

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

Ex Parte and Under Seal

AE 426 (WBA)

**Emergency Defense Motion to Compel
Appointment and Funding of Confidential
Expert Consultant, or Postpone 30 May 2016
Pretrial Hearings**

Date Filed: 19 May 2016

1. Timeliness:

This Motion is timely filed. Counsel for Mr. bin 'Atash hoped the government would provide a reliable assessment of Camp Justice's habitability well in advance of the upcoming 30 May – 3 June 2016 pretrial hearings in this case. When that did not occur, counsel for Mr. bin 'Atash, after seeking the Prosecution's position on 12 May 2016, attempted to file this Motion on 13 May 2016. The Trial Judiciary rejected the 13 May 2016 filing after close of business on 16 May 2016. The next day, 17 May 2016, Counsel for Mr. bin 'Atash attempted to re-file the Motion, styled as an Emergency Motion in light of the gravity of the issue and the fast-approaching hearings. That attempt was rejected, after close of business on 18 May 2016, on the basis that attachment dividers included the words "ex parte and under seal," a practice that was acceptable to the Trial Judiciary as recently as 30 March 2016 (AE 413 (WBA)), and which the Trial Judiciary did not mention when rejecting the first attempt to file this Motion.

Both the 13 and 17 May 2016 attempts to file the instant Motion included the following language:

Between the date of this Motion and 30 May 2016, the government will declare Camp Justice safe for occupancy and habitation. The declaration, however, will have little transparency; there will be no evidence in support of the claim. It will remain unclear whether toxins known to exist in Camp Justice have caused numerous cases of cancer and other diseases among the small population of individuals who have lived and worked there in support of military commissions. And, more importantly, it will remain unclear whether Camp Justice is a safe place to live and practice law today.

The Trial Judiciary's refusal to accept this Motion for a never-before-seen basis has allowed the government to deliver its line on cue. As predicted, today, 19 May 2016, counsel for Mr. bin 'Atash learned that the Navy Marine Corps Public Health Center has, once again, certified Camp Justice temporary housing structures safe for occupancy. As predicted, this declaration comes unsupported by evidence.

Counsel for Mr. bin 'Atash now file, for a third time, and request an expedited briefing schedule for this emergency Motion of which the Prosecution was notified a week ago on 12 May 2016, and the substance of which was provided to the Trial Judiciary six days ago on 13 May 2016.

The Defense investigation into this matter will continue, and counsel for Mr. bin 'Atash will supplement this Motion with relevant information as it becomes available.

2. Overview:

Camp Justice, the current venue for this capital military commission, may be safe for occupancy and habitation; it also may be a cloaca of carcinogens. The Convening Authority stands in the way of the truth.

Counsel for Mr. bin 'Atash have exhausted their ability to investigate the habitability of Camp Justice and are left with such uncertainty that Defense team members are uncomfortable entering Camp Justice for any purpose. In the apparent absence of an official investigation, Defense counsel have confirmed the existence of at least 9 and as many as 15 diagnoses of cancer, as well as at least 3 diagnoses of benign tumors and a variety of non-cancerous health issues. Each of these diagnoses appears in otherwise healthy individuals, most of whom were in their 20s, 30s, or early 40s at the time of diagnoses, and all of whom worked in Camp Justice in support of military commissions before his or her diagnosis.

It is beyond dispute that carcinogenic and other harmful toxins exist in Camp Justice. Very much in dispute, however, is the risk those toxins present to Camp Justice's occupants. The Navy and Marine Corps Public Health Center ("NMCPHC") has attempted to opine on the habitability of Camp Justice, but consistent with its past practice has muddled the situation with, at best, suspect data or, at worst, biased and misleading information.

The Prosecution, entrenched in a battle for Mr. bin 'Atash's execution, refuses to acknowledge the possibility that Camp Justice is hazardous to human health, likely because such a possibility threatens the government's interest in expediting this case at any cost. Likely for the same reason, the Convening Authority has refused to act on Mr. bin 'Atash's request for the appointment and funding of an independent expert consultant ("Consultant") qualified to consult and opine on Camp Justice's industrial hygiene and industrial toxicology.

For the sake of all who must work in Camp Justice in furtherance of appointed duties in this case, the Commission should order the Convening Authority to appoint and fund Consultant immediately and allow Consultant sufficient time to determine whether Camp Justice is safe for occupancy during the 30 May – 3 June 2016 hearings. If such a determination cannot be made

before 28 May 2016, the Commission should conduct the hearings in a location known not to contain harmful toxins. Alternatively, the Commission should postpone the hearings until Camp Justice is determined safe for occupancy by a qualified, independent expert.

3. Burden:

The moving party in a motion to compel the appointment of an expert consultant, typically, maintains the burden of proving factual issues by a preponderance of the evidence. R.M.C. 905(c)(1). Below, Mr. bin 'Atash establishes the existence of a reasonable probability that Consultant would be of assistance to the Defense, and the denial of the request for expert assistance would result in a fundamentally unfair trial. Thus, the Commission must grant the request and order the Convening Authority to appoint and fund Consultant. See United States v. Lloyd, 69 M.J. 95, 98-99, 103; United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994); United States v. Garries, 22 M.J. 288, 290-291.

It is the responsibility of the United States, however, to maintain safe facilities in which Mr. bin 'Atash and Defense personnel can live and work. Defense counsel, below, present compelling questions regarding whether Camp Justice is safe for occupation and habitation. Under these circumstances, the Commission should demand that the government prove by clear and convincing evidence that the appointment and funding of Consultant is not necessary because Camp Justice can be occupied safely.

4. Facts:

a. During hearings in this case, Mr. bin 'Atash and members of his defense team regularly spend 10-15 hours per day in Camp Justice, the current venue for this case and the location where attorneys, paralegals, and support staff are required to live and work when in Guantanamo Bay.

b. On 28 July 2015, Reuters News Agency reported the existence of a complaint filed with the Department of Defense Inspector General (“DoDIG”) citing an “unusually large” number of cancer diagnoses among individuals living and working in Camp Justice. (Attachment B). The Navy and Marine Corps Public Health Center (“NMCPHC”) has since confirmed that DoDIG did, in fact, receive a “hotline complaint,” and that on 23 July 2015, the Commander, Navy Region Southeast, requested the NMCPHC conduct a Public Health Review of military commissions buildings located on Camp Justice. (Attachment C, [REDACTED])

c. [REDACTED]
[REDACTED]
[REDACTED] (Attachment C, [REDACTED])

d. Despite numerous requests, the “preliminary report” was never provided to Defense counsel.

e. On 1 April 2016, COL [REDACTED] the Convening Authority’s Chief of Staff, provided the Chief Defense Counsel with a memorandum including a report [REDACTED]
[REDACTED]

(Attachment C [REDACTED])

f. Counsel for Mr. bin ‘Atash have not been informed why there is a five-week gap between the Report’s date and the Chief Defense Counsel’s receipt of the Report. During the five-week delay, however, and despite the alarming content of the 23 February 2016 Report, the Convening Authority regularly approved and supported travel for Defense teams to live and work in Camp
[REDACTED]

Justice.

g. [REDACTED]
[REDACTED]

h. [REDACTED]
[REDACTED]
[REDACTED] (Attachment C, [REDACTED])

[REDACTED]

i. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Attachment C, [REDACTED])

j. [REDACTED]
[REDACTED]
[REDACTED] (Attachment C, [REDACTED])
[REDACTED]
[REDACTED]

(Attachment C, [REDACTED])
[REDACTED]

(Attachment C, [REDACTED])
[REDACTED]

[REDACTED] (Attachment C, [REDACTED])
[REDACTED]

(Attachment C, [REDACTED])

[REDACTED]

(Attachment C, [REDACTED])

[REDACTED]

[REDACTED] (Attachment C, [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED] (Attachment C, [REDACTED])

[REDACTED]

[REDACTED] (Attachment C, [REDACTED])

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[REDACTED] (Attachment C, [REDACTED])

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C, [REDACTED]

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k.

[REDACTED]

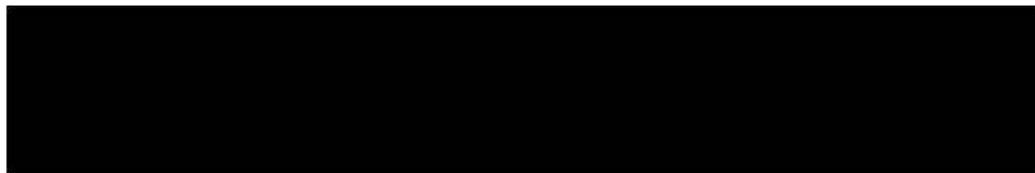
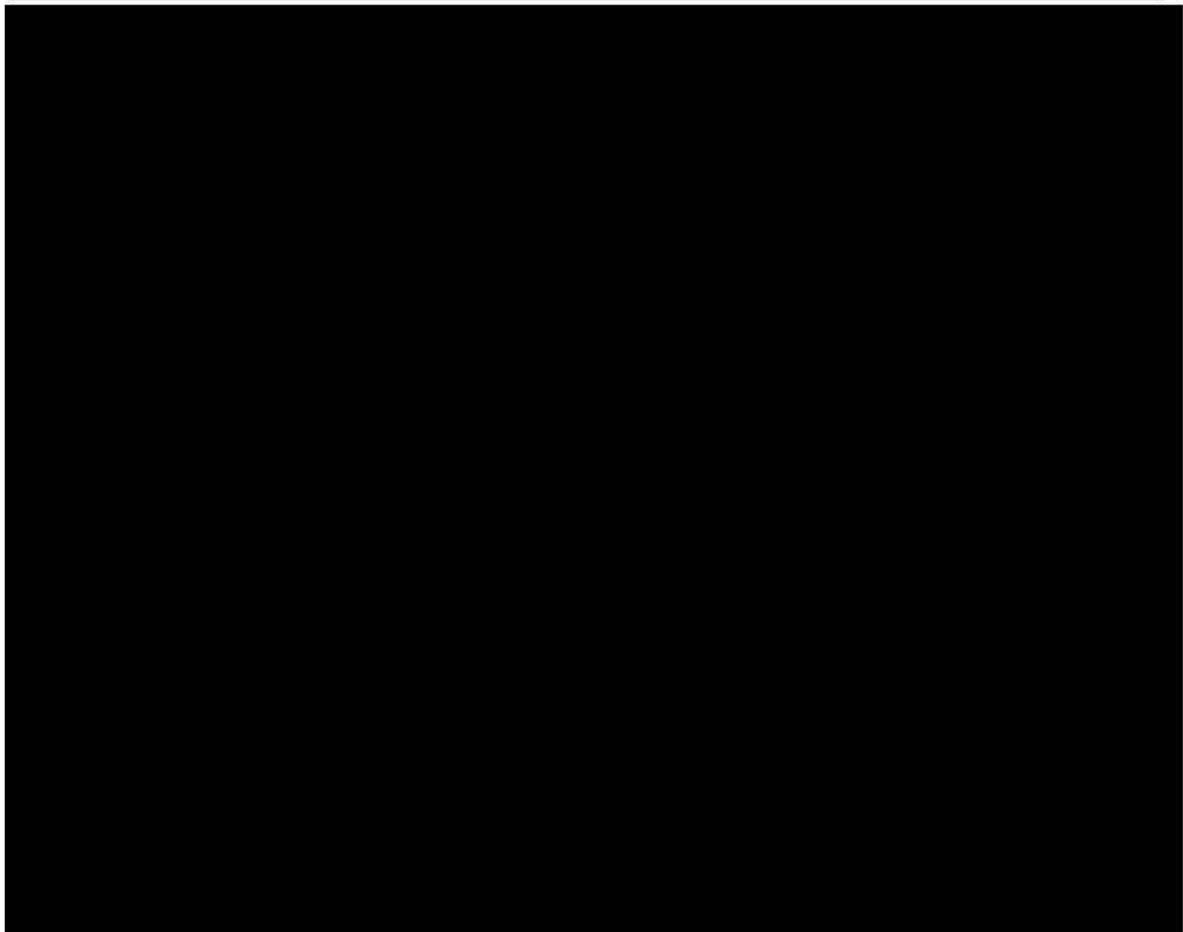
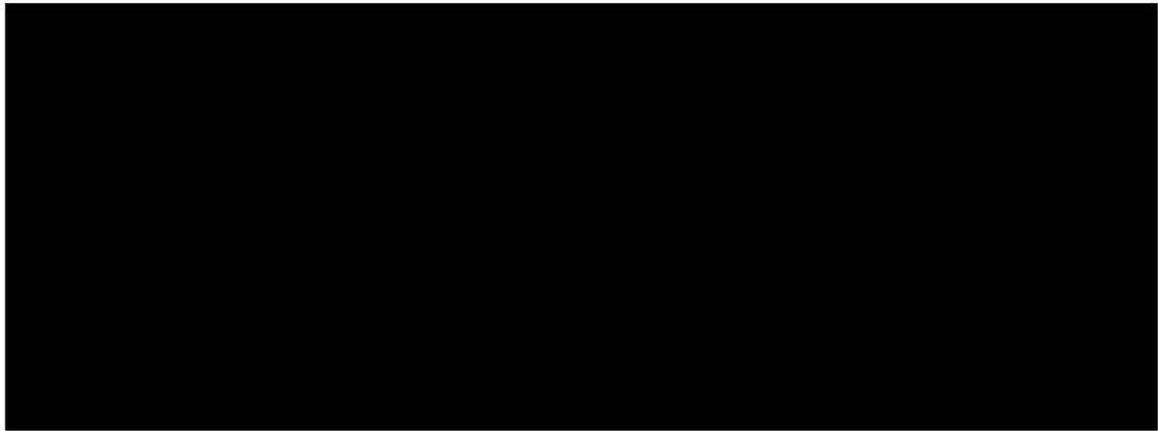
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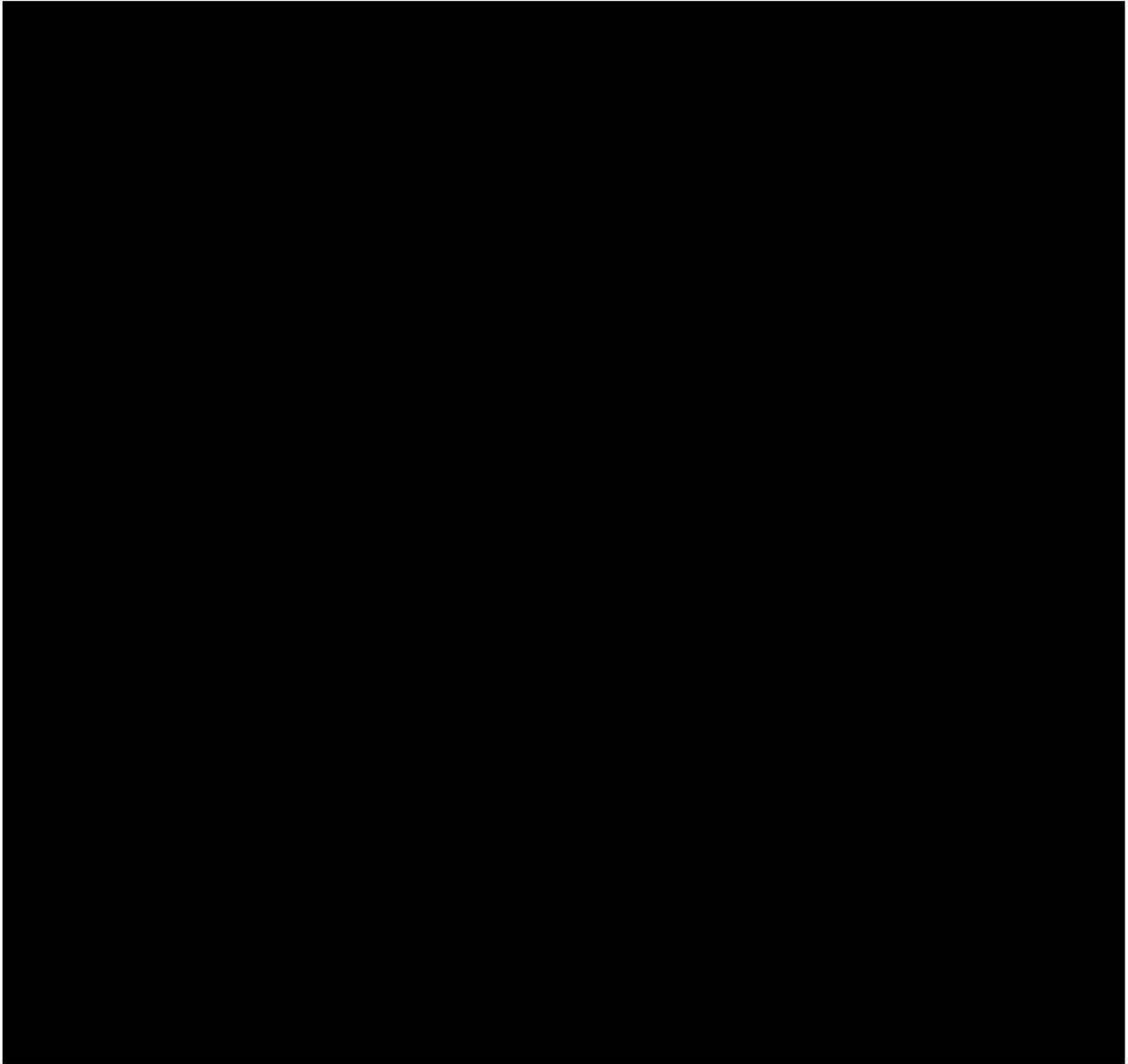
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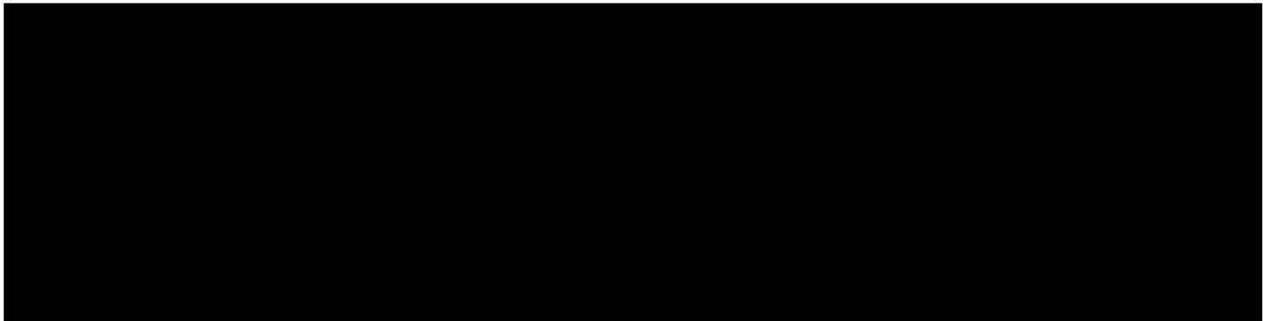
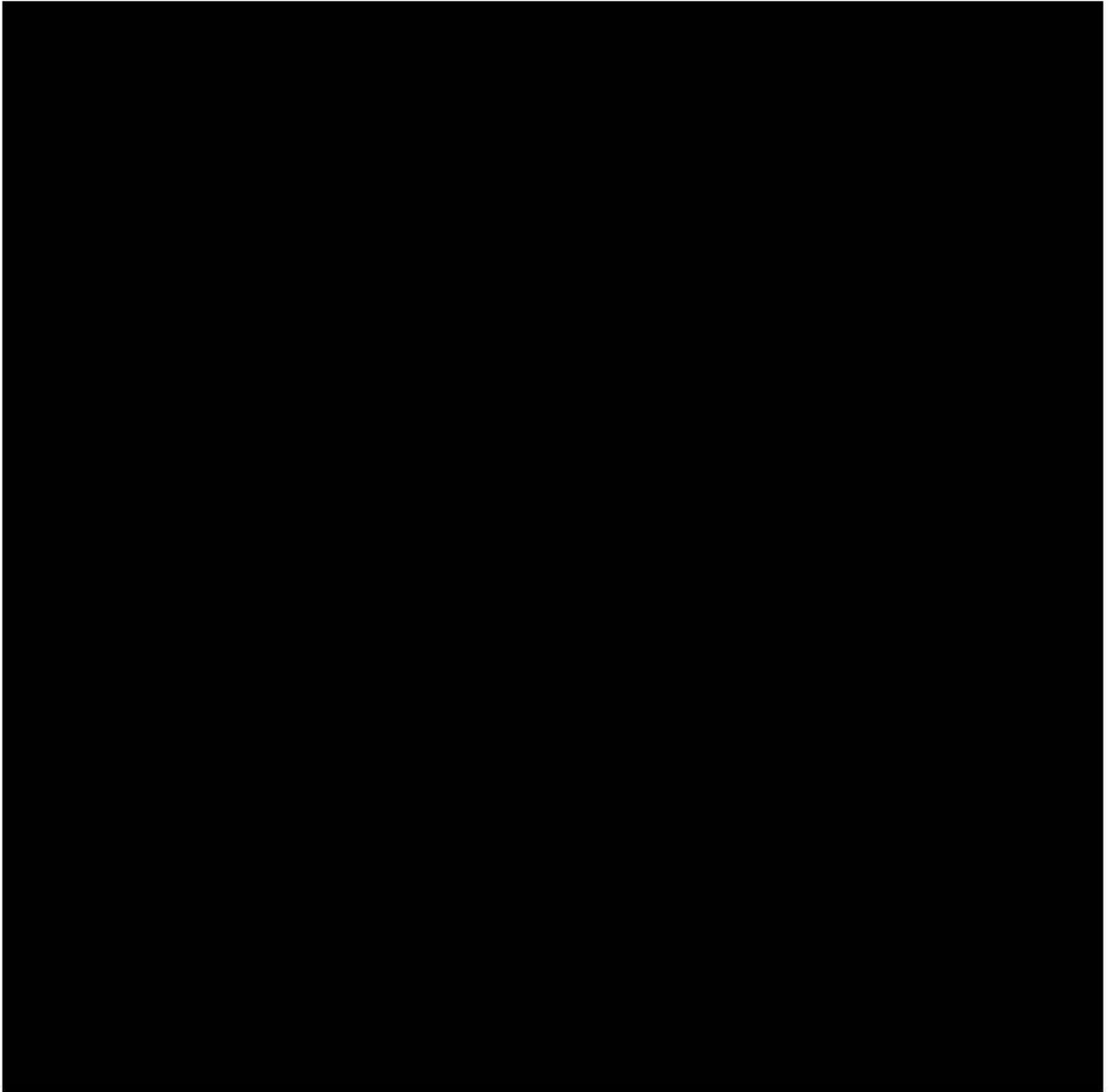
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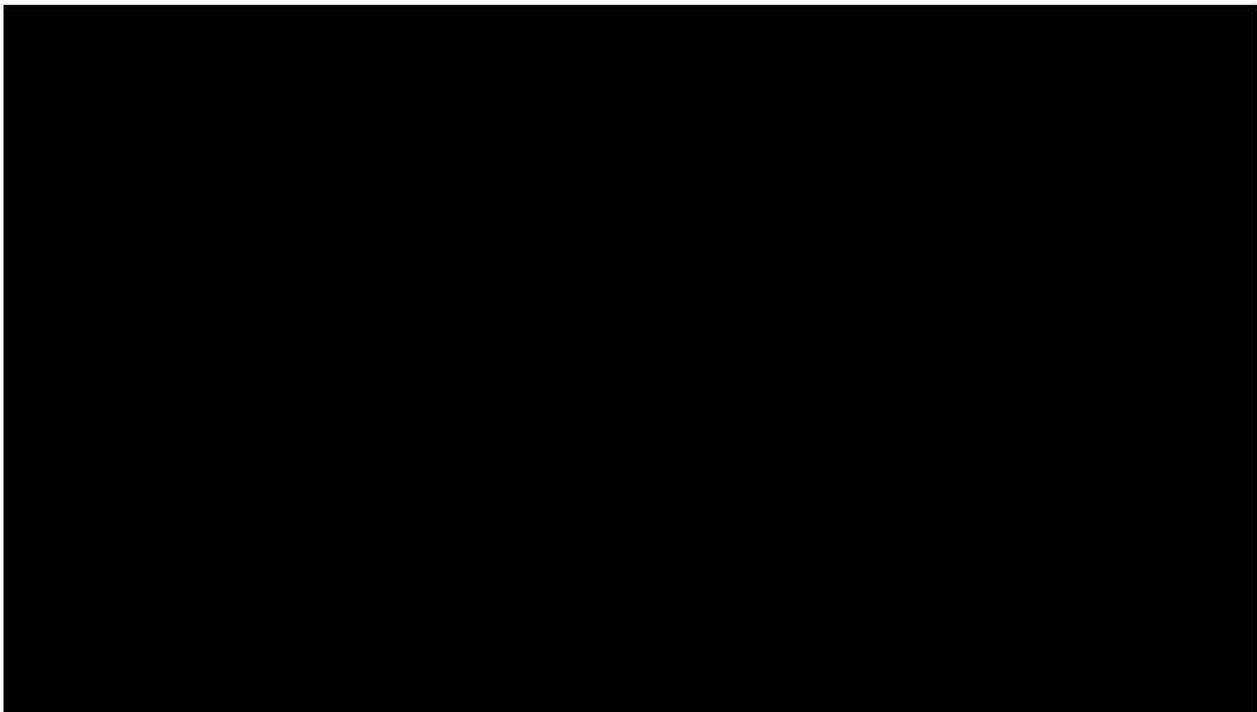
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l. [redacted]
[redacted]
[redacted] (Attachment C, [redacted])

m. [redacted]
[redacted]
[redacted]
[redacted]
[redacted]

(Attachment C, [redacted])



n. The most significant omission from the 23 February 2016 Report, however, is the absence of hard science. The Report fails to explain the methodology of the investigation's design, conduct of data collection, or analytical framework. [REDACTED]

o. According to the Navy, further testing and review of medical records is ongoing and will be completed later this year.⁴² Counsel for Mr. bin 'Atash, however, are not aware of a single individual who has been interviewed regarding health issues that might have been caused by toxins in Camp Justice.

p. Defense counsel's own investigation has revealed a number of known diagnoses of cancer among individuals who have worked in Camp Justice in support of military commissions. Defense counsel have discovered the following [REDACTED]

diagnosis:

- (1) appendix cancer, [REDACTED]
- (2) brain cancer, [REDACTED]
- (3) colorectal cancer, [REDACTED]
- (4) basal cell carcinoma, [REDACTED]
- (5) basal cell carcinoma, [REDACTED]
- (6) connective tissue cancer, [REDACTED]
- (7) lymphoma, [REDACTED]
- (8) testicular lymphoma, [REDACTED]

⁴² <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article72127182.html>

(9) colon cancer, [REDACTED]

Three of these diagnoses have resulted in death. Of the remaining six, the NMCPHC has been in contact with *none*.

q. Additionally, Defense counsel are currently investigating the possibility of six rumored or suspected cases of cancer among individuals who have worked in Camp Justice in support of military commissions. Defense counsel are working to learn more about these diagnoses.

r. Defense counsel's investigation has also identified several non-cancer diagnoses or other unexplained symptoms among individuals who have worked in Camp Justice in support of military commissions, including the following [REDACTED]

diagnosis:

- (1) kidney cysts, [REDACTED]
- (2) benign breast tumor, [REDACTED]
- (3) benign tumors in liver, gall bladder, and colon, [REDACTED]
- (4) benign ear canal tumor, [REDACTED]
- (5) multiple sclerosis and premature labor resulting in the infant's death, [REDACTED]
- (6) thyroid gland failure, [REDACTED]
- (7) recurring parotid gland swelling, [REDACTED]
- (8) Additionally, a large number of individuals have reported symptoms such as respiratory and eye problems after spending time in Camp Justice.

s. Defense counsel's discoveries are the result of an investigation that only began on 6 May 2016 when it became apparent that the Navy was not examining the diagnoses of which Defense counsel were then aware. Defense counsel discovered the cancer and non-cancer diagnoses

listed above between 6 and 17 May 2016. Defense counsel will continue to investigate in anticipation of Consultant's appointment.

t. Consultant is unable to execute a meaningful affidavit regarding Camp Justice's habitability without more information. He has opined, however, that the presence [REDACTED] [REDACTED] alone are a sufficient basis for an independent assessment.

u. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Attachment C, [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]

(Attachment C, [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(Attachment C, [REDACTED] [REDACTED]
[REDACTED]

v. Further tainting the Navy's credibility regarding the habitability of Camp Justice is its 2012 doctoring of a predecessor report to the 23 January 2013 Report. In response to a request by counsel for Mr. bin 'Atash, on approximately 17 October 2012, the Commission ordered the Prosecution to disclose emails regarding the preparation of various habitability reports for AV 29, the Camp Justice building [REDACTED]. Included in those emails was an exchange between LTJG [REDACTED] then an Industrial Hygiene Officer assigned to Guantanamo Bay, and CAPT [REDACTED] the senior-ranking military member responsible for Camp Justice facilities when LTJG [REDACTED] issued an industrial hygiene report [REDACTED] (Attachment C, [REDACTED]). Despite the fact that CAPT [REDACTED] was not an expert in Industrial Hygiene, the much junior LTJG [REDACTED] apparently felt the need to submit, prior to publication, a draft [REDACTED] to CAPT [REDACTED] a man with no industrial hygiene expertise whatsoever. [REDACTED]

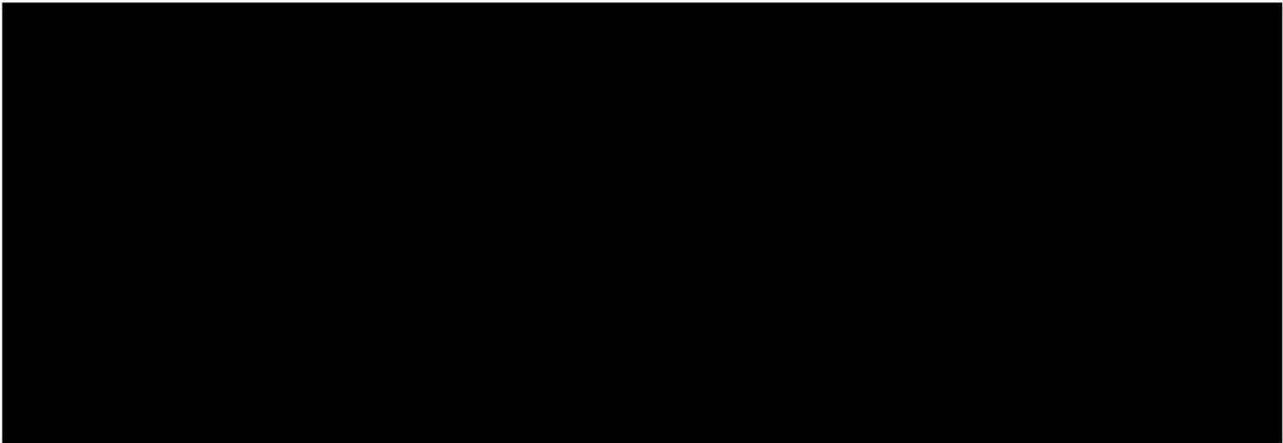
[REDACTED]
[REDACTED]
[REDACTED] (Attachment C, [REDACTED]) Prior to this language being published, CAPT [REDACTED] suggested via email that LTJG [REDACTED] change Paragraph 6 of his report. CAPT [REDACTED] wrote, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (Attachment C, [REDACTED]) CAPT [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]
(Attachment C, [REDACTED])

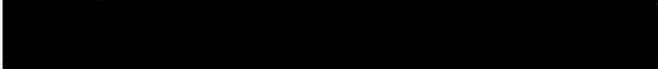
w. On 19 April 2016, counsel for Mr. bin ‘Atash submitted to the Convening Authority a request for the appointment and funding of an independent expert consultant (“Consultant”) to assist the Defense in determining whether Camp Justice is safe for occupancy and habitation. (Attachment C). The Convening Authority has not acted on the Defense’s request. (Attachment D).

x. Today, on 19 May 2016, according to the Chief Defense Counsel, the NMCPHC has announced just in time for the 30 May – 3 June 2016 pretrial hearings that:



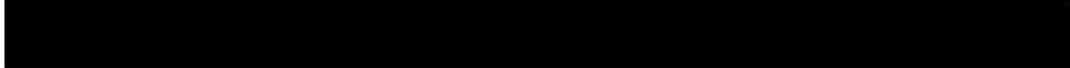
y. The NMCPHC’s 19 May 2016 announcement is devoid of supporting evidence.

z. [Redacted]



aa. The NMCPHC’s 19 May 2016 announcement fails to define what remediation efforts were made.

bb. [Redacted]



cc. And the NMCPHC’s 19 May 2016 announcement fails to report whether further testing or remediation efforts have been accomplished [Redacted]



5. Law:

The appropriate standard for the employment of expert consultants before a military commission is broad and highly deferential to the judgment of counsel. The Rules for Military Commissions (“RMC”) provide that “[t]he defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.” RMC 703(a). This applies both to the merits phase of the case as well as any sentencing phase, if one is necessary. RMC 703(b).

In both military and civilian courts, expert consultants should be provided to the Defense as a matter of due process, in order to prepare properly for trial and otherwise assist with the defense of a case. See Ake v. Oklahoma, 470 U.S. 68, 84-85 (1985); United States v. Langston, 32 M.J. 894, 895 (C.M.A. 1991); United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986). Article III courts, however, are significantly more deferential to defense counsel’s judgment. Explaining what constitutes a “reasonable opportunity to obtain witnesses and other evidence,” the Military Commissions Act of 2009 indicates “[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.” 10 U.S.C. § 949j (2012); see also RMC 703(a), Discussion. In this case, therefore, requests for expert consultants shall be reviewed under the Article III standard.

With respect to the employment of expert consultants, Article III jurisprudence counsels in favor a “reasonable attorney” test. Under the reasonable attorney test, necessity is demonstrated when “the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial

means to pay for them.” United States v. Anderson, 39 F.3d 331, 334 (D.C. Cir. 1994); see also Brinkley v. United States, 498 F.2d 505, 510 (8th Cir. 1974) (“[T]he trial judge should tend to rely on the judgment of the defense attorney if the latter ‘makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses.’”) quoting United States v. Theriault, 440 F.2d 713, 717 (5th Cir. 1971).

The reasonable attorney test places great emphasis upon the representations of counsel and upon counsel’s educated judgment as to how best to prepare for trial. See, e.g., United States v. McVeigh, 954 F. Supp. 1441, 1445 (D. Colo. 1997) (noting that, in a capital prosecution for the bombing of the Oklahoma City Federal Building, the court had “made no effort to evaluate the credibility or determine the significance of [defense] submissions [regarding appointment of experts], and has consistently relied on the experience and integrity of defense counsel, accepting their representations that such resources are reasonably necessary in preparing for the trial defense . . .”).

The federal test differs from the more formulaic test utilized at courts-martial, wherein an accused must demonstrate that: (1) an expert would be of assistance to the Defense; and (2) denial of expert assistance would result in a fundamentally unfair trial. See United States v. Freeman, 65 M.J. 451, 458 (C.A.A.F. 2008). Before courts-martial, in order to establish that an expert would be of assistance to the Defense, the Defense “must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.” United States v. Breshnahan, 62 M.J. 137 (C.A.A.F. 2005).

If an expert consultant is needed, the requesting party “shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.” RMC 703(d). All parties, including the Defense, have the same “reasonable opportunity to obtain expert witnesses” in a military commission. MCRE 706(a). Unlike an expert witness who testifies at trial, an expert consultant is protected by the attorney-client and attorney work-product privileges, and not subject to interview by the Prosecution. See Mil. R. Evid. 502; Langston, 32 M.J. at 894-95; United States v. Turner, 28 M.J. 487, 488-89 (C.M.A. 1989). The consultant is available to “advise the accused and her counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made.” Turner, 28 M.J. at 488-89. Designation as a person within the Defense privilege is important because:

The expert often will receive confidential communications from the accused and her counsel; and he may have occasion to learn about the tactics the defense plans to employ. If the expert consultant were free to disclose such information to the prosecutor prior to trial, a defense counsel would be placed at a great disadvantage. Indeed, he might hesitate to consult with the expert. The result would be impairment of the accused's right to counsel, because her attorney would be inhibited in the performance of her duties and unable fully to utilize the assistance contemplated by Ake.

Id. at 489 citing Ake, 470 U.S. 68.

6. Analysis:

Defense counsel have had less than a month to examine highly-technical data contained in the 23 February 2016 Report and underlying the concerns surrounding Camp Justice’s habitability. No member of Mr. bin ‘Atash’s Defense team is qualified to conduct expert

analysis in industrial hygiene and industrial toxicology. Similarly, no member of Mr. bin 'Atash's Defense team is qualified to opine on the habitability of Camp Justice. In fact, no member of Mr. bin 'Atash's Defense team is even qualified to gather data in an attempt to determine whether the numerous cases of cancer among Camp Justice occupants are the result of toxins in Camp Justice. Defense counsel have been forced to undertake such an investigation only because it is apparent that the government refuses to conduct its own in a manner that ensures the health and safety of the litigants in Mr. bin 'Atash's. Despite significant media coverage regarding the possibility of a cancer cluster in Camp Justice, not a single person identified by Defense counsel as having been diagnosed with cancer after working in Camp Justice has been contacted by government officials investigating this matter.

Counsel for Mr. bin 'Atash do not allege that Camp Justice is unsafe. We simply do not know. The evidence, interpreted without the benefit of an appointed expert consultant, suggests cause for concern. The NMCPHC's retraction of its initial finding of habitability should have been sufficient to suspend all non-essential access to Camp Justice. Unfortunately, the politics of the military commissions appear to have prevailed.

In light of the 23 February 2016 Report, the existence of a suspicious number of cancer and non-cancer diagnoses, the connection between Camp Justice's toxins and the known diagnoses, the Navy's poor credibility in matters related to the habitability of Camp Justice, and Defense counsel's lack of technical expertise, the Commission must intervene. Mr. bin 'Atash is entitled to the appointment and funding of an independent, qualified expert in the fields of industrial hygiene and industrial toxicology to assist Defense counsel in determining whether the prosecution of this capital case threatens the lives of the judge, lawyers, and staff assigned.

a. The 23 February 2016 Report is alarming.

Camp Justice has served as the location for Mr. bin 'Atash's case since arraignment in 2012. Members of Mr. bin 'Atash's Defense began working and residing in Camp Justice years before that. During that period, Defense counsel complained of health hazards existing in Camp Justice. When the NMCPHC finally commenced an investigation into the obvious possibility of toxins existing on the abandoned airstrip at Camp Justice, Defense counsel repeatedly requested the findings of the investigation. For almost a year, the government refused to reveal those findings. [REDACTED]

[REDACTED] This revelation has caused the NMCPHC to concede its error in publicly proclaiming Camp Justice safe for occupancy in August 2015, and has led the Navy to commit to further testing at Camp Justice.

The precise implications of the NMCPHC's findings are unclear and depend on further analysis. On its face, and despite the apparent flaws in its scientific method, the 23 February 2016 Report provides facts which, when read in the context of the history of this case, would cause a reasonable person not to enter Camp Justice until further testing can be accomplished.

[REDACTED]

There is no question that at least nine individuals who have worked in Camp Justice have since been diagnosed with cancer, and at least three individuals who have worked in Camp Justice have been diagnosed with benign tumors. There is no question that the toxins existing in Camp Justice are known to cause cancer and benign tumors and, in some cases, precisely the types of cancer diagnosed in individuals who have worked in Camp Justice. Whether the toxins at issue caused the cancers and benign tumors at issue is a separate question—one that requires expert medical assessment. But the possibility that toxins in Camp Justice cause cancer and other diseases—and, in particular, some of the diseases seen in individuals who have worked in Camp Justice—is indisputable.

In a “cancer cluster” where only one toxin exists—for example, lead in drinking water—it might be expected that only diseases the single toxin is known to cause would appear in the exposed population. In Camp Justice, however, such a variety of toxins exists that the disparate nature of the diagnosed cancers does not rule out the possibility that the cause of the cancers is something (or various things) in the environment in Camp Justice. In fact, if multiple toxins in Camp Justice are causing diseases, it would be expected that the diseases would be various.

The Navy’s failure to examine the nine known cases of cancer, the three cases of benign tumors, and the various non-cancer diagnoses that Defense counsel were able to discover in merely 11 days of investigating is most concerning. At this point, it would be reasonable to

deduce that more, if not many more, cancers, benign tumors, and other maladies will be identified as the investigation continues. The Navy's participation would improve the amount of information available to Consultant. Defense counsel recognize, however, that such participation is not in the Navy's or the Prosecution's interest, which might explain the apparent inaction by the NMCPHC thus far.

b. The appointment and funding of an unbiased expert industrial hygienist/ industrial toxicologist is necessary.

Regardless the cause of the known cancers, the 23 February 2016 Report demands independent expert analysis. No member of Mr. bin 'Atash's Defense team, nor anyone assigned to the Military Commissions Defense Organization (MCDO), is qualified to opine on such a highly-technical subject. Defense counsel require the assistance of Consultant.

Under either the Article III standard or the courts-martial standard, the Military Judge should order Convening Authority to appoint and fund Consultant to serve as a confidential consultant for Mr. bin 'Atash. Consultant is a renowned expert in the fields of Industrial Hygiene and Industrial Toxicology. Unlike the Convening Authority, Consultant has no interest in the outcome of Mr. bin 'Atash's case, or in final habitability assessment for Camp Justice. Unlike the Navy, which has contributed to the current state of affairs through a pattern of questionable public health assessments, Consultant is independent and possesses unquestioned expertise and credibility.

An attorney representing a client with the means to hire an expert such as Consultant would reasonably be expected to do so. First, no reasonable defense attorney would accept the conclusions of a discredited agency such as the NMCPHC. In light of its decision to declare Camp Justice habitable in August 2015 *knowing of its insufficient environmental testing for*

lethal toxins and carcinogens, any conclusion now reached by the NMCPHC is unreliable. Moreover, ten months after receiving the request for a Public Health Review, the NMCPHC has failed to reach any conclusion at all. NMCPHC's current position is that its initial declaration of habitability was wrong, that the Cuzcos are safe, and that more testing is required. In the meantime, it cannot be expected that military commissions lawyers, paralegals, and staff who, unlike the Convening Authority, actually live and work at Camp Justice will continue to pretend their lives might not be at risk.

Defense counsel for Mr. bin 'Atash, as the Convening Authority has been aware for years, is severely under-resourced. Certainly, no member of the Defense team is an expert in Industrial Hygiene or Industrial Toxicology. Defense counsel have undertaken steps to educate themselves to become sufficiently convinced that the 23 February 2016 Report is reason to avoid Camp Justice. However, the Defense does not have the expertise required to sufficiently assess the true condition of Camp Justice.

Even if Camp Justice is eventually determined safe for occupancy by an unbiased expert, the contents of the 23 February 2016 Report, absent further information, prevent Defense counsel from rendering effective assistance to Mr. bin 'Atash. The distraction created by the real threat of lethal toxins existing in Camp Justice cannot be ignored. The research and writing of this Motion, on its own, has prevented Defense counsel from preparing for substantive matters in Mr. bin 'Atash's case. Once this Motion is fully briefed and submitted for action by the Military Judge, the fear of health risks will not dissipate. Much like conflict of interest can cause a defense attorney to pull punches, counsel for Mr. bin 'Atash, until this matter is resolved, will operate with suspicion that they are unsafe in Camp Justice. This is no way to represent a man facing trial for his life.

c. Consultant is qualified.

Consultant is a physician, attorney, industrial hygienist, industrial toxicologist and biomedical engineer licensed to practice medicine in three states as well as law in two. He is certified in the engineering and public health discipline of industrial hygiene by the American Board of Industrial Hygiene as a Certified Industrial Hygienist (C.I.H.) in the comprehensive practice of industrial hygiene. He is board certified in the medical specialties of Internal Medicine, Occupational Medicine, and Public Health and General Preventive Medicine. Public Health and General Preventive Medicine is the medical specialty focused on epidemiology. Consultant is an Assistant Clinical Professor of Family Medicine and Public Health and is an Adjunct Professor of Industrial Hygiene and Industrial Toxicology. He has served as the Medical Director of a major American city and was the chief physician responsible for measures designed to protect the public health of over one million persons living or working in that city.

d. The Navy's past conduct in matters regarding the habitability of Camp Justice taints the credibility of its future assertions of habitability.

There is significant history in Guantanamo Bay and elsewhere bearing on the question of whether and to what extent the United States military can provide competent and unbiased opinion on the safety and health concerns their service-members face. Today's certification by NMCPHC that the Cuzcos are habitable—without any mention of the rest of Camp Justice—is practically meaningless.

It is with grave consideration that counsel for Mr. bin 'Atash question the qualifications or integrity of the Navy's public health officers, but past events speak for themselves. The Navy has, on four occasions in this case, issued opinions that have allowed for military commissions

participants to continue occupying Camp Justice. All four instances are clouded by either substandard science or bias.

In the first instance, with LTJG [REDACTED] and CAPT [REDACTED] the Navy issued a doctored scientific report. Defense counsel only discovered CAPT [REDACTED] manipulation after the Military Judge ordered the Prosecution, which had previously objected to Defense counsel's request, to disclose relevant emails. It was quickly apparent why the Prosecution had attempted to keep CAPT [REDACTED] email to LTJG [REDACTED] a secret.

In the second instance, where the NMCPHC reviewed complaints of respiratory problems (which look different today in the light of the 23 February 2016 Report), the Navy issued an opinion based on a methodology that non-scientist attorneys were able to immediately identify as flawed. The NMCPHC's analysis of respiratory issues existing in Camp Justice in 2012 provides an eerily similar example of an apparent motive to expedite commissions cases at the expense of public health. The NMCPHC's decision to compare the percentage of MCDO members reporting respiratory issues with a seemingly-arbitrary percentage taken from a population in Norfolk , VA was erroneous and misleading. The NMCPHC's obvious inference

[REDACTED]
[REDACTED] led to the conclusion that Camp Justice was habitable. (Attachment C, [REDACTED] This statistical comparison was flawed for a number of reasons. First, not all 132 Defense personnel had ever traveled to Guantanamo Bay and, therefore, not all 132 had been exposed to the mold, dust, and rat urine and feces that prompted the investigation. The NMCPHC's reliance on such an inflated number produced a false, low statistical occurrence for Defense personnel, and was misleading. Second, the NMCPHC failed to consider qualitative and quantitative factors such as how many Defense

personnel actually traveled to Guantanamo; the frequency of their visits; the location where these individuals worked while at Camp Justice; and their length of exposure to toxins while there. And third, the NMCPHC did not interview all of the Defense personnel believed to be suffering from the known toxins in Camp Justice. Rather, like its 23 February 2016 Report, the NMCPHC's 23 January 2013 assessment seemed motivated to minimize health impact for the purpose of expediting commissions hearings, as both reports contained fundamental flaws that paved the way for scheduled commissions hearings to proceed without delay.

In the third instance, the NMCPHC's August 2015 certification of habitability for Camp Justice, the Navy issued its opinion that Camp Justice was safe despite knowing that lab results for collected soil and air samples were not yet available. This almost unbelievable error was revealed when the NMCPHC was forced to step back from its certification of habitability in the 23 February 2016 Report.

Finally, in the fourth instance of the Navy's influence on this case, the publication of the 23 February 2016 Report, the Navy failed to demonstrate its ability to analyze and report on data critical to the safety of commissions participants in a manner consistent with the state of scientific and medical report-writing. The absence of methodological information in the 23 February 2016 Report is so unusual that it led one expert Defense counsel consulted to conclude that the report could not be peer-reviewed, was below the standard of medical practice, and might have been an attempt to deceive the public regarding the habitability of Camp Justice. Without the proper methodological information, it is impossible to know.

Counsel for Mr. bin 'Atash can no longer rely on the Navy's representations regarding the habitability of Camp Justice. The Navy has demonstrated a propensity to misdiagnose or ignore potentially-hazardous working and living conditions in Camp Justice. The Convening

Authority has, according to NMCPHC, only exacerbated the problem. It is now clear that the Convening Authority—who referred capital charges against Mr. bin ‘Atash and has since refused to properly resource his defense team—has either no understanding of the flaws in the 23 February 2016 Report, or simply little regard for the health of commissions personnel who must live and work in Camp Justice in order to perform their duties.

Historically, the military’s track-record of protecting its service-members from exposure to harmful toxins is less than perfect. More disconcerting is the military’s history of denying and minimizing health risks to which its service-members have been exposed. Service-members’ exposure to Agent Orange and napalm in Vietnam is infamous. For years, the Department of Defense denied any deleterious effects from exposure to Agent Orange and napalm. Only when forced to admit the growing numbers of veterans with illnesses correlated to exposure to these toxins did the military face up to reality. The Department of Veterans Affairs website now lists a variety of toxins service-members may have been exposed to in Iraq, including toxins released from burn-pits, depleted uranium used in tank armor, and mustard or nerve agents used to demolish explosive ordinances.⁴⁴ Unfortunately, the military did not tell service-members about these toxins in advance and did not mitigate the possible contaminations prior to exposure.

Warzones are not the only examples of service-member exposure to toxins. Residents of Camp Lejeune, NC were exposed to drinking water contaminated by industrial solvents, benzene, and other chemicals from for three decades until the 1980s.⁴⁵ Only two months ago,

⁴⁴ <http://www.publichealth.va.gov/exposures/wars-operations/iraq-war.asp>

⁴⁵ <http://www.publichealth.va.gov/exposures/camp-lejeune/index.asp>

the General Accounting Office issued a report concluding that military science laboratories are careless in their handling of deadly diseases.⁴⁶

Some cases of service-member exposure to harmful chemicals are unavoidable. An enemy's use of chemical weapons is an inherent risk of the military profession. Infectious diseases in foreign environments might be considered a cost of doing business. The decision to hold military commissions on an abandoned airstrip, of course, is something altogether different.

Counsel for Mr. bin 'Atash are unwilling to be frogs in pot of water that may very well be boiling. None of the parties to this case should learn 20 years from now that Camp Justice turned out to be as toxic as some hypothesized in 2016. Short of individuals refusing to enter Camp Justice, however, only the Commission has the power to prevent such a lesson. The Commission should order Consultant's immediate appointment and permit him sufficient opportunity to determine the true state of Camp Justice.

7. Conclusion:

The information available regarding toxins in Camp Justice, absent further information and an independent opinion from a qualified expert, demands the appointment and funding of Consultant and, if necessary, postponement of the 30 May – 3 June 2016 hearings in this case. To resume pretrial hearings before an independent review might subject more than a hundred military and civilian lawyers, paralegals, and support staff to lethal chemicals. Even if Camp Justice is ultimately determined habitable, the current lack of reliable information will continue to distract Defense counsel from their duty to represent Mr. bin 'Atash—a distraction presents the entire Defense team with a conflict of interest.

⁴⁶ <http://www.gao.gov/assets/680/675925.pdf>

8. Conference:

The Prosecution opposes the appointment and funding of an independent expert consultant to determine the habitability of Camp Justice.

9. Attachments:

- A. Certificate of Service
- B. Reuters article, dated 28 July 2015 (2 pgs)
- C. Request for Consultant, dated 19 Apr 16 (154 pgs filed ex parte and under seal)
- D. Convening Authority's interim response, dated 28 Apr 16 (1 pg filed ex parte and under seal)
- E. Draft Sealing Order

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
MATTHEW H. SEEGER
Major, USA
Detailed Military Counsel

//s//
MICHAEL A. SCHWARTZ
Detailed Defense Counsel

//s//
EDWIN A. PERRY
Detailed Defense Counsel

//s//
JASON M. MILLER
Captain, USAR
Assistant Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 20 May 2016, I electronically filed the attached **Emergency Defense Motion to Compel Appointment and Funding of Confidential Expert Consultant, or Postpone 30 May 2016 Pretrial Hearings** with the Trial Judiciary and served a version of the Motion with placeholders at Attachments C and D on all parties of record by email.

//s//
CHERYL T. BORMANN
Learned Counsel

Attachment B

EDITION: UNITED STATES

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U.S. Navy investigates report of cancer cluster at Guantanamo

NEW YORK | BY DAVID ROHDE



A guard tower of Camp Delta is seen at the Guantanamo Bay Naval Station in Guantanamo Bay, Cuba September 4, 2007. REUTERS/JOE SKIPPER/FILES

The U.S. Navy is investigating a complaint that seeks the evacuation of civilian and military lawyers from parts of the U.S. base in Guantanamo Bay, Cuba, following reports of cancer cases among personnel working on the trials of detainees there.

At least seven civilians and military members who worked on detainee trials at Guantanamo Bay have been diagnosed with cancer, according to the complaint, which was filed with the U.S. Defense Department's Office of the Inspector General. The complaint calls on American military officials to remove personnel from court facilities on the base and test them and the base itself for carcinogens.

The complaint claims that an unusually large number of relatively healthy and young people who worked at the base have been diagnosed with cancer. Over the past decade, roughly 200 prosecutors, defense lawyers and other court personnel have worked on the base.

The complaint says that the patients may have been exposed to carcinogens when they lived and worked in a location at Guantanamo that was formerly used to dispose of jet fuel, adjacent to an abandoned runway. The patients may also have been exposed to toxins such as asbestos in an older building that initially hosted military trials, according to the complaint.

PHOTOS OF THE DAY



BEST OF CANNES



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"The Department of Defense is aware of concerns about possible carcinogens around the DOD military commission site located at Naval Station Guantanamo Bay," said Kelly Wirfel, spokesperson for Naval Station Guantanamo Bay. "Working together with the Navy Marine Corps Public Health Center and other environmental and health officials, Navy Region Southeast is looking into this to identify whatever steps may be necessary to address these concerns."

A spokesperson for the Defense Department Inspector General's office said the office could not confirm or deny any investigations or complaints.

"We have been telling our chain-of-command for years that we don't feel safe living and working in the temporary facilities the government has erected for military commissions," said U.S. Air Force Capt. Michael Schwartz, a military defense lawyer who has worked on Guantanamo Bay for years. "But, along with the Constitution, the government seems to want to sweep this under the rug."

The complaint doesn't allege an increase in cancer levels among detainees, who are imprisoned on a separate part of the 45-square-mile base. There are currently about 115 detainees at the base, which President Barack Obama has been trying for years to shut.

If evidence of health risks does emerge at Guantanamo, it would add to a litany of problems that has slowed the trials. But the existence of a cancer cluster, which is what the complaint is essentially alleging, can be extremely hard to establish.

Two doctors consulted by Reuters said it would be difficult to determine whether the cancer rate at the base was abnormal without much more detailed information. They said seven cases would be unusual among a group of 200 younger people, particularly if all of them developed the same type of cancer. But seven people in a group of 200 developing different forms of cancer could be normal, particularly if the group's members were older.

The author of the complaint worked on military trials at Guantanamo Bay for several years and is still employed by the U.S. military, according to another U.S. military official.

On Monday, Canadian media reported that U.S. Navy Lieutenant Commander Bill Kuebler, a longtime defense lawyer for Canadian detainee Omar Khadr, died of cancer on July 17th. Kuebler was 44.

Civilian lawyers who have worked at the base said they supported the call for an investigation.

"There appears to be a cancer cluster surrounding the military commissions at Guantanamo," said J. Wells Dixon, a lawyer with the Center for Constitutional Rights, who has represented dozens of Guantanamo detainees. "And the Centers for Disease Control should be brought in to investigate the matter thoroughly."

(Edited by Michael Williams)



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Attachment C

United States v. KSM et al.

APPELLATE EXHIBIT 426 (WBA)

(Pages 39 - 192)

Ex Parte/Under Seal

Attachment C

**APPELLATE EXHIBIT 426 (WBA) is located in
the original record of trial.**

**POC: Chief, Office of Court Administration
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United States v. KSM et al.

APPELLATE EXHIBIT 426 (WBA)

Attachment D

APPELLATE EXHIBIT 426 (WBA)

(Page 194)

Ex Parte/Under Seal

Attachment D

**APPELLATE EXHIBIT 426 (WBA) is located in
the original record of trial.**

**POC: Chief, Office of Court Administration
Office of Military Commissions**

Attachment E

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

AE426

**Order to Seal Attachment C and D of
AE426(WBA)**

Date Filed: 19 May 2016

Upon consideration of the submissions of Mr. bin 'Atash contained in the defense's motion for an order to seal attachment C and D of AE426(WBA), this Commission finds that an order sealing attachment C and D of AE426(WBA) is necessary to protect privileged information from being disclosed to parties outside the privilege. Accordingly, pursuant to Rule 3, paragraph 5n of the Rules of court, this commission hereby orders that attachment C and D of AE426(WBA) is sealed.

So ORDERED this _____ 2016.

JAMES L. POHL
COL, JA, USA
Military Judge