[The R.M.C. 803 session was called to order at 0906, 11 December 2015.]

MJ [COL POHL]: The commission is called to order. Any changes in the prosecution team?

CP [BG MARTINS]: Good morning, Your Honor. No.

MJ [COL POHL]: Mr. Nevin.

LDC [MR. NEVIN]: No, Your Honor. But I would like to say that again today our translator, who is on island, is still not read back on the program.

MJ [COL POHL]: Do you have an anticipated time when that would happen ----

LDC [MR. NEVIN]: I don't.

MJ [COL POHL]: ---- other than a continual promise that it's going to happen.

LDC [MR. NEVIN]: None.

MJ [COL POHL]: Ms. Bormann?

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

MJ [COL POHL]: I will note that Mr. Bin'Attash is not here. Mr. Mohammad is here. Mr. Binalshibh and Mr. Ali are here.

Mr. Harrington?

LDC [MR. HARRINGTON]: No change, Judge.

MJ [COL POHL]: Mr. Connell?

1 LDC [MR. CONNELL]: No change.
2 MJ [COL POHL]: And Mr. Ruiz?
3 LDC [MR. RUIZ]: No change.
4 MJ [COL POHL]: Mr. Swann.
5 **CAPTAIN, U.S. ARMY, was recalled as a witness for the**
6 **prosecution, was reminded of her oath, and testified as**
7 **follows:**
8 **DIRECT EXAMINATION**
9 **Questions by the Trial Counsel [MR. SWANN]:**
10 Q. Good morning, Captain.
11 A. Good morning, sir.
12 Q. Again I'll just simply remind you that you are under
13 oath. Now, did you have occasion to advise both
14 Mr. Bin'Attash and al Hawsawi of their rights to attend this
15 mornings's proceedings?
16 A. Yes, I did.
17 Q. All right. Let's start with Mr. Bin'Attash. What
18 time did you advise him of his right?
19 A. I began advising him of his rights at 0546 this
20 morning.
21 Q. In English or in Arabic?
22 A. I read him the English portion. I asked if he would
23 like an interpreter. He said yes, and so an interpreter read

1 him the Arabic portion.
2 Q. All right. Did you use the forms that we have used
3 for at least the last 18 months that I'm aware of?
4 A. Yes, I did.
5 Q. Okay. What did Mr. Bin'Attash indicate to you about
6 his willingness to attend this morning?
7 A. He stated he did not wish to attend his commission
8 proceedings today, and he also did not wish to attend his
9 scheduled morning and afternoon legal meeting.
10 Q. All right. Did you understand that his waiver was
11 voluntary this morning?
12 A. Yes, I did.
13 Q. Now, let's turn to Mr. al Hawsawi. Using the same
14 form this morning again?
15 A. I did.
16 Q. Arabic or English?
17 A. Both. I read the English version. He stated he
18 wanted an interpreter, who read to him the Arabic version.
19 Q. All right. And what did he indicate he wanted to do?
20 A. He stated he did not wish to attend today's
21 commission proceedings.
22 Q. And both these individuals signed these documents; is
23 that correct?

1 A. That's correct, sir.
2 Q. Now, these documents have been marked Appellate
3 Exhibits 393EE and --
4 A. 383, sir.
5 Q. Okay. I apologize.
6 A. Foxtrot.
7 Q. 383F for Mr. Bin'Attash, and EE for Hawsawi?
8 A. That's correct, sir.
9 Q. Okay. Each consisting of three pages?
10 A. Yes, sir.
11 Q. All right. Do you have those in front of you?
12 A. I do.
13 TC [MR. SWANN]: All right. I have no further questions,
14 Your Honor.
15 MJ [COL POHL]: Either defense counsel wish to inquire?
16 Negative response for Ms. Bormann?
17 DDC [Maj SCHWARTZ]: I do not.
18 MJ [COL POHL]: Thank you, Captain. You are excused.
19 **[The witness was excused and withdrew from the courtroom.]**
20 MJ [COL POHL]: Ma'am.
21 DDC [MAJ WICHNER]: Your Honor, may I address the court?
22 MJ [COL POHL]: Yes.
23 DDC [MAJ WICHNER]: Good morning, Your Honor. Yesterday,

1 Mr. Harrington gave notice that despite the judge's order,
2 152HH, that orders the guards not to create noises and
3 vibrations in Mr. Binalshibh's cell, that despite that order
4 that Mr. Binalshibh -- the government is still subjecting him
5 to noises and vibrations.
6 So Mr. Binalshibh has asked me to tell you that these
7 noises and vibrations go on 24 hours, night and day, and that
8 they are a continuation of the torture that he previously
9 experienced in the hands of the U.S. Government. So he
10 also -- he has tried to work with the camp guards and your
11 order and he is being told continuously by guards in
12 leadership positions that camp SOP, which we heard a lot about
13 yesterday, overrides your order.
14 We have -- as Mr. Harrington said, we are about to
15 file 152LL, which will be forthcoming shortly. But in the
16 interim, we ask that you reaffirm your order to the
17 government, to the guard force, that they are to follow your
18 order without exception; that camp SOP does not override your
19 orders in the camp.
20 MJ [COL POHL]: How would the -- I know that you are
21 conveying what your client said to you.
22 DDC [MAJ WICHNER]: Yes, sir.
23 MJ [COL POHL]: How would the order and the SOP conflict?

1 DDC [MAJ WICHNER]: That's a good question, Your Honor,
2 and that's something that we are ----
3 MJ [COL POHL]: I mean, so the statement that the SOP
4 controls over the order, even if that is true, there's nothing
5 in the SOP that says harass Mr. Binalshibh or any other
6 detainee, does it?
7 DDC [MAJ WICHNER]: Well, that's another good question,
8 Your Honor. We don't have all of the SOP; that is something
9 we are working on, and it's also a situation where, unlike
10 others, we cannot just go into the facility and start
11 interviewing the guards. And, again, we are making great
12 efforts to try to do this, to try to figure out what is going
13 on. We would like very much to know this, and we are doing
14 the best that we can to try to get to the bottom of this and
15 figure out what is going on. But given the circumstances of
16 Camp VII, unfortunately, that is just something that is very
17 challenging with many obstacles.
18 MJ [COL POHL]: I understand. I understand. But for me
19 to tell the government -- when we have the camp commander here
20 yesterday, Colonel Heath says he has got the order and he
21 knows it needs to be complied with, and analogizing to the 254
22 series, there's an order that they really don't like ----
23 DDC [MAJ WICHNER]: Yes, sir.

1 MJ [COL POHL]: ---- they're complying with. So I can say
2 it again, and I think we end up at the same place. If we need
3 to take evidence on this, we'll do that, but I ----
4 DDC [MAJ WICHNER]: Yes, sir. Yeah.
5 MJ [COL POHL]: You and I are kind of in the same
6 situation. We're not there when it happens ----
7 DDC [MAJ WICHNER]: Exactly.
8 MJ [COL POHL]: ---- if it happened; and, therefore, it's
9 hard to say whether it happened, if it did happen, and to tell
10 people not to do what they're not going to do anyway. If we
11 need to take evidence on it next time, we will. Okay?
12 DDC [MAJ WICHNER]: Thank you, sir.
13 MJ [COL POHL]: Mr. Connell.
14 LDC [MR. CONNELL]: Your Honor, I have a suggestion as to
15 order of march.
16 MJ [COL POHL]: Okay. I'm always willing to listen.
17 LDC [MR. CONNELL]: Yesterday completed the pleadings
18 on the -- on 386, which is the Touhy issue. I know that the
19 military commission had discussed 112 after 031 is complete,
20 and I'm prepared and happy to do 112, but what I was thinking
21 is if we could do 386, that would basically have a beneficial
22 effect where that would mean that, in February, we could do
23 the discovery aspects of 350 with the hope of doing the

1 substantive aspects of 350 in April. And it would basically
2 slide everything up one hearing if we could do the Touhy
3 issues now.
4 MJ [COL POHL]: When was the last filing on the Touhy
5 issue?
6 LDC [MR. CONNELL]: Yesterday.
7 MJ [COL POHL]: That was your reply, as I recall?
8 LDC [MR. CONNELL]: That's right. It was 386I.
9 TC [MR. RYAN]: Judge, I haven't received that. I haven't
10 been receiving defense pleadings this week. They may have a
11 wrong e-mail down here for me, but I have not seen the
12 document yet.
13 LDC [MR. CONNELL]: All right.
14 MJ [COL POHL]: Let's ----
15 LDC [MR. CONNELL]: It's properly filed.
16 MJ [COL POHL]: I understand that, but it's ----
17 LDC [MR. CONNELL]: I mean, is Mr. Ryan saying that the
18 government has not received it or simply he, himself?
19 MJ [COL POHL]: You don't ----
20 TC [MR. RYAN]: I, myself.
21 LDC [MR. CONNELL]: All right. I'll go have somebody go
22 print a copy.
23 MJ [COL POHL]: Okay. I understand, Mr. Ryan, I'm not --

1 if you believe you need time to digest it, we'll revisit
2 whether or not it's appropriate to argue it this session or
3 next session, because I'm not going to ----
4 TC [MR. RYAN]: Yes, sir. Thank you.
5 MJ [COL POHL]: Okay.
6 LDC [MR. CONNELL]: Sure. Thank you.
7 MJ [COL POHL]: Yeah. You just give him a hard copy and
8 then we'll go from there. But, again, if he just got it
9 today, it's not necessarily reasonable to request
10 a well-thought-out argument with that type of a notice. Okay.
11 That being said, Mr. Ruiz, back to 031.
12 LDC [MR. RUIZ]: Your Honor, yesterday I was -- attempted
13 to, as best I could, draw a timeline. Upon further review,
14 I'm not sure that I did the best job of doing that, so I want
15 to just clarify some of those dates which I think are
16 important in your analysis. Certainly with all of the facts,
17 there are a lot of times and a lot of dates which I think are
18 important. I've tried to narrow those down.
19 I'll start with December of 2011. December of 2011
20 is ultimately when Admiral Woods signed what then became known
21 as the Woods orders which, as I related yesterday, began as
22 the MacDonald, CIA, Joint Chiefs, Department of Defense,
23 General Counsel's office, and then were then sent to

1 Admiral Woods, who ultimately, in December of 2011,
2 implemented those orders.
3 At the same time, the baseline review was in October
4 of 2011. So the baseline review preceded the actual
5 implementation of those orders. In that very same time frame,
6 in September of 2011, was when Admiral MacDonald was first
7 discussing with us the issue of mitigation expert and a
8 submission for mitigation matters in consideration of their
9 referral. That timeline for Mr. al Hawsawi was from October
10 of 2011 to February of 2012.
11 So that gives you some sense of the overlap, I think,
12 perhaps a little better than what I articulated yesterday in
13 terms of the parallel timelines and the overlap between the
14 implementation of these orders, the search and seizure of
15 attorney-client materials, and at the same time, a second
16 conversation and exchange of requests for the convening
17 authority to provide us with resourcing.
18 What I didn't say yesterday was that, as part of our
19 communications with Admiral MacDonald, we did inform him that
20 the implementation of these orders was creating severe
21 obstacles to our ability to communicate in confidence with the
22 people we represented, with Mr. al Hawsawi in particular for
23 us. And we made him aware of those circumstances and those

1 difficulties. Of course, at that point, we didn't necessarily
2 have all the facts and weren't able to put them into the
3 context that we have them today to realize that
4 Admiral Woods -- that Admiral MacDonald was a key player in
5 ultimately implementing these orders. His legal advisors
6 were, in fact, key players in that.
7 It was also, I think, significant that even though
8 Admiral Woods ultimately signed those orders, his primary
9 legal advisor, Captain Welsh, testified that he didn't -- he
10 didn't author those orders. And that's consistent with what I
11 have argued here and the facts that I have related yesterday,
12 which was that Captain Welsh did some pen-and-ink changes.
13 That was his testimony. He said he did some pen-and-ink
14 changes and had some editing on the orders that he received
15 that were sent to him, and that was the extent of the
16 involvement of Admiral Woods' legal advisors in the
17 implementation of those orders.
18 I attempted to quote the exact language yesterday on
19 your finding in the al Nashiri case. The exact wording was
20 that "the procedures utilized in the baseline review infringed
21 on the attorney-client privilege." That was in the al Nashiri
22 case, of course; but as I have indicated, the government in
23 this case took the position that the issues were virtually

1 identical. And we think that the issues were virtually
2 identical, at least to the extent that the attorney-client
3 privileged materials were seized and searched by agents of the
4 Joint Task Force-Guantanamo Bay without notice -- without any
5 prior notice to counsel representing those men. I received no
6 notice of that. I think that's clear on the record as well.
7 I spoke briefly yesterday about the change or the
8 removal of the lieutenant colonel, Army lieutenant colonel,
9 who at the time of the baseline review was the designated
10 high-value detainee liaison. As you know, this is the person
11 who would come in and testify -- or who would have
12 face-to-face communications on an everyday basis with
13 high-value detainees and really is the person that has the
14 more in-facility time than anybody else. He was removed based
15 on his objections to these procedures and, during the course
16 of that search and seizure, they had other attorneys present.
17 But the attorney who replaced him, as I said, was
18 somebody who, in their civilian capacity -- this was a
19 reservist that was brought to Guantanamo Bay -- in their
20 civilian capacity, we learned that they worked for the
21 National Security Agency.
22 One of the things we were able to establish on the
23 record and is submitted for your review in the numerous

1 pleadings on this case is that once that attorney replaced
2 Lieutenant Colonel -- the Army lieutenant colonel, a number of
3 legal documents that we were attempting to send to
4 Mr. al Hawsawi began to be rejected. And I think you will see
5 that consistently, not only in Mr. al Hawsawi's case where
6 attorney-client letters were refused, attorney-client work
7 product was refused, and by that, I mean they refused to
8 deliver it and she refused to deliver it at the time.
9 I know some of those documents were, for instance, a
10 letter from the convening authority regarding a specific
11 expert or the denial of an expert, funding of an expert.
12 There was a client letter from myself to Mr. al Hawsawi that
13 was not allowed to go forward, to move in.
14 So what you saw with that change and the
15 implementation of those orders was the narrowing down and
16 seeming lack of understanding of the reason for choking off
17 the attorney-client communications at that time.
18 Of course, again, it's critical for us that this was
19 during the time that we were attempting to communicate and
20 negotiate with the convening authority to provide what we saw
21 as a critical function in the capital defense arena, which is
22 before the person is charged and before a case is referred,
23 sworn, as a death penalty case, to have the opportunity to

1 present a comprehensive case to the decision-maker as to why
2 that person should not be tried, at least in a capital case,
3 where their life, ultimately, is in the balance.
4 Judge, we've also referenced in 031 that at that time
5 we were also unable to get a translator. We did not have a
6 translator during this time, a properly cleared translator.
7 Again, we had the security classification, security
8 qualification issues, and I related why that was a difficult
9 thing with the convening authority's office since their
10 security department was under investigation.
11 Judge, that takes me to a series of supplements that
12 were filed with AE 031. And as you know, we have talked about
13 how this motion has grown over time, and the additional facts
14 that were submitted for consideration of this motion based on
15 the repeated violations of attorney-client privileged
16 relationships and the unauthorized interference by government
17 agencies.
18 AE 031 (MAH 3rd Sup) was a supplement that was
19 submitted immediately following the CIA's intrusion into this
20 courtroom where they turned off the audio and the video feed
21 to the public, the well-known "red light incident," where it
22 was, unbeknownst to you and unbeknownst to the court security
23 officer, the CIA turned off the proceedings and the public

1 feeds without the authority to do so. That was the subject or
2 at least part of the subject of our 3rd Supplement for
3 unauthorized influence and unlawful command influence --
4 excuse me, not unlawful command influence, but unlawful
5 influence.
6 That also included the surreptitious listening
7 devices. Our supplement included recounting the surreptitious
8 listening devices that were uncovered by one defense team in
9 the meeting rooms that was much litigated in this instance and
10 where defense counsel were told that there were not listening
11 devices, there were no recording devices in the
12 attorney-client meeting rooms.
13 And equally important, in one of our supplements we
14 recounted to you the seizure of a number of attorney-client
15 privileged documents from Mr. al Hawsawi. Of course, this
16 predates your communications order. But in the 5th Supplement
17 that we submitted to you -- actually, we submitted it -- we
18 argued it in the 3rd Supplement, the seizure of the documents,
19 and in the 5th Supplement we submitted for you a series of
20 documents under seal to highlight for you the privileged
21 nature of the documents that were seized from Mr. al Hawsawi
22 or disappeared and were returned to him without seemingly any
23 explanation.

1 Of course, this is not the only instance of that. It
2 is the only instance that we supplemented 031 with. We'll
3 have multiple arguments on this on 018, at least three
4 separate incidents where Mr. al Hawsawi's privileged
5 communications have been seized, have been translated, have
6 been read without notice to counsel, and in direct violation
7 of your now-existing order. But in this instance, what we
8 submitted to you were 14 documents that were seized and the
9 explanation as to what those documents contained.
10 One of the representative documents was a motions
11 list. So I had prepared a motions list for Mr. al Hawsawi of
12 motions that we -- some which we had filed and some which we
13 expected to file in the future. This was a comprehensive list
14 of the motions as well as a synopsis of the legal analysis and
15 where these motions fit within the strategy of the defense
16 case; it was in English and it was in Arabic. And this was
17 one of the documents that was seized without any explanation.
18 It was taken without explanation from Mr. al Hawsawi, despite
19 the fact that it was both in English and in Arabic. So there
20 was no question as to the substance and the privileged nature
21 of these documents.
22 There were also handwritten attorney notes with the
23 names of personnel on our defense teams as well as the names

1 of experts and prospective experts that we expected to make an
2 inquiry or request from the convening authority as well as
3 from the court. That was the substance of these documents
4 that were taken from Mr. al Hawsawi, as well as
5 attorney-client letters and other legal documents that were
6 taken from Mr. Al Hawsawi.
7 We heard from the Staff Judge Advocate in that case
8 who testified that he didn't really know why these documents
9 were seized because he doesn't spend much time in the
10 facility. That's understandable. And he had no notice of the
11 seizure. The only time he's over at the facility is if
12 there's a problem or to deliver the attorney-client mail or to
13 receive attorney-client mail and retrieve it. He had no
14 direct knowledge of the seizure. The guard force that was
15 involved, the people who were involved in reviewing that
16 information, doing whatever it is they were doing with that
17 information, never testified.
18 I would like to make an additional line of argument
19 on this issue, but I will reserve that for the classified
20 portion. I know you still have that under consideration, but
21 in my estimation, it would fit along these lines. So I'm just
22 making that clear for the record, as well as clear for you,
23 Judge, that I would like to be able to at some point complete

1 that line of argument in a closed session.
2 Judge, in addition to the supplements that I just
3 discussed, in our 031 original motion, we also submitted a
4 number of exhibits in support of the motion, in particular
5 AE 031C (MAH). Now, two of those exhibits are ones that I
6 want to highlight.
7 One was an affidavit from [redacted], which was
8 dated May 5 of 2012. And the substance of that affidavit was
9 recounting the interference, the unauthorized interference by
10 the Office of the General Counsel with the privilege team that
11 was put in place at that time, presumably to facilitate
12 communications. That affidavit recounts how the Office of the
13 General Counsel, in contradiction to current orders at the
14 time, asked the privilege team or directed the privilege team
15 to stop delivering mail to clients. Given the state and the
16 lay of the land at that place and the authority for that, it
17 was an unauthorized use of influence at the time. And that
18 specific affidavit references for you what happened at that
19 particular time.
20 There is also an affidavit of an LN1 [redacted]
21 [redacted], 4 May 2012, which again recounts some of the
22 information, attorney-client materials that were refused to
23 have been admitted to the facility at that time. Again, this

1 would have been during the time that the Staff Judge Advocate,
2 who is a civilian, worked for the National Security Agency and
3 was in charge of screening and mining attorney-client
4 privilege materials.
5 Judge, Mr. Swann made reference yesterday to a
6 standard which was the objective discharged observer standard,
7 fully informed of all of the facts and circumstances, would
8 have significant doubts about the fairness of the procedures
9 and the law. And I found it interesting that he saw fit to
10 remind me of that standard, given the amount of legal motions
11 and challenges and facts that we have raised. That is, in
12 fact, the reason why we filed these motions.
13 In some of the prosecution's response to our motions,
14 which are firmly grounded on facts, facts that I submit to the
15 commission are very clearly not facts of our creation -- I
16 certainly did not speak for the President; I certainly did not
17 speak for the Vice President, the Attorney General of the
18 United States; I certainly was not involved in the creation or
19 implementation of orders that were meant to thwart
20 attorney-client communications; I certainly did not consult
21 with the CIA on the implementation of those orders, or with
22 the Office of the General Counsel, or with the Joint Chiefs of
23 Staff. I certainly did not do any of that. And I certainly

1 did not remove an Army lieutenant colonel because of his
2 objections to the manner in which attorney-client privileged
3 communications were being reviewed; I didn't do that. And I
4 didn't replace him with somebody who worked for the NSA as a
5 civilian. We didn't do any of that. That was a device of the
6 government's doing.
7 I'm not saying it was Mr. Swann or the prosecution,
8 but those are the facts. Whether the government likes it or
9 not, those are the facts in this case. I certainly don't have
10 the ability to turn off the audio and the video feed to this
11 courtroom when something is said that I do not like; I
12 certainly did not do that. And I certainly didn't install
13 surreptitious listening devices in our own meeting huts, where
14 I expect to have an attorney-client privilege communication
15 with my client. And I certainly didn't seize Mr. al Hawsawi's
16 attorney-client privileged materials, list of his motions,
17 attorney-client letters; I certainly didn't do that, either.
18 But I will tell you that what we did do is exactly what we are
19 required to do as advocates, which is, we filed motions on it.
20 And it's something that you have asked us to do when this
21 issue arises.
22 The prosecution in their response, rather than
23 focusing on the facts themselves, says that the defense has

1 chosen to take a shotgun approach to these issues, taking
2 target and taking aim at anybody and anybody who will be out
3 there. And they have gone through a long litany and a list of
4 names of people that have been referenced in our motion for
5 unlawful influence and where we've leveled legal challenges to
6 their conduct, to their comments, and to the interference that
7 we have seen throughout these proceedings. I will say that
8 that is true. I will say that there is a very long list of
9 names, a very long list of facts. But as I've just, I think,
10 related, that wasn't Walter Ruiz. That wasn't any of these
11 counsel creating these facts. These facts presented
12 themselves independently and needed to be adjudicated and
13 brought to the attention of this court, an unlawful influence
14 in and of itself.
15 When I talked briefly yesterday about the perception
16 of unlawful influence, certainly the jurisprudence in the law
17 within normal military courts, which the prosecution has at
18 least acknowledged informs the analysis in this court, very
19 clearly states that the appearance of unlawful influence is as
20 destructive as actual influence in and of itself. Military
21 courts have recognized that principle; that's why they have
22 developed a body of law to deal with that. It's meant to
23 instill confidence in the institution. It's meant to instill

1 confidence in the fact-finding process. It's meant to instill
2 confidence in the result.
3 And when that appearance is threatened -- because
4 whatever those facts may be, it is up to the government to
5 dispel it. And that is exactly what the
6 United States v. Calley case says, and I'll quote that
7 again -- of course, this was the My Lai massacre case,
8 Judge -- and they said, "You better be prepared when you come
9 in here to show by live witnesses whether or not there has
10 been influence on any commanders here at Fort Benning to
11 prefer any charges against Lieutenant Calley. I think the
12 issue is raised squarely by the statements, if true, that the
13 defense has previously introduced in these proceedings, the
14 quotes from Time magazine and Life and others as to the
15 interest of the President, the Secretary of Defense, and the
16 Secretary of the Army." That was United States v. Calley,
17 46 CMR at 1151.
18 We have raised that issue squarely, Judge, by the
19 statements of the President, by the statements of the Vice
20 President, by the statements of the Attorney General, by the
21 statements of the Secretary of Defense, by the statements of
22 numerous senators, by the -- by the surreptitious listening
23 devices in our meeting rooms, by the unauthorized interference

1 with this very courtroom's operation, by the unauthorized
2 seizures of our attorney-client and privileged materials by
3 Admiral MacDonald's orders in concert with the CIA, with the
4 Department of Defense, general counsel, the Admiral MacDonald
5 orders, the seizure of attorney-client communications in
6 October of 2011.
7 We have raised all of these issues squarely within
8 facts for this court, and they must be dispelled beyond a
9 reasonable doubt because that's what the law requires. The
10 law requires that the prosecution dispel that beyond a
11 reasonable doubt. It doesn't mean that you do that by endless
12 argument. It doesn't mean that you do that by constant
13 denials. It doesn't mean that you say that by saying that the
14 sky is not blue when it clearly is. It means that not only
15 that they need to do that, but that this court needs to do
16 that.
17 And what the law ultimately envisions is that when
18 there is an insult to the proceedings, when there are
19 circumstances that call into question the legitimacy of those
20 proceedings, what needs to happen is, when this issue is done,
21 finished, over, ideally what the law requires is that that
22 confidence is fully restored. And then moving on nobody,
23 objective, disinterested observer looking at it can say, oh,

1 well, the subject of those proceedings are a sham or the
2 subject of those proceedings are still a show trial and
3 they're still subject to outside or external influence. So in
4 making that determination, in making that decision, that's
5 where the government needs to put this court. That's what the
6 government needs to prove beyond a reasonable doubt is why
7 that hasn't happened.
8 And I submit to you they won't be able to do that
9 because this continuity of comments, these toxic comments over
10 time -- and you saw them from 2009 to 2010, 2011, 2013, 2014,
11 and 2015 -- they have poured this toxicity into this well.
12 These facts have all gone into this well. And what the
13 prosecution wants to say to you and wants to say to us is,
14 "Don't worry, we've taken that out of the well." And these
15 toxic comments, these toxic interferences, all of these issues
16 that have gone on through the course of these proceedings that
17 have been publicly recounted, no rational, disinterested
18 observer could harbor any doubts about these proceedings. I
19 know there's a lot of evidence out there, I know a lot of
20 facts, but that's based on the imagination and the fanciful
21 assertions of a defense counsel, and no reasonable
22 disinterested observer could harbor any doubt about these
23 proceedings. So everything is well, and we should simply move

1 on."
2 But I would say to you, Judge, that we should not
3 drink from that well. We should not drink from that well any
4 more than we would from a well that had had toxic waste poured
5 into it over time, any more than we would allow our children
6 or our loved ones or people that we would want to have
7 confidence in the cleanliness of that water to drink from the
8 polluted well and one that continually has the unlawful
9 influence leveled upon it.
10 Again, Judge, the appearance, the appearance of
11 unlawful influence is squarely upon these commissions. In
12 AE 031 (MAH 3rd Sup), which we filed on April 13, we
13 highlighted a number of different public recountings of these
14 episodes. In one of them, the headline was "September 11
15 Hearing Censorship Order Stopped." That was in *The New York*
16 *Times* in relation to the interference by the CIA with these
17 proceedings, "Hidden Microphones in Guantanamo Disclosed,"
18 "Legal Papers Improperly Seized," "Trial Plunged Into Deeper
19 Discord As Confidence in the Court Wanes."
20 Judge, I would submit to you that the facts speak for
21 themselves and the law requires that the prosecution do more
22 than simply try to argue this away, to prove beyond a
23 reasonable doubt that these questions -- these proceedings are

1 beyond question and that they are, in fact, legitimate and
2 free from any undue influence.
3 That's all I have for now, Judge.
4 MJ [COL POHL]: Thank you. Any other defense counsel wish
5 to be heard on this?
6 Mr. Connell.
7 LDC [MR. CONNELL]: Your Honor, I don't have anything to
8 add to the substance of Mr. Ruiz's argument, and I adopt it on
9 behalf of Mr. al Baluchi. There are a couple of record notes
10 that I would like to make.
11 The first is that the first of the motions related to
12 this seizure of attorney-client materials from Mr. al Baluchi
13 after the entry of the written communications order is
14 AE 018QQ. I mention that because it got a different AE number
15 than Mr. al Hawsawi's similar motion, which was AE 018PP.
16 The second thing that I wanted to bring to the
17 court's attention on this is AE 373. AE 373 is the motion
18 which challenges the seizure of disks of mitigation material
19 that I and other members of the legal team recorded in the
20 Middle East, and very sensitive material, and then sent
21 through the proper channels, marked it properly, sent it to
22 the privilege team, and it was still seized from
23 Mr. al Baluchi and exploited by a series of persons.

1 The reason why I specifically bring that to the
2 court's attention is that the government has filed a motion,
3 373-1, which hasn't actually been acted on, requesting an
4 extension of time for their reply until the military
5 commission rules on AE 365C. And AE 365C, although it's an
6 ex parte pleading from the prosecution, I believe is a -- is a
7 motion for protective order of some kind. And so I'm bringing
8 that to the military commission's attention because, you know,
9 things have follow-on effects. And AE 365 would profit from
10 the military commission's attention.
11 MJ [COL POHL]: Thank you.
12 Any other defense counsel want to be heard on 031?
13 Major Poteet.
14 DDC [Maj POTEET]: Good morning, Your Honor.
15 MJ [COL POHL]: Good morning.
16 DDC [Maj POTEET]: When senior officials make statements
17 that are intentionally aimed at a pending military case, they
18 cause a serious problem. These statements, when viewed even
19 in the most generous light possible, are -- when they are
20 plainly inappropriate and reckless and, in a more realistic
21 light, when they broadcast expected outcome of a military
22 case, that is attempted unlawful influence.
23 When the leaders are senior enough, there ceases to

1 be a distinction between attempted unlawful influence and
2 unlawful influence.
3 You have -- as Your Honor has stated in other
4 contexts, there's some certain instances when you cannot
5 unring a bell. And where you have the appearance of unlawful
6 influence from the President of the United States and other of
7 the most senior national leaders, civilian and military
8 leaders, you cannot unring that bell.
9 The case of United States v. Brown, 1996 C.A.A.F.
10 case, has been cited. It's an example where one brigade
11 commander engaged in unlawful influence over a case that that
12 brigade commander had convened, had acted on as the convening
13 authority. The remedy there is simply to transfer the case to
14 a different brigade commander, it may be to transfer the case
15 to a different base, just to ensure that you have eliminated
16 the taint beyond a reasonable doubt.
17 MJ [COL POHL]: Is that an option here?
18 DDC [Maj POTEET]: No, sir, it is not.
19 MJ [COL POHL]: I'm not sure there's another brigade
20 available.
21 DDC [Maj POTEET]: Exactly, sir. When the leadership of
22 the entire national security apparatus has announced
23 repeatedly the expected outcome, the bell cannot be unrung.

1 There is no way to eliminate the taint. No less than the
2 President of the United States in this case has announced an
3 expected outcome publicly; and not just one President, of
4 course, but two Presidents. President George W. Bush
5 announced the -- made very conclusory statements about the
6 guilt of the defendants, naming Mr. Mohammad by name,
7 frequently by his initials. President Obama not only
8 announced in conclusory statements about the guilt, allegedly,
9 of Mr. Mohammad, but announced that he expected the death
10 penalty to be applied in this case. Over the past 12 years,
11 two different Presidents have made plainly inappropriate
12 statements that constitute unlawful influence.
13 These officials have engaged in conduct which merits
14 dismissal of the case. They have engaged in conduct which, in
15 an ordinary case, would result in them being disqualified.
16 But as Your Honor noted, that option is not available. There
17 is no other brigade commander. There's no other convening
18 authority to transfer these cases to.
19 Mr. Ruiz went through an extensive history yesterday,
20 and so I'm not going to replow all that ground, but there's a
21 few aspects of it that I wanted to point out.
22 The DoD official who bears the title Convening
23 Authority for Military Commissions is not the person who chose

1 the venue of Guantanamo Bay and the forum of a military
2 commission for this case, even though that is the role of the
3 convening authority. Pursuant to the Manual for Military
4 Commissions, the convening authority is to choose the forum
5 and the venue. But the President of the United States
6 overruled ----
7 MJ [COL POHL]: What other venue can the convening
8 authority pick other than a military commission?
9 DDC [Maj POTEET]: In terms of venue, the convening
10 authority could choose some other geographic location to hold
11 a military commission.
12 MJ [COL POHL]: Does he have that authority?
13 DDC [Maj POTEET]: Yes, sir, under the regulations.
14 The -- the venue is chosen ----
15 MJ [COL POHL]: Isn't there a statute that says you can't
16 move these people to the United States?
17 DDC [Maj POTEET]: There are. There's other military
18 bases around the world, U.S. military bases, Your Honor. And
19 this is not a motion for change of venue. That we don't ----
20 MJ [COL POHL]: I'm just saying, you seem to imply that he
21 had options. And my question to you was, simply, he had venue
22 options, you believe he had venue options that we could move
23 these proceedings to some other place.

1 DDC [Maj POTEET]: Your Honor, there's ----
2 MJ [COL POHL]: And I think that's -- it is what it is.
3 And then the other point that you made, that he had some type
4 of forum options other than a military commission, and I'm
5 trying to figure out the -- you said the convening authority,
6 not the Executive Branch.
7 DDC [Maj POTEET]: The convening authority.
8 MJ [COL POHL]: The convening authority either had a
9 choice to convene a military commission or not. He did not
10 have an option. There was no door three for him, was there?
11 DDC [Maj POTEET]: Yes, sir. The convening authority
12 could have referred these charges to a military commission or
13 to a capital military commission. The convening authority,
14 after the President had announced the ----
15 MJ [COL POHL]: Okay.
16 DDC [Maj POTEET]: ---- expected outcome, chose to refer
17 these cases to a capital military commission.
18 MJ [COL POHL]: In that sense, I understand your point.
19 Go ahead.
20 DDC [Maj POTEET]: And there has been reporting recently
21 of internal -- in a separate case, I'm just citing this as an
22 example -- there have been press reports recently of internal
23 administration discussions about whether or not to try a

1 detainee who was transferred from Bagram to the United States,
2 whether to -- should that person come to Guantanamo for
3 military commission or should a military commission be
4 convened or held at Charleston, South Carolina. Instead of
5 transferring that person, ultimately it was chosen, it was
6 elected -- the Administration decided to bring that person to
7 federal court.
8 MJ [COL POHL]: And is the fact that the Administration
9 has chosen to proceed with, for argument, similarly situated
10 accused into federal court is somehow unlawful influence for
11 trying these accused here?
12 DDC [Maj POTEET]: Your Honor, the point that I'm trying
13 to make is that the -- it's supposed to be the convening
14 authority -- in any case, whether the convening authority is
15 the brigade commander or is a DoD official whose title is
16 convening authority for military commissions, it's supposed to
17 be the convening authority over any sort of military case who
18 decides the forum and venue for a case. But that decision was
19 not made by the DoD official bearing the title Convening
20 Authority in this case.
21 That decision was made -- originally, it was
22 encouraged by the Attorney General to take these cases to
23 federal court. The original charges against these defendants

1 were withdrawn. There was public discussion of taking them to
2 federal court. Former Attorney General Eric Holder has spoken
3 about this publicly. President Obama overrode that decision
4 on approximately July 4 of 2010 and made the determination,
5 no, these cases are going to Guantanamo Bay military
6 commissions.
7 MJ [COL POHL]: Is that decision unlawful influence?
8 DDC [Maj POTEET]: Your Honor, when it is -- the decision
9 not to take a case -- Your Honor, I'm not prepared to say that
10 in every context that that decision would be unlawful
11 influence.
12 MJ [COL POHL]: Tell me in this context.
13 DDC [Maj POTEET]: But in this context, where it is the
14 subject of public discussion, including the announcement of
15 the expected outcome ----
16 MJ [COL POHL]: That's not what I'm talking about. You're
17 focusing on the choice that this case was -- instead of
18 federal court, for whatever reason, they said go try it in a
19 commission. That was made by the Executive Branch; and let's,
20 for the sake of this discussion, say it was made by the
21 President. Is that type of decision by the Executive Branch
22 evidence of unlawful influence on this commission?
23 DDC [Maj POTEET]: And, Your Honor, in the totality of the

1 circumstances, it is in this military commission.
2 MJ [COL POHL]: Okay.
3 DDC [Maj POTEET]: Because of the public nature of the
4 discussions and the announcements by the President himself of
5 not only anticipation of a conviction, but anticipation of a
6 death sentence.
7 MJ [COL POHL]: Oh, I understand that part, right. But
8 I'm just saying the forum selection, you seem to be saying
9 when they said we are not going to -- we are revisiting the
10 decision to go to federal court and therefore we're going to
11 return it to the commission process, that decision you believe
12 is some evidence of unlawful influence.
13 DDC [Maj POTEET]: Your Honor, if that decision were made
14 in a way that was opaque to the convening authority, to the
15 DoD official bearing the title of Convening Authority for
16 Military Commissions, if that decision was made in a process
17 and manner that was opaque to that DoD official, and instead
18 the DoD official simply received, okay, yes, you have
19 authority to proceed as you see fit, with the following --
20 with any charges regarding the following defendant -- or
21 perhaps it's a transmittal. Instead of involving the
22 convening authority whatsoever, instead it's simply a
23 transmittal to the chief prosecutor of we, the Executive

1 Branch, have considered and reviewed these cases and we -- you
2 are now authorized to proceed as you see fit with these cases
3 in seeking a referral by the convening authority.
4 But it has to be a process that's opaque, opaque to
5 the convening authority. And this was not at all opaque. It
6 was completely visible by the convening authority, by the --
7 this DoD official bearing that title, and in so doing, if you
8 have a brigade commander who is trying to decide is this a
9 special court-martial or a general court-martial, I need to
10 figure out how to refer this. And if the general who's direct
11 advisor or the superior officer in the chain of command to
12 that brigade commander announces, yes, I want you to be the
13 convening authority on this case, I think it's a capital
14 general court-martial. That has announced to that brigade
15 commander and has become unlawful influence over that brigade
16 commander's decision, it's no longer an independent decision.
17 And in that context, one of the reasons why it's so
18 important to fashion an appropriate remedy is because, if you
19 were just simply saying, okay, well, never mind. You, brigade
20 commander, you're still the convening authority, you make your
21 own independent decision now, I regret that I ever said that,
22 well, the only decision that that brigade commander can make
23 that would exercise -- that would demonstrate independence,

1 that would prove beyond a reasonable doubt the lack of
2 unlawful influence, would be to make a contrary decision. You
3 can't unring that bell. And that's why it's advisable to
4 transfer it to a completely different brigade commander who is
5 outside the chain of command of the original general who made
6 the inappropriate statement. That is not available here.
7 There is legitimate public interest in this case.
8 There is enormous public opinion aligned in one fashion that
9 is aligned -- as I've said previously, these defendants are
10 uniquely unpopular with the American people. The case, the
11 Lieutenant William Calley case, gets cited frequently in
12 unlawful command influence context. It's not because it
13 established a new test for unlawful command influence such as
14 the Biagase case did. It's not because it's from C.A.A.F. or
15 the Court of Military Appeals, it was from a lower service
16 court of criminal appeals. But the Calley case is nonetheless
17 still today a milestone.
18 In this case -- similarly, there was enormous public
19 interest in the case. It was sharply divided public opinion,
20 but there was enormous public interest in the case. And it
21 set a precedent for decades to come as to what is deemed
22 acceptable. In that case, the President and Secretary of
23 Defense had made statements about the case. They had

1 expressed interest. I note their statements in that case
2 looked completely innocent and tame in comparison to the
3 statements made by the senior national military and political
4 leaders in the case before us.
5 This case will likewise -- this case here will
6 likewise be cited for decades to come as a vivid example of
7 what is or is not acceptable in military justice. If
8 President Nixon had said he expected that Lieutenant Calley
9 would be convicted and put to death, it would have been the
10 end of that case. He said nothing of the sort.
11 Dismissal of the charges, we believe, is the
12 appropriate remedy. However, if you believe that it is not
13 the best available remedy, then the next remedy that we see --
14 I believe you engaged Mr. Ruiz yesterday regarding severance,
15 which that certainly would not be an available remedy for
16 Mr. Mohammad. That wouldn't help his situation whatsoever
17 in -- with these facts.
18 The only alternative remedy that we can envision that
19 would be at all something that would help to unring that bell,
20 since you can't disqualify the President, so removal of the
21 death penalty as an available sentence is the only remaining
22 way to remove the taint of this. And we believe dismissal --
23 in this context and based on the precedent, dismissal is the

1 appropriate remedy.
2 Thank you, Your Honor.
3 MJ [COL POHL]: Thank you.
4 Major Schwartz.
5 DDC [Maj SCHWARTZ]: Good morning, Your Honor.
6 MJ [COL POHL]: Good morning.
7 DDC [Maj SCHWARTZ]: Just briefly. We adopt the arguments
8 by co-defendant's counsel.
9 Today will be the last time that I argue before you
10 in uniform, sir, as far as we know. And it's an opportunity
11 to present this issue in that context, to speak before you in
12 uniform to talk about the impact of unlawful influence on
13 defense counsel.
14 949b -- and the discussion we have been having today
15 has been largely about the influence on the commission, on
16 Your Honor, on prospective panel members; but 949b extends to
17 the conduct of defense counsel as well.
18 From the arraignment in this case, both in here, as
19 recently as yesterday, and outside of the courtroom, I think I
20 have suffered personally some criticism for asking that the
21 charges be read at the arraignment. And it's maybe
22 regrettable in retrospect, because what I didn't foresee at
23 the time was the pain that that might cause family members of

1 victims of September 11th, and that's probably the
2 second-to-last thing that I would want to do in my capacity
3 here.
4 But the last thing that I wouldn't want to do in my
5 capacity is my job. I would not want to do my job
6 incorrectly. I would not want to have my job influenced and
7 my actions subject to the unlawful influence of the
8 government. So yes, the focus of this conversation is the
9 important influence on the commission, on the system, and the
10 structure. It's appropriate to also cite -- also note the
11 impact on defense counsel.
12 And this one example of the charges being read at the
13 arraignment is illustrative of many that are preserved in the
14 record. I won't go through them today. Mr. Ruiz went through
15 many in detail.
16 But on day one of this case, on the arraignment,
17 May 5, 2012, we came into this courtroom to represent a man in
18 a capital case. And under those circumstances at that time, I
19 was unable to conduct an attorney-client meeting with
20 Mr. Bin'Attash without -- with the luxury of having notes,
21 with the luxury of bringing in paperwork into an
22 attorney-client meeting. So the only meetings I could have
23 with him were based on whatever I could bring in in my own

1 memory. And that's not how defense counsel operates,
2 obviously.
3 The reason that was is because the convening
4 authority, in conjunction with the CIA, the Office of General
5 Counsel, the other actors, in a sense behind the curtain at
6 the time, drafting the rules that would govern attorney-client
7 meetings required me to turn over my notes and other
8 privileged materials to the SJA for JTF-GTMO. The same SJA
9 who, as we heard yesterday, was involved in manipulating
10 SOP 39 in a way that certainly will have an impact on the
11 conclusion of that important issue.
12 MJ [COL POHL]: To be fair, probably the same SJA office.
13 Given the time ----
14 DDC [Maj SCHWARTZ]: Yes, sir.
15 MJ [COL POHL]: Given the time change, I doubt it's the
16 same SJA.
17 DDC [Maj SCHWARTZ]: Since then we have had four people,
18 the entity, the Office of the Staff Judge Advocate here.
19 MJ [COL POHL]: That's how I took it. Go ahead.
20 DDC [Maj SCHWARTZ]: And so on May 5, 2012, when I came
21 into this courtroom, that day was the only opportunity at that
22 time, because we had filed motions but we weren't hearing
23 motions on that day, for me to actually spend some time

1 discussing important matters in this case, trying to have a
2 conversation and build some rapport with Mr. Bin'Attash.
3 Again, this is one example of a variety that are cited within
4 the AE 031 series. But it really is, I think, the first and
5 best example of how the unlawful influence, the unlawful
6 actions of the government affect defense counsel in being able
7 to do our jobs.
8 MJ [COL POHL]: Do you believe it was unlawful for the
9 government -- you have a right for the charges to be read,
10 there's no dispute about that, okay? But do you think it's
11 unlawful for the government to say that that was a waste of
12 time? I mean, aren't they entitled to their opinion?
13 DDC [Maj SCHWARTZ]: I think they're -- of course they're
14 entitled to their opinion. But their opinion on the exercise
15 of a right by defense counsel -- and I don't -- I don't --
16 maybe let me shift the focus. I'm not criticizing the
17 government or anybody else for criticizing that decision.
18 MJ [COL POHL]: Okay.
19 DDC [Maj SCHWARTZ]: That's a different conversation. Is
20 it subject to criticism? Maybe. I don't think that anybody
21 should come up here and exercise a right and have that very
22 act be attacked or criticized.
23 MJ [COL POHL]: Okay.

1 DDC [Maj SCHWARTZ]: But that aside, the unlawful conduct
2 of the convening authority, of the other entities that were
3 influencing my ability to do my job, is one of many reasons
4 why the charges in this case should be dismissed; and if
5 they're not and this conduct continues, any convictions
6 secured in this case will be reversed.
7 MJ [COL POHL]: Okay.
8 DDC [Maj SCHWARTZ]: Thank you, sir.
9 MJ [COL POHL]: Thank you, Major Schwartz.
10 Mr. Harrington, do you wish to be heard.
11 LDC [MR. HARRINGTON]: No, Judge. We adopt the arguments
12 of the other counsel.
13 MJ [COL POHL]: Thank you. Trial counsel?
14 Mr. Swann.
15 TC [MR. SWANN]: Your Honor, one might expect that the
16 leaders of this nation, the world, might have something to say
17 when 19 men hijack aircraft, fly them into buildings, and into
18 what has become a field of honor, while others sat in the
19 comfort of their homes searching the Internet or watching
20 television for proof of death.
21 No one can and should possibly think that the
22 Presidents of this United States and other leaders of the
23 world would remain silent when 2,976 treasures are stolen.

1 Now, the defense imagines that the 75 or so
2 statements that are attached to their pleadings led to the
3 referral of charges in this case. But I say it again: One's
4 imagination is hardly what allows one to throw around
5 allegations of unlawful influence without benefit of some
6 evidence that affects this commission.
7 Still, imagination is not lacking in this trial. All
8 of what follows are supplemented as examples of unlawful
9 influence. The defense imagines that someone listens to their
10 conversations between attorneys and their clients at the
11 meeting places, with no proof; or that someone is reading
12 attorney e-mails or viewing their work product, again, absent,
13 without proof. They imagine that guards have nothing else to
14 do but to rifle through legal bins looking for nuggets of a
15 defense strategy.
16 They imagine that there are no off-limits zones in a
17 prison and the commanders of the Joint Task Force and those
18 who run this facility engaged in a concerted effort with the
19 convening authority, the Office of General Counsel, on down,
20 to stifle the defense attorneys' ability to form an
21 attorney-client relationship founded on trust.
22 Supplement 7 to AE 031 alleges that the leadership of
23 the Office of the Convening Authority engaged in unlawful

1 influence by recommending that Mr. Ruiz's request to
2 demobilize from active duty during a time when hearings were
3 scheduled also fails the test.
4 Now, it is not my intent to stifle imagination. But
5 if you put it in a motion, present some evidence logically
6 connected with having an impact on the potential unfairness of
7 the commission, for an object and effect must be identified
8 for influence to exist.
9 Baseless claims unsupported by evidence that the
10 convening authority was influenced by elected officials are
11 just that, baseless claims. They are talking points. And
12 sometimes I wonder who counsel are talking to, because at
13 times I wonder if it is truly you. These talking points
14 consume far too much ink, strategically inserted and
15 containing no substance or value. They don't merit the oxygen
16 of publicity or certainly this commission's attention for much
17 longer.
18 Now, Mr. Ruiz spent a large amount of time
19 challenging the integrity of Admiral MacDonald. He attempted
20 to connect dots in order to attribute a sinister motivation to
21 the convening authority. Well, I see it differently. After
22 assuming his job in March 2010, Mr. Ruiz's PowerPoint
23 demonstration, he sat in wait for nearly one year before the

1 decision by Mr. Holder to return this case to the very place
2 where it began, and stopping that case resulted in a 23-month
3 delay. Then the Admiral waited another year to staff the
4 defense with highly paid lawyers, which Congress now required.
5 Mr. Ruiz forgets that the Admiral had before him a
6 charge sheet and package that painted a picture of attacks on
7 that second Tuesday of September 2001 as unprecedented shock
8 and suffering. It described the deaths of nearly 3,000
9 innocent men, women and children, some of those children just
10 learning to walk. There were women pregnant who were
11 incinerated. Thousands of children who had a mother or a
12 father on September 11th did not have one on September 12th.
13 The referral package described the deaths of over 400
14 firefighters, police, and Port Authority officers who ran into
15 those buildings in efforts to save thousands of lives from the
16 burning infernos at the World Trade Center and at the
17 Pentagon. And it described the deaths of 40 brave in a vacant
18 field in Pennsylvania; again, more heroes.
19 So if Mr. Ruiz had a problem with the referral, he
20 and these others had opportunity, ample -- and I will get to
21 that in a moment -- to question Admiral MacDonald. So when
22 they flashed that slide to you of a quote from Calley in 1973,
23 and I believe that slide is actually the trial judge in that

1 case, he must have forgot that they had ample opportunity in
2 this room to question the Admiral, who dispelled any spectre
3 of unlawful influence.
4 So it takes no imagination to see that a man who rose
5 in rank from -- to what Vice Admiral MacDonald did, and who
6 was the very best at what he did, would do anything other than
7 the right thing without the interference from outside sources.
8 You see, that's what an honest man does.
9 His over 30 years in uniform, his biography at
10 page 155 of our filing, is a good starting point for believing
11 him when he said that the decision to refer this case to trial
12 was his, his alone. He took action once he convinced himself
13 that the defense had the assets and time to submit matters in
14 extenuation and mitigation. And all of this was prudent, but
15 it was -- it wasn't because they had a right; Admiral
16 MacDonald decided to allow them that right.
17 Mr. Connell submitted a package of mitigation
18 materials on behalf of his client, a package the prosecution
19 has never seen, because Mr. Connell asked that Admiral
20 MacDonald not share it with the prosecution.
21 Now, to place this motion in context, counsel believe
22 that because of the statements of two Presidents and other
23 elected and non-elected officials, men who Admiral MacDonald

1 testified that he had never met and with whom he had never
2 spoken with or received correspondence, influenced a potential
3 life or death decision.
4 Admiral MacDonald subjected himself to 15 hours and
5 six minutes, spread out over three days. His testimony totals
6 more than 600 pages. And I reference this court to the
7 February sessions that appear at pages 2445 to 2547; the
8 17 June session, pages 2738 to 2970; and the June 18 session
9 and the over 300 pages from 2982 to 3036, and then again from
10 3094 to 3326; all part of the unauthenticated record of trial
11 in this commission.
12 Now, he answered every one of the defense's
13 questions. Sometimes it was the same question over and over
14 again. His answers were unequivocal and clear, that whatever
15 the defense thought about outside influence, none of it was
16 true. In fact, not once in those 600 pages I have referenced
17 did the defense ask a question that really went to the heart
18 of the matter.
19 So it was left to Mr. Ryan's cross-examination to
20 reveal the answers the defense did not want to hear. In
21 responses to just 13 questions, Mr. Ryan was able to get to
22 the heart of what is important in this motion. And again I
23 refer this commission to pages 3272, to 3275 of the

1 unauthenticated record on June 18 during our session that
2 began at 1543 hours. A sampling of those questions include:
3 "Did you consider any of the statements in the
4 defense brief in making your decision to refer this case to
5 trial?
6 "No, I did not."
7 And what he was referring to was the 75 or so
8 statements that appear in Mr. Ruiz's filing in March -- excuse
9 me, May of 2012.
10 "Was your decision to refer this case involving the
11 murder of 2,976 men, women and children influenced by any of
12 the statements in Appellate Exhibit 031?"
13 Answer: "No."
14 "Have you ever received any oral or written
15 communications from any of the government officials mentioned
16 in AE 031?"
17 Answer: "No."
18 "Did you consider anything other than the charges,
19 any additional charge, the transmittal letters, the referral
20 binder, and all materials therein, the submissions of defense
21 counsel, and the pretrial advice?"
22 Answer: "Yes, that is all I considered."
23 And, "Finally, was the decision to refer this case to

1 trial yours and yours alone?"
2 Answer: "Yes, it was."
3 Now, counsel wishes for this court to believe that
4 this commission was convened irrespective of the fact that
5 these men are believed responsible for the deaths of nearly
6 3,000 men, women and children. Counsel for Hawsawi has called
7 the convening authority's testimony in a pleading "pious
8 declarations and persistent protestations," and, again, the
9 prosecution sees it differently. It sees a man who answered
10 questions truthfully. And after 15 hours, if he protested, it
11 was because counsel asked the same question over and over and
12 over again and never was really interested in what he had to
13 say. The defense is offended by that lack of a Perry Mason
14 moment.
15 The defense would wish the convening authority -- the
16 commission to believe that a retired three star officer, the
17 former Judge Advocate General of the Navy, a lawyer, and also
18 his staff of legal advisors were influenced by these
19 statements in referring this commission to trial,
20 irrespective, irrespective of the convening authority's
21 finding probable cause to believe that these men committed the
22 very crimes with which they are charged.
23 Now, there's no dispute about what the Presidents or

1 the others have said. The dispute is whether what was said
2 constitutes unlawful influence. And in this instance, the
3 defense has failed to meet their initial burdens of showing
4 facts, if true, would constitute actual or apparent influence.
5 The prosecution would submit that the statements
6 contained in the pages of the defense brief made by two
7 Presidents and the senior civilian officials, statements
8 like, "American and Pakistani authorities struck a serious
9 blow to al Qaeda while arresting Khalid Shaikh Mohammad, the
10 top operational planner, the top killer of the al Qaeda
11 network. The man who masterminded the September 11 attacks is
12 no longer a problem to the United States"; statements like,
13 again, by President Bush, "We have captured the mastermind of
14 the September 11 attacks against our nation. Khalid Shaikh
15 Mohammad conceived and planned the hijackings and directed the
16 actions of the attackers. We have dismantled al Qaeda's
17 senior leadership, such as Khalid Shaikh Mohammad and Ramzi
18 Binalshibh."
19 Now, all of these statements -- and it's in the
20 government's brief -- all of these statements follow an
21 interview that Mr. Mohammad and Mr. Binalshibh conducted with
22 a reporter just prior to the first anniversary of the
23 September 11th attacks, and he wrote a book about it. And in

1 that book, he described the meeting with Mr. Mohammad. And
2 then again, that's all in our brief, so I won't say anything
3 more about that.
4 But efforts to establish that the convening authority
5 is anything other than a neutral arbiter in this case are
6 unsupported. Even the 15 hours and six minutes that the
7 defense had to question the convening authority did nothing to
8 advance their cause. And what it did was establish that there
9 is no truth to any of their allegations. His answers are
10 worthy of public trust.
11 Now, as the defense has pointed out in its reply
12 brief -- and I'm talking about Mr. Ruiz's reply brief -- that
13 there are approximately 75 statements spread out over more
14 than a decade. And if you were to total the number of times
15 anyone has even mentioned Mr. Ruiz's client, you might find
16 one. The number of times anyone has mentioned Mr. Connell's
17 client is the same. Ms. Bormann's client gets similar
18 treatment, one time. Mr. Harrington's client rates a grand
19 total of eight times, seven times by President Bush and one
20 time by the Attorney General.
21 MJ [COL POHL]: Is there a different remedy for those four
22 than the others?
23 TC [MR. SWANN]: No, Your Honor. I'm simply pointing out

1 in the brief that that's what we're dealing with. There is no
2 different remedy.
3 MJ [COL POHL]: If we keep them -- if they're tried
4 together, would not the issue be looked at the impact of all
5 of them?
6 TC [MR. SWANN]: Yes, sir. This is the September 11
7 shared counsel, so it would be there all together. I agree
8 with that.
9 MJ [COL POHL]: Go ahead.
10 TC [MR. SWANN]: The record also reflects the transcript
11 of the combatant tribunal that was conducted in 2007, long
12 before any referral in this case, and, quite frankly, long
13 before the first referral in this case, where Khalid Shaikh
14 Mohammad takes credit for the 9/11 operation from A to Z, and
15 to the interviews he gave to the reporter months before the
16 first anniversary where he was described by that reporter as
17 the external operations chief for al Qaeda. But I think the
18 reporter got it wrong in the book. He called Mr. Mohammad the
19 military commander of al Qaeda, and that is incorrect.
20 Except for the two times that Mr. Holder has given
21 interviews in the last 18 months -- the last was more than
22 18 months ago; the first was actually in November of 2013, and
23 the second one was in March of 2014 -- would point out that

1 those statements by Mr. Holder were 18 months to nearly two
2 years after the referral in this case. So those statements
3 could have had no impact whatsoever on the convening
4 authority's referral decision in this case.
5 Now, Mr. Schwartz has pointed out -- or Major
6 Schwartz, I'm sorry. Major Schwartz has pointed out that he
7 acknowledges the reading of the charge sheet in this case in
8 May of 2012, and I would submit that while that is his right,
9 that right has consequences. That charge sheet alone did far
10 more than anything, any of the statements in this case say.
11 The reading of the charge sheet in this room at the request of
12 certain defense teams, and it was not just Mr. Bin'Attash's
13 team, placed in the public domain, for the first time, the
14 individual actions of each of these men, and in a pleading
15 that's also part of the record, I believe it's D-105, where
16 they take credit for the "blessed Tuesday," as they call it,
17 in a pleading filed with the commission.
18 Now, while counsel may have established predicate
19 facts -- namely, that statements were made -- they have made
20 no logical connection between the statements and the referral
21 of this case. There is no indication that the general tenor
22 of the statements were intended to influence the commission.
23 There is no object and effect that has been demonstrated in

1 this case. That ends the analysis as it pertains to actual
2 influence.
3 So if no actual influence exists in the referral of
4 this case, what about apparent influence? There's just
5 absolutely no reason to believe that any of the statements had
6 the effect of indirectly influencing the convening authority's
7 referral. We've heard ample testimony on that.
8 The test on apparent unlawful influence, and I
9 believe I stated it yesterday, is an influence where any
10 member of the general public is cognizant of all the facts,
11 the circumstances of this case. And we would submit that
12 someone that is cognizant of all facts and circumstances would
13 not conclude that the influence of senior officials' comments,
14 to include the President and Former President, placed an
15 intolerable strain on the public perception of the military
16 commission system.
17 Now, no one willing -- and I have to emphasize that
18 word "willing," for there's always some who just can't get
19 past their firmly fixed misperceptions to objectively look at
20 the facts -- no one would conclude that any of the statements
21 by the Presidents or others of prominence was the driving
22 force behind the convening of this -- behind the convening of
23 this commission by Admiral MacDonald. The American public is

1 both perceptive and informed. Opinions are not formed by a
2 handful of individuals who vilify the commission process, or
3 even in some cases who lionize it. The American public is
4 capable of understanding the differences of our civilian
5 system from that of courts-martial and that of the commissions
6 system.
7 Now, Congress and two Presidents understood the
8 difference, and they enacted the legislation in this case.
9 Officers who will ultimately decide this case on what they see
10 and hear in this courtroom and from what you tell them with
11 your rulings and your instructions, we would submit that there
12 is no intolerable strain on public perception.
13 Now, let me go back to the President's statements
14 again one last time here. You know, sometimes Presidents and
15 other officials make statements that mention potential cases.
16 But just because they mention the case or individuals, it
17 doesn't mean that they are intending or attempting to
18 influence a trial or, in this case, a commission, its
19 participants, or the actions of a convening authority.
20 You see, Presidents say a lot of things, and what
21 they say are for different audiences. The audience that
22 Mr. Obama had in that interview with Chuck Todd was trying to
23 convince the American people that his decision to move the

1 case to New York was the right decision. That was a tough
2 time for the administration. Taken fully in its context,
3 though, Mr. Obama came back to the right answer: "I don't
4 decide these kind of things. These things are decided by
5 prosecutors, defense counsel, and the judge doing their job."
6 And, again, who was that directed at? Counsel would
7 say that that alone was directed at the convening authority.
8 Well, we know that Admiral MacDonald did not consider that.
9 You see, the most important job of any President is to protect
10 the American people from harm. The public needs to know that
11 there are a lot of good and great people working hard,
12 extremely hard, to do just that. And so what all of these
13 Presidents were saying is that they were saying in a progress
14 report that we have taken steps to stop the enemy. Sometimes
15 Presidents must explain their actions.
16 The public needs to know that the successes on and
17 off the battlefield, that war that came to this shore on
18 September 11th, is not measured by how many tanks are
19 destroyed or how many competent forces are destroyed; it's
20 measured by how many enemy are taken off the battlefield, how
21 many alleged killers, who for the most part boast of their
22 accomplishments, are caught or silenced.
23 Not one of the 38 statements attributed to the

1 43rd President between 2007 -- 2002 and 2007 amounts to
2 unlawful influence. He averaged just under eight statements a
3 year. Those statements informed the American people of the
4 ongoing successes of a war. As seen from the context of each
5 of those statements, and I know that you have those, they are
6 comments educating the American people stung by an event so
7 unimaginable, and they were comments about the war different
8 from others, with setbacks, difficulties, and successes.
9 Further, those statements made by President Obama, a
10 member of his cabinet, or members of his staff were not
11 intended to influence the commission. All of those statements
12 identified in the defense brief were about how there would be
13 no commission, that the administration would exercise its
14 prerogative to try the case at the site of one of the attacks.
15 Further, when one considers the timing of the statements, one
16 sees that none of those statements were made to influence the
17 convening authority. Admiral MacDonald didn't even have the
18 job when the statements were made, and he wasn't hired until
19 months later, and didn't even refer this case until almost two
20 years after obtaining the position.
21 Now, I've heard counsel indicate, and I believe it
22 was actually Major Poteet, about the forum determination in
23 this case. As to the forum determination, which the defense

1 maintains amounts to unlawful influence, the debate whether
2 this case should have gone to New York or stay here at
3 Guantanamo, the defense has no say in. To think that men
4 accused of acts of terror or their lawyers can lobby to have a
5 case tried in a forum of their choosing, and then, when that
6 decision goes against them, that it amounts to unlawful
7 influence, is without merit.
8 The notion that somehow Senator Graham, who is part
9 of some of the filings of Mr. Ruiz, influenced this commission
10 is equally without merit. While Senator Graham held firm to
11 his position that the 9/11 case should be tried in a military
12 commission, not a federal court, this was an opinion, an
13 opinion ultimately shared by the overwhelming majority of both
14 houses of Congress. Others had different opinions;
15 predictably, some of them fought hard, but they lost. This
16 forum is now the lawful place for subjecting these men to what
17 most of the defense attorneys have predicted in interviews and
18 their pleadings as a long and rigorous trial.
19 Now, I said I would address the recent two statements
20 by the Attorney General separately because they were made long
21 after the referral of this case, so that the only group those
22 statements could impact are potential panel members.
23 Those statements are unfortunate, but taken in

1 context, that statement is really about a decision that he had
2 made that he was unable to make happen. My point in this is
3 that Presidents, elected officials, and other representatives
4 of the government, public spokespersons, and convening
5 authorities don't decide cases. Juries, or in our case
6 panels, do. They decide cases based on evidence the
7 government presents and on any evidence the defense chooses to
8 present, the instructions, and full deliberations.
9 They decide sentences based on extensive instructions
10 and testimony. And not even the most effective advocate,
11 whether he or she represents the government or the defense,
12 has much say in what the adjudged sentence might be. Their
13 arguments are not evidence.
14 Accountability for September 11th, 2001, will be
15 decided in this room, not from outside participants. These
16 men are presumed innocent until guilt is established by legal
17 and competent evidence beyond reasonable doubt. So whatever
18 the Attorney General might have said has no significance in
19 this room.
20 MJ [COL POHL]: Mr. Swann, now, there's been a lot of
21 discussion about the impact of the two Presidents' remarks on
22 how it impacts the defense counsel and the convening
23 authority. And then you mentioned that Mr. Holder's remarks

1 would only influence, if there was any, on potential panel
2 members.
3 I want to kind of turn the discussion a little bit
4 back. The panel members will be all military officers. What
5 about the impact on them of the two remarks by the
6 Commanders in Chief?
7 TC [MR. SWANN]: I would say this, Your Honor: One can't
8 expect that every trial is free of influence of external
9 factors. Trials like this one are not laboratories,
10 completely sterilized and free of outside influences. After
11 all, practically every person on earth alive on
12 September 11th, 2001, saw or learned of the devastation that
13 hit the United States on that first Tuesday in September.
14 Any determination about whether any of those
15 statements, and except for Mr. Holder's statement, at least
16 1500 days old, will be determined when the panel is selected.
17 There will be commission members, potential members, that have
18 been exposed to news accounts of a crime, and that does not
19 presumptively deny an accused a fair trial. Prominence does
20 not necessarily produce prejudice and panel impartiality has
21 never required ignorance.
22 So if massive pretrial publicity -- and I think
23 that's probably where the panel members might learn of that --

1 but I want to point out to you that on -- in one of the
2 pleadings by Mr. Hawsawi, they do not contend that those
3 statements amount to pretrial publicity. And we would submit
4 that the proper time to inquire of those members, if they are
5 aware of any statements the President or others might have
6 made that would have an impact on their ability to sit, it is
7 through extensive voir dire. And if they can convince this
8 court that they can be fair, and only after they convince this
9 court that they can be impartial, will they get to sit.
10 Now, I'm reminded of a case that I actually was the
11 prosecutor in many, many years ago, the retrial of a case
12 called the United States v. Todd Dock. And Dock had been
13 tried about five years earlier and the case was reversed, and
14 therefore I got the case on a retrial. And everyone --
15 practically everyone on that panel, had read the *Stars and*
16 *Stripes* in Germany. So they were aware that he had been
17 convicted of the crime. The test was, could they set aside
18 that knowledge and decide the case just based on the evidence.
19 And when the judge in that case, Craig Jacobsen, said he was
20 convinced, they got to sit.
21 So counsel will be given an opportunity to inquire
22 about the President's statements, they will be given the
23 opportunity to inquire about Mr. Holder's predictions, and it

1 will be only at that time -- and by the time we get there --
2 given what the defense says, kind of indicated, we may be a
3 little bit away from that time. So that's the time for all of
4 that to occur, sir.
5 MJ [COL POHL]: Okay. Mr. Swann, do you have much more?
6 I'm not cutting you short. It's just we're going to -- I'm
7 going to let you finish. I just don't want to ----
8 TC [MR. SWANN]: Your Honor, here's what I would say,
9 simply that the motion should be denied. Subject to any
10 questions that you might have, and I refer you back to the
11 briefing that we have done, that -- and in particular
12 Mr. Trivett's ably prepared brief for anything that I have
13 failed to address.
14 MJ [COL POHL]: Okay. Thank you.
15 The commission will be in recess for 15 minutes.
16 Commission is in recess.
17 **[The R.M.C. 803 session recessed at 1042, 11 December 2015.]**
18 **[END OF PAGE]**
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