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1 [The R.M.C. 803 session was called to order at 1120,
2 29 October 2015.]

3 MJ [COL POHL]: Commission is called to order. At least
4 from my perspective, all parties again are present that were
5 present when the commission recessed. If that's incorrect,
6 let me know.

7 I hear nothing; therefore, that is correct. Okay.

8 Again, as stated before we recessed, I want to
9 address part of 350, and that deals with the -- what I'm
10 referring to as the Touhy notice requirements. Okay? So --
11 and this may end up being more question and answer, but,
12 Mr. Connell, are you first out of the box for the defense?

13 LDC [MR. CONNELL]: Your Honor, the military commission
14 clearly has some unclassified path in mind. I do want to say
15 that I have five arguments on the Touhy issue, and one of them
16 is classified.

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: So I'm not sure that we're able to
19 dance around the need for a 505(h) hearing.

20 MJ [COL POHL]: Okay. Let's start the dance, and then
21 we'll see whether we can complete it.

22 LDC [MR. CONNELL]: Yes, sir. I just wanted to be clear
23 that I have moved for a 505(h) hearing, and I want to be

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1 heard ----

2 MJ [COL POHL]: I got it. I got it. If necessary, we
3 will do that, like I said, following the process. I have what
4 I think is a relatively narrow Touhy issue, and I just want to
5 make sure, if we can address it now, perhaps we can move this
6 issue further down the road, rather than not. Okay.

7 Let me ask you this: The defense, okay, under Touhy,
8 when you're requesting in this case an agency witness, what do
9 you believe the defense has to provide under Touhy and the
10 relevant CIA regulations?

11 LDC [MR. CONNELL]: So every agency's Touhy regs are
12 different. The CIA Touhy regulations are found at 32 Code of
13 Federal Regulations 1905.1 to .4. The regulations -- these
14 particular regulations impose no specific duty on the defense.

15 The operative language -- and I have lots of reasons
16 why these regulations themselves don't even apply in our
17 current situation. And I'm happy to begin the argument on
18 that, though one of those arguments is classified. But I want
19 to answer your specific question as well.

20 There are two actual requirements that are contained
21 within these Touhy regulations that impose a duty upon someone
22 to do something. The first of those is found at 1905.4, and
23 that is subsection (a), "when a demand for production is made

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1 upon an employee" -- and we're going to have to come back to
2 that word "employee," because it's important -- "the employee
3 shall immediately notify the litigation division, which shall
4 follow the procedures set forth in this section."

5 So in section (a) it imposes, these regulations
6 impose a duty on two different bodies. The first of those is
7 the employee, a notification requirement, and the second of
8 those is the office of general counsel, which has to follow
9 the regulations.

10 The second duty which is imposed in 1905.4 is found
11 in subsection (d), and it says, "If oral or written testimony
12 is sought by a demand in a case or matter in which the CIA is
13 not a party," put an asterisk there, "a reasonably detailed
14 description of the testimony sought in the form of an
15 affidavit or, if that is not feasible, a written statement by
16 the parties seeking the testimony or by the party's attorney
17 must be furnished to the CIA Office of General Counsel."

18 So the duty of the party's attorney in that situation
19 is to produce an affidavit or a written statement. We have
20 done so in 350A and in 350Y. There is no duty imposed upon
21 the defense to be the party who furnishes it to the CIA Office
22 of General Counsel, and I can only assume that the prosecution
23 has done so.

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1 MJ [COL POHL]: Okay. Let me -- you -- my question is, is
2 you believe you complied with your Touhy notice, for want of a
3 better term, in which exhibits again, please?

4 LDC [MR. CONNELL]: A, 350A, and 350Y, those are the
5 505(g) notices.

6 MJ [COL POHL]: And those are classified?

7 LDC [MR. CONNELL]: The notices themselves are
8 unclassified.

9 MJ [COL POHL]: Okay. But how about the underlying
10 document? Isn't there an underlying exhibit?

11 LDC [MR. CONNELL]: Yes. Both ----

12 MJ [COL POHL]: My question -- and, again, this is why I
13 don't need to talk about classified, I'm just saying, because
14 my first question is: Do you believe you've complied with the
15 Touhy notice requirement? And, if so, which specific exhibits
16 contain that notice, understanding it may be a classified
17 exhibit? So I'm not talking about what's in it, just a
18 number.

19 LDC [MR. CONNELL]: Right. 350A and Y. I believe that
20 those documents themselves are unclassified.

21 MJ [COL POHL]: Okay. But is your Touhy notice contained
22 in that or in the underlying classified document?

23 LDC [MR. CONNELL]: All right. I wanted to be a hundred

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1 percent clear on a couple of things.

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: First, we have not gotten to the point
4 of whether these regulations apply in this situation in this
5 tribunal.

6 MJ [COL POHL]: I've got that.

7 LDC [MR. CONNELL]: I understand you're trying to do it
8 the easy way first, and I get that. I would do the same
9 thing. That's not with any sort of judgment. The easy way
10 is, well, if the Touhy regulation is complied with, then we
11 don't have to make any decisions on whether it applies or not.

12 All that is required of the party seeking testimony,
13 which also requires an asterisk, because in the military
14 commission the prosecution is always the party seeking
15 testimony. They are responsible for all witnesses. But in
16 its narrowest reading, a written statement by the party
17 seeking the testimony or by the party's attorney, that is what
18 we have produced.

19 MJ [COL POHL]: Back to my question.

20 LDC [MR. CONNELL]: In our 505(g) notices, which are 350A
21 and 350Y ----

22 MJ [COL POHL]: Okay. So 350A and 350Y are the 505(g)
23 notices, the unclassified notices, and underlying them is

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1 classified information ----

2 LDC [MR. CONNELL]: In 350, in 350C, in 350H.

3 MJ [COL POHL]: Okay. I'm just saying if -- and, again, I
4 know you want to be heard on what you have to do, but I just
5 want to get this little box drawn for me.

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

7 MJ [COL POHL]: What specific exhibits, classified or
8 unclassified, by number, constitute your Touhy notice?

9 LDC [MR. CONNELL]: 350A and 350Y are the notices
10 themselves. They incorporate, by reference, the information
11 in AE 350, AE 350C, and AE 350H.

12 MJ [COL POHL]: And some of those are classified?

13 LDC [MR. CONNELL]: Right. There is -- I should add 350X
14 as well.

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

16 LDC [MR. CONNELL]: And in 3500, Attachment B, there is a
17 classified attachment which is also subsumed within the same
18 issue.

19 MJ [COL POHL]: Okay. Now, if a Touhy notice is required,
20 and you're going to discuss with me whether it's ----

21 LDC [MR. CONNELL]: Sure.

22 MJ [COL POHL]: ---- I'm simply saying you believe --

23 well, let me ask this: All you can require is -- excuse me.

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1 All you're going to give, based on what you know, is
2 contained in those exhibits? So that would be a complete
3 Touhy notice?

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: I mean, there's an issue -- and I
6 understand if it goes up -- and they're going to say it's not
7 complete or it's a not a summary or whatever. I've got that.

8 LDC [MR. CONNELL]: Right.

9 MJ [COL POHL]: But I just want to make it clear, there's
10 nothing additional. If I said, Mr. Connell, have you provided
11 all notice under Touhy if it's required, you're going to say
12 yes, and here is where it is.

13 LDC [MR. CONNELL]: Yes.

14 MJ [COL POHL]: Understand I'm going to go back to the
15 government to make sure.

16 LDC [MR. CONNELL]: Yes.

17 MJ [COL POHL]: Go ahead.

18 LDC [MR. CONNELL]: Our classified pleading in AE 380B
19 relates to the -- which is another 505 notice -- relates to
20 the fifth argument that I want to make today, the one that I
21 think has to be made in -- or at least the prosecution will no
22 doubt claim needs to be made in a closed hearing.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: So that's the universe, if that's what
2 you're asking me.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: Now, the thing that I also want to say
5 to that, if the military commission decides that this is
6 deficient as to form rather than content, deficient as to
7 form, because these say -- are addressed to the United States
8 Government as opposed to addressed to the Office of the
9 General Counsel of the Central Intelligence Agency, then when
10 you say is that all the Touhy notice you're going to provide,
11 in that situation, of course, if it's merely a deficiency as
12 to the addressee, I would rewrite it in another form and send
13 it to the addressee identified in the regulation.

14 MJ [COL POHL]: Yeah. Is it my position -- rephrase that.

15 As I understand this process, you comply, assuming
16 it's required -- I'm going to hear you on that. I know we're
17 getting to a point you don't think we ought to get to. But I
18 want to get to it anyway -- is that whether or not it's
19 reasonably detailed, the first cut of that, I'm assuming,
20 would be the agency involved?

21 LDC [MR. CONNELL]: I'm sure that -- I don't know what
22 they consider reasonably detailed, Your Honor.

23 MJ [COL POHL]: Neither do I. That's my point. Okay. So

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1 go ahead.

2 LDC [MR. CONNELL]: So the 505 notice serves the same
3 purpose as the Touhy notice. And there's no -- the thing that
4 I -- you know, you started this question with: What are the
5 duties imposed by this regulation? And there are other Touhy
6 regulations for other agencies that impose a different set of
7 duties, but for this set of regulations, it is worded in the
8 passive, "must be furnished." And it doesn't impose any
9 responsibility on the defense to furnish it directly to the
10 CIA; it simply says the defense duty, the party seeking the
11 testimony, is to provide reasonably detailed descriptions. So
12 it is the same as my 505(g)(1)(A).

13 MJ [COL POHL]: Okay. Just so I'm clear, because you said
14 something earlier that caused me a little pause, which you
15 said everything is the government.

16 LDC [MR. CONNELL]: Yes, shall we move to that question?

17 MJ [COL POHL]: No, we're not going to move to that
18 question yet.

19 LDC [MR. CONNELL]: Okay.

20 MJ [COL POHL]: What I am saying is I have a motion for me
21 to produce a witness, slash, to conduct a deposition.

22 LDC [MR. CONNELL]: Which I think are analytically
23 distinct, but I'll go with you.

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1 MJ [COL POHL]: They are. But fundamentally the bottom
2 line is production of sworn testimony, for want of a better
3 term.

4 LDC [MR. CONNELL]: I do want to draw a distinction there,
5 because there is no -- in 350C, the motion for deposition,
6 there is no Touhy issue. In fact, the government
7 distinguished in its response 350F. It distinguished between
8 deposition, which it didn't take any position on whether Touhy
9 notice was required, and a session or evidentiary hearing in
10 its phrase where the government said that it believed Touhy
11 compliance would be required.

12 MJ [COL POHL]: Okay. So just so I understand your
13 position that -- because you've asked for, I think in the
14 alternative, a deposition or live testimony.

15 LDC [MR. CONNELL]: Because of the sequence in which
16 things occurred.

17 MJ [COL POHL]: Okay. And I understand how you're reading
18 it. You read the Touhy notice -- and, again, we're looking at
19 the CIA regulations, because that's the one that controls in
20 this. It talks about trial testimony. And so your position
21 is that there's no Touhy notice required for depositions?

22 LDC [MR. CONNELL]: No. I'm suggesting that the
23 government has not raised any -- let's go there now, because I

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1 suggest that Touhy regulations have no place in a military
2 tribunal.

3 MJ [COL POHL]: Okay. Tell me that. I know you wanted to
4 get to that ----

5 LDC [MR. CONNELL]: Right.

6 MJ [COL POHL]: ---- and I short-circuited you. Go ahead,
7 Mr. Connell.

8 LDC [MR. CONNELL]: In AE 036, we litigated the question
9 of compulsory process for the defense, because in one of these
10 other courts that are so often referenced, the defense has the
11 ability to go down to the clerk's office, get a subpoena,
12 issue it to a witness, have that -- and compel that process to
13 appear.

14 We lost that issue, right? We lost the issue of
15 compulsory process for the defense. We asked for it, and it
16 was -- the military commission ruled. We understand the
17 military commission's ruling. But what that means is, is that
18 the R.M.C. 703, and, to another extent, R.M.C. 702 for the
19 deposition, the prosecutor is responsible for the production
20 of all witnesses.

21 I have no authority, ability, capacity or anything
22 else to produce a witness. All I can do under R.M.C. 703 is
23 to submit a list of witnesses that I think are necessary to

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1 the prosecution -- for the prosecution to produce them.

2 And so when I do so, I don't have any authority to
3 compel a witness to appear and, thus, I have no responsibility
4 under any agency's Touhy regulations, because the fear -- the
5 idea behind Touhy regulations is that my investigator might
6 show up with a subpoena, serve it on some low-level employee
7 or high-level employee, some employee, and the interests of
8 the agency would not be represented because they would never
9 know that John Jones, CIA employee, had been subpoenaed to
10 testify in Fairfax, Virginia Circuit Court. And the Touhy
11 regulations give them an opportunity to weigh in.

12 In this situation, there is no production -- there is
13 no demand for a person. There's no civil deposition request.
14 There's no subpoena in a criminal case, and any witness who
15 appears in this building or in a deposition does so on the
16 authority of the prosecution. Sometimes, as happened in.

17 AE 050, 0-5-0, the military commission orders them to
18 produce someone, but it's always the trial counsel. It's
19 never the defense counsel. We have no compulsory process
20 right.

21 So both the letter and the spirit of the Touhy -- of
22 Touhy regulations have no applicability in the military
23 commissions.

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1 Now, that leads very much to ----

2 MJ [COL POHL]: You see the Touhy regulations as a
3 preemptive prophylactic to avoid, in this case, CIA employees
4 being deposed or called into court without notice to the
5 agency?

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: So, really, Touhy is just a notice -- for
8 want of a better term, a notice to the agency that one of
9 their employees is being asked to talk about something? In
10 that sense, you provide the notice to the Government to
11 produce the witness, and the Government, big G, then therefore
12 knows about it; therefore, there's no surprise; therefore,
13 there's no Touhy reg.

14 LDC [MR. CONNELL]: And to add to that, it is in fact the
15 government -- the big G, little G thing doesn't make a hundred
16 percent -- so I'm going to say it is this part of the
17 government that is sitting right here today that actually
18 produces the witness for the deposition or for the testimony
19 here today. So there's exactly zero chance that the United
20 States Government and all its component parts as represented
21 by these prosecutors who sit here today does not know about
22 the situation.

23 And there's a reason, Your Honor, why there is not a

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1 single Touhy case in any military court, and the reason for
2 that is Touhy just doesn't have any application in that
3 situation, because it is always a military prosecutor who is
4 producing the witnesses for a court-martial or, in this case,
5 for a military commission.

6 MJ [COL POHL]: Now, Mr. Connell, I -- you made a very
7 broad statement there, and I would agree that there's not a
8 lot of Touhy litigation in military courts. I'm not sure your
9 statement is totally accurate.

10 LDC [MR. CONNELL]: All right.

11 MJ [COL POHL]: Maybe an outlier or two out there. But,
12 as a general rule, I understand what you are saying, but I
13 think part of that's because it does not come up frequently in
14 military courts. But go ahead. I gotcha.

15 LDC [MR. CONNELL]: I couldn't find any. Maybe the
16 military commission found some with ----

17 MJ [COL POHL]: I may be aware of some others, but that's
18 okay. Your basic argument is that Touhy is a notice
19 requirement more than anything else, and, therefore, since
20 they're on notice because they're going to -- they have to
21 produce, therefore, Touhy doesn't apply.

22 LDC [MR. CONNELL]: Right. That's right.

23 MJ [COL POHL]: Let me ask you this.

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1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: So let's go down that a little bit. If --
3 because basically what you're saying is that the Touhy notice
4 is simply a double-tap when the government has to produce a
5 witness to begin with; therefore, they already know about it,
6 in essence.

7 LDC [MR. CONNELL]: That's one way to structure the
8 argument. I think it's a bit broader than that, but I'm happy
9 to go with that for these purposes here.

10 MJ [COL POHL]: Let me ask you this: If the normal Touhy
11 scenario with the Central Intelligence Agency, for example,
12 and the Touhy notice goes to the OGC and they say we want six
13 topics covered by this person, as I understand it, and correct
14 me if I'm wrong, is then the OGC makes a scrub and says you
15 can talk about 1, 4 and 6 ----

16 LDC [MR. CONNELL]: To their employee.

17 MJ [COL POHL]: To the employee, and then the employee is
18 done, okay. So there is a role under that scenario for the
19 OGC -- and I understand that's not the end of the inquiry.
20 There may be judicial involvement after that.

21 LDC [MR. CONNELL]: Sure.

22 MJ [COL POHL]: But the bottom line is that under the
23 normal Touhy procedure the OGC can limit, at least initially,

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1 what they're going to permit their employee to testify to.

2 Okay.

3 Under your -- under your reading of the Touhy notice
4 issue, which you just discussed, does the OGC have any role in
5 delineating how much the witness can testify to?

6 LDC [MR. CONNELL]: We in this courtroom are the tiny tip
7 of a gigantic triangle of government agencies that are
8 involved in a wide variety of decisions, from who has a
9 security clearance, to who gets read on, to what ACCM to what
10 the classification is to begin with, to where the wires in the
11 courtroom run and everything else.

12 When a JTF -- when JTF's equities are at stake, the
13 SJA for JTF does not show up here in court. When some other
14 unnamed OCA's equities are at stake, their lawyer does not
15 show up in court. Here in this court, the United States
16 Government's interests -- and I think in your dichotomy that
17 is big G, but the whole United States Government's interests
18 are represented by these prosecutors here.

19 MJ [COL POHL]: So under my scenario, just so I understand
20 it, is that the OGC can weigh in any way they like, but they
21 weigh into the commission through the prosecutors?

22 LDC [MR. CONNELL]: Yes. And that is, in fact, what
23 the -- how I read the regulation to require it, because the

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1 regulation requires that the written summary, in this case the
2 505(g) notices, must be furnished to the OGC, and then the OGC
3 has certain duties and factors that it takes into account.
4 And all of that happens behind the scenes, right? I'm not --
5 the defense is not involved in any of that.

6 The communication between the Office of the Chief
7 Prosecutor and the Office of General Counsel of the CIA or any
8 other agency, we just don't have any role in that. We
9 don't -- we can't make it happen. We can't stop it from
10 happening. We don't get a vote. All of that happens behind
11 the scenes in the rest of the giant triangle that is the
12 military commissions.

13 MJ [COL POHL]: Okay. So you've made an argument why
14 Touhy does not apply procedurally because the government
15 produces the witness or anything. I thought you made some
16 reference that you're not sure it even applied to this
17 particular individual.

18 LDC [MR. CONNELL]: Yes. That's right. And if I could
19 have the court's indulgence for just a moment?

20 MJ [COL POHL]: Sure.

21 [Pause.]

22 MJ [COL POHL]: And I know you know this, Mr. Connell,
23 probably better than most, is that some of this is classified,

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1 so we have to be careful.

2 LDC [MR. CONNELL]: Well, I keep asking, Your Honor.

3 MJ [COL POHL]: I know, but I'm trying to do what we can,
4 pursuant to the rules, as much in an open setting as possible.

5 LDC [MR. CONNELL]: Sure. The court's indulgence for just
6 one moment. I think my staples might be off.

7 [Pause.]

8 LDC [MR. CONNELL]: Your Honor, I have a document here
9 which I have -- would like marked as the next appellate
10 exhibit. May I approach?

11 MJ [COL POHL]: Sure. Have you got a copy for the
12 government? Have you given a copy to the government?

13 LDC [MR. CONNELL]: Yes.

14 MJ [COL POHL]: Okay. This will be -- whatever.

15 TC [MR. RYAN]: Your Honor, I'm sorry to interrupt, sir.

16 MJ [COL POHL]: No problem.

17 TC [MR. RYAN]: Counsel, I believe, is getting marked a
18 declaration that he handed to me just before Your Honor came
19 back on the bench. I didn't finish reading it. And although
20 I certainly respect counsel's assessment as to whether it's
21 classified, this should be reviewed before it's discussed in
22 open court.

23 MJ [COL POHL]: [Conference with court personnel] Okay.

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1 Mr. Ryan, your motion not to refer to it until at
2 least we've got to a classification review is granted. I
3 mean, my court security officer hasn't seen this either.

4 LDC [MR. CONNELL]: I'm not at a microphone.

5 MJ [COL POHL]: I know.

6 LDC [MR. CONNELL]: Your Honor, I'm a stickler for
7 procedure, and the procedure got away from me while I was away
8 from the microphone. I intended to put on the record that I
9 have provided a copy of this document, which is AE 350I ----

10 MJ [COL POHL]: II.

11 LDC [MR. CONNELL]: ---- double India, to the government
12 and to counsel for each defendant. This document has not been
13 reviewed for classification.

14 The question which arises is whether this Touhy --
15 and which is what the military commission addressed to me, is
16 whether this Touhy regulation applies to the individual in
17 question at all. And that's a factual question as to whether
18 the person falls under the definition of employee under
19 1905.2(c), and whether he falls under the scope of former
20 employees under 1905.3. 1905.3 states that the regulation
21 applies -- and let me ----

22 MJ [COL POHL]: I've got it in front of me.

23 LDC [MR. CONNELL]: ---- to former employees to the extent

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1 consistent with applicable nondisclosure agreements. In this
2 situation we do not -- you know, we have been directed to
3 refer to the individual as the former CIA employee who --
4 excuse me, "former CIA linguist utilized by Mr. Binalshibh's
5 defense team," but we have zero information as to -- in the
6 words of the regulation, the applicable nondisclosure
7 agreements. In fact, there's a substantial debate as to the
8 applicable nondisclosure agreements and, in fact, whether the
9 person would fall under the definition of employee at all.

10 And the declaration that I have just provided does
11 have information -- I won't refer to it in open court, but it
12 does have information relevant to that topic.

13 MJ [COL POHL]: Okay. I can read it for myself, and then
14 we won't reference it until we're sure it's unclassified.
15 Okay.

16 LDC [MR. CONNELL]: The last argument that I have to make
17 is itself classified, and I can't make it in open session.

18 MJ [COL POHL]: Okay. Then I don't want you to make it
19 in -- so ----

20 LDC [MR. CONNELL]: I repeat my request for a 505(h)
21 hearing.

22 MJ [COL POHL]: I still remember it. It isn't that long
23 ago. Okay. Got it. Thank you.

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1 LDC [MR. CONNELL]: Thank you.

2 MJ [COL POHL]: Any other defense counsel have anything to
3 add to Mr. Connell's presentation? Again, we're narrowly
4 addressing simply the Touhy issue.

5 Apparently not.

6 Trial Counsel? Mr. Ryan.

7 TC [MR. RYAN]: Your Honor, counsel indicated that in
8 regard to the invoking of Touhy regulations, I believe his
9 statement was that -- well, first to say that in his initial
10 pleading, which is Charlie, I know that the accused's counsel
11 did not raise Touhy at all, made no description, no statement
12 as to efforts or any movement towards trying to satisfy Touhy.

13 Now, in his -- in our reply to that, which counsel I
14 believe said we did not refer to Touhy. I just want to point
15 out that we did, in fact, in footnote 1 of our response, which
16 is F, states -- specifically cites Touhy and states that any
17 testimony must be in compliance with 505(g) of M.C.R.E. and
18 the CIA's Touhy regulations, 32 CFR, et cetera.

19 The relevant portion of that is if oral -- and this
20 is a big part of the discussion between the commission and
21 both parties. If oral or written testimony is sought by a
22 demand in a case or matter in which the CIA is not a party, a
23 reasonably detailed description of the testimony sought, in

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1 the form of an affidavit or, if that is not feasible, a
2 written statement by the party seeking the testimony or by the
3 party's attorney, must be furnished to Office of General
4 Counsel. So that's first. This was put in the forefront.

5 The accused then in his reply to our response
6 essentially says what was told to you today, it's the
7 government's job to do that.

8 Now, we take, as it would not surprise you, Judge,
9 obvious issue with that statement.

10 MJ [COL POHL]: Let me kind of break this up in two parts.

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

12 MJ [COL POHL]: Because part of it is just the processing
13 of the Touhy notice and whether service on the government here
14 meets the requirement of service on the CIA.

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

16 MJ [COL POHL]: There's that issue there, and I think
17 there's case law that kind of goes both ways on that, but I
18 don't want to get into that because I see that as kind of a
19 Western Union issue of how the mail is going to be delivered,
20 not that it doesn't need to be delivered, but talking about
21 how it's got to get to the places it's got to get to.

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

23 MJ [COL POHL]: Let me put that aside, because Mr. Connell

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1 mentioned it once, and, again, it doesn't strike to me as a
2 particular issue. I may be wrong. If you enlighten me, and
3 if you have an issue, I will certainly listen to it.

4 If Touhy notice is required -- and the government
5 position obviously it is, okay. And this is why I asked
6 Mr. Connell about do you think you -- what is your Touhy
7 notice? And he listed, I believe, five separate exhibits,
8 okay? Now, is that -- just on a procedural perspective, I'm
9 not saying it will necessarily mean they get it, but if that's
10 all they got, is that a format that you believe is okay, or do
11 they got to make a separate piece of paper altogether with
12 specificity?

13 TC [MR. RYAN]: They do have to make it a separate piece
14 of paper with specificity, just based on the reading. I take
15 great issue with this concept, because in a military
16 commission, the accused didn't have right of compulsory
17 process, at least the way they describe it; that somehow now
18 everything is the government's problem when it comes to
19 witnesses.

20 The regulations say specifically "seeking testimony,"
21 not who's compelling. We're not seeking the testimony of this
22 person; the accused is. Now, that's sort of parsing the
23 language specifically.

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1 But getting further from there, Your Honor, I would
2 suggest for plain reasons, for reasons you would see easily,
3 the government should not be in a position of having to try
4 and figure out, with sufficient specificity, what it is the
5 defense is seeking in terms of testimony. And the proof is
6 right here. As Your Honor noted, counsel says, well, we've
7 given everything that we need to, and it's plenty specific
8 enough. I take great issue with that.

9 The reason the Touhy regulations exist in general, as
10 in the entire big G, small G, whatever G you like, government,
11 is each agency has some interest in what its employees talk
12 about in terms of the inner deliberative work product, inner
13 workings of the United States Government and its respective
14 agencies. That's the big G.

15 As to this specific part of it, the CIA, the need,
16 the concerns are even greater because, as here, there is
17 automatically -- I shouldn't say "automatically," but
18 frequently going to be the implication of classified
19 information. So their general counsel is in a position of
20 even greater importance than most other situations in terms of
21 knowing what its employees, former employees, whoever, are
22 going to be talking about in terms of what goes on inside the
23 agency because of that, because so much of what they do is

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1 classified.

2 The accused's notice that come in the form of various
3 pleadings are broad and vague and speak in generalities.
4 Words like, quote, knowledge. They want knowledge of this
5 area, knowledge of that area. In short, it's they want to
6 roam around in these big areas, and they want you to sanction
7 it first by giving them this. But in terms of Touhy, what
8 they're saying is that's good enough for you to know what we
9 want.

10 Well, I'd submit, Judge, it's absolutely not, because
11 it doesn't give them any kind of discussion. And this goes
12 again to why the government, meaning the prosecution,
13 shouldn't be trying to translate any kind of discussion that
14 goes on about this, because they're going to keep it vague so
15 we don't know. I understand that. But it doesn't counteract
16 the fact that Touhy requires that the agency understand what
17 sort of information might be going out there. They have a
18 right to know "with reasonable specificity," I think is the
19 exact language.

20 I would submit what the defense has submitted in
21 terms of why they want to talk to this individual in a
22 testimonial setting is not reasonably specific.

23 MJ [COL POHL]: Let me make sure, Mr. Ryan. I have before

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1 me a number of different motions about -- a number of motions,
2 but it talks about a deposition, talks about witness
3 production.

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

5 MJ [COL POHL]: When I looked at this, it struck to me is
6 the threshold inquiry is the Touhy notice. It just strikes to
7 me that before I can rule on that, I've got to address if
8 Touhy applies and if it does apply after it's been done. Do
9 you agree with that, that I can't get to the substance of this
10 until we decide the Touhy issue?

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

12 MJ [COL POHL]: Okay.

13 TC [MR. RYAN]: As a threshold matter, yes, sir.

14 MJ [COL POHL]: Okay.

15 TC [MR. RYAN]: Finishing up the last part of what I said,
16 Judge, here is a good piece of proof for you as to why it
17 was -- this process has been deficient on the defense's part.
18 I shouldn't even say "deficient"; they ignored it for the most
19 part. But now they're saying to you, "We've done enough."
20 Their general description of things like knowledge as to
21 various areas is what they present to you.

22 They know much more than that. They could be much
23 more specific. I know that because two minutes before Your

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1 Honor walked out and I got this declaration, it concerns
2 matters of much greater detail of what they want to talk
3 about, what they want to hear about.

4 MJ [COL POHL]: Of course, at the end of the day -- at the
5 end of the day, what they choose to disclose in their Touhy
6 notice is up to them, and whether it's sufficiently -- if it's
7 required, if it's reasonably detailed enough for the OGC to
8 respond, then that's up to him, correct?

9 TC [MR. RYAN]: That is certainly true, Judge.

10 MJ [COL POHL]: You may be -- because you indicated you
11 know stuff that they know that you don't believe is in their
12 notice. But let's assume I tell them that they've got to put
13 their notice in one piece of paper -- rephrase that -- one --
14 I don't care if it's one or 20 pieces of paper, but in a
15 separate specific notice marked their Touhy notice.

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

17 MJ [COL POHL]: Then if there's other stuff that they
18 could have put in there and chose not to, is that not their
19 decision, even though -- and then it goes to the CIA, and they
20 do what they do?

21 TC [MR. RYAN]: It is their decision. And they may choose
22 not to, but then they may not like the answer that comes
23 because of ----

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1 MJ [COL POHL]: Oh, I understand that. I understand that.

2 Let me ask you one other question -- I'm sorry.

3 Do you want to be heard more on that?

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

5 MJ [COL POHL]: Let me go on to what I call the Western
6 Union issue. If they submit a Touhy notice, and I understand
7 your point about -- let's just say, as I say, you've got to
8 provide a Touhy notice, and you've got to give it to the trial
9 counsel, and they're responsible for getting it over to the
10 OGC CIA.

11 TC [MR. RYAN]: That being their position.

12 MJ [COL POHL]: No, I'm just talking about how it gets
13 there now that simply. It strikes to me is my concern is
14 if -- if when you say it goes to the CIA, why can't they just
15 give it to you and you take it over to whomever? I just don't
16 want to get into an issue it goes in the wrong in box.

17 TC [MR. RYAN]: I understand, Judge.

18 MJ [COL POHL]: I don't see that as a particularly onerous
19 requirement. I'm just simply saying they serve it on you, and
20 then the government carries it over to wherever the CIA has to
21 see it.

22 TC [MR. RYAN]: I don't know ----

23 MJ [COL POHL]: Because I think the case law can kind of

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1 go both ways, whether service on you or service on them. Just
2 that way it gets in the government channels, and you're in a
3 better position to ensure it gets to the right person. That's
4 where I am at.

5 TC [MR. RYAN]: Certainly we'll do whatever we can to try
6 to facilitate the process. If there is some reasons I am not
7 seeing, God knows what happened.

8 MJ [COL POHL]: If I issue an order to that effect and
9 there is something that has changed, let me know.

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

11 MJ [COL POHL]: Mr. Connell.

12 LDC [MR. CONNELL]: The first question that the
13 prosecution raises is purely a procedural one. When -- who
14 mentioned Touhy first and what did they say about it? There
15 are two separate pleadings, of course, right? There's ----

16 MJ [COL POHL]: Mr. Connell, I know, and I hear from both
17 sides continually, and I know there's a lot of this, well, we
18 said it here and they said, no, they didn't hear, and
19 Mr. Swann made comments about Ms. Bormann's comments and
20 things like that. I've got it. It's not productive for me
21 for you to spend your valuable time to say "I said it first."
22 I know Mr. Ryan did. I can read the pleadings, I know what it
23 is. But let's get to the substance.

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1 LDC [MR. CONNELL]: Sure. Here's the substance. With
2 respect to the Western Union issue, the government, the Office
3 of the Chief Prosecutor, cannot pick and choose which parts of
4 the United States Government it represents in its tactical
5 interests in any particular hearing.

6 The prosecution was very careful not to say that the
7 Office of General Counsel, you know, didn't know about this
8 request, doesn't know about the former CIA interpreter
9 utilized by Mr. Binalshibh's team, hasn't been intimately
10 involved. He doesn't make any of those claims. And, in fact,
11 the prosecution here, their coin, their e-mail addresses and
12 everything else, are the prosecution task force, which is a
13 multi-agency task force set up, which includes the FBI, the
14 CIA, other agencies of the United States Government, to be
15 involved in the prosecution of this case.

16 In fact, one of the strangest facts in the whole case
17 is that when we get a bounced e-mail from the prosecution,
18 it's returned by a server, cia.gov. The idea that the Office
19 of the General Counsel of the CIA does not know about this and
20 hasn't seen our 505 issues really just kind of defies -- I
21 don't want to go so far. I will say instead that the United
22 States Government as a whole is well aware of this notice.

23 MJ [COL POHL]: But you seem to be conflating two issues

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1 here, okay? By that I mean you talked about the Western Union
2 issue. I'm just talking about how it gets from you to the
3 CIA. Then you conflated back they're already on notice of it,
4 okay? That's a separate -- that remark about Western Union
5 was only to facilitate if there needed to be facilitation, to
6 get, if required, Touhy notice from you to the deputy general
7 counsel of the CIA.

8 And, again, the cases appear they can go both ways,
9 on service, when the U.S. Government is a party, whether
10 service on them suffices as opposed to service directly on the
11 OGC.

12 I don't want to come back in two months and hear,
13 well, you didn't give it -- you know, he never got the mail.

14 LDC [MR. CONNELL]: Right.

15 MJ [COL POHL]: That's all I was trying to resolve in
16 that.

17 The other issue ----

18 LDC [MR. CONNELL]: In the Pentagon mail system, I can
19 completely understand your concern about that.

20 MJ [COL POHL]: The other issue I think you conflated with
21 is, again, a variation of your earlier argument that they're
22 already on notice. Okay.

23 Now, let me ask you this: How do you address Mr. --

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1 you indicated to me your Touhy notice that you don't believe
2 is required, but let's say for the sake of this discussion it
3 is required, is contained in at least five, and perhaps six,
4 separate exhibits. To meet the intent of Touhy, is that how
5 it should be done; that it's look here, here, here and here,
6 and you'll find it? Or shouldn't it be in one neat little
7 package with a reasonably detailed description of the
8 testimony sought?

9 LDC [MR. CONNELL]: Your Honor ----

10 MJ [COL POHL]: Aren't you putting a burden on the OGC to
11 kind of figure out what you mean?

12 LDC [MR. CONNELL]: I fully endorse the idea that
13 classified information should be delivered in a neat little
14 package with all available information, context sufficient to
15 understand it, and reasonable specificity. I fully endorse
16 that idea.

17 The rest of us, however, who live in the real world,
18 have to deal with dribbled discovery, pleadings which come up
19 as information is obtained, and some of which is under seal,
20 classified, classified at different levels and different
21 compartments, et cetera. If the military commission orders me
22 to, you know, compile everything I know at this time and put
23 it in one place -- but just imagine -- let's just talk for a

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1 moment what would this have actually looked like in the 350
2 series.

3 So as soon as I wanted to -- I asked the military
4 commission for the deposition on the day after the individual
5 in question appeared in court, because I -- I'm speaking in an
6 unclassified way -- wanted to, thought that it would be most
7 efficient and efficacious to do the deposition right then and
8 there.

9 To give a Touhy notice in that situation, I would
10 have to provide -- I would have to do exactly what I did in
11 350A, which is give -- when I gave 505(g) notice, I would have
12 to provide the information that I had.

13 Now, a couple of days later, through an
14 investigation, we provide more information. Then I need to
15 provide that to the Office of General Counsel. A little bit
16 later than that, the prosecution produces some discovery
17 that's relevant, I put in that information.

18 So in the ideal world, we would all exchange nicely
19 indexed and complete packets of information, but it doesn't
20 actually happen that way. We are operating in a duck blind
21 with a hole about this big where we peek out, and different
22 pieces of classified information flutter by our field of
23 vision. And when we find out those pieces of information, we

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1 write them down in a notice, and we provide them to the
2 government. And that's all that this regulation or 505
3 require.

4 MJ [COL POHL]: So what you're saying is it's too
5 difficult for you to compile all this information in one set
6 of ----

7 LDC [MR. CONNELL]: I'm not saying it's too difficult.

8 MJ [COL POHL]: ---- but the OGC is supposed to figure it
9 out for you?

10 LDC [MR. CONNELL]: I'm not saying it's too difficult at
11 all, because I do it.

12 MJ [COL POHL]: At one point in time -- I know you do it,
13 because -- that's why I think you're selling yourself short.

14 What I'm saying is if a Touhy notice is required, you
15 know, and it seems to me it's the party that has to provide
16 said notice responsibility to provide a clean, clear, detailed
17 description according to the rule, if the rule applies -- I
18 know you say it doesn't -- and not force the OGC to hunt and
19 peck through six other exhibits, at least, to see what it is.
20 Because again, they may pick the wrong stuff.

21 This way -- two advantages of this way: One is it's
22 in one place; and two is they know what you say it is. As
23 Mr. Ryan pointed out, you know, he says he thinks your notice

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1 could have other details that it doesn't have. I mean, for
2 example, this most recent document, now, would that be
3 included in your Touhy notice and say, okay, now we've got a
4 seventh document that the OGC has got to consider?

5 LDC [MR. CONNELL]: The seventh document is from a defense
6 investigator, not ----

7 MJ [COL POHL]: Okay. I'm just saying is -- I have not
8 read it yet, but I'm just saying ----

9 LDC [MR. CONNELL]: The CIA doesn't have any equity in
10 that document.

11 MJ [COL POHL]: Okay. So you say it doesn't apply ----

12 LDC [MR. CONNELL]: I think it does apply. I'm saying the
13 CIA doesn't have any equities in it.

14 MJ [COL POHL]: Okay. But what I'm saying is, is that
15 you -- if a Touhy notice is required, it will go to the OGC,
16 and he will make certain determinations under the relevant
17 regulations, okay? But I think it's only fair for him to know
18 exactly what your Touhy notice entails and not that he -- he
19 may be on notice of it, may be on notice of a lot of things, I
20 suspect, okay? But if this procedure applies, it seems to be
21 a specific regulatory procedure that will require you to
22 provide, with relative specificity, a reasonably detailed
23 description.

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1 We can go back and forth on this. I think you know
2 where I'm going on this.

3 LDC [MR. CONNELL]: I do know where you're going, but let
4 me just say one place where my vision parts company with the
5 military commission, because I'm all in favor of clear
6 pleadings and good communication and complete discovery and
7 all those other virtues.

8 The place that -- the thing that I think the military
9 commission is leaving out of this is the time dimension, that
10 -- how much information gets dribbled out to us, and that we
11 do our very best within the construct of 505 and now Touhy,
12 and the regulations which govern our handling of classified
13 information, to provide notice to everybody who needs it.

14 And so if what the military commission is saying now,
15 six months after the event, we should take everything we have
16 and put it in one place, that's fine. But to impose that as
17 an ongoing burden on us on, say, February 12th of 2015, as
18 opposed to October 28th of 2015 -- or 29th, is unreasonable.
19 The ----

20 MJ [COL POHL]: Well, let's be clear here, okay,
21 Mr. Connell, is to my knowledge -- and I've been here at every
22 session ----

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

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1 MJ [COL POHL]: This is the first time the Touhy issue
2 came up.

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

4 MJ [COL POHL]: When you say the commission is imposing
5 some type of rule, understand this: If you wanted to say
6 that, you certainly can, okay? I'm simply saying if I rule a
7 certain way that these regulations, the Touhy regulations,
8 apply, then they're going to apply. And if a Touhy issue
9 comes up again, absent some different facts, then guess what?
10 They'll probably apply again.

11 If you get additional information that you want to
12 supplement your Touhy notice, you can. But that's -- I mean,
13 I don't understand your point that because we get it in dribs
14 and drabs, therefore we can drib and drab, bury it in
15 pleadings to the OGC, and that constitutes sufficient Touhy
16 notice.

17 LDC [MR. CONNELL]: The -- what I'm saying is there's
18 not -- I mean, there are two alternatives: One is to give
19 notice of information as we receive it, all right, that's
20 dribs and drabs. Number two is to wait at some point when it
21 feels ripe and put it all in one place and send it off.

22 And the ----

23 MJ [COL POHL]: But let's back up, though, because you're

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1 requesting a witness to be produced, either live or for
2 deposition for testimony, okay? So you've got a point in time
3 where you filed that request.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: Okay. Like any witness production
6 issue -- and I know I don't need to hear it again, the defense
7 version, view of why this process is unfair about the
8 government comes in, I understand it.

9 LDC [MR. CONNELL]: I won't repeat it.

10 MJ [COL POHL]: I understand everybody's view on that.
11 I've got it. I'm not going to revisit that view.

12 But be that as it may, is that at a point in time you
13 say, as you do frequently, we want this witness.

14 LDC [MR. CONNELL]: Sure.

15 MJ [COL POHL]: Once you request that witness, that's the
16 point in time you've got to provide whatever required
17 supporting documentation is required. So why is this any
18 different?

19 LDC [MR. CONNELL]: It is not different at all.

20 MJ [COL POHL]: Good.

21 LDC [MR. CONNELL]: That's exactly my point, Your Honor.
22 Because each time we file some piece of classified
23 information, we file a 505(g) notice about it, and so it

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1 becomes dribs and drabs. And what you are -- what I hear the
2 court describing is different from that process.

3 What I hear the court saying is there has to be a
4 single document, composed of however many subparts that it may
5 happen to contain; that at some point, which I guess is in my
6 discretion -- or if it's not in my discretion, at least taken
7 at my own risk -- at some point I need to draw a line under
8 the dribs and drabs and say, okay, now I think it's
9 completely -- you know, it's sufficiently fruitful for me to
10 send off a letter to the Office of General Counsel.

11 MJ [COL POHL]: When you want me to produce a witness,
12 okay, you tell me why it's material to the preparation of the
13 defense ----

14 LDC [MR. CONNELL]: Of course.

15 MJ [COL POHL]: ---- or material or relevant, and then you
16 give me some facts.

17 LDC [MR. CONNELL]: Sure.

18 MJ [COL POHL]: Why is this any different?

19 LDC [MR. CONNELL]: It is not different. It will be in
20 dribs and drabs to the OGC in the same way it is in dribs and
21 drabs to the court or military commission. When we get
22 information, we provide it.

23 MJ [COL POHL]: If Touhy applies, at some point in time

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1 you've got to give a Touhy notice. Now, if you want to wait
2 on it and say I've not got complete information, or wait on
3 dribs and drabs, as you keep saying, fine. Don't give the
4 notice. Don't give the notice.

5 LDC [MR. CONNELL]: No, Your Honor has misinterpreted ----

6 MJ [COL POHL]: If you say I want to give the notice and I
7 want to supplement it later, that's fine, too.

8 LDC [MR. CONNELL]: Here is where we part ways. I have
9 given notice. That's what 350A is, that's what 350Y is. The
10 only real point we're debating is whether it is legitimate to
11 ask the lawyers at the Office of General Counsel to do things
12 that the rest of the lawyers do, which is look at the record
13 and figure out what the record says, as opposed to a single
14 sheet of paper. That's really the only thing we're debating,
15 as far as I can tell.

16 And my objection to the single piece of paper
17 construction of this regulation is that it ignores the way we
18 receive information.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: Now, I have one more thing I want to
21 say about this ----

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: ---- which is the question that I

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1 raised about whether the individual applies ----

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

3 LDC [MR. CONNELL]: Okay. Whether the individual falls
4 under the technical definition of former employee, as
5 necessitated by nondisclosure agreements under 1903 -- no,
6 excuse me, 1905.3, is a factual question. We don't actually
7 know the answer to that because we've never seen the
8 nondisclosure agreements.

9 And it is a perfect example of the difficulty of
10 providing a unitary Touhy notice as opposed to simply
11 providing the government with the information we have, because
12 we can only provide information that we have.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: Thank you very much.

15 MJ [COL POHL]: Mr. Ryan?

16 TC [MR. RYAN]: Your Honor, absent any questions from the
17 commission, I will make no further argument.

18 MJ [COL POHL]: My preference was to try to resolve the
19 Touhy issue at this session, because I think that -- that
20 would assist us in resolving this issue. But to do that, let
21 me ask you this, Trial Counsel.

22 You've gotten a 505(g) notice from Mr. Connell on
23 this issue? True? Are you requesting a 505(h) hearing?

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

2 MJ [COL POHL]: Okay. So it seems to me, before I can
3 resolve this, I need to give him at least the opportunity --
4 without knowing what it is, I don't know whether it requires a
5 closed session or not under 806. But obviously I consider
6 these motions to be made in good faith, so we need to conduct
7 a 505(h) hearing, which would obviously alter our potential
8 schedule.

9 My suggestion would be is that we could do the 505(h)
10 hearing -- have you filed a 505(h) hearing request?

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

12 MJ [COL POHL]: Here's the issue, and this is simply a
13 scheduling issue. To do the 505(h) hearing, obviously it has
14 got to be closed. And we do a follow-on 806 hearing, that
15 again is obviously closed. That creates, obviously,
16 logistical challenges. We were discussing, other than 008,
17 trying to get some of the 254 litigation begun, and this may
18 infringe on that.

19 So for scheduling purposes -- well, let me ask the
20 government. Given all those competing equities, because a
21 lot -- we can go different ways on this. What would be your
22 suggested way ahead, when to do the 505(h)? When to do the
23 806 if necessary, the closed 806? And in light of that, what

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1 do we do with the other motions, given the transportation,
2 logistical challenges involved?

3 And defense, I'm going to give you an opportunity on
4 this, too. It's simply a scheduling issue.

5 MTC [MR. TRIVETT]: One second, sir.

6 MJ [COL POHL]: Sure.

7 [Conference with court personnel.]

8 MJ [COL POHL]: General Martins?

9 CP [BG MARTINS]: Your Honor, on scheduling matters, so
10 you're seeking our input?

11 MJ [COL POHL]: Yeah. What I am just saying is, is that
12 given that we have today and tomorrow, okay, and given the
13 logistical challenges of a 505(h) hearing/a closed 806
14 hearing, there may be difficulty doing that and also taking
15 the witnesses on 254, assuming we get to there. I just kind
16 of want to get your input as to the way ahead.

17 You can tell me now or we can go -- we're only going
18 to go for about another 20 more minutes and discuss it over
19 the break, and tell me after the break. We're going to 008
20 next, so we've got time on this.

21 CP [BG MARTINS]: That's what we understood. If it helps
22 to get our -- sort of how we see it structurally because of
23 the logistics ----

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1 MJ [COL POHL]: You understand, once we go to a closed
2 session, that creates logistical challenges, and pick-up the
3 same day is difficult.

4 CP [BG MARTINS]: Putting that together for us, Your
5 Honor, this would be the government's request: Come back, do
6 831, visit those, 505(h) hearing after that, and then tomorrow
7 -- so that we can start arranging for the testimony and the
8 witnesses in 254, start that tomorrow.

9 MJ [COL POHL]: Okay. Do the 505(h) hearing today and
10 then, if necessary, follow it right away with the closed 806
11 hearing today, okay? And then tomorrow -- okay.

12 CP [BG MARTINS]: Wherever we are in the 350 process,
13 right, because we're ----

14 MJ [COL POHL]: Right.

15 CP [BG MARTINS]: Wherever we are, tomorrow let's go the
16 witnesses on 254, would be our suggestion.

17 MJ [COL POHL]: Okay. Here's what we're going to do. I
18 understand that may be kind of the best efficient use of time.

19 What we're going to do between now and when we break
20 is, I want to talk about -- I want to touch on 254. Because
21 once we break out of it, I want to be able to tell the guards
22 what to do so we can get ahead. So let me go -- I now want to
23 touch on 254, and then we will see where we're at as far as a

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1 505(h) on 350, okay?

2 Mr. Connell.

3 LDC [MR. CONNELL]: Doing the 505(h) this afternoon makes
4 sense to me. My question is I just will need some advance
5 notice of what is the scope of the 505(h) hearing. I can
6 imagine three different scopes: One is just the piece that I
7 want to argue relative to Touhy; one is all the different
8 classified facts in 350; and one is, you know, the vast list
9 of classified information that's covered in 376 from the
10 defense and 376A from the prosecution. So small, medium or
11 large, and I'm just trying to figure out what it is.

12 MJ [COL POHL]: Small.

13 LDC [MR. CONNELL]: Small, got it. Thank you.

14 MJ [COL POHL]: Okay. Let's start 254. And, again, we're
15 just talking scheduling here.

16 Last time we met in February -- I think it was
17 February -- I put on the record that I was aware that my order
18 of, I believe, January, basically freezing in place what was
19 proffered to me the current policy with regards to male
20 guards, was subject to some EO complaint, Equal Opportunity
21 complaint from the -- I'm assuming, the female guard force. I
22 told you that -- I gave you written notice of that as soon as
23 I found out about it. I put it on the record as soon as I --

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1 at our next session.

2 Since that time, I have heard zero about the E0
3 complaint. I have no idea where it is. I have no idea its
4 resolution or lack thereof, and I have no idea and, quite
5 frankly, have no interest in any of that. If anyone wants to
6 voir dire me on the E0 complaint, as I told you before, I
7 would give you that opportunity, and that opportunity is
8 today.

9 Does any defense counsel wish to be heard on it? I
10 know there are other motions for other options, too, and if
11 you wish to be heard on that, you certainly can.

12 LDC [MR. RUIZ]: Judge, as you know, I filed 254WW, and in
13 that motion we asked that -- for two forms of relief. The
14 first was that you recuse yourself from hearing this issue,
15 obviously, as you were the target of an investigation. The
16 second one was that you put this decision on hold until a
17 determination is made that the investigation is over.

18 Since that time, there have been some additional
19 facts and additional public statements made by high-ranking
20 officials that we believe are necessary to supplement that
21 pleading. You heard about them this morning from Major
22 Poteet. We have the same issue that arose at the same time on
23 the 27th of October, and it was based on the same comments by

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1 the Secretary of Defense and other high-ranking officers
2 including senate -- a senator.

3 What we're going to ask the court to do on this, at
4 least our position, is that we should be allowed to supplement
5 that before the judge and the court makes any type of ruling
6 on this decision. I'm also told, and I have to track down the
7 e-mail that indicates that at least to a public affairs
8 officer, there has been a public disclosure that the EEO
9 complaint remains open until at which time the judge issues
10 his ruling.

11 So it seems to me that it is time, and premised
12 on ----

13 MJ [COL POHL]: Well, you're telling me things I don't
14 know.

15 LDC [MR. RUIZ]: Okay. I'm telling you information that I
16 need to put into our supplement, and why we will need to
17 supplement our ----

18 MJ [COL POHL]: Just understand this, that if you tell me
19 something I don't know ----

20 LDC [MR. RUIZ]: I don't know what you don't know, Judge.

21 MJ [COL POHL]: Yes, you do. I told you what I know about
22 the EO complaint. Now, if you tell me something I don't know,
23 which you just did, and that somehow that influences,

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1 therefore, raises an issue, you know, you're telling me
2 something that, "Oh, by the way, Judge, you ought to recuse
3 yourself because now you have this additional fact which, by
4 the way, you didn't know until I told you." So be careful
5 what you tell me.

6 LDC [MR. RUIZ]: Sure. And we're going to ask for
7 different relief. We're no longer going to ask for you to
8 recuse yourself.

9 MJ [COL POHL]: Okay.

10 LDC [MR. RUIZ]: But that's part of our supplement.

11 MJ [COL POHL]: Okay. That's really what I want to
12 address right now.

13 LDC [MR. RUIZ]: I understand.

14 MJ [COL POHL]: But that -- okay. Let me make it easier,
15 because, again, I'm focusing simply on that issue.

16 LDC [MR. RUIZ]: Sure.

17 MJ [COL POHL]: Voir dire/recusal, and at this point ----

18 LDC [MR. RUIZ]: I'm not asking you to recuse yourself any
19 longer. We believe that remedy no longer would cure the
20 unlawful influence because of the statements that have now
21 been made publicly. If you recused yourself and replaced them
22 with another military judge who could be aware of the same
23 statements and the same pressure, we don't think it would

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1 leave us -- or purge the unlawful influence, which is, of
2 course, the concern here.

3 MJ [COL POHL]: Okay.

4 LDC [MR. RUIZ]: I'm not -- I don't have a -- I'm not
5 going to move for you to recuse yourself.

6 MJ [COL POHL]: Okay.

7 LDC [MR. RUIZ]: But I also don't think that voir dire
8 would resolve the issue.

9 MJ [COL POHL]: I'm not saying it would resolve the issue,
10 I'm simply giving you the opportunity to do it.

11 LDC [MR. RUIZ]: Cure it.

12 MJ [COL POHL]: Okay.

13 LDC [MR. RUIZ]: What we would like to do is we would like
14 to have the opportunity in the normal course of business to
15 file our supplement before you rule on this issue. That's
16 what we are requesting, before you rule -- and I think that's
17 where you're heading anyhow.

18 MJ [COL POHL]: The big issue.

19 LDC [MR. RUIZ]: Big issue, right.

20 MJ [COL POHL]: Quite frankly ----

21 LDC [MR. RUIZ]: The order itself.

22 MJ [COL POHL]: The initial order itself, I don't want to
23 prioritize what's big and what's small. And there's an

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1 unlawful influence issue which someone may characterize as a
2 big issue, also, and they're conflated together. I've got it.

3 LDC [MR. RUIZ]: Yes.

4 MJ [COL POHL]: Mr. Nevin.

5 LDC [MR. NEVIN]: Yes, Your Honor. And we request the
6 opportunity to do some discovery before we're put in the
7 position of voir diring the military judge. And voir dire
8 can't be meaningful unless we know what information is out
9 there.

10 MJ [COL POHL]: Okay. And as -- you may not remember
11 this, but I do, is that all the way back at the arraignment,
12 after the voir dire, everybody said I want to reserve if ----

13 LDC [MR. NEVIN]: Everyone said what?

14 MJ [COL POHL]: Everybody wanted to reserve whether or not
15 they wanted to challenge me, as I recall, okay?

16 This case is not different than any other case. If
17 something comes up that requires an initial -- again, it's got
18 to be new. But if something comes up you didn't know about
19 you want to ask me about, you will always have that
20 opportunity from now until I'm no longer on the case or the
21 case is over. That's -- but I think that's just black-letter
22 law.

23 So if that's your request, it's always granted.

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1 LDC [MR. NEVIN]: Well, thank you, Your Honor. And I
2 assumed that would be the case. But now we're talking about
3 specifically this issue of voir diring you on 254 before we go
4 forward to litigate it further, and I can't meaningfully do
5 that. And I appreciate that the military commission would
6 make that opportunity available to me at any reasonable time,
7 but I'm just saying I think this is not a reasonable time to
8 do that.

9 MJ [COL POHL]: Okay.

10 LDC [MR. NEVIN]: The statements of the Secretary of
11 Defense and the statements that Mr. Ruiz mentioned suggest
12 that there's a tie-in to those issues depending on what the
13 military commission does in this round of hearings, and we
14 have discovery requests out on that to learn more about where
15 that comes from, where it's gone, and so on.

16 We can't -- there's not any way for us to know what
17 the military commission has seen or not seen, who has said
18 things to you at times, what you've read in newspapers. These
19 are public pronouncements that are made, and we have to assume
20 that this kind of information is finding its way to the
21 military commission. Unless we're following you around
22 24 hours a day to see what you're listening to and talking
23 about, there's not any other way for us to approach this.

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1 MJ [COL POHL]: I understand that, Mr. Nevin. But just --
2 and I'm not -- and I understand, you're an experienced
3 attorney, and I've been a judge for a while. I believe every
4 judge -- this judge -- if he's aware of any matter that might
5 cause question, he has a responsibility to disclose it, and I
6 will disclose it to you and to everybody. I disclosed to you
7 everything I know about the EO complaint.

8 I disclosed to you everything I've read about, which
9 is, quite frankly, your motion on this. I heard noise that
10 something happened, but I didn't know any details until I got
11 your motion. That's the sum and substance of what I know.

12 Now, if you want to -- and I will continue to keep
13 you informed if I hear additional things on these kind of
14 issues, because it is all going to -- but I see that just as a
15 responsibility of any trial judge, or any appellate judge, for
16 that matter, to disclose that.

17 Now, that doesn't mean to say that there are other
18 issues that you may need to investigate, okay? I've got that.
19 And that does not mean to say the unlawful influence issue is
20 just brand new. I've got that, too, okay?

21 So I understand what you're saying. I'm not sure,
22 when you say I have to investigate because I can't follow you
23 24/7, what that necessarily means. But I will tell you this,

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1 is that I will always disclose what I know, when I know it, as
2 I did with the EO complaint. And that's all I can do.

3 And if you find something else you think I didn't
4 disclose that I should have, bring it to my attention and I
5 will tell you whether I did it. But, again, I see that's my
6 job as a judge, to tell you that.

7 LDC [MR. NEVIN]: Right. And, Your Honor, let me put it
8 this way: I don't plan to get up every morning before we
9 start court and every time we come back from a break and ask,
10 "Did you hear anything since we last met that causes you any
11 problem?" I know that the military commission will come
12 forward with that.

13 But the military commission just said that you heard
14 something about this, practically speaking, was my point.
15 There is not any way for us to have contemporaneous, ongoing
16 perfect awareness of what the military commission has been
17 made aware of. And there's -- undoubtedly there's no way for
18 the military commission to know going forward what you're
19 going to be made aware of.

20 MJ [COL POHL]: That's true.

21 LDC [MR. NEVIN]: Right. So all I'm saying is this: One,
22 we have what on its face seems to be a pure instance of either
23 unlawful influence or the appearance of unlawful influence.

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1 The point of what Major Poteet said this morning is
2 that it's not right to litigate this motion, 254 -- I think
3 we're talking about 254Y, really, and the subsequent
4 pleadings -- it isn't right to litigate that when there is now
5 this cloud over this situation.

6 We become obligated as lawyers to get to the bottom
7 of this as best we can, and we have filed discovery requests
8 yesterday evening, and we intend to follow up on those. To
9 now go ahead and litigate this and say, well, we're going to
10 submit evidence to you and make arguments to you to some
11 degree, we're going to hear testimony from witnesses, ask you
12 to rule on objections or not, these kinds of things, until we
13 get to the bottom of a colorable issue of unlawful influence,
14 I think it's inappropriate to have further litigation on this
15 motion.

16 And there are a hundred other things we can -- well,
17 there are many, many other things that we can do between now
18 and tomorrow at 1700, or whenever we finish ----

19 MJ [COL POHL]: Okay.

20 LDC [MR. NEVIN]: ---- as opposed to that. So that's my
21 request.

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

23 Anything else from either -- any of the other defense

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1 counsel? Apparently not.

2 Trial Counsel, do you want to be heard on this?

3 CP [BG MARTINS]: Nothing further, Your Honor. We've
4 given you our requested approach to the -- you mean on 254?

5 MJ [COL POHL]: No, on -- what I'm hearing the defense
6 requesting is, in essence, is that we don't even take
7 witnesses on 254 tomorrow. Is that we basically punt 254
8 until the December hearings. That's what I -- and we pick up
9 other things like, for example, 018. I mean, there's other
10 stuff to do, but I just ----

11 CP [BG MARTINS]: Your Honor, on the witnesses, I mean
12 these are witnesses that have long been set up for the issues
13 that were already presented in 254 and your order in January.

14 MJ [COL POHL]: Okay. We're talking about the two
15 witnesses referenced earlier?

16 CP [BG MARTINS]: Yeah, and we also have some VTC -- well,
17 these are defense witnesses, so we're making them available to
18 them.

19 MJ [COL POHL]: We're talking -- how many witnesses are we
20 talking about?

21 CP [BG MARTINS]: A total of five, Your Honor.

22 MJ [COL POHL]: Okay. And they're all theoretically
23 scheduled to appear tomorrow?

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1 CP [BG MARTINS]: Yes.

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

3 Mr. Nevin?

4 CP [BG MARTINS]: Your Honor, I'm sorry, I've been
5 corrected. Four.

6 MJ [COL POHL]: Mr. Nevin.

7 LDC [MR. NEVIN]: I just wanted to add, Your Honor -- I
8 wanted to add, and I didn't say it, that we also support the
9 idea of holding the 505 hearing, and an 806 if one gets held,
10 this afternoon ----

11 MJ [COL POHL]: Okay.

12 LDC [MR. NEVIN]: ---- then going forward with substantive
13 matters tomorrow.

14 I also wanted to point out with respect to these
15 witnesses that their testimony, we were told later this week,
16 we were given notice of that, as I understand it earlier this
17 week, within the past several days. My recollection is that I
18 was advised of that at the time that I was advised of the
19 availability of the witnesses whom I interviewed last night,
20 whom Ms. Bormann was referring to.

21 So the idea that there is some written-in-stone
22 longstanding understanding that these witnesses were going to
23 give testimony tomorrow, I think is incorrect.

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

2 Here's what we're going to do: We're going to do the
3 505(h) hearing this afternoon. That means -- I'm going to
4 give time for the courtroom to be vacated, that means it's a
5 closed session. It's a classified session. It will begin at
6 1430. And that means the courtroom needs to be vacated of all
7 nonessential personnel that shouldn't be at a 505(h) hearing
8 by that time.

9 If there's a need for an R.C.M. 806 closed session,
10 my intent, without written in stone, would be to do that
11 shortly thereafter, since it's exactly the same procedure. I
12 recognize the unlawful influence issue is 254, that may need
13 fleshing out, but it seems to me there is no need to delay
14 taking evidence at this point in time on the substantive
15 underlying issue that has been percolating since at least
16 January of 2015.

17 Therefore, tomorrow morning we will begin with the
18 testimony on 254 of the four witnesses referred to. If
19 somehow we get through all four of them, we will pick up the
20 docket where it is, which I believe the next topic would be --
21 excuse me. Tomorrow morning, first thing tomorrow morning,
22 will be the final two arguments on 008. Then we will pick up
23 254 witnesses. Then if time permits, we will go into the 018

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1 series of motions.

2 LDC [MR. NEVIN]: I -- could the military commission tell
3 me what we're talking about with four witnesses? I understood
4 there were going to be two. I was told earlier this week
5 there would be ----

6 MJ [COL POHL]: I just go with what they tell me.

7 Who are the four witnesses, Mr. Swann?

8 TC [MR. SWANN]: Your Honor, if you recall in your order
9 254XXX, I believe, the defense requested several witnesses.
10 They wish to speak with the former commander -- the former
11 commander, and then they wished to speak with Colonel Heath.
12 They wish to speak with the current camp commander, and
13 because over time the current camp commander has kind of just
14 moved a little bit, and they wanted ----

15 MJ [COL POHL]: Mr. Swann, you're standing between me and
16 lunch. Let me ask you the question ----

17 TC [MR. SWANN]: They said five witnesses they requested.
18 It's their choice. Who do they want? Just tell us and we'll
19 get them here.

20 MJ [COL POHL]: Okay. Who are the two live witnesses?

21 TC [MR. SWANN]: There are potentially three live
22 witnesses: Colonel Heath; the camp commander; and an NCO, a
23 current NCO that they requested.

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1 MJ [COL POHL]: Okay. Defense, you want all three of
2 them? These are your witnesses, is my understanding. Is the
3 answer yes? Give me one yes or five noes.

4 LDC [MR. NEVIN]: I don't know, Your Honor. I'm not
5 prepared to tell you at this moment.

6 MJ [COL POHL]: Okay. Who are the other two?

7 LDC [MS. BORMANN]: Judge, I have yet to interview two of
8 them. So, frankly, I'm a little bit left in the dark here.

9 MJ [COL POHL]: I got it. I got it. Okay. Who are the
10 other two?

11 TC [MR. SWANN]: The other two would be the two former
12 commanders, the one that left in August of 2015 and then the
13 commander that left -- that actually instituted the policy and
14 probably departed sometime around December of 2014.

15 MJ [COL POHL]: Okay. So those are the five?

16 TC [MR. SWANN]: Yes, sir.

17 MJ [COL POHL]: And three are live?

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

19 MJ [COL POHL]: Are the three live witnesses at 0900?
20 Again, they may not testify first because we're going to do
21 008. And then the other two, just have them standing by, and
22 if we get to them, we get to them. Given our experience with
23 witnesses, we might not get to all five.

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

2 MJ [COL POHL]: That's the best I can do. You guys figure
3 out all this.

4 The commission will be in recess until 1430, when we
5 will have a closed 505 session.

6 [The R.M.C. 803 session recessed at 1240, 29 October 2015.]

7 [END OF PAGE]

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