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1 [The R.M.C. 803 session was called to order at 0902, 1 June
2 2016.]

3 MJ [COL POHL]: Commission is called to order.

4 Trial Counsel, any change in the attorneys
5 representing the United States this morning?

6 MTC [MR. TRIVETT]: Good morning, Your Honor. No changes
7 to the attorneys representing the United States. There's an
8 additional FBI personnel in the courtroom today, Donald J.
9 Fuhr, along with Patrick O'Malley.

10 MJ [COL POHL]: Mr. Nevin, I noticed Major Poteet is not
11 here.

12 LDC [MR. NEVIN]: Right, Your Honor. He's working on a
13 separate project and will be available shortly and we're good
14 to proceed without him. Mr. Mohammad is not present.

15 MJ [COL POHL]: Yeah. I'm going to account for their
16 absence.

17 It appears that all of the other attorneys are here.
18 None of the accused are present today. And Major Poteet has
19 now joined us. Mr. Swann.

20 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
21 was previously sworn, and testified as follows:

22 DIRECT EXAMINATION

23 Questions by the Trial Counsel [MR. SWANN]:

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1 Q. All right. Good morning. Are you the same major who
2 testified yesterday?

3 A. I am.

4 Q. Okay. Again, I remind you that you are still under
5 oath. Did you have occasion to advise all five of the accused
6 of their rights this morning?

7 A. I did.

8 Q. And you have in front of you what's been marked as
9 Appellate Exhibit 429B through F, each consisting of three
10 pages; is that correct?

11 A. That is correct.

12 Q. All right. Let's take 429B first. Is that the right
13 advisement for Ali Abdul Aziz Ali?

14 A. That is correct.

15 Q. And did you advise him of his rights this morning?

16 A. I did advise him of the rights. I read the English
17 version of the right advisement and started that reading at
18 0621 hours and I signed it after he signed the document at
19 0622 hours. And he did not request that to be interpreted or
20 read in Arabic.

21 Q. All right. Do you believe that he understood his
22 rights?

23 A. Yes.

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1 Q. Let's take now 429C which is Khalid Shaikh Mohammad.

2 A. Okay.

3 Q. Did you advise Mr. Mohammad of his right to attend
4 this morning?

5 A. I did.

6 Q. Did you do it in English or in Arabic?

7 A. I read the English version only. He asked -- or he
8 said that would be fine. He didn't ask that it be
9 interpreted. I started reading that at 0633 hours and I
10 signed it after watching him sign at 0635 hours.

11 Q. All right. Do you believe he understood his rights?

12 A. I do.

13 Q. With respect to 429D, Mustafa al Hawsawi, did you
14 advise him?

15 A. I did.

16 Q. What time was that?

17 A. I started reading the English version at 0623 hours.
18 I read the entire rights advisement in English. He followed
19 along with the Arabic form and then the interpreter read the
20 Arabic form to him. And after watching him sign, I signed the
21 document at 0627 hours.

22 Q. All right. Did you deviate from the form in any way?

23 A. I did not.

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1 Q. With respect to 429E which is Ramzi Binalshibh, did
2 you do the same thing?

3 A. I did. Mr. Ramzi Binalshibh advised me to just read
4 it in English. So I read him the entire English version and
5 started reading that at 0630 hours. And then after he signed
6 the document, I signed it at 0632 hours, and he did not ask
7 that it be interpreted.

8 Q. 429F which is Walid Bin'Attash, did you do the same
9 thing?

10 A. I did. I read the English version to Mr. Bin'Attash
11 and started that reading at 0615 hours. He also followed
12 along with the Arabic form and then the interpreter read the
13 entire Arabic form to Mr. Bin'Attash. And after I saw him
14 sign the document, I signed it at 0620 hours.

15 Q. All right. Were there any questions with respect to
16 any of these men and their waiver of their rights?

17 A. None of them had any questions about waiving their
18 rights or coming to the commissions.

19 TC [MR. SWANN]: All right. Your Honor, I have nothing
20 further.

21 MJ [COL POHL]: Defense counsel, any questions?
22 Apparently not.

23 Major, thank you for your testimony.

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1 WIT: Thank you, sir.

2 [The witness was excused.]

3 MJ [COL POHL]: At the conclusion of the commission
4 proceedings yesterday, I conducted an 802 with counsel to
5 discuss the way forward today. One of the issues that came up
6 was the -- whether or not we're going to get to 426, and I
7 indicated to the defense, I'm just putting this on the record,
8 that I am not going to get to 426 until the briefing on it has
9 been completed. I understand the defense position, but it
10 strikes to me as to have one side argue without even the
11 benefit of the brief from the other side is not --
12 accomplishes little to nothing, particularly since that
13 would -- we have to wait until July to hear from the
14 government. So I just wanted to put that on the record.

15 The second thing I want to discuss is that -- this is
16 the logistics of the VTC witness on Friday, is I've received a
17 505(g) notice on that witness. Assuming without deciding that
18 the classified testimony will need to be taken from him, can
19 we do that logistically Friday afternoon from a secure VTC?

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

21 MJ [COL POHL]: I mean, right now we got it scheduled for
22 0900 in open court. I'm just saying is that if we -- I don't
23 want to wait until Friday morning to address, or at least

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1 start thinking about the mechanics of the issue.

2 MTC [MR. TRIVETT]: Yes, sir. We would certainly have to
3 bifurcate it to some degree, but the logistics are possible.
4 So providing the court can give a little guidance on the time
5 you would want to begin the classified portion of the
6 testimony, we'll make sure that the witness is available.

7 MJ [COL POHL]: Okay. Okay.

8 That brings us to -- and given the fact that there
9 are no detainees here today, we do not need to adjust the
10 schedule to accommodate their prayer schedule. So given the
11 number of issues that we need to discuss in a classified
12 session this afternoon, my intent is to go this morning to
13 about 1200 or so and then begin the classified 505(h) hearing
14 at approximately 1330.

15 That being said, as discussed yesterday, we're going
16 to start with, I believe, 360. Mr. Schwartz.

17 DDC [MR. SCHWARTZ]: Good morning, Your Honor.

18 MJ [COL POHL]: Good morning.

19 TC [MR. SWANN]: Before we get to 360, I just want to
20 request the commission's clarification on the 426 issue.

21 There's a lot of confusion over the briefing schedule
22 on this looking backwards. And so is it the conclusion that
23 the government is due -- that this wouldn't be ripe for oral

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1 argument until Friday COB versus Thursday? And the reason --
2 this is important for us to establish in the record because it
3 affects our ability to seek alternate avenues of relief
4 between now and July, which is particularly important on a
5 public health issue where -- I mean, if I didn't put it as
6 clearly as I needed to on Monday, or should have, it comes
7 down to this: I'm not comfortable being in this room and I'm
8 not comfortable bringing a team of typically 12 to 15 people
9 and asking them to be here on behalf of my role as a defense
10 attorney and on behalf of Mr. Bin'Attash.

11 I understand the commission's finding that we're not
12 going to break from the typical briefing cycle and the oral
13 arguments schedule, but the -- as far as I can tell, the
14 briefing cycle on this motion ends Thursday, which means it
15 would be ripe for argument on Friday.

16 The filing inventory ----

17 MJ [COL POHL]: Well, your pleading was filed on what day?

18 DDC [MR. SCHWARTZ]: The pleading was originally
19 filed ----

20 MJ [COL POHL]: When was it accepted for filing?

21 DDC [MR. SCHWARTZ]: According to the filings inventory,
22 it was accepted on 19 May.

23 MJ [COL POHL]: Okay.

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1 DDC [MR. SCHWARTZ]: But I don't want to leave it at that
2 because here's where the confusion starts. It was filed on 13
3 May and rejected. Set that aside, fine. That was a Friday.
4 That would have had us due for oral argument this week,
5 Monday.

6 It was refiled on the request of the trial judiciary
7 that we fix an error, and it wasn't even filed until -- I
8 should say this: It wasn't even filed until after 4:00 p.m.
9 on the 13th, so we didn't expect it to be accepted until
10 Monday the 16th. We didn't know that it hadn't been accepted,
11 however, until Monday night, so we couldn't file then again
12 until the 17th.

13 We filed on the 17th and it was rejected, we learned,
14 because the attachments that you were looking at that were
15 marked ex parte under seal were, for the first time in the
16 history of this case, determined to be inappropriate because
17 they included the language "ex parte under seal." So we were
18 asked to refile again.

19 We did that on the 19th. But between the 17th and
20 the 19th, there was confusion between the trial judiciary
21 staff and our crack staff on what exactly was wanted on these
22 placeholder -- not placeholders, but the cover sheets for the
23 placeholders. Because what had been rejected was what had

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1 been accepted in the past. So over the course of those two
2 days, we attempted to understand what was requested. And we
3 filed on the 19th, and that filing was rejected on the 19th
4 and accepted as the 20th.

5 I spoke to the chief clerk, I believe is his title,
6 on the 20th and he said this will be accepted on the 20th.
7 Subsequent to that, however, the government filed an identical
8 document, a cover sheet to a placeholder that was marked ex
9 parte under seal. It also was rejected by the trial judiciary
10 until the government responded, no, here are examples of past
11 filings where you accepted this. And the trial judiciary
12 said, yes, you're right, we accept it on the day that it was
13 filed.

14 Following that logic, our motion should be accepted
15 May 17th, which would have it ripe yesterday. 17th to the
16 19th makes no difference to me. I'm just confident that it's
17 not the 20th, which would mean we are ripe for oral argument
18 on Friday.

19 The other issue you raised on Monday when we
20 discussed this ----

21 MJ [COL POHL]: But you've had two subsequent filings.

22 DDC [MR. SCHWARTZ]: The supplement, right, so 425A.

23 MJ [COL POHL]: There's two. You filed two.

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1 DDC [MR. SCHWARTZ]: The supplement is 425 -- I'm sorry,
2 426 sup. and then separately is 426A, which is the discovery
3 motion. So the discovery motion couldn't possibly reset the
4 clock because it's an independent motion. It's related and
5 it's in the same series, but I don't think anybody would
6 suggest that that resets the clock on the initial filing.

7 Excuse me.

8 MJ [COL POHL]: Not necessarily, but when you have
9 multiple motions filed on the same issue, there is a thought
10 that piecemeal litigation is not useful. I'm assuming you
11 filed the discovery request because this is information you
12 need on the underlying motion.

13 DDC [MR. SCHWARTZ]: It's information we need once the
14 expert is appointed.

15 MJ [COL POHL]: Okay, then ----

16 DDC [MR. SCHWARTZ]: It's not ----

17 MJ [COL POHL]: ---- then ----

18 DDC [MR. SCHWARTZ]: In an attempt to make this an
19 expeditious process, we filed that probably sooner than we
20 normally would have. Normally we would have waited for the
21 ruling on the expert. If the funding for the expert would
22 have come through, we would have then requested the discovery
23 that the expert needs. I don't even have a full list of

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1 requests from an expert for the discovery requests. I mean,
2 that's how it would normally work is the expert tells you,
3 here's what I need for you to get.

4 MJ [COL POHL]: Okay. What about the supplement?

5 DDC [MR. SCHWARTZ]: And the supplement, and this is
6 where -- I think the purpose of the Rule of Court that does
7 reset the clock with supplements is so that when the landscape
8 of the argument is changed, when there's truly new information
9 or new law, the opposing party has the opportunity to respond
10 to that. In this case, with this supplement, this is simply
11 an expert opining exactly what we say in the motion. It
12 doesn't change the facts, it doesn't change the position of
13 the motion at all.

14 And the problem with -- I mean, here's where the
15 rules are really standing in the way of what I think is the
16 right result. We could have just as easily filed the
17 supplement as an attachment to the discovery motion because
18 the discovery motion says, hey, we need this other information
19 in order to interpret the February 23rd report. And that
20 would appropriately fall right alongside an expert's opinion
21 that says, I need more information, which is what the
22 supplement says.

23 So our choice to put it in the 426 series as opposed

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1 to the 426A series can't possibly reset the clock. But here's
2 what ----

3 MJ [COL POHL]: That's a choice you made.

4 DDC [MR. SCHWARTZ]: It is, but -- but it's the choice
5 that we made for the purpose of efficiency and clarity here.

6 If I go home -- as we say in 426, this is an ongoing
7 issue. The investigation continues. We want to update both
8 the commission and the government and the rest of the defense
9 teams, all parties to this proceeding, on the state of the
10 information, which is what we did on Friday. Since Friday,
11 I've learned of more relevant information that I haven't had a
12 chance to supplement into the record, but I intend to do that
13 next week.

14 At every iteration where more relevant information is
15 discovered, we'll be supplementing. So at what point -- and
16 the reason for doing that isn't to delay the process, isn't to
17 confuse anybody, it's to add to the volume of information, the
18 universe of information so that the commission can make a good
19 decision.

20 MJ [COL POHL]: But don't I need the whole universe you
21 want me to consider?

22 DDC [MR. SCHWARTZ]: I think you need the whole universe
23 on the ultimate issue, but certainly not with respect to

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1 whether an expert is appointed now. That's really, have we
2 met the threshold, have we met the burden to convince the
3 commission that we need an expert today? And given that this
4 is a public health issue -- two people outside of the Military
5 Commission Defense Organization have come up to me since
6 Monday and said, I really hope that you can have this heard
7 this week because I'm uncomfortable.

8 I know that's anecdotal and that doesn't affect your
9 opinion here, but it's representative ----

10 MJ [COL POHL]: You're right, it doesn't.

11 DDC [MR. SCHWARTZ]: ---- of how we feel. It suggests --
12 it demonstrates how a lot of people in this room feel, whether
13 they say it or not, and nobody deserves that, certainly not a
14 capital defendant.

15 MJ [COL POHL]: No, I understand your public health
16 concerns. I'm in the same room. So I got it, okay. So it's
17 your position that the government's pleading is filed on
18 Thursday?

19 DDC [MR. SCHWARTZ]: That is our position, sir, yes.

20 MJ [COL POHL]: Okay. When -- and I'm not going to get
21 into the mechanics of acceptance of pleadings, okay? I know
22 there are times it doesn't run as smoothly as all of us would
23 hope. We continually try to adjust the rules of court for

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1 clarity and there's going to be new rules, updated rules
2 coming out shortly, hopefully to avoid these kind of issues.
3 But be that as it may, if the government was on notice that
4 this was accepted on 20 May for whatever reason, that starts
5 their clock.

6 DDC [MR. SCHWARTZ]: The government's had this filing
7 since 17 May. If they were -- I don't think they could have
8 been told one way or the other because I don't believe there
9 was ever an e-mail from the trial judiciary accepting this
10 particular motion. What the government knows is that the
11 motion was rejected for the same reason its motion was
12 accepted on the day it was filed.

13 So, I mean, either we accept the reality that there's
14 disparate treatment, and I don't think that anybody thinks
15 that that's appropriate, or there's equal treatment and we
16 recognize that the government's been on notice of this issue
17 since May 12, when we sought their opinion for the conference,
18 has had the filing since May 17th and, like you say, Your
19 Honor, has an interest in the outcome of this as much as
20 anybody else.

21 I certainly don't represent the commission, but I do
22 speak on behalf of servicemembers, Feres barred
23 servicemembers, who certainly wouldn't be in Guantanamo Bay if

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1 it weren't for me asking them to be here. The Air Force Staff
2 Sergeant you've seen probably walk 50 miles from this
3 courtroom back to our office because I can't get my act
4 together and have all of the materials that I need at the
5 table, I have to decide if she's going to be here in July
6 because I need that support, because Mr. Bin'Attash needs that
7 support.

8 I'm not comfortable making that decision today. I'm
9 not comfortable with the conversation I have to have with my
10 wife about whether and how I balance my responsibility to the
11 client and my concern about the uncertainty of the state of
12 the safety of this facility.

13 MJ [COL POHL]: One moment.

14 [Pause.]

15 MJ [COL POHL]: I don't want to get too much wrapped
16 around the time issue, but in your pleading, your fact
17 section, you refer to events from the NMCPHC's report
18 announcement dated 19 May 2016. So how could this have been
19 filed in the exact same form on the 12th of May?

20 DDC [MR. SCHWARTZ]: Can you say that again, Your Honor?

21 MJ [COL POHL]: I'm saying -- I'm looking at your pleading
22 here. In your facts section on page 18, you refer to, and
23 I -- I'm skipping over who the -- what the NMCPHC stands for.

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1 DDC [MR. SCHWARTZ]: It's the Navy Public Health Center.

2 MJ [COL POHL]: Yeah. But you keep referring to a 19 May
3 2016 announcement, so I'm coming back to your, your saying
4 earlier this was exactly the same thing that you filed on the
5 12th of May.

6 DDC [MR. SCHWARTZ]: I need to check the exact line. I
7 don't mean to represent it's an identical version. Two things
8 changed between ----

9 MJ [COL POHL]: You're relying on facts of 19 May, so it's
10 clear that at least part of your pleading wasn't the same
11 pleading you filed. I mean, you made an issue -- there's
12 going to be a way to get to this, I got it. You made an issue
13 that the government has had this pleading since the 12th of
14 May and then you spend a number of paragraphs talking about
15 the report of 19 May.

16 DDC [MR. SCHWARTZ]: The changes between 17 and 19 May,
17 and I'll double-check this, but my recollection is I learned
18 about one or two new cases of cancer between those two dates.

19 But that's a discussion of whether it's filed the
20 17th or the 19th, not the 19th or the 20th, and I think that's
21 really the issue here is whether this was filed the 19th or
22 the 20th. Because if it was filed the 19th, then it's ripe
23 for argument Friday. I can check and see what ----

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1 MJ [COL POHL]: Well, the briefing cycle would necessarily
2 have been, but it says on the face of it it's filed the 20th
3 of May.

4 DDC [MR. SCHWARTZ]: On the motion.

5 MJ [COL POHL]: On the copy that I've got.

6 DDC [MR. SCHWARTZ]: I believe that's the wrong copy.

7 MJ [COL POHL]: Okay.

8 DDC [MR. SCHWARTZ]: The chain of events there ----

9 MJ [COL POHL]: Okay.

10 DDC [MR. SCHWARTZ]: Believe it or not, the chain of
11 events there, on the 19th filing -- the date reflected in the
12 caption was the 19th. On the 20th is when I was contacted
13 personally by the chief clerk and told this won't be accepted
14 on the 19th, it will be accepted on the 20th, you need to
15 change the date to the 20th.

16 MJ [COL POHL]: Okay. I don't want to get wrapped around
17 this axle because this is getting -- your caption says date
18 filed 19 May. The lower left-hand corner says filed with the
19 trial judiciary 20 May.

20 DDC [MR. SCHWARTZ]: Okay. So the lower left corner. I'm
21 going off the filing inventory, which could be a typo.

22 MJ [COL POHL]: I got it. I got it. Okay. Hold on.

23 [Pause.]

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1 MJ [COL POHL]: Trial Counsel, when do you think your
2 response is due?

3 MTC [MR. TRIVETT]: Sir, we believe it's due on the 10th
4 based on the supplement of 27 May. We're also relying on the
5 e-mail from the judiciary from 23 May indicating that the
6 initial filing date was 20 May, 2016, which would make it, the
7 original due on Friday, but with the supplement that next
8 Friday, that it would be due on the 10th.

9 MJ [COL POHL]: Mr. Schwartz?

10 DDC [MR. SCHWARTZ]: Your Honor, under other circumstances
11 I think the way to cure the disparate treatment would be to
12 extend our filing deadline on the motion that I mentioned that
13 the prosecution filed by a day that was 429E, I believe.
14 There was a dispute over whether that was filed on the 26th or
15 the 27th. Okay. That would solve the unequal ----

16 MJ [COL POHL]: What's 429E got to do with this?

17 DDC [MR. SCHWARTZ]: Well, 429E demonstrates that motions
18 filed with the attachment cover page that we filed on the 19th
19 are accepted on the day that they're filed despite any
20 language that they're -- one member of the trial judge staff
21 didn't like. So the government files 429E on the 26th, trial
22 judiciary responds like they did to us saying no, you need to
23 fix this, we'll accept it on the 27th.

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1 MJ [COL POHL]: I'll look at that issue if that's the
2 allegation. I -- a day here, I got it. I got it.

3 DDC [MR. SCHWARTZ]: But that really isn't the point, I
4 agree.

5 MJ [COL POHL]: No, that's not the point. Point is how to
6 resolve the health issue.

7 DDC [MR. SCHWARTZ]: Right.

8 MJ [COL POHL]: And what I'm saying is, you have a number
9 of pleadings, but basically what you want to do more than
10 anything else is address the expert consultant.

11 DDC [MR. SCHWARTZ]: That's really the only issue pending.

12 MJ [COL POHL]: That's the only issue.

13 DDC [MR. SCHWARTZ]: There's a discovery issue that can be
14 dealt with later. What the goal is, as I mentioned Monday, is
15 to try to get movement on that so that we can have this issue
16 out of our way, not serving as a distraction for the July
17 hearing. I spent -- we received the report on April 11th. We
18 tried to interpret it over the course of the next week or so,
19 we started reaching out to experts. And I spent -- then I
20 couldn't find a pro bono expert to come in and testify today,
21 or sign an affidavit that's more detailed than the one you
22 received. I spent two weeks doing nothing but this, trying to
23 study this, trying to determine is it safe for us to be here.

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1 I again will be the first person to admit it probably
2 is. The level of uncertainty makes me uncomfortable to the
3 point that -- this has very much been a distraction for us
4 this week and it will continue to be for July. So the goal
5 is, eliminate this as an issue. And we do that by having a
6 finding, a ruling before the July session. We can't do that
7 if we don't have oral argument this week.

8 I would consider waiving oral argument altogether if
9 I thought that it was going to lead to an opinion before July.
10 The problem with that is the government might not want to
11 waive their oral argument. I'd have to consider that in the
12 first place, but we're attempting to do anything we possibly
13 can to ----

14 MJ [COL POHL]: But -- okay. I got it. Sequentially,
15 though, it's not going to be resolved by July if I gave you
16 the expert today, because then now the next thing is we are
17 going to be litigating the discovery request. I mean, so I
18 understand what you're saying. If your pleading is
19 sufficient, the government's response is sufficient, I can
20 always choose to deny the request for oral argument and decide
21 this kind of issue. I mean, quite frankly, expert witnesses,
22 of which I get -- expert assistance is not an issue I'm
23 unfamiliar with. So ----

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1 DDC [MR. SCHWARTZ]: I don't know that there's not
2 information in this filing that you would need to make the
3 appropriate conclusion.

4 MJ [COL POHL]: Well, I mean, so you can only argue what's
5 in your filing anyway.

6 DDC [MR. SCHWARTZ]: Except that it provides ----

7 MJ [COL POHL]: I mean, I know you like -- the anecdotal
8 evidence is for whatever it's worth, but the bottom line is,
9 you're bound by your filings. You can't stand up to an oral
10 argument and say, by the way, Your Honor, there's another
11 scientific test out there that says X. If it's not part of
12 the filings, I'm not going to consider it.

13 DDC [MR. SCHWARTZ]: But to the extent that anything in
14 here is confusing, a lot of it could be, or is misunderstood,
15 it allows us the opportunity to clarify that. That's what's
16 so difficult about analyzing this. And many of have come to
17 different conclusions or certainly no conclusion at all
18 because of how dense and confusing some of this stuff is.

19 MJ [COL POHL]: So a lawyer is going to explain it to a
20 judge and we're all going to understand it?

21 DDC [MR. SCHWARTZ]: That's why I spent two weeks studying
22 it so hopefully I can do just that. What I can tell you today
23 in support of why the uncertainty is unacceptable to me is not

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1 very difficult to discern from the report. The fact that the
2 report isn't a self-supporting document, isn't peer reviewable
3 on its own isn't the basis. I mean, that's what -- a lot of
4 this is going to come down to a credibility issue, do we trust
5 the Navy Public Health Center or do we not. And I don't want
6 to get into the substance of this now, but there are many
7 reasons why we might not want to do that.

8 Setting that aside, on the face of the report, there
9 are many reasons why we should be uncomfortable being here.
10 The report finds in 60 samples of soil testing for
11 benzo(a)pyrene, which is a highly carcinogenic, nasty material
12 that causes scrotal cancer, frequency of 78 percent within
13 Camp Justice.

14 Nobody knows -- well, the Navy knows where that is,
15 but nobody will tell us where that 78 percent is. Presumably
16 if the methodology of the testing was accurate, it would be an
17 equal 78 percent of the facility, meaning everywhere we walk
18 today could be hazardous to our health.

19 Now, the details of that question are what we need to
20 get to, and that I can't answer. That's where we need the
21 expert to come in and explain to us, yeah, there's a 78
22 percent frequency but it's at such a level that you don't have
23 a problem.

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1 MJ [COL POHL]: What do you want the expert to do?

2 DDC [MR. SCHWARTZ]: I want the expert to come in and have
3 an independent assessment, not necessarily fly down here, not
4 necessarily conduct any testing, but look at the report and
5 the information in the discovery request.

6 MJ [COL POHL]: Read the report then subsequent data and
7 then ----

8 DDC [MR. SCHWARTZ]: The underlying data, right. The
9 references to the report, really, and tell me, you don't have
10 to be worried about sending your enlisted paralegals down to
11 Guantanamo for as long as they need to be there to live in
12 this facility 24 hours a day in this, you know, temporary
13 housing unit, in these temporary offices that were designed to
14 be occupied for one to two years, according to OMC when they
15 actually did the construction, then this issue goes away.

16 If you were to grant this today, just going along
17 with your hypothetical, obviously I can't commit to a forever
18 resolution by July. But given the amount of work we've put
19 into this so far and our level of understanding, I would be
20 very surprised if we couldn't get to where we need to be
21 within two weeks.

22 MJ [COL POHL]: Even without the discovery?

23 DDC [MR. SCHWARTZ]: With the discovery.

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1 MJ [COL POHL]: Well now, you just added a caveat.
2 Understand, you know, I'm -- I understand your position and I
3 understand the concern, I'm just -- what I -- what I'm
4 struggling with is you want to do something in a very
5 irregular procedure that I'm not sure you get there from here.
6 If I give you the expert but don't give you the discovery, can
7 the expert do his job?

8 DDC [MR. SCHWARTZ]: Well, if you gave us the expert and
9 not the discovery, I suspect that I'd have the expert sitting
10 on the stand in July telling all of us that he wouldn't be in
11 here if it were up to him. If it were his choice to be an
12 attorney coming down to represent -- not because it's unsafe
13 or likely unsafe, but simply because there's too much
14 uncertainty at this point.

15 MJ [COL POHL]: Yeah, but we have that now. The expert
16 doesn't need to tell me that, right?

17 DDC [MR. SCHWARTZ]: But, I mean, when I say it, I get the
18 sense that it doesn't have quite the weight that it might from
19 an expert. I mean, I know that doesn't solve the problem if
20 that's the testimony we get, but at least then the commission
21 can be convinced this is a real issue. I mean, that's the --
22 the biggest problem we've had from the beginning of this is it
23 seems to be, you know, we're not only talking about the Navy's

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1 credibility, but I almost feel like we're talking about ours.
2 It seems like the reaction to our concern about the
3 habitability of Camp Justice has been focused on whether this
4 is some kind of, you know, prank or stunt or attempt to delay
5 the proceedings.

6 You know, if I had filed a motion that said, you
7 know, Your Honor, there's going to be a bomb planted in
8 Courtroom 2 for the June hearings, we need to get out, clearly
9 there would have been some kind of different response than
10 what we got. And I'm not suggesting that the commission
11 doesn't give us the benefit of the doubt on the accuracy of
12 our proffers here, but I am convinced that the level of
13 concern that this report has generated has been inadequate,
14 and I think that's simply because of the lack of understanding
15 of the science.

16 As you say, none of us is a scientist, none of us has
17 training or experience to understand what this stuff means.
18 But we are decent researchers and we have somewhat analytical
19 minds and we've been able to, you know, not with a whole lot
20 of effort figure out that there's some serious questions
21 underlying this.

22 I mean, the Navy in August says, it's fine, we did
23 our walk-through survey, you can be in here. In February it

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1 says, wait a minute, we didn't know that these lab results
2 were going to come back with 16 toxins, mostly carcinogenic,
3 exceeding the screening levels. And on top of that, we don't
4 even know what the appropriate standard would be because we
5 are not sure if this is an expeditionary facility or a
6 permanent facility, we're not sure if this is an occupational
7 environment or residential environment. And yet without any
8 further testing which is called for in that report, they come
9 back and somehow conclude we don't know the total risk but
10 it's safe for occupancy. That doesn't make any sense.

11 And I said without any further testing. That's not
12 true. They did further testing on formaldehyde, probably the
13 least toxic of the substances, and it doesn't allay any of the
14 concerns that we've had from the beginning. Whether this
15 formaldehyde is at fairly low levels, whether in the cuzcos or
16 structures, has never been something that I have been overly
17 concerned with despite my 200-plus days living in those
18 facilities.

19 But I'm concerned with the toxins that are known to
20 cause cancer, that are known to cause leukemia in simply acute
21 exposures. And we talk about these cancers in the motion and
22 I wrestled a lot with whether we should even bring that up
23 because I think that is potentially dangerous. It can be

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1 misleading. I have no evidence that there's a causal link
2 between the toxins here and those cancers. All I can say is,
3 again, what the experts are telling us is this could be an
4 issue. This population, this small population of people who
5 are young and healthy who travel here -- young for the most
6 part -- travel here, should not be -- probably should not be
7 experiencing the cancer diagnoses and the noncancer diagnoses
8 at the rate that they are.

9 It doesn't mean that there is a causal link just
10 because of that, right? You can flip a penny ten times and
11 you might have it go heads ten times in a row. But it's worth
12 looking into because there's no need for us to be here. This
13 isn't like a battlefield where we don't have a choice, we need
14 to be in that environment conducting the proceedings because
15 that's what the case demands. This is artificial.

16 And I'm not talking about Guantanamo Bay, I'm talking
17 about this abandoned airstrip. We're standing on top of a
18 piece of property that was likely used for dumping fuel, for
19 jettisoning fuel in the course of regular military operations
20 for decades. There are no records of that because we are
21 where we are. And that's another thing that the Navy Public
22 Health Center notes, that it's very difficult to analyze this
23 facility because the records that should have been kept

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1 haven't been kept going back before this was an OMC and even
2 since this became an OMC facility.

3 That's one of the Navy highlights, the Public Health
4 Center highlights, is that OMC has failed to uphold its
5 responsibility to collect asbestos or to maintain an asbestos
6 plan.

7 MJ [COL POHL]: Okay.

8 DDC [MR. SCHWARTZ]: So, you know, we're sliding into the
9 substance, but the ----

10 MJ [COL POHL]: No. I understand. I got you. And
11 regardless of the cause of the confusion and whether you think
12 there's disparate treatment with the filing by my office, if
13 there was, it certainly is never intentional, at least that's
14 my view. I have a lot of people that work for me and they're
15 doing the best they can, but sometimes one interprets a rule
16 one way and another way and many times, you're going to find
17 this hard to believe, I have no idea what they're doing.

18 DDC [MR. SCHWARTZ]: I don't find that ----

19 MJ [COL POHL]: Be that as it may, what we're going to do
20 on this issue is I will give the government the full briefing
21 schedule. You will have an opportunity to file a response.
22 If I need an oral argument, we will set it for July on the
23 expert request. Like I said, I deal with these experts all

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1 the time -- expert assistance all the time, most of the time
2 without oral argument.

3 What I'm saying is I'm not promising you I will
4 decide there's no need for an oral argument and be able to
5 decide quickly without it, but I'm telling you I will consider
6 that as an option. But I think it's -- you know, fair, as I
7 get a complete government response and opportunity to look at
8 this. So ----

9 DDC [MR. SCHWARTZ]: So then back to my initial question,
10 is the conclusion we're pushing this to July because of the
11 briefing schedule or because it's not as important of an issue
12 as the stuff we're going to get to on Friday? Is the motion
13 filed on the 19th the question? I was just handed a ----

14 MJ [COL POHL]: Okay. My copy says it was filed on the
15 20th.

16 DDC [MR. SCHWARTZ]: So the website and the inventory ----

17 MJ [COL POHL]: I just look at what's stamped on the
18 thing. Accepted for filing with the trial judiciary on 20
19 May.

20 DDC [MR. SCHWARTZ]: And if your staff concludes in the
21 next day that it was actually supposed to be 19 May, are we
22 arguing this Friday or are we kicking it because we're just
23 not going to get to it on Friday?

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1 MJ [COL POHL]: We're not going to get to it on Friday.
2 For whatever reason -- and understand, you put that into a
3 disjunctive, one dealing with an administrative issue and the
4 other thing is like I don't care or it's not important. It is
5 important. It's very important. And it's -- I've got it.
6 But it is important that we have complete -- both sides have
7 an opportunity to look at this stuff. Okay. I mean, the
8 government -- if I told you right now, that no, it's
9 considered filed the 19th so the government then theoretically
10 has two days to finish a filing they thought wasn't due until
11 Friday, I'm not going to do that, okay?

12 DDC [MR. SCHWARTZ]: Okay.

13 MJ [COL POHL]: But again, I will seriously consider this
14 part without further oral argument, so you get the same -- in
15 essence, get the same result. I'm not guaranteeing that
16 because I haven't waded into the pleadings yet, but I
17 routinely do. Quite frankly, most expert assistance requests
18 are done without oral argument anyway because most of them are
19 ex parte as is.

20 DDC [MR. SCHWARTZ]: Often we waive the oral argument to
21 get that expeditious response. I only ask that because the
22 record does show this was filed on the 19th. Again not that
23 the commission didn't care about it, but there are other

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1 things on the schedule that took precedence.

2 MJ [COL POHL]: I got it. You made your point.

3 That brings us ----

4 LDC [MR. NEVIN]: Your Honor, could I raise one matter?

5 MJ [COL POHL]: Sure.

6 LDC [MR. NEVIN]: I wanted to ask the military commission
7 about 425, the motion to disqualify the military judge and the
8 prosecution, and just to say that the briefing apparently is
9 complete as of yesterday. And I think there are a number of
10 other -- actually, I think there are other collateral issues
11 in it, the positions that other parties have taken, but I just
12 wanted to inquire of the military commission about the way
13 forward on this. And I hadn't really realized until yesterday
14 afternoon that the briefing was complete, and so technically
15 speaking, I guess we'd be within your docketing order that
16 says that any motion on which the briefing cycle is complete
17 could theoretically be on the docket.

18 And so I didn't want to wait much longer to ask you
19 whether the -- you know, what the way forward is, in other
20 words.

21 MJ [COL POHL]: I -- I just got it today, quite -- just
22 the way the system works. My intent was, given the nature of
23 the issue, it will probably be the first thing on the July

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1 hearing.

2 LDC [MR. NEVIN]: Okay. I just would point out to the
3 military commission then that one of the issues is that we ask
4 that a separate judge be appointed to resolve the motion
5 itself. And the government's response did not address that
6 and didn't seem to object to it or disagree with it. So one
7 possibility is that that is something that could be addressed.
8 So I simply raise that.

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

10 Okay. Now, I think that does bring us to 360.

11 Mr. Schwartz.

12 DDC [MR. SCHWARTZ]: Your Honor, AE 360 is a discovery
13 motion that is a prerequisite to 321 and 399. All of these
14 tend to fall into the same category of discussions, but the
15 fact patterns for each are different. In 360, we're
16 requesting information related to a 7 December 2014 tape
17 recording that Mr. Bin'Attash made for delivery by the ICRC to
18 his family in Saudi Arabia.

19 I don't have children, Your Honor, I only have dogs.
20 But I've thought about, from time to time, what it would be
21 like to have kids and what it would be like to have a child
22 kidnapped from me. I've imagined what it would be like to
23 have a child kidnapped on the arraignment date of this case, 5

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1 May, 2012, and then hear nothing about that child's
2 well-being, that child's custody, anything at all, whether he
3 or she was even alive, until this past spring.

4 That's the amount of time that most of the men in
5 this case, including Mr. Bin'Attash, were held in
6 incommunicado detention without any notice to their families
7 of their well-being or their whereabouts, whether they were
8 even alive.

9 The impact of that incommunicado detention, as well
10 as the conditions of confinement since then here in
11 Guantanamo, is significant. There are four or five issues I
12 want to present to you in support of a discovery production in
13 AE 360.

14 First is the issue of voluntariness of
15 Mr. Bin'Attash's actions today, his statements in court, his
16 participation with his defense team. The brief goes into
17 detail about the impact of that incommunicado detention
18 combined with the continued inability to communicate with
19 families today, the impact that has on his ability to come to
20 court and answer your questions voluntarily.

21 You've heard testimony, you've seen evidence about
22 the limited amount of information that is allowed to pass
23 between family members and detainees here in Guantanamo. What

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1 you're going to see in detail in 321 and 399 is the legal
2 explanation for why that amount of information is insufficient
3 and is in violation of the United States law and international
4 law.

5 The government's refusal to permit better -- and
6 we'll talk about how much better it needs to be, whether it
7 needs to be in-person communication, visitation as 399 says,
8 or maybe just electronic, as AE 321 says, near-real-time
9 communication is something we'll get into. But the denial of
10 that, where we are at today, the level of communication that's
11 allowed today amounts to pretrial punishment.

12 The DoD directive on this subject doesn't codify, but
13 it summarizes the state of international law, and the law that
14 binds the United States with respect to the detention of
15 pretrial detainees and law-of-war detainees and it discusses
16 the definition of humane treatment. And humane treatment,
17 according to the DoD Directive 2310.01E includes,
18 quote, appropriate contacts with the outside world, end quote,
19 including, quote, exchange of letters, phone calls, and video
20 teleconferences with immediate family or next of kin, as well
21 as family visits.

22 What appears to be an arbitrary denial of
23 Mr. Bin'Attash's right to have this communication isn't only

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1 pretrial punishment but it's something that affects his
2 ability to participate in his defense. It's also something
3 that affects our ability, his defense team's ability to gather
4 mitigation evidence.

5 You know, this video that we are seeking production
6 of is itself Skipper evidence, under Skipper v. South
7 Carolina. Statements that Mr. Bin'Attash makes to his family,
8 especially when they demonstrate the type of person he is, his
9 demeanor in confinement, clearly is mitigating information,
10 clearly is something that the government has to turn over.

11 But it also affects our ability to communicate with
12 his family. It's difficult enough for me to go knocking on
13 the door of the Bin'Attash household, and to not do that as a
14 starting point would be, per se, ineffective in a capital
15 case. A family is going to be an obvious source of mitigating
16 information. But I'm supposed to go knock on that door and
17 say, you know, Hello. My name is Michael Schwartz. I'm
18 funded by the United States. Yes, it's the same government
19 that held your son in incommunicado detention for three and a
20 half years. It's the same government that has held him in
21 Guantanamo Bay since 2006 without any meaningful contact with
22 you. I've been his lawyer since 2011, and I haven't been able
23 to arrange a phone call between Mr. Bin'Attash and his mother.

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1 That has an unbelievable chilling effect on a defense team's
2 ability to develop mitigating information.

3 Finally in our motion, we cite to one procedural rule
4 and one evidentiary rule that very clearly demands that the
5 evidence at issue in 360 be disclosed. First, and I --
6 nobody understands why this procedural issue is in the Rules
7 of Evidence, but M.C.R.E. 304(c)(1) requires the prosecution
8 to disclose -- shall disclose to the defense counsel contents
9 of all relevant statements, oral, written, or recorded, made
10 or adopted by the accused that are within the possession,
11 custody or control of the government and are material to the
12 preparation of defense under R.M.C. 701. And that's the other
13 rule. Obviously, 701(c)(3) requires the government to produce
14 this information, oral, written or recorded, if it's material
15 to the preparation of the defense.

16 We made such a request to the government for a pretty
17 particularized group of documents. In 360, we asked for the
18 video that was recorded itself. And the reason that we asked
19 for this video is that it was the first apparent opportunity
20 for Mr. Bin'Attash to make what's called a recorded video
21 statement that would be delivered to his family in Saudi
22 Arabia. This is an issue -- you know, communication between
23 Mr. Bin'Attash and his mother is something we've sought since

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1 early on in this case. It was only after we filed AE 321, I
2 believe, that the government began to pursue some type of what
3 they call near-real-time communication. For reasons unknown
4 to me, that near-real-time communication was never successful
5 for Mr. Bin'Attash. Both the Skype-type communication that
6 the government was attempting to set up and also these
7 nonsimultaneous recorded messages were simply not afforded to
8 him.

9 So on December 7, 2014, when he made the recorded
10 statement, it seemed like we had broken through and that we
11 were going to be able to deliver, you know, on his behalf
12 through the ICRC this message from him to his mother, to his
13 family. Shortly after that recording was made, it was
14 determined by the government to not be suitable for release to
15 the family. It's unclear to us why that was. It was never
16 explained to him, it was never explained to his defense
17 counsel. We have asked for both the recording and any
18 information surrounding the refusal of the government to
19 permit that recording to be sent to the family.

20 I want to add one fact to the motion which we
21 originally filed in May of 2015, but just to make sure the
22 record is clear, I don't want to mislead you, Mr. Bin'Attash
23 has now had one video delivered to his family. So during his

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1 13-plus years of detention by the United States, he now has
2 been fortunate to have his family see one single, short
3 recorded video statement by him.

4 Unfortunately, between the time that we filed this
5 motion, or originally filed 321, at least, and today, his
6 mother has passed and she wasn't able to see that video.

7 We're asking you in 321 and 399 to cure what is
8 amounting to a significant impediment to our ability to
9 represent our client, and that starts with producing the
10 discovery at issue in AE 360.

11 MJ [COL POHL]: Thank you.

12 Trial counsel.

13 ATC [Maj DYKSTRA]: Good morning, Your Honor.

14 MJ [COL POHL]: Good morning.

15 ATC [Maj DYKSTRA]: Just to be clear, Mr. Schwartz was
16 saying that they were looking just for the one video.
17 According to the motion, which referenced back to their
18 discovery request of 27 January, not only are they requesting
19 just one video, but they're asking to provide a copy of all
20 video or audio messages to Mr. Bin'Attash's family in any
21 format recorded by him for the period of 1 December to
22 present. So not only are we talking about just that one
23 video, we're talking about a continuing obligation going

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1 forward.

2 Now, in regards to that one video, it's important to
3 remember two key facts about this issue when we're discussing
4 it. One, Mr. Bin'Attash recorded the video messages on his
5 own volition for his own reasons. It only had to benefit him.
6 There was no question here it was self-initiated and served
7 his own purposes. Two, with that said, the message was not
8 directed or elicited by any law enforcement authority or any
9 entity within the U.S. Government.

10 Now, Mr. Schwartz referenced the requirements of
11 R.M.C. 701(c)(3), namely that the prosecution is required to
12 turn over all relevant statements that were made by the
13 accused and are material to the preparation of the defense or
14 material or intended for use by the trial counsel in the case
15 in chief. Now, the prosecution acknowledges our duties under
16 that rule and we have no problem doing so. However, a line
17 needs to be drawn somewhere and needs to be drawn here on what
18 kind of statements that includes. Here we have an accused
19 that's sent an ICRC -- or attempted to send an ICRC message to
20 his family. It was not directed or elicited by law
21 enforcement authorities, was not directed or elicited by any
22 entity within the U.S. Government, and it really has no
23 self-apparent nexus even they may claim to this commission in

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1 any way. But rather, it was self-initiated and only served to
2 benefit him. It is, by this commission's own definition,
3 nonlegal mail according to the written privileged
4 communications order.

5 Certainly, this commission should not require the
6 prosecution to review and disclose every single piece of
7 nonlegal mail an accused authors, especially where the
8 prosecution has no intention whatsoever to use it in our case
9 in chief.

10 Now, the defense -- the defense argument primarily
11 relies on that these statements are somehow Brady material or
12 they're relevant to the accused's conditions of confinement or
13 demonstrate some sort of mitigating circumstances. But what I
14 contend, Your Honor, is that when those arguments are held up
15 to the light, they really don't pass muster here.

16 First, the message in question does not qualify as
17 Brady material. Brady, as you may know, involves statements
18 given to a law enforcement authority. It didn't involve
19 defendant's communications with his family members; instead,
20 it involved a co-accused giving a material statement to the
21 law enforcement authorities, confessing to the same crime that
22 the accused was charged with in that case. That is very, very
23 different than what we have here now.

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1 Under the defense theory of Brady, any statement of
2 the accused -- and by any, I truly mean any and all statements
3 of the accused -- would need to be turned over to the defense
4 or over to this commission for an in camera review, no matter
5 their relevance to the case. And like I alluded to before,
6 we're talking about every statement from December 1, 2014,
7 going forward, not only for this particular accused but for
8 every particular -- every accused.

9 Under the defense theory, any letter he may write,
10 any message he may record for his own benefit would need to be
11 disclosed no matter its relevancy to this commission.
12 Certainly such a result would completely and utterly
13 eviscerate R.M.C. 701 and this commission should decline to do
14 so here or any issue that comes before it.

15 MJ [COL POHL]: Well, are they asking to deliver it or
16 simply to possess it?

17 ATC [Maj DYKSTRA]: They're asking to possess it, for us
18 to hand it over to them.

19 MJ [COL POHL]: Okay. And since, as you keep saying, this
20 came from them to begin with, he wrote a non -- if he wrote a
21 dear mother/father letter, nonlegal mail ----

22 ATC [Maj DYKSTRA]: Uh-huh.

23 MJ [COL POHL]: ---- and put it in his bin and it was

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1 never delivered, wouldn't you let him keep it? I mean, part
2 of this deals with the delivery part of it, and that is a
3 separate issue, but part of it is simply the -- you seem to
4 say that if he writes a statement that's nonlegal mail, he
5 then loses all right to even possess it. Is that true?

6 ATC [Maj DYKSTRA]: Your Honor, I wouldn't say that he --
7 because every -- I wouldn't say that every statement that he
8 writes he loses possession of that, of course. But given
9 the -- I personally do not -- the prosecution does not know
10 why this message was rejected and so it can't speak to why
11 that can't be delivered back to him.

12 There's obviously concerns about force protection and
13 otherwise that may have given rise to ----

14 MJ [COL POHL]: How can there be a force protection issue
15 if Mr. Bin'Attash makes a recorded video statement, the
16 government says we're not going to deliver it to your mother,
17 and gives it back to him? How could that be a force
18 protection issue? I mean, I don't -- as I've said many times,
19 I don't run detention facilities. I've got it. Okay. But
20 we're -- it's just simply a statement he made and it's going
21 back to the guy who made the statement, and now it's a force
22 protection issue?

23 ATC [Maj DYKSTRA]: I can't speak to the reasons that

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1 JTF-GTMO did not hand it back to him, Your Honor. All I would
2 say is ----

3 MJ [COL POHL]: I mean, so it's just they chose not to
4 give it back to him. And since it's nonlegal mail, that's the
5 end of the inquiry; is that kind of your position?

6 ATC [Maj DYKSTRA]: Yes, Your Honor. I mean, ultimately
7 when it comes down to it, Your Honor has shown deference to
8 JTF-GTMO in regards to nonlegal mail, something that has no
9 apparent self-nexus to this commission.

10 Certainly if the defense wants to know what's on that
11 message or otherwise, they have access to the ultimate source
12 of that message, Mr. Bin'Attash himself. So I would
13 respectfully request that they go ask him what he said on that
14 message.

15 Now, they also raise the question that it's somehow
16 relevant or in some fashion relates to his conditions of
17 confinement over at JTF-GTMO. What I would say is that if
18 they wish to truly argue his conditions of confinement using
19 this message, ultimately the content of that particular
20 message is not relevant. Whether it went out or whether it
21 didn't, or actually went out, that's the relevant piece here.
22 What is the actual content; they have access to him.

23 And third, they finally argue that the content of the

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1 ICRC message can be used in military commission or to
2 demonstrate Mr. Bin'Attash's behavior and adaptability to
3 prolonged periods of confinement. However, the defense
4 argument ignores the fact that the accused can do so himself
5 to include recorded, written, and/or oral presentations as
6 well as via sworn testimony. While the defense may want the
7 prosecution to review every single nonlegal communication --
8 not just this video, Your Honor, we're a talking about every
9 one of them, by this commission's own definition the
10 prosecution has no such obligation or even desire to do so.

11 And this kind of ties into our concerns in 018Y. If
12 we handed this message over to them and it was deemed
13 unclassified, what would happen to that message? Even though
14 JTF-GTMO viewed it as having some concerns, their concerns
15 would be completely eviscerated.

16 For these reasons, Your Honor, the prosecution
17 asserts that the defense simply has not demonstrated the
18 relevance of this self-initiated, self-benefitting video
19 message to Mr. Bin'Attash's family to be an issue before this
20 commission. And because of this, we request that you deny the
21 defense motion.

22 MJ [COL POHL]: Thank you.

23 Mr. Schwartz, anything further?

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1 DDC [MR. SCHWARTZ]: Your Honor, I don't know how
2 something is not relevant when we haven't reviewed it. I
3 don't know how that conclusion can be drawn if we haven't seen
4 it. Relevance is the not standard.

5 MJ [COL POHL]: Let me ask you this, and I'm a little
6 confused in your motion. Is your motion simply that you get
7 the video back or that you get the video back and can send it
8 to Mr. Bin'Attash's family?

9 DDC [MR. SCHWARTZ]: Now we're getting into 018Y. But no,
10 the motion has nothing to do with trying to deliver the video.
11 The motion is purely produce the document, the -- both the
12 documents and the recording that the rules require you to
13 produce.

14 MJ [COL POHL]: So if I -- if I granted your motion with
15 the caveat that this is only to be given to -- back to the
16 defense, and if they wish to disseminate to a third party,
17 they've got to come back to the commission to ask about it, so
18 we avoid the 018Y issue?

19 DDC [MR. SCHWARTZ]: I would think so yes, sir. I mean --
20 I don't presume that there's a force protection issue here,
21 first of all.

22 MJ [COL POHL]: Well, I ----

23 DDC [MR. SCHWARTZ]: But if the recording comes back to

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1 us, we would do as we always have to do, our analysis of
2 whether it can be released to a third party.

3 MJ [COL POHL]: But that one may be special, though.

4 DDC [MR. SCHWARTZ]: This one could be special.

5 MJ [COL POHL]: By that I mean, because you've asked for a
6 particular document ----

7 DDC [MR. SCHWARTZ]: Sure.

8 MJ [COL POHL]: ---- the government's main concern is it
9 goes to third parties. Again, I defer to the confinement
10 facility, but I have a tough time understanding why it's a
11 force protection issue if it's merely given back to the person
12 who said it to begin with. But again, I'm not going to go too
13 far down that road.

14 But be that as it may, you have a specific motion for
15 a specific piece of evidence and some paperwork, too, with the
16 understanding that if you got it back but you could not
17 disseminate it to a third party -- because the gravamen here,
18 and I think we're getting ahead of ourselves, is really the
19 communication to the family. That's really the issue
20 underneath here.

21 But what you're asking on this particular motion is
22 simply the thing back ----

23 DDC [MR. SCHWARTZ]: This motion doesn't ask that

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1 question.

2 MJ [COL POHL]: ---- with no intent or probably no
3 permission to disseminate to a third party at this time.

4 DDC [MR. SCHWARTZ]: That's right.

5 MJ [COL POHL]: Got it.

6 DDC [MR. SCHWARTZ]: I do want to comment on the notion
7 that the continuing obligation to go forward would be somehow
8 burdensome. First of all, this discovery request was
9 submitted on January 27th. Less than 24 hours later the
10 government responded, not only that they weren't going to
11 provide the discovery that we requested but that they didn't
12 have an obligation even to pursue it, even to review it. So
13 setting aside that relevance is the wrong standard, the
14 government can't possibly know whether this is actually
15 material to the preparation of the defense or not because they
16 haven't reviewed it.

17 Yes, now the discovery request reflects that we're
18 asking for everything from December 2014 to today; that's only
19 because it's taken us 20 months to get to this issue. On the
20 day that we filed the discovery request, it was a very
21 limited, narrow request for information that was developed
22 over the course of two months in 2014 and 2015. But that
23 doesn't -- and we shouldn't ignore the fact that the

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1 government does have an ongoing obligation to provide this
2 kind of information if it's material to the preparation of the
3 defense. And that's not because I'm making an argument that
4 somehow I need it, that's just what the rules say.

5 That's all I have.

6 MJ [COL POHL]: Thank you.

7 Major, anything further? Oh, okay.

8 LDC [MR. CONNELL]: May I be heard?

9 MJ [COL POHL]: Oh, okay. I thought this was a
10 Bin'Attash-only issue, but apparently it's not.

11 LDC [MR. CONNELL]: It is, the relief is a Bin'Attash --
12 but the reason that the government just expressed reaches a
13 new low in its interpretation for the rules of commission. So
14 I can't just let it go by.

15 701(c)(3) expresses the rule which is the rule in
16 every court in America, which is that all of a defendant's
17 statements have to be -- ordinarily have to be turned over to
18 the defendant. And that's true whether those are jailhouse
19 recordings that the ----

20 MJ [COL POHL]: All of the statements in possession of the
21 government?

22 LDC [MR. CONNELL]: All of the statements in possession of
23 the government. It's just the rule.

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1 And so, in fact, this Rule, 701(c)(3) refers us to
2 United States v. Yunis, 867 F.2d 617, a D.C. Circuit case out
3 of 1989 which is the limitation on production of classified
4 information. Now, Yunis itself was a statements case. You
5 recall the issue in Yunis was that there were a bunch of
6 overseas recorded statements by some sort and method and did
7 they have to turn over these generally irrelevant recordings
8 because it might reveal the source and method. There's no
9 source and method problem here. There's no classified problem
10 here.

11 What there is instead is the common rule that the
12 D.C. Circuit articulated in Yunis that the statements of a
13 defendant are almost always relevant to that defense. And
14 it's difficult to see how the prosecution could take the
15 position that it doesn't have to even review defendant's
16 statements that it spent all day yesterday claiming the right
17 to review for discovery.

18 So there's no way that this military commission could
19 adopt the view that they -- the government just articulated
20 of Rule 701(c)(3). Thank you.

21 MJ [COL POHL]: Major, do you want to respond to that
22 or ----

23 ATC [Maj DYKSTRA]: Nothing further, Your Honor.

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1 MJ [COL POHL]: Okay. Thank you. I'll take it under
2 advisement.

3 The commission is in recess for 15 minutes.

4 [The R.M.C. 803 session recessed at 1013, 1 June 2016.]

5 [END OF PAGE]

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