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1 [The R.M.C. 803 session was called to order at 1000,
2 29 October 2015.]

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

6 This brings us to the next issue, which I believe is
7 152 -- Major Schwartz.

8 DDC [Maj SCHWARTZ]: Your Honor, before the recess there
9 was one last line that you said that Mr. Bin'Attash didn't
10 hear. I didn't hear it either. I don't know if you had ----

11 MJ [COL POHL]: Which line was that? Because I didn't
12 write that down.

13 DDC [Maj SCHWARTZ]: It was going to the nature of his
14 relationship ----

15 MJ [COL POHL]: His relationship with Ms. Bormann?

16 DDC [Maj SCHWARTZ]: Yes, sir.

17 MJ [COL POHL]: I'll go over it again. Okay.

18 Mr. Bin'Attash, as I told you before, that -- and
19 again, you'll get a copy of my long ruling that will explain
20 my rationale -- that under the law you've not established good
21 cause to terminate Ms. Bormann, but Ms. Bormann and Major
22 Schwartz and all members of the defense team at the end of the
23 day do what you want them to do. Do you understand that?

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1 ACC [MR. BIN'ATTASH]: Yes.

2 MJ [COL POHL]: And, more importantly, don't do what you
3 don't want them to do. Do you understand that?

4 What I mean is, if you tell them not to do something,
5 they say, for example, in their opinion they want to file a
6 particular motion, and if you say "I don't want that motion to
7 be filed," then we will discuss whether or not that should be
8 filed or not. But ultimately it's your defense, and in this
9 case it is your life. So, ultimately, you are the decision
10 maker. Do you understand that?

11 ACC [MR. BIN'ATTASH]: To understand that I understood
12 you, that if I do not want somebody to submit or file a
13 motion, a certain motion, they are not supposed to file it; is
14 that correct?

15 MJ [COL POHL]: That's my view of the law. Anybody
16 disagree with that?

17 LDC [MR. NEVIN]: Yes, Your Honor, on behalf of
18 Mr. Mohammad.

19 LDC [MR. CONNELL]: Yes, Your Honor.

20 Sorry, there was a request for clarification. Yes, I
21 do not believe that's an accurate statement of the law.

22 MJ [COL POHL]: Okay. Perhaps it's too broad a statement.
23 There are only certain decisions the accused can make,

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1 correct?

2 LDC [MR. CONNELL]: Absolutely.

3 MJ [COL POHL]: So if he indicates -- I understand what
4 you're saying, and as soon as I said that, I realized it's too
5 broad a statement.

6 Okay, Mr. Bin'Attash, let me try it a different way,
7 is that there are certain decisions only you can make, and
8 there are other decisions your attorneys will make on your
9 behalf, okay? The decisions that you make are unique to you.
10 And if you and your attorneys disagree on anything, they may
11 have a responsibility to file a motion, even over your
12 objection, but, if that were to happen, your input would be
13 considered before the motion was filed -- was litigated.

14 Any disagreement with that statement of the law? I
15 mean, he has a right to say I don't want -- I didn't want it
16 filed and you tell me why, doesn't he?

17 LDC [MR. NEVIN]: I mean ----

18 MJ [COL POHL]: At least be heard on it. I'm not saying
19 it's dispositive. That's simply what I am saying.

20 LDC [MR. NEVIN]: I think the entire -- to work out all of
21 the parts and subparts of this issue is really complex.

22 MJ [COL POHL]: Okay.

23 LDC [MR. NEVIN]: Basically, my understanding is that the

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1 defendant has the right to control the outcome of certain
2 questions, and the lawyers have the right to control and an
3 obligation to control the outcome of others. And which are --
4 which are sometimes a little difficult ----

5 MJ [COL POHL]: Okay. But at the end of the day, is that
6 if he disagreed with a particular course of action, would he
7 have the right, in your guys' view, to put that on the record
8 himself? Or not? Or does it depend what the issue is? Okay.

9 Okay. Mr. Bin'Attash, kind of what we talked earlier
10 about ----

11 ACC [MR. BIN'ATTASH]: I'd like to ask one question.

12 MJ [COL POHL]: Sure.

13 ACC [MR. BIN'ATTASH]: If I disagree with my lawyer about
14 a specific motion, the court will discuss that. You said
15 that; is that correct? How is this going to be discussed in
16 the court? I could give the judge one example about when the
17 motions -- about one motion.

18 MJ [COL POHL]: Hold on a second, Mr. Bin'Attash. I don't
19 need an example here. I'm going to ask Mr. Nevin to respond
20 because he -- I don't want to put the Bin'Attash team in a
21 position -- okay.

22 It's your position -- go ahead.

23 We're just talking about general legal principles

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1 here, not necessarily any particular motion, okay? You
2 understand kind of what the question is?

3 LDC [MR. NEVIN]: Yes, sir. And I -- let me ask this
4 indulgence of the court -- of the military commission. I
5 think it was improvident for me to speak to this. I think
6 this is a really complicated issue that has lots of
7 implications, and I would prefer if we're going to have a
8 position-taking in this, to have the opportunity to do some
9 additional research.

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: I know there's a good deal of both case
12 law and scholarly research on this, and I'd be glad to try to
13 present ----

14 MJ [COL POHL]: It's clear from what I've been talking
15 about that I don't necessarily have a clear view of it either.
16 So we'll go forth.

17 LDC [MR. NEVIN]: Thank you.

18 MJ [COL POHL]: Mr. Bin'Attash, it's a very complicated
19 legal issue, about what you can control as far as motions are
20 concerned. And what we're going to do is I'm going to have
21 the attorneys provide me input on it, and then next time we
22 meet, I'll come back and tell you about it, okay? Because
23 it's just not a simple yes-or-no answer. So we'll come back

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1 to it.

2 ACC [MR. BIN'ATTASH]: That's good. There's no problem.

3 MJ [COL POHL]: Thank you. Okay. So, Defense, I'm going
4 to take Mr. Nevin up on his offer. I want to make sure you
5 know what the issue is, is what rights does the accused have
6 to control his defense in terms of -- I know he's got
7 certain -- you know, pleading guilty, I've got that part of
8 it.

9 But I'm really talking about the example we're
10 talking about here, the attorney wants to file a motion, the
11 accused says, "I don't want to file the motion," how do we
12 handle that? I don't think it's necessarily ripe right now,
13 but it seems to be an issue that let's get cleared up so we
14 can avoid it, okay? Normal briefing schedule, two weeks, two
15 weeks and a week.

16 DDC [Maj POTEET]: Your Honor, we recognized yesterday and
17 this morning it's important to take up and resolve the matters
18 involving the Bin'Attash team. But before moving on to other
19 matters, we do believe it's appropriate to address the 254WW
20 emergency motion regarding unlawful influence that happened
21 the other day.

22 MJ [COL POHL]: Hold on. Hold on.

23 Major Schwartz, are we done with 380?

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1 DDC [Maj SCHWARTZ]: Sir, I'll wrap up 380 in one
2 statement.

3 MJ [COL POHL]: Okay.

4 DDC [Maj SCHWARTZ]: We'll brief this issue. We will
5 brief the regulation issue with respect to the Chief Defense
6 Counsel's role.

7 The other issue I just want to make sure the record
8 reflects we intend to brief is the 505(d), issue of good
9 cause. To the extent I agreed with the commission yesterday
10 about whether good cause is the standard, that's an issue that
11 we do intend to brief.

12 MJ [COL POHL]: Sure. Fine. I understand. Okay.

13 Come to the podium. Major Poteet.

14 DDC [Maj POTEET]: Good morning, Your Honor.

15 MJ [COL POHL]: Good morning.

16 DDC [Maj POTEET]: The UCMJ restricts and constrains what
17 servicemembers may say about certain military and civilian
18 leadership; that is appropriate. Leadership at the top
19 justifies that constraint. Similarly, military and civilian
20 leadership are constrained by the rule of law and
21 constitutional due process, statutory prohibitions of unlawful
22 influence and other authority in what they may say about
23 military tribunals.

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1 Yesterday in the Senate -- or excuse me, day before
2 yesterday in the United States Senate, the Secretary of
3 Defense and the Chairman of the Joint Chiefs of Staff
4 inappropriately criticized an order of this military tribunal,
5 and we do believe it's necessary at this point to take this
6 up.

7 There are serious consequences from ----

8 MJ [COL POHL]: Just a second.

9 LDC [MR. RUIZ]: Your Honor, if I may, sorry to interrupt.
10 I just want to make our position clear on this on behalf of
11 Mr. al Hawsawi. We just recently filed a motion for leave to
12 file a supplement on this issue. We've also sent a conference
13 request to the prosecution. And we're going to ask to have
14 the opportunity to supplement our previous filing with these
15 facts.

16 MJ [COL POHL]: Let's just do things in regular order of
17 business. Mr. Ruiz, if you want to be heard in this, you'll
18 be heard, but let Major Poteet finish, and I'll give everybody
19 an opportunity to be heard. Don't worry about it.

20 Go ahead, Major Poteet.

21 DDC [Maj POTEET]: Thank you, Your Honor.

22 MJ [COL POHL]: So you filed a motion on unlawful
23 influence based on remarks by ----

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1 DDC [Maj POTEET]: The Secretary of Defense and national
2 civilian and military leadership.

3 MJ [COL POHL]: These remarks were made when?

4 DDC [Maj POTEET]: Made the day before yesterday, Your
5 Honor, during a Senate Armed Services Committee hearing.

6 MJ [COL POHL]: Okay. And you filed the motion today?

7 DDC [Maj POTEET]: Last night, accepted for filing today.

8 MJ [COL POHL]: I don't think it's actually got a filing
9 number yet, but I have seen a copy of it, and, quite frankly,
10 that was the first time I was aware of the remarks. But
11 that's okay. Okay.

12 What do you want me to do now? You filed a motion,
13 okay? So what do -- do you want me to do now? Or let me
14 rephrase that. What don't you want me to do now?

15 DDC [Maj POTEET]: Judge, we've asked for this commission
16 to abate proceedings except as to conducting a thorough
17 investigation into this unlawful influence, and plainly it's
18 the appearance of unlawful influence. And certainly when the
19 Secretary of Defense ----

20 MJ [COL POHL]: Other than pulling up newspaper articles
21 off the Internet, what would this investigation entail?

22 DDC [Maj POTEET]: Your Honor, we believe that there may
23 have been inappropriate -- the investigation, I can't say

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1 exactly what it is, but we have to question whether there was
2 orchestration or coordination between the legislative and
3 executive branches of the Senate fact-finding mission last
4 week to Guantanamo Bay regarding the issues presented in AE
5 254 in which ----

6 MJ [COL POHL]: What difference -- would that make a
7 difference? Isn't the issue whether I'm unlawfully
8 influenced?

9 DDC [Maj POTEET]: Your Honor, there is both apparent and
10 actual unlawful influence, of course.

11 MJ [COL POHL]: But it has to affect the proceedings, and
12 which part of the proceedings does it affect other than me?

13 DDC [Maj POTEET]: With the defendants in this case, Your
14 Honor.

15 MJ [COL POHL]: Okay. But let me ask you this: I'm not
16 saying you won't get time to investigate the case, but this
17 deals with 254, right?

18 DDC [Maj POTEET]: It also strikes at the heart of the
19 independence of the trial judiciary. It strikes at the ----

20 MJ [COL POHL]: You have another motion on that, anyway.
21 What I am saying is: Why should I stop now? Why should I
22 abate the proceedings? I mean, that's when I asked what do
23 you want me to do, I really meant what you don't want me to

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1 do, okay?

2 It seems to me this is a matter that -- it's not the
3 first time unlawful influence has come up as an issue.
4 Unlawful command influence comes up frequently in military
5 context. And it strikes to me the normal course of business
6 is to file pleadings, have it fully briefed, take evidence as
7 necessary, and then follow the normal process. And I don't
8 see any reason why we shouldn't follow the normal process now,
9 do you? Apparently you do, so I'm just trying to figure out
10 why.

11 DDC [Maj POTEET]: Your Honor, this is an instance in
12 which the Secretary of Defense, who -- it's appropriate to
13 evaluate this as the Secretary of Defense being Your Honor's
14 direct superior. The only official who is specified in the
15 statute for Military Commissions Act or the Regulation for
16 Trial by Military Commission as having the authority to review
17 or remove the chief judge of the trial judiciary is the
18 Secretary of Defense.

19 The Secretary of Defense in 2011 -- then Deputy
20 Secretary of Defense Ashton Carter promulgated the Regulations
21 for Trial by Military Commission, and 1-3 states that the
22 Secretary of Defense is responsible for the overall
23 supervision and administration of military commissions within

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1 the DoD.

2 The next provision is even more particularly
3 relevant. It says that the chief trial judge of the military
4 judiciary, as a designee of the Secretary of Defense or his
5 designee, is responsible for the supervision and
6 administration of the military commissions trial judiciary.
7 It's unique when a -- or it's "focused" is a better word.
8 It's focused when the direct superior of a judge in an ongoing
9 case publicly, officially, formally in an interaction between
10 the two most powerful branches of the federal government
11 criticizes -- is invited to address ----

12 MJ [COL POHL]: Actually, I believe the three branches are
13 coequal, but I don't want ----

14 DDC [Maj POTEET]: The judiciary is considered the least
15 dangerous, Your Honor.

16 MJ [COL POHL]: Go ahead. I understand what you are
17 saying, and I'm not going to predecide anything, okay? I've
18 got it.

19 But I just don't see why this cannot go the normal
20 course of business, and so it deals with one issue. It's not
21 the first time in these proceedings that there's been issues
22 raised about OSD's role in -- at least in where the trial
23 judiciary should live. It's not the first time that there has

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1 been external matters raised as far as influencing the
2 judiciary.

3 I'm not saying you won't get a remedy. I'm not
4 saying this is not an issue. I'm just saying it's not ripe,
5 and I fail to see why it cannot be handled in the normal
6 course of business. And, therefore, as your motion is -- and,
7 quite frankly, the government has an opportunity to be heard
8 in this, too.

9 DDC [Maj POTEET]: Of course.

10 MJ [COL POHL]: And basically they're supposed -- they're
11 not in a position to -- well, rephrase that. I'm not going to
12 have them respond to something like this, that they just got
13 today. In fact, they may not have even got it yet because
14 there isn't a notice on it.

15 At the end of the day, Major Poteet, if you're asking
16 me to abate the proceedings until this issue reaches some
17 other culmination point, that request is denied. We will
18 handle the issue in the normal course of business. It may
19 influence the current litigation on 254, and I will revisit it
20 when and if we get to 254 on the current docket.

21 Thank you.

22 DDC [Maj POTEET]: Your Honor, I would just like to note
23 that there is a notice on the pleading, just to let the record

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1 reflect. We requested the prosecution's position the evening
2 of the 27th of October and didn't receive a response within
3 24 hours. So that's why we filed it -- it was ready to be
4 filed earlier, but we didn't file it until last night.

5 MJ [COL POHL]: That's fine. I'm not faulting you. The
6 event only occurred a couple days ago, so I'm not faulting
7 that. What I'm just saying is that I don't believe you made a
8 showing that results in extraordinary remedy of stopping
9 everything on this issue, and I'm not going to do it. So
10 that's -- so it will be handled in the normal course of
11 business. Okay?

12 DDC [Maj POTEET]: And when 254 is brought up ----

13 MJ [COL POHL]: When we get to 254, we'll discuss it at
14 that time.

15 DDC [Maj POTEET]: Yes, sir.

16 MJ [COL POHL]: Because it could impact on 254. I'm not
17 saying it doesn't. I'm just simply saying you're asking for a
18 full stop of everything, and the answer to that is no.

19 DDC [Maj POTEET]: Yes, sir.

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

21 Now, I can hear from everybody else, if they want to,
22 but let's understand this. The motion was just filed. If
23 other defense counsel wish to supplement, or whatever term you

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1 want to use, pleadings on it, follow the normal procedure,
2 you'll have that opportunity. And, Trial Counsel, obviously
3 you will have an opportunity to respond in the due course of
4 time, according to the normal briefing schedule, unless for
5 some reason I change it, okay?

6 That being said, Mr. Ruiz, do I need to hear from you
7 again on this issue?

8 LDC [MR. RUIZ]: We probably would disagree on that,
9 but ----

10 MJ [COL POHL]: Disagree on what?

11 LDC [MR. RUIZ]: On whether you need to hear from me or
12 not.

13 MJ [COL POHL]: Okay.

14 LDC [MR. RUIZ]: But the only reason I raise this issue
15 now is because 254 was just raised. And I wanted to make
16 sure, if you were going to get into logistics of it, that you
17 at least had our position on it. It doesn't appear to me from
18 what you're saying that you want to address logistics of 254,
19 but we do think that that's where -- that's where our position
20 makes a difference.

21 MJ [COL POHL]: Again, as I just told Major Poteet, as the
22 request is to stop everything now, until this is investigated
23 or whatever term you want to use, that request is denied.

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1 When we get to 254 on the current docket, then I will hear
2 whether or not we can proceed on 254 and, if so, how. Okay?

3 LDC [MR. RUIZ]: Very good. Thank you.

4 MJ [COL POHL]: Thank you.

5 Trial Counsel, you wish to be heard on this? I
6 suspect not.

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

8 MJ [COL POHL]: Okay. That brings us to 152. And there's
9 two parts of 152 that I want to address today.

10 But before I do that, Mr. Harrington, your team
11 provided a 505 notice on a number of motions, including 152;
12 is that correct?

13 LDC [MR. HARRINGTON]: Judge, yes.

14 MJ [COL POHL]: Okay. The two parts I wanted to discuss
15 today deal with the government request for a hearing on the
16 accused's competency and the discussion we had I believe on
17 Monday, week ago Monday, on the order. First on the
18 competency issue.

19 LDC [MR. HARRINGTON]: The notice does not apply to that
20 part of it, Judge.

21 MJ [COL POHL]: Okay. On the order issue?

22 LDC [MR. HARRINGTON]: Yes.

23 MJ [COL POHL]: It might?

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1 LDC [MR. HARRINGTON]: It applies to the underlying
2 complaint, Judge. We are still requesting the order that ----

3 MJ [COL POHL]: Okay.

4 LDC [MR. HARRINGTON]: But the complaint obviously goes to
5 our continued complaints to the court about the camp
6 conduct ----

7 MJ [COL POHL]: Okay. Got it. I just wanted to make it
8 clear on the 505.

9 Now, while you're standing there, let me just break
10 up -- on the 909 competency issue, your position is the same
11 as it's been from the start? You're not raising competency;
12 you don't see a competency issue from your perspective?

13 LDC [MR. HARRINGTON]: That's correct.

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

15 Trial Counsel, do you want to be heard on this
16 request for the 909 issue or not?

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

18 [Pause.]

19 MTC [MR. TRIVETT]: No, sir.

20 MJ [COL POHL]: Okay. I may have the dates wrong here,
21 but I believe in December of '13, the government requested
22 that there be a 706 board conducted for Mr. Binalshibh
23 concerning his competency to stand trial. We did not meet in

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1 February of '14 because the board wasn't complete. By the
2 time we got to April of '14, Mr. Binalshibh indicated he would
3 not cooperate with the board.

4 And I don't have the pleadings in front of me, but
5 somewhere in the course of the pleadings the government wanted
6 me to conduct some type of hearing to declare
7 Mr. Bin'Attash -- or, excuse me, Mr. Binalshibh, competent to
8 stand trial.

9 The government request for that hearing is denied.
10 There is no evidence before the commission that the accused,
11 in this case Mr. Binalshibh, is incompetent -- or is not
12 competent to assist in his defense and competent to stand
13 trial.

14 The default is always you presume competency until
15 evidence of the contrary. Mr. Binalshibh's complaints under
16 152 and his occasional speaking up in court do not raise the
17 level to this court that there is a competency issue. His
18 failure to cooperate in a 706 board would necessarily, in the
19 commission's view, waive any such allegation to begin with,
20 because you can't have it both ways.

21 Accordingly, the court, based on the state of the
22 record before it, that Mr. Binalshibh is presumed competent
23 according to the default. There will be a detailed order to

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1 follow. That resolves, in my view, the 909 issue.

2 Now let's go simply to the order issue. I received a
3 pleading from both sides, a proposal pursuant to the
4 commission's direction on Monday. I had asked
5 Mr. Harrington's team to prepare a proposed order. He did
6 that, served it on the trial counsel, and trial counsel
7 objected to the -- some of the wordings in the order.

8 So I want to do this in the following order, is I
9 want -- okay. I want to hear from the government first. I
10 know it's kind of a reverse order, because what I'm seeing now
11 is -- I'm going to issue an order. The question is just how
12 it's worded. And I got one proposal, and then I have the
13 government response.

14 Trial Counsel, on 152FF, you proposed adding some
15 language and editing some language, correct?

16 MTC [MR. TRIVETT]: Yes, sir.

17 MJ [COL POHL]: Paragraph 1, you want me to include the
18 words "The prosecution has denied that the JTF guard force
19 intentionally harassed or disrupted Mr. Binalshibh"?

20 MTC [MR. TRIVETT]: Yes, sir.

21 MJ [COL POHL]: Why is that an order? I mean, the issue
22 here is -- I'm not saying that's not a statement of fact.

23 I've got that.

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1 MTC [MR. TRIVETT]: Right.

2 MJ [COL POHL]: But the issue is to make a clear order.

3 The concern I've got that I'm trying to address -- and it

4 strikes to me is not difficult -- is that the oral order is

5 not being followed. I'm not saying that's true or untrue.

6 I'm saying that's what I'm getting, the allegation.

7 So the simple answer is: Put it in writing. Okay.

8 MTC [MR. TRIVETT]: Yes, sir.

9 MJ [COL POHL]: Is this language necessary, to put it in
10 writing, to tell them not to do this anymore?

11 MTC [MR. TRIVETT]: No, sir.

12 MJ [COL POHL]: Okay. Now, your other edits is on
13 paragraph -- the rest of the edits are taking things out -- is
14 the first edit would be "The guards will provide numbers or
15 some identifier to Mr. Binalshibh for reporting accountability
16 purposes."

17 Why do you want that out? Understand, I'm not
18 ruling. I just want to get your rationale, because all I've
19 got here is an edited ----

20 MTC [MR. TRIVETT]: Yes, sir. We were concerned about the
21 breadth of the defense proposed order in that it seemed to
22 give the accused certain rights that would infringe upon
23 JTF-GTMO's ability to lawfully detain him. We didn't think

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1 that was necessary. We think that to the extent
2 Mr. Binalshibh has any complaints, he can simply bring those
3 up the same way he has been bringing them up to his attorney
4 and that we can litigate that in the due course.

5 But that, you know, somehow having the court reach
6 into JTF-GTMO's detention facility when there will be no
7 evidence, other than perhaps from the accused himself, that
8 any of this is happening anyway, it seems like it's giving a
9 lot more power to the detainee than is necessary under the
10 circumstances. So that was our general premise on why we
11 would edit it the way we recommended it.

12 MJ [COL POHL]: And your view is -- because I think all
13 we're talking about now is not the order part. It's the
14 reporting of alleged violations?

15 MTC [MR. TRIVETT]: Correct.

16 MJ [COL POHL]: And it's your understanding the current
17 way that is being done is that Mr. Binalshibh reports this to
18 his counsel, who then brings it to the attention of the
19 commission?

20 MTC [MR. TRIVETT]: Correct.

21 MJ [COL POHL]: As opposed to going through the SJA office
22 or something here?

23 MTC [MR. TRIVETT]: Correct.

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

2 Okay. Mr. Harrington, do you want to be heard?

3 Again, now we're only talking about the edits.

4 LDC [MR. HARRINGTON]: Correct.

5 MJ [COL POHL]: I got your order.

6 LDC [MR. HARRINGTON]: Correct. On this edit, Judge, we
7 pursue not only bringing things to the attention of the
8 commission, but going through the administrative functions.
9 And in the past, the guards wore numbers so Mr. Binalshibh
10 could identify the number. And the AWCs were identified by a
11 nickname or something else. We're not asking for people's
12 names. We're not asking ----

13 MJ [COL POHL]: AWC, unless that's a ----

14 LDC [MR. HARRINGTON]: Assistant watch commander, Judge,
15 who deals with him when there's a complaint.

16 MJ [COL POHL]: Okay.

17 LDC [MR. HARRINGTON]: Same with the watch commander.

18 The problem we have, if we write a complaint to the
19 SJA and ask the authorities here to look into it or take care
20 of it, we don't want to be in a position of saying a white
21 male approximately 25 years old, blah, blah, blah, at this
22 particular time. We just want some identifying marker. We're
23 not asking for the identities of the people. That's not the

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1 purpose of it.

2 It makes it easy for everyone, including the people
3 that respond to it, and including the prosecution if they have
4 to do it. We don't have to go searching to try to identify
5 people.

6 MJ [COL POHL]: Do they -- the guards in Camp VII don't
7 have names. They simply have numbers on their ----

8 LDC [MR. HARRINGTON]: Correct. Correct. And the
9 assistant watch commanders always had nicknames, and now they
10 cover them up. They don't give them to us.

11 That's all we want. We want to be able to identify
12 somebody so people can look into it efficiently and respond to
13 it.

14 MJ [COL POHL]: Okay. That's the paragraph 4 edits.

15 Paragraph 5 talks about some type of different
16 reporting procedure? I'm assuming this is not the current
17 reporting procedure?

18 LDC [MR. HARRINGTON]: Correct, Judge. Well, it's -- I
19 think it's a memorialization of what the procedure is, but we
20 wanted everything set out in a manner that we know everybody
21 would be on the same page. That's all.

22 MJ [COL POHL]: Okay. Would it be fair to say that -- and
23 again, I'm now going to be parsing paragraph 5. The first

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1 sentence -- it's two sentences.

2 First paragraph is -- is that designed to permit the
3 camp to address the issue before they brought it to me?

4 LDC [MR. HARRINGTON]: Yes, Judge.

5 MJ [COL POHL]: And the second part -- second sentence is
6 so you know what the issue is, if there is an issue?

7 LDC [MR. HARRINGTON]: Correct. That's correct.

8 MJ [COL POHL]: Now, paragraph 6, it's written kind of in
9 the passive voice, as I'm not sure who's supposed to promptly
10 notify me.

11 LDC [MR. HARRINGTON]: Judge, I think we can agree that
12 that particular paragraph should not be there, because ----

13 MJ [COL POHL]: I would assume this is a ----

14 LDC [MR. HARRINGTON]: We do not want to involve the
15 commission in being the policeman, unless it's done in the
16 form of a motion with things put together.

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

18 Mr. Trivett, I've got one more question for you.
19 Is -- actually, I may have more than one question.

20 The identifier, if any detainee -- let's not just
21 talk about Mr. Binalshibh. If any detainee feels that a guard
22 has mistreated him, does that detainee have the right to
23 complain about that?

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1 MTC [MR. TRIVETT]: Sure.

2 MJ [COL POHL]: Okay. And does that detainee have a right
3 to know, by number, who the guard is?

4 MTC [MR. TRIVETT]: Yes. I don't concede that they no
5 longer have guard numbers. That was the first I had heard
6 of ----

7 MJ [COL POHL]: No. Assuming they have guard numbers,
8 okay, what I'm saying is, you know -- what I'm saying is, is
9 there anything -- if any detainee says, "I was mistreated by a
10 guard," how can he file that complaint unless you know what
11 the guard's number is?

12 MTC [MR. TRIVETT]: I think there are ways that they can
13 do it, and they do do it. The Detainee Information Management
14 System has a flurry of these types of complaints that are
15 made, and they're logged. If they don't know -- if they don't
16 know the guard number, which I'm not conceding they don't, but
17 if they don't, they still know who the person is, whether it's
18 the assistant watch commander or the person who is at their
19 cell. They have the ability to communicate directly to the
20 control room as well.

21 So they have the ability to do this. We don't think
22 that they in any way don't have the ability to do this. He's
23 actually quite prolific in doing this.

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1 MJ [COL POHL]: And Mr. Harrington alleges that the first
2 sentence of paragraph 5, it says may report alleged
3 violations, basically what I am reading this, through the
4 chain of command. You don't think he -- why do you object to
5 that? Paragraph 5.

6 MTC [MR. TRIVETT]: Can you read that again, sir?

7 MJ [COL POHL]: Yeah, it says "Mr. Binalshibh may report
8 alleged violations," and, again it's a "may," "to the JTF
9 guard force and directly to the representative of the SJA."

10 MTC [MR. TRIVETT]: Yes, we ultimately -- I think my
11 concern ----

12 MJ [COL POHL]: I don't know what the procedures are
13 there. I don't want to put procedures in place.

14 MTC [MR. TRIVETT]: Right.

15 MJ [COL POHL]: But Mr. Harrington is telling me this is
16 what they do now.

17 MTC [MR. TRIVETT]: And I think our concern generally,
18 sir, is you infusing yourself in a process where you don't
19 need to be because they already have the ability to do it.

20 MJ [COL POHL]: Okay. My question is this, is -- is that
21 I want Mr. Binalshibh to know what -- and again, I don't run
22 detention facilities. I've got it.

23 MTC [MR. TRIVETT]: Certainly.

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1 MJ [COL POHL]: But is there a reporting procedure in the
2 camp?

3 MTC [MR. TRIVETT]: Yes, sir.

4 MJ [COL POHL]: So if that is read, "Mr. Binalshibh may
5 report alleged violations in accordance with JTF policy" ----

6 MTC [MR. TRIVETT]: No objection, sir.

7 MJ [COL POHL]: And why do you object to documentation of
8 the alleged violation of the order will be made to
9 Mr. Binalshibh's counsel? Why do you object to that?

10 MTC [MR. TRIVETT]: Because it has to come through us,
11 sir. We think that's a part of the normal discovery process.
12 When the issue comes up and it's raised and it's entered into
13 the Detainee Information Management System or it's a letter
14 sent, that it all comes through the government, that we're
15 part of the discovery process in that. We wouldn't object to
16 doing that, but it's our role as representatives of the
17 U.S. Government to do that.

18 MJ [COL POHL]: So if any detainee -- I don't want to make
19 this specific to Mr. Binalshibh -- writes down that guard
20 number A, B, C and D -- I know it's a number, 1, 2, 3, 4, did
21 this to me this day, he writes that down, you're saying he
22 can't give that to his counsel? That's all this is saying.

23 MTC [MR. TRIVETT]: If he's writing his own note of that?

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1 MJ [COL POHL]: Yeah. Okay. Let me make sure I've got
2 this straight. You're treating documentation as the
3 camp-generated document.

4 MTC [MR. TRIVETT]: Correct.

5 MJ [COL POHL]: I was treating it as the accused's
6 documentation.

7 MTC [MR. TRIVETT]: No, he's certainly free to do that.

8 MJ [COL POHL]: Okay. Got it. Okay. Thanks.

9 MTC [MR. TRIVETT]: Thanks.

10 MJ [COL POHL]: This is why I don't want to get into
11 running detention facilities.

12 Okay, Mr. Harrington.

13 LDC [MR. HARRINGTON]: Just a point of clarification, is
14 that the detainees are not told what this procedure is. They
15 just make complaints and hope that they make their way up the
16 system. I mean, any other penal institution that I have been
17 experienced with, they always have a form, a detainee fills it
18 out. It's usually three copies. Two copies go to the
19 administration, and the detainee keeps a copy so the person
20 has something in writing that records it.

21 The other thing is that some of the communications
22 here are not in person. For example, there's an intercom
23 system. If there's a problem with the guard, Mr. Binalshibh

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1 hits the intercom and wants to talk to the AWC. There's
2 communication with the AWC, and they won't tell him who it is
3 that he is talking to. So that's kind of an additional
4 problem in here.

5 And I understand the court not wanting to get into
6 the management of the facility, but the system now is not
7 satisfactory for us to prepare these complaints and to bring
8 it to the court, and for everybody to deal with it more easily
9 and more systematic.

10 And underlying all of this is the fact that this
11 inhibits our relationship with Mr. Binalshibh and our ability
12 to see him in the times when we come down here and he can't
13 come to see us. I mentioned that to the court before, because
14 of the things that he says are happening to him, that it makes
15 it impossible for him to even get up during the day. It's a
16 horrible interference, Judge, with our attorney-client
17 relationship.

18 MJ [COL POHL]: Let me ask you this: When you say
19 documentation of alleged violations of this order will be made
20 available to Mr. Binalshibh's counsel, are we -- and, again, I
21 was confused when I talked to Mr. Trivett. I thought that
22 meant what he writes, he gives to you, but anything from the
23 camp, you have to request -- you'd have to request.

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1 LDC [MR. HARRINGTON]: We never see that unless -- and
2 even requesting, we don't get it. But ----

3 MJ [COL POHL]: But I thought you were focusing on his
4 complaints themselves.

5 LDC [MR. HARRINGTON]: That, but also we have a situation
6 where he writes to us. We file complaints on his behalf based
7 upon what he has written. So there's a two type of complaint
8 that goes in.

9 MJ [COL POHL]: Okay. And I don't -- okay. I got it.
10 Okay.

11 Mr. Trivett -- thank you, Mr. Harrington.

12 Mr. Trivett, last question: Do the detainees know?
13 Are they told how to report violations -- alleged violations
14 of their conditions of confinement?

15 MTC [MR. TRIVETT]: Yes, sir, and they've utilized ----

16 MJ [COL POHL]: No, just ----

17 MTC [MR. TRIVETT]: Yes, sir.

18 MJ [COL POHL]: It will go much faster, because I'm almost
19 done with this.

20 So if it reads "Mr. Binalshibh may report alleged
21 violations according to JTF policy and the detainees will be
22 informed of what the procedures are," that's just
23 double-tapping what they already know?

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1 MTC [MR. TRIVETT]: Yes, sir.

2 MJ [COL POHL]: Got it. Okay. Thank you.

3 Mr. Harrington?

4 LDC [MR. HARRINGTON]: One last point, Judge.

5 Mr. Binalshibh advises us now that when he is asked for the
6 identification of the watch commander or the assistant watch
7 commander, he has been told that the camp commander now has
8 instructed the watch commanders just to make up a number or
9 make up something. I don't know if that's true or not, but he
10 has no way of identifying these people. And there shouldn't
11 be -- if that's the case, there shouldn't be that kind of
12 game-playing.

13 MJ [COL POHL]: No, I understand, Mr. Harrington. I'm
14 just trying to take a balance here ----

15 LDC [MR. HARRINGTON]: I understand, Judge.

16 MJ [COL POHL]: ---- of issuing a clean order without
17 getting into the daily running of a detention facility, but
18 while respecting your client's rights. Okay. I've got it.
19 Thank you.

20 I've got the input on 152. I'll issue an order in
21 due course.

22 Just to close the loop on something, I believe we did
23 this at an 802, and I just want to put it on the record that,

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1 Ms. Harrington, you had asked -- Ms. Bormann had asked for
2 access to a 505(h) transcript for AE 378. I'm just putting on
3 the record that I granted that request.

4 LDC [MS. BORMANN]: Thank you.

5 MJ [COL POHL]: Okay. Just so I'm clear on the timing
6 here, is my understanding is that the afternoon -- or the
7 midday prayer is now 1245, not 1145. It's always been there.

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

9 MJ [COL POHL]: Okay. What we're going to do is take a
10 ten-minute recess, and then we're going to pick up with 350.
11 And then, as we discussed in the docket, then we will
12 address -- how much, I can't tell you, given the light of
13 recent events -- then we'll go to 254. Okay. But before I do
14 that, there's one other -- and I don't know whether this has
15 changed or not in light of recent events. Ms. Bormann, we had
16 talked about you wanting to be heard on 008?

17 LDC [MS. BORMANN]: Yes, and I have been delinquent in
18 returning Mr. Trivett's e-mail because other matters ----

19 MJ [COL POHL]: I got it. I got it. What does "we're
20 good" mean?

21 LDC [MS. BORMANN]: I'm being briefed by Major Schwartz,
22 who I guess coordinated with Mr. Trivett while I was attending
23 to other matters.

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1 We are prepared to argue on 008 after 254.

2 MJ [COL POHL]: Okay. In an unclassified setting?

3 LDC [MS. BORMANN]: Yes.

4 MJ [COL POHL]: Okay. That was the issue. Okay.

5 Just so I'm clear, when we last left 008, which is a
6 lingering motion, that I had given the government -- when we
7 last got to this, I heard complete argument from all defense
8 counsel, except Ms. Bormann, because part of it was ----

9 LDC [MS. BORMANN]: Classified.

10 MJ [COL POHL]: ---- classified. I asked the government
11 if you wanted to be heard, and initially the government said
12 yes, and because it was classified, and other things, delayed
13 it.

14 So I never did get a government argument on it, and
15 then subsequent to that I heard the government didn't want to
16 be heard on it. And so where I think we're at, absent -- is
17 all I have left to do on 008 is to listen to Ms. Bormann.

18 LDC [MS. BORMANN]: I think that's a correct statement of
19 the history.

20 MTC [MR. TRIVETT]: That's correct.

21 LDC [MR. RUIZ]: I disagree, Judge.

22 MJ [COL POHL]: Okay. Mr. Ruiz, what are you wanting
23 to ----

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1 LDC [MR. RUIZ]: Judge, you granted a motion for leave to
2 supplement AE 008. We submitted a fifth supplement on
3 12 February 2015. It was in relation to the Senate's torture
4 report and we did, in fact, supplement AE 008 with that
5 information. We hadn't had the opportunity to address AE 008
6 with respect to that information.

7 MJ [COL POHL]: If you ----

8 LDC [MR. RUIZ]: That was after.

9 MJ [COL POHL]: I believe, correct me if I'm wrong here, I
10 believe it was December of '13 that we last addressed 008
11 because, as I recall, we thought we may be able to do the
12 classified portion without the detainees, and we may get to
13 it. Is that everybody's else's memory?

14 Okay. If there has been new facts, new law since
15 December of '13 you wish to argue, you may. But I'm not
16 listening to the same thing I've heard already. Okay? So if
17 your answer is can I be heard on something that's new since
18 December of '13? The answer is yes.

19 LDC [MR. RUIZ]: Okay.

20 MJ [COL POHL]: But it is not to hear the same argument
21 again I've already heard.

22 LDC [MR. RUIZ]: No. To be very clear, you granted the
23 motion for leave to file supplement based on the new

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1 information.

2 MJ [COL POHL]: Got it.

3 LDC [MR. RUIZ]: That is what I will focus my argument on
4 and how it impacts 008 and our position. But I will also tell
5 the court that we have sent a conference request to the
6 prosecution to supplement AE 008 further based on information
7 that we learned last week and which I am unable to expound on
8 further in this setting.

9 But I think it is -- I think you know what I'm
10 referencing, and this is information that came to our
11 attention just last week, is new information that we believe
12 affects our argument on AE 008. We have a conference request
13 with the prosecution on that. We're following the normal
14 course of procedures, as I know the court is fond of doing.
15 But that is a matter that we believe is important to our
16 argument on the AE 008, and which we were not aware of until
17 last week and how it impacts our analysis.

18 We'd like to provide that to the court for its
19 analysis on AE 008. I wanted to make that clear because I
20 know where we last left it, you were accurate up to that point
21 and, of course, with the passage of time we've received
22 additional information ----

23 MJ [COL POHL]: Just so I'm clear -- and the focus here is

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1 defective referral, right?

2 LDC [MR. RUIZ]: Yes, and of course the advice that is
3 given to the Convening Authority is part of that analysis.

4 MJ [COL POHL]: Okay. I'm not sure what you're referring
5 to. You think I know something that I'm not sure I know. But
6 that's okay.

7 We'll go in the normal course of business. Right now
8 what I have before me is you have new law or new facts that
9 were not discussed in December of '13. Okay.

10 Does any other defense counsel have a similar issue?

11 Silence. Okay.

12 So you will be permitted to -- Mr. Nevin?

13 LDC [MR. NEVIN]: Just aside from automatic joinder, so
14 we're -- we take ourselves to be ----

15 MJ [COL POHL]: I understand, but my only point is he
16 wants to be heard on it.

17 LDC [MR. NEVIN]: Yes.

18 LDC [MR. RUIZ]: Judge, I was assuming that you would be
19 aware of the information I am referencing. It deals with the
20 additional program that came to our knowledge last week.

21 MJ [COL POHL]: Okay.

22 LDC [MR. RUIZ]: It's how we believe that impacts at least
23 a portion of the argument on 008, and I didn't want to go

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1 further than that.

2 MJ [COL POHL]: No, don't go further than that.

3 Here's what we're going to do, is that we're going to
4 do 350, and we'll see where we're at. I will probably want to
5 hit 008 before 254, because I think 254 may take a while. And
6 what I'm hearing now is I have two arguments on 008 today with
7 a possibility that there may be supplement. Depending what
8 the supplement says, okay, I may or may not grant further oral
9 argument on 008, okay? But obviously I will not decide 008
10 until you've had an opportunity to at least brief the
11 additional issue, okay?

12 LDC [MR. RUIZ]: Thank you.

13 MJ [COL POHL]: Okay. Ms. Bormann.

14 TC [MR. RYAN]: Your Honor, I'm sorry, just as a point of
15 reminder on the 505 hearing ----

16 MJ [COL POHL]: I understand that, and ----

17 LDC [MS. BORMANN]: I was just going to remind the
18 commission of that, that we can't proceed on 350 until we
19 actually determine how to proceed.

20 MJ [COL POHL]: Well, we can do -- let me just say, is I
21 think there's an element of 350 that we can address in an open
22 setting because it deals primarily with procedure and based on
23 unclassified pleadings. We'll talk about it, and if we can

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1 address that part of it -- I see a threshold question on 350,
2 quite frankly. I see the Touhy issue as a threshold issue
3 that can be addressed in an unclassified setting, okay?
4 Because I'm talking procedure here more so than ----

5 LDC [MS. BORMANN]: Substance.

6 MJ [COL POHL]: ---- than substance.

7 I agree that 350 itself is going to touch -- could
8 touch classified information. But what I'm saying is I want
9 to address the Touhy issue first, before we go to anything
10 else, because that seems to be a threshold requirement, given
11 the pleadings. And I know there's classified pleadings in the
12 Touhy issue, but I don't need to talk about what's in them.

13 But given the government response, I think we need to
14 clarify what the Touhy procedure will be in this case before
15 we can really meaningfully go forward. Because without that,
16 I don't think we get to your basic -- we may or may not get to
17 the basic request for deposition or witnesses, as I understand
18 the way the Touhy rules work.

19 So when I say 350, that's what I want to focus on.

20 Okay?

21 LDC [MS. BORMANN]: So a couple of housekeeping matters so
22 Your Honor is aware. On 350L, you granted in open court last
23 week allowing me to see 350C, which is Mr. Connell's

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1 classified pleading.

2 MJ [COL POHL]: Right.

3 LDC [MS. BORMANN]: And you gave us leave to supplement
4 that. Unfortunately, 350C does not pertain to our supplement,
5 so our supplement doesn't really lie with 350C.

6 So we'll be seeking an additional AE number on the
7 350 series to supplement it to something else, because the two
8 things are not correlated.

9 MJ [COL POHL]: Yeah.

10 LDC [MS. BORMANN]: And I didn't know that, because I
11 hadn't seen 350C.

12 MJ [COL POHL]: I understand that. And that's fine,
13 Ms. Bormann.

14 LDC [MS. BORMANN]: Two, on 254, particularly on 254Y, we
15 requested jointly among the defense two witnesses, the officer
16 in charge of the camp involved in our client's -- Camp VII,
17 and the NCIC, noncommissioned officer in charge. The
18 government provided those witnesses to us.

19 I received an e-mail on -- let's see, what is today?
20 Today is Thursday. On Tuesday at 1:00 after that, 2:30 in the
21 afternoon when I arrived back to my office after meeting with
22 Mr. Bin'Attash in the morning area and into the early
23 afternoon, I received an e-mail from Mr. Swann indicating that

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1 they would be made available on Tuesday at 1:30. So that had
2 been overcome by events since it's now after 1:30, or the day
3 following, which would be yesterday, at 4:30.

4 When we finished the ex parte -- or not ex parte, the
5 closed 806 hearing yesterday, I went back to my office and
6 e-mailed Mr. Swann and said, "despite my best intentions, I
7 have been told by the commission that I need to remain here.
8 I'm going to receive a transcript." I need to redact it and
9 get it back to the commission ASAP. I'm not going to be able
10 to participate in the interview of the witnesses.

11 Mr. Swann responded back with some unhelpful
12 comments, but ultimately I'm asking for the ability to be able
13 to do that. I still have not received an answer from
14 Mr. Swann. I ask that -- I explained to him that I would be
15 available today at 4:30, and the answer I received was, "Well,
16 we'll see."

17 MJ [COL POHL]: Okay. Just so everybody has kind of got
18 my intent on the 254 issue, okay -- okay, is today the one
19 issue which I will discuss on the record -- and I've discussed
20 it before -- regards the EO complaint filed by the guards
21 against me, okay? And there's a motion on that to do various
22 things, but that's a threshold inquiry.

23 Assuming I'm still around after that, okay, then the

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1 next thing is which witnesses are coming and when are they
2 going to be here, with the intent to set up some type of order
3 to start getting the factual predicate started tomorrow, okay,
4 understanding that we've got the new 254 issue out there, and
5 so that may impact on that. But that was kind of when I
6 talked about discussing 254 today, or whatever day we're going
7 to get it, A, B, C and D, and then discuss your motion for
8 reconsideration of the witnesses.

9 And I don't want to tell you what I'm going to do on
10 that now, but that's kind of where I was going on 254 today.
11 And then if you need some time, we'll see what we can work in
12 on the timing.

13 LDC [MS. BORMANN]: I want to let the commission know I
14 don't want to throw a monkey wrench into the entire situation
15 here, but if I don't have the opportunity to interview
16 witnesses, I'm not going to be prepared to proceed in the
17 taking of evidence.

18 So despite my best intentions ----

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

20 LDC [MS. BORMANN]: ---- to attempt to do that, I just was
21 unable to do ----

22 MJ [COL POHL]: I understand that. And let me ask you
23 this. I understand as an Article I tribunal court, that each

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1 case stands on its own. It's not a continuing jurisdiction.

2 So what's done in this case, even the same issues in a

3 different case, even if it's the same judge ----

4 LDC [MS. BORMANN]: Right.

5 MJ [COL POHL]: ---- it's two completely different things,

6 two factual predicates. But it's my understanding that this

7 issue has been litigated in another case, Mr. Hadi.

8 LDC [MS. BORMANN]: Yes.

9 MJ [COL POHL]: Okay. I'm not saying -- whatever that

10 judge did, the judge did. Nothing to do with -- he exercised

11 his judgment, I'll exercise mine, assuming I'm still the judge

12 for this. And, again, there are still some issues before me,

13 whether I'm -- but let me say this: There is a record of

14 witness testimony, I think. I don't know, okay? Have you

15 been given copies of that?

16 LDC [MS. BORMANN]: I have access to them on the website.

17 MJ [COL POHL]: Okay. Are any of those the same witnesses

18 we're just talking about?

19 LDC [MS. BORMANN]: No, different witnesses.

20 MJ [COL POHL]: That would be too easy.

21 LDC [MS. BORMANN]: Right, that would be way too easy.

22 MJ [COL POHL]: That was my point.

23 LDC [MS. BORMANN]: So I'm available today after the

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1 commission ends, and that's what I advised Mr. Swann. So if
2 it can happen, I may be able to be prepared for tomorrow, just
3 to let the commission know.

4 MJ [COL POHL]: We're talking about two people?

5 LDC [MS. BORMANN]: Two people.

6 MJ [COL POHL]: Mr. Swann, do I know who those two people
7 are?

8 TC [MR. SWANN]: You do, Your Honor. And I believe I was
9 extremely helpful on this issue. That said ----

10 MJ [COL POHL]: Okay.

11 TC [MR. SWANN]: ---- one of the two people has
12 participated in two interviews with the defense teams over the
13 last couple of weeks. I talked to her again this morning.
14 She's indicated that she will cooperate in an interview with
15 Ms. Bormann this evening immediately following these
16 proceedings.

17 MJ [COL POHL]: Okay.

18 TC [MR. SWANN]: The camp commander has attended two
19 meetings, totaling well over what -- because he sat around
20 waiting for the other for about six hours. I offered up the
21 opportunity to Ms. Bormann to send other attorneys to the
22 meetings last night, just to take notes and do whatever. She
23 said no.

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1 Now, I'll reach back to the company commander,
2 because he's a pretty busy guy, having to come over here
3 twice.

4 MJ [COL POHL]: The camp commander?

5 TC [MR. SWANN]: The camp commander. I will reach out to
6 him one more time, and I will ask him if he will likewise
7 consent to this interview later this evening to help
8 Ms. Bormann in her way.

9 MJ [COL POHL]: I've got it. Mr. Swann, I understand from
10 the tone of your voice the sense of frustration sometimes you
11 may feel.

12 TC [MR. SWANN]: They're their witnesses. They've never
13 reached out, so I did it for them.

14 MJ [COL POHL]: I know that, and I'm sure you made your
15 best efforts. But I'm simply saying this: The government has
16 charged this as a five-person case, okay? And as you know, as
17 everybody knows who's been involved in this process, that
18 creates logistical issues that are geometrically more
19 difficult.

20 So sometimes when they've got to talk to one group of
21 attorneys, that does not mean the other group of attorneys
22 also have the right to talk to the person or do any business.
23 Just like cross-examining a witness. I'm just saying that for

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1 you is -- is that you may want to explain that to various
2 witnesses, that they may have to do the same interview five
3 times.

4 But at the end of the day -- I'm not saying that
5 always will happen, I'm not saying they can't be done
6 together, but if there's problems because there's five sets of
7 attorneys that want to do something, the root cause -- I'm not
8 saying this pejoratively, but the root reason for that is the
9 government decision to charge five together.

10 TC [MR. SWANN]: I understand, Your Honor.

11 MJ [COL POHL]: All I'm saying is I can see where a layman
12 may get frustrated why they need to do this again. And that,
13 to me, perhaps is a way to persuade him. But be that as it
14 may.

15 TC [MR. SWANN]: All right, sir. I've got it, sir.

16 MJ [COL POHL]: Let's go ahead and take a 15-minute break.
17 We will pick up with 350. And, again, I'm focusing, just so
18 everybody knows where I'm going on this, on the Touhy issue,
19 Touhy notice issue that the government had raised in its
20 reply. And, quite frankly, it may be a cart-and-horse issue,
21 but that's kind of where I want to start with to avoid the
22 issue.

23 Then when we get done with that, depending where

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1 we're at, we'll go for the -- Ms. Bormann and Mr. Ruiz to be
2 heard on 008, and then we will discuss 254. And, again, that
3 will be primarily scheduling, who's going to be here, who's
4 not, as well as any questions you may have of me in regards to
5 the EO complaint or, quite frankly, the new issue. Then,
6 also, just 254 issues, and we'll see where we're at at that
7 point.

8 Mr. Swann, just so I understand, you said these
9 witnesses or at least one will be available this evening. I
10 like dealing with time. What time? 1800?

11 TC [MR. SWANN]: That witness will be available
12 immediately following this proceeding because that witness is
13 in the immediate vicinity of this building ----

14 MJ [COL POHL]: Okay.

15 TC [MR. SWANN]: The second witness, I will reach out ----

16 MJ [COL POHL]: Reach out during the break or lunch?

17 TC [MR. SWANN]: Reach out if I can make contact with
18 him -- I will reach out if I can make contact with him, and I
19 will arrange that interview, if he agrees, that it will take
20 place immediately following the first interview.

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

22 That being said, the commission is in recess until
23 1115.

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1 [The R.M.C. 803 session recessed at 1058, 29 October 2015.]

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