit witness requests to the government,
8 often, very often the response we get is you haven't provided
9 an appropriate synopsis or your synopsis isn't relevant to
10 the, you know, issue at hand. So the government does stand in
11 the way, the vast majority of the time government being
12 prosecutors.

13 But JTF conduct, to the extent that it's also
14 interfering with our ability to interview witnesses, is
15 probably more at issue here, is of more concern on this 342
16 issue. And what I mean is, you know, Ms. Bormann referenced
17 this morning SOP Number 11. And when we look at SOP
18 Number 11, we see that at least at one point.

19 There was a very clear policy in place that violated
20 the defendants' rights to obtain witness -- access witnesses
21 and obtain information in preparation for trial.

22 SOP 11 specifically prohibited defense counsel from
23 approaching and interviewing JTF personnel. And the fact that

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1 that existed at one point, if it doesn't exist now, to my
2 understanding it does, 5 August 2014, JDG SOP Number 11,
3 Section 11-3(d), "At no time are counsel permitted to solicit
4 information on camp operations or other aspects of JTF-GTMO
5 operations from guards or other JTF personnel." Clearly, that
6 can't be the standard when we're talking about criminal
7 defense, particularly a capital defense.

8 So again, without yet attacking whatever policy
9 exists today, this background information is relevant, it's
10 material to our preparation in determining how to get around
11 whatever unlawful impediments exist.

12 A good example -- because we don't have to look at
13 this in a vacuum. You know, if this were day one of the case
14 and we read the bench brief and we saw that the government had
15 taken into consideration the various types of witnesses and
16 certain protections or procedures that would have to be put in
17 place for each particular witness, maybe at least we could
18 look ahead and say, well, all right, we'll try that out.
19 That's not what we're dealing with here. We are dealing with
20 a history of witness requests that have gone unmet or
21 completely ignored.

22 And 399C, which is another motion that we should at
23 some point before we recess for the week take up, is a good

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1 example. In 399C, this is the family visitation motion. So
2 our factual predicate lays out that Mr. Bin'Attash had
3 essentially no ability to communicate with his family for a
4 long time. Once we filed AE 321, the theory, at least, of
5 some kind of delayed video teleconference system came to
6 fruition. And over the course of the past two or three years,
7 we have seen that develop to a point where it isn't
8 satisfactory, essentially is what we're debating in 399.

9 So in 399 we submit to the government a witness
10 request for the JTF personnel who oversees this delayed video
11 teleconference function to help us understand why it is that,
12 despite the appearance of some kind of program, Mr. Bin'Attash
13 is not having the opportunity to participate in this program
14 and have access to his family.

15 The response from the government to this witness
16 request is, your synopsis isn't good enough but we'll pass
17 along your request to the SJA here in Guantanamo, and if that
18 person wants to speak to you, he or she will do that. After
19 that, we hear nothing.

20 And so considering SOP 11, considering some of the
21 particular biases we've seen throughout the litigation of
22 different issues in this case, we have to ask ourselves, okay,
23 is the SJA or some other representative at JTF-GTMO

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1 approaching the witness. And that's a big assumption we're
2 making at all, because I have no record that that actually
3 happened.

4 But assuming it does, does the conversation go
5 something like, okay, Mr. Witness, one of the parties wants to
6 interview you. You may speak to them. You don't have to.
7 You know, fill in the blank with the appropriate language. Or
8 does it go something more like, you know, Mr. Witness,
9 Ms. Bormann, counsel for Mr. Bin'Attash, you know, the woman
10 who wears the black abaya to court, she wants to talk to you.
11 What do you think about that? You know, two different
12 conversations, certainly, and I can only ----

13 MJ [COL POHL]: You don't think a witness has a right to
14 know who wants to talk to him? Again, I -- I got the -- I got
15 the equal access to witnesses, that's not what I'm talking
16 about. But I'm simply saying is that in litigation, if
17 somebody walks up and says, I'm Mr. Schwartz, do they have a
18 right to know why you're talking to them, or do they have
19 to ----

20 DC [MR. SCHWARTZ]: Well, it's not a witness right issue
21 that we're concerned with, obviously. So there might be
22 circumstances where, for example, I can't walk up to somebody
23 and say, I'm not going to tell you who I am, but I'm going to

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1 ask you questions related to the case. That would be
2 unethical, so I have to do that.

3 MJ [COL POHL]: Do you identify yourself as defense
4 counsel?

5 DC [MR. SCHWARTZ]: I have to.

6 MJ [COL POHL]: That's just my question, when you said the
7 Ms. Bormann issue, I'm simply saying is -- again, you're
8 talking about institutional barriers, for want of a better
9 term, to witness access. I'm talking about the personal
10 decision of the witness. The witness says, I'm not going to
11 talk to defense counsel, I'm not going to talk to prosecutors
12 or whomever ----

13 DC [MR. SCHWARTZ]: Right.

14 MJ [COL POHL]: ---- but they have to know who's asking
15 the questions.

16 DC [MR. SCHWARTZ]: Well, they might. And so it ----

17 MJ [COL POHL]: They might what? They might have to what?

18 DC [MR. SCHWARTZ]: They might have to know. If we -- if
19 we -- I say we, if a representative of the government
20 approaches this person and says you're being sought for a
21 witness interview, period, no, they wouldn't need to know that
22 and I don't think anybody would argue they have a right to
23 know that, the identity of the person seeking to do the

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1 interview.

2 MJ [COL POHL]: Or the person's job?

3 DC [MR. SCHWARTZ]: Or the person's job.

4 Where it becomes relevant, and the reason I propose
5 these hypothetical two different scenarios, is if the
6 information that's provided suggests a certain answer to the
7 witness and has a chilling effect on whether the witness
8 chooses to engage -- and you will see that throughout. I
9 mean, in this future debate over whether the language or the
10 scheme in the bench brief is appropriate, you will see many
11 examples where the language used might on its face appear to
12 be neutral, but in reality, when read a certain way, clearly
13 could have a chilling effect on a witness' interest.

14 MJ [COL POHL]: So if the JTF point of contact, for want
15 of a better term, walks up to a guard and says, Mr. Schwartz
16 from the defense wants to talk to you, do you want to talk to
17 him, that's too much information?

18 DC [MR. SCHWARTZ]: In a vacuum, in general, I don't know
19 that that would necessarily be a problem. But that's just not
20 what we're working with here, no. So, you know, if the SJA
21 walked up with me in front of a witness and said, you know,
22 Staff Sergeant, Mr. Schwartz here from the defense wants to
23 interview you, would you like to be interviewed, do you have

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1 an objection to being interviewed? I don't have a problem
2 with that at all.

3 The problem that I have here is the lack of
4 transparency combined with the history of this case convinces
5 me that that's not how it would work. And that's why these
6 records of oral communications are material to our preparation
7 and our ability to argue what will ----

8 MJ [COL POHL]: I know it was on a different motion, but
9 didn't Mr. Connell tell me that some people talk and some
10 don't; that there's no consistent pattern?

11 DC [MR. SCHWARTZ]: There is what -- and I don't want to
12 speak for Mr. Connell, saying the same question you asked ----

13 MJ [COL POHL]: No, no. That's not your experience?

14 DC [MR. SCHWARTZ]: My experience is there's the spectrum
15 of answers. There might or might not be patterns in certain
16 circumstances, but I don't think -- again, I won't speak for
17 him -- answering your question to him, we're not talking about
18 witnesses who are here.

19 I can't think of a scenario where I have requested a
20 local witness who's currently local and that witness, without
21 the government saying there's an interview here, we're going
22 to come and accompany and participate in it, that witness
23 choosing to be interviewed. And that gets to another issue,

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1 and, again, I don't want to get down the road of actually
2 arguing the merits of the scheme.

3 MJ [COL POHL]: Okay.

4 DC [MR. SCHWARTZ]: We do spend some time talking about if
5 what the government is doing is forcing a witness to be
6 accompanied to an interview by government personnel, that has
7 legal implications. There are problems with that. But
8 setting that aside ----

9 MJ [COL POHL]: I understand that.

10 DC [MR. SCHWARTZ]: ---- these are all reasons why the
11 records of these oral communications that we know do exist are
12 material to our preparation.

13 MJ [COL POHL]: Okay.

14 DC [MR. SCHWARTZ]: I won't spend too much time on
15 privilege. We've dealt with deliberative process privilege.
16 I believe deliberative process privilege was raised even on
17 the convening authority e-mails regarding Change 1. We have
18 kind of been down this road several times. There is no
19 deliberative process privilege that governs communications
20 between the prosecutors, as they exist as one government
21 entity, and JTF-GTMO, who's carrying out a completely
22 different function, so I'm told. But we do go into some
23 detail in our position about the factors to consider, the

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1 relevance of this evidence, the importance of it, the venue,
2 you know, is this a FOIA case or is this a criminal scenario,
3 is this a capital case.

4 More to the point, the cases tell us that the -- to
5 the extent that there is a deliberative process privilege over
6 communications like this, it's pierced automatically when
7 there is any reason to believe government misconduct might
8 have occurred. And considering the existence of SOP
9 Number 11, the privilege simply is gone.

10 Can I have a moment, Your Honor?

11 MJ [COL POHL]: Sure.

12 DC [MR. SCHWARTZ]: Subject to your questions.

13 MJ [COL POHL]: I have none. Thank you.

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

16 Mr. Ryan.

17 TC [MR. RYAN]: Yes, sir. This concerns the request of
18 the defense not for actual documents relating to the policy
19 that went into effect, but actually requesting the
20 behind-the-scenes, if you will, discussions as to how a policy
21 was to be put together, implemented, and taking into account
22 various considerations, various interests, various compelling
23 government issues, such as classified, such as protected, such

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1 as official government information. The defense seeks all of
2 these things.

3 Now, let me start by saying in this motion in regard
4 to various defense requests, we did provide, as we state in
5 our brief, a number of pages of various documents that
6 concerned either policies in existence or communications
7 between the Office of the Chief Prosecutor, the JTF, and
8 SOUTHCOM. It includes, among other things, the government's
9 bench brief which, of course, became a defense exhibit, and
10 of -- and which, of course, was filed in the Hadi case, as I
11 stated, back 3 December 2014.

12 It also includes, Your Honor, SOP 11, which was made
13 reference to, which was put in effect by the JDG commander.
14 To the extent that this has been presented to you as an
15 example, I believe it was stated as an example of government
16 misconduct, then I would commend it to Your Honor's reading.
17 Although I don't ever want to give you more work than you need
18 to, but I don't think, looking at that SOP, it can be
19 described as an example or as a sort of prima facie case of
20 government misconduct. In reality, I believe it was the
21 actions of the JDG commander to do the best he could in
22 running this very difficult facility.

23 Now, once all of those documents were produced, and

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1 I'll state now, Judge, I think -- I think the provision of
2 this much was -- and I won't use the term generous by the
3 government, but I think it was an attempt to try and allay
4 some concerns and to explain to some degree what the
5 government was trying to accomplish in putting together the
6 bench memo.

7 That was not enough, as it turned out. In fact, much
8 more was requested, which got into discussions that we believe
9 was inappropriate to be turned over to the defense under any
10 situation, but certainly in this one, and I'll get to that in
11 a moment. We declined it as predecisional and deliberative,
12 and we believe that is the proper justification for not,
13 although, I would submit, not the only one.

14 The defense says it wasn't about materiality or
15 relevance or anything like that. Well, all of those issues
16 are always on the line. Materiality is always the subject of
17 any discovery discussion because that's what 701 and 703 say.
18 Secondly, simply because we didn't tell the defense all of our
19 reasons for not turning it over, it doesn't mean we've waived
20 them as if we're in front of a court. And furthermore, as I
21 will read in a second, relevance is sort of inherent in the
22 discussion regarding deliberative process as well.

23 So the deliberative process that we relied on in

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1 denying any further delving into this subject and into the
2 internal communications of the prosecution and others can be
3 pierced; however, the commission is required to take into
4 account the relevance of the evidence and availability of
5 other evidence, as well as possible future timidity by
6 government employees and the role of the government. And
7 that's quoting the case that we cite In re Sealed Case.

8 Now, Judge, we're back to this issue of this bench
9 memo, and a review of it. And I don't know if Your Honor has
10 taken it on just yet, and I'm not suggesting you should have,
11 but a careful review of that document will show that it was
12 constructed with a great deal of concern and a great deal of
13 adherence to the various authorities, both case law, the Rules
14 for Military Commissions, and other significant authorities as
15 well. I also point out that it was done at the request of a
16 military judge and, of course, was done to design -- designed
17 to protect important government interests, including but not
18 limited to classified information.

19 So that's what we're talking about. This came into
20 effect because somebody told -- somebody with a black robe
21 told us to put it into effect. And we did so after a great
22 deal of work, after it being reviewed by everyone of
23 significance within the Office of the Chief Prosecutor, and

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1 ultimately being approved by General Martins as well, and it
2 was put in place.

3 Now, the defense at one point decided, well, they
4 didn't like it, so they made requests for discovery about it.
5 And as I said before, I think above and beyond the government
6 complied to a certain extent, maybe with the unrealistic hopes
7 that somebody would actually see that it was put together with
8 specific -- with a great deal of specificity and desire to
9 achieve the proper goals. Nonetheless, that was followed up
10 with requests for internal communications.

11 Now, I'd submit, Judge, that such requests for
12 internal communications should be a last resort and only when
13 actual wrongdoing has occurred, even if then, and as
14 determined either by the commission or conceded by the Office
15 of the Chief Prosecutor. What it amounts to, Judge, as we
16 stand here right now and based on what you heard from counsel
17 is defense saying, well, we don't believe you, and we don't
18 like your product so we want to go down the road of treating
19 it as if the government has done something wrong, which I
20 submit is absolutely not the case.

21 As to this specific type of document or evidence or
22 information they're requiring, I would submit, Your Honor,
23 that the commission and the parties should want -- should

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1 encourage full and frank deliberations within various aspects
2 of the United States Government. This kind of policy, as
3 contained in the government's bench memo, should not have come
4 from JTF alone, from SOUTHCOM alone, or even from the OCP
5 alone. It's the type of thing that we should be doing
6 together with lots of communication between us all.

7 To simply be able for the defense, based on the
8 record before Your Honor right now, to say, well, we get
9 everything you ever talked about I would submit is a bad idea
10 in terms of chilling and being a disincentive for that full
11 and fair discussion of all information necessary for making a
12 determination as to an important matter such as this.

13 Subject to your questions, sir.

14 MJ [COL POHL]: I have none, thank you.

15 TC [MR. RYAN]: Thank you.

16 MJ [COL POHL]: Mr. Schwartz, anything further?

17 DC [MR. SCHWARTZ]: Your Honor, again, I'm not asking for
18 any information that prosecutors said to prosecutors or
19 somebody within OCP said to somebody else within OCP. We're
20 talking about communications from the prosecution's office to
21 JTF-GTMO or from JTF-GTMO to the prosecutors.

22 There's a lot that I'd like to say in response to the
23 substance of the bench memo. That's not the issue here so I

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1 won't do it. I would like to add, though, that to the extent
2 the prosecution has a position on whether discovery is
3 relevant, material, in existence or not, whether witnesses are
4 material, whether our synopsis is somehow lacking, the
5 response that they provide us in writing is what we have to
6 rely on to file our motions.

7 So if the response is, you know, silent on
8 materiality but objects under the -- some kind of privilege,
9 then that's the motion that we file. For them to then come in
10 to the courtroom and say, well, you know, we didn't tell you
11 before, but by the way, it's also not material or, you know,
12 somehow should be withheld from you for some other reason,
13 that's just going to allow them to have as many bites at the
14 apple as they need until they win the issue. So I'll just
15 throw that out there.

16 MJ [COL POHL]: Well, as a general rule, I decide what is
17 in the pleadings. I mean, there's always exceptions to
18 general rules, but ----

19 DC [MR. SCHWARTZ]: Sure.

20 MJ [COL POHL]: ---- it's not a good litigation posture to
21 say, well, here's my first offense, and if I don't win on
22 that, I'll get back to you on my second one or my third one.
23 That goes for both sides.

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1 DC [MR. SCHWARTZ]: Sure. Thank you.

2 MJ [COL POHL]: So I got it. Thank you.

3 Any other defense counsel wants to be heard on this?
4 Apparently not.

5 TC [MR. RYAN]: Nothing, sir.

6 MJ [COL POHL]: I'm sorry, Mr. Ryan, I didn't know. I
7 meant to give you an opportunity.

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

9 MJ [COL POHL]: Brings us to 356. Then we'll take the
10 afternoon break.

11 LDC [MR. CONNELL]: May I approach the CISO for a moment?

12 MJ [COL POHL]: Sure.

13 LDC [MR. CONNELL]: Sir, on 16 August 2012 -- seems like a
14 long time ago now -- when we were seeking access to a security
15 clearance guide for the information which was alleged to be
16 classified in this case, I argued in open court that we, as
17 the defense, are holders of SIPR and JWICS accounts. I heard
18 a lot about that from members -- off the record from members
19 of the Office of the Chief Prosecutor, who maintained that
20 that was irregular and that I should not have it, even though
21 I was at the time a DoD employee.

22 On information and belief -- and I can't prove it
23 yet, though I have good information that it's true, some

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1 member of the Office of the Chief Prosecutor went to the --
2 another DoD agency, who complained to the Office of the
3 Director of National Intelligence, and at an unknown time in
4 2003 -- now we're not on information and belief, now we can
5 prove this ----

6 MJ [COL POHL]: 2003?

7 LDC [MR. CONNELL]: Sorry, 2013. The office of the ODNI
8 wrote to the Secretary of Defense. And on 18 July 2013, the
9 Secretary of Defense disabled all browser access, certainly
10 for the defense office and perhaps for other service of
11 offices as well, to SIPR and JWICS. This was communicated to
12 us in a memorandum which is Attachment B to AE 356. And with
13 court's permission, I will display it on the document camera.
14 I have shown it to the CISO.

15 MJ [COL POHL]: Yeah, go ahead.

16 LDC [MR. CONNELL]: So the authority for the statement I
17 just made about in 2013 is in the second paragraph of the
18 document. The Secretary of Defense himself -- only the second
19 time to my knowledge that he's directly touched the case, the
20 other being the promulgation for the Rules for Military
21 Commission -- says that, "The Office of the Director of
22 National Intelligence has expressed concern that defense
23 counsel assigned to represent Guantanamo detainees in military

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1 commissions cases have access to classified intelligence
2 information outside of the established discovery processors
3 through web browsers resident on the Joint Worldwide
4 Intelligence Communication System, JWICS, and the Secret
5 Internet Protocol Router Network, or SIPRNet."

6 We have never seen the communication from the ODNI to
7 the Secretary of Defense, but this letter continues on its
8 focus on defense counsel in the second paragraph to explain
9 something which is not actually factually true, that the -- a
10 series of procedures, and I'm down about three-quarters of the
11 way now, mandate that defense counsel obtain classified
12 information only from the Office of the Chief Prosecutor.

13 "Defense counsel access to classified information
14 outside the discovery process, for example, through the use of
15 JWICS and SIPRNet web browsers circumvents these established
16 procedures." At this time shortly after this memorandum in
17 July of 2013, all of our -- or my, I can say specifically,
18 SIPR and JWICS access, browser access, was disabled.

19 It strikes me that one of the things that we can tell
20 from this letter is that it is both targeted at the defense
21 and it is based on litigation concerns. Even if the
22 prosecution JWICS and SIPR were disabled, certainly they have
23 other channels that they can obtain information through, such

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1 as through the High-Value Detainee Prosecution Task Force.
2 We've discussed before that PTF, the Prosecution Task Force,
3 is in fact the information structure that the government uses
4 to send its e-mails frequently, and it's a CIA server.

5 The -- what we are asking for is, given what we
6 learned in the discussion earlier today with a review of the
7 e-mails, it is safe to say that memoranda between principals
8 of the National Security Council do not take place with a
9 great deal of staffing and communication. What we are asking
10 for is the production of that communication so that we can
11 trace back this policy which has had a substantial impact upon
12 the defense office.

13 MJ [COL POHL]: What does a JWICS account give you access
14 to?

15 LDC [MR. CONNELL]: There are two separate things. First,
16 there is a -- there are some accounts -- there is some
17 information which is resident only at the JWICS level. There
18 are no need for further access. Most intelligence maintained
19 on JWICS and a great deal of it maintained on SIPR are in
20 walled gardens where we have to make a specific application to
21 the proprietor or the owner of that information, who makes an
22 individualized need-to-know determination as to whether we
23 need it or not.

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1 MJ [COL POHL]: Can you access parts of either of these
2 systems on your own without permission ----

3 LDC [MR. CONNELL]: We only have ----

4 MJ [COL POHL]: ---- once you're given basic access?

5 LDC [MR. CONNELL]: Right. I want to make sure that I'm
6 answering the question. So if this doesn't give you the
7 information you need, ask me again.

8 We right now have functioning browser access only for
9 one website and that is the one necessary to -- it's the JPRS
10 website, the one necessary to fill out our personal
11 information in case we need to be recovered, the Joint
12 Personnel Recovery something. That's the only thing that we
13 have access to.

14 MJ [COL POHL]: Well, that's not my question.

15 LDC [MR. CONNELL]: Right.

16 MJ [COL POHL]: My question is, prior to being cut off on
17 these two systems, if you got -- if you went into JWICS, would
18 there be any limitation of what you could see? You talked
19 about gardens a second ago.

20 LDC [MR. CONNELL]: Yes. Oh, there's enormous limitations
21 on what you can see just with a base-level browser in either
22 SIPR or JWICS, the -- like, I don't know, something like 98 or
23 99 percent -- I'm making that number up, but it's enormous.

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1 The vast, vast majority of the information requires -- is not
2 accessible by simply a JWICS or SIPRNet ----

3 MJ [COL POHL]: If you got into the, for want of a better
4 term, the commission garden, okay, how would that work? Would
5 you want a specific piece of information, or into the whole --
6 I'm using your term -- garden?

7 LDC [MR. CONNELL]: Right. Walled garden is an
8 information technology firm -- term. That means something
9 that is set up that requires further access. Perfect example,
10 easy to understand, the access of a walled garden is LEXIS,
11 right? It's resident on the Internet, on NIPRNet, but in
12 order to get into it, you have to have proper credentials
13 which you obtain by paying for them.

14 MJ [COL POHL]: Now, before you got cut off on the JWICS,
15 what garden -- were you allowed in the garden?

16 LDC [MR. CONNELL]: In JWICS, no.

17 MJ [COL POHL]: So what are you losing?

18 LDC [MR. CONNELL]: What we primarily lose, and I'm trying
19 to dance here, we have already introduced ----

20 MJ [COL POHL]: Don't touch classified material.

21 LDC [MR. CONNELL]: I understand. Can I ask a question of
22 the prosecution?

23 MJ [COL POHL]: Sure.

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1 LDC [MR. CONNELL]: We have -- I am not going to say what
2 I was going to say because we're not sure.

3 The -- but there are -- on SIPRNet, there are
4 substantial amounts of information that are available to
5 anyone with a SIPRNet token and browser access, which is every
6 other person in the Department of Defense, and that
7 information is what people need to do their ordinary job.

8 I'll give you a perfect example that came up last
9 week. We were planning travel to another country, and as we
10 always do, we went to the foreign clearance guide and said,
11 well, what are the requirements for, you know, a contractor, a
12 GS employee, military member, whatever, to go to that country.
13 And one of the requirements for travel to that country is that
14 you have to go to a specific website on SIPRNet and submit an
15 application because of recent events in that country.

16 That's a perfect example of something that is taken
17 for granted by every Servicemember and every other employee
18 and virtually all contractors to the Department of Defense
19 that we can no longer participate in the ordinary life of the
20 Department of Defense because we have been kicked off of
21 SIPRNet.

22 Now, separate from that, there is substantial
23 information available to an ordinary SIPRNet user on a wide

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1 variety of topics. The -- already we have introduced, which I
2 can identify in a closed session -- we have introduced one
3 exhibit, which I will actually be arguing on Friday, and I'll
4 flag it when I get there, that we obtained prior to the
5 information about -- coming down from the Secretary of Defense
6 that they were cutting off our access to SIPRNet.

7 So yes, we lose an enormous amount -- an enormous
8 asset, which I personally used quite frequently prior to our
9 access being cut off. They took away one of our tools. You
10 know, eventually we will learn whether they took away the
11 prosecution tools as well, but they certainly took away ours
12 based on litigation concerns targeted at the defense.

13 The reason we're seeking this information is that
14 ultimately I think it might support an unlawful influence
15 claim, certainly a reasonable access to evidence claim, and
16 perhaps if it does turn out that the prosecution was involved,
17 a due process claim as well.

18 MJ [COL POHL]: Just something you said about discussing
19 this on Friday. Just my notes are never the greatest in the
20 world. Did we do a 505(h) on this one?

21 LDC [MR. CONNELL]: We don't need a 505(h). All I meant
22 was there is an exhibit which will be coming up in the 018Y
23 series ----

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1 MJ [COL POHL]: Okay. Okay.

2 LDC [MR. CONNELL]: ---- that at the time I'll say, hey,
3 look, here is an example of something that we got off SIPR.

4 MJ [COL POHL]: Exactly. Okay. Thank you.

5 LDC [MR. CONNELL]: Thank you.

6 MJ [COL POHL]: Any other defense counsel want to be heard
7 on this motion? Apparently not.

8 The government, I'll give you an opportunity to
9 respond. Do you want to respond?

10 MTC [MR. TRIVETT]: One second, Your Honor.

11 MJ [COL POHL]: Okay. Well, I'm just going to say, we're
12 going to take a 15-minute recess, and then if you want to
13 respond, you can respond after the recess.

14 Commission is in recess.

15 [The R.M.C. 803 session recessed at 1525, 26 July 2016.]

16 [END OF PAGE]

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