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1 [The R.M.C. 803 session was called to order at 1105, 21 July  
2 2016.]

3 MJ [COL POHL]: Mr. Bin'Attash, please be seated.

4 ACC [MR. BIN'ATTASH]: You can talk as you want, but no  
5 lawyer at my table.

6 MJ [COL POHL]: Please be seated.

7 ACC [MR. BIN'ATTASH]: We can sit and you have to move  
8 them first, but then I decide.

9 MJ [COL POHL]: No, you don't understand. I run this  
10 courtroom, not you. Please be seated.

11 ACC [MR. BIN'ATTASH]: But I cannot. Why you don't cause  
12 a problem? Why you let me fight with them? I don't fight  
13 with them to this point.

14 MJ [COL POHL]: Mr. Bin'Attash, if you don't be quiet and  
15 be seated, you will be escorted out of this courtroom.

16 ACC [MR. BIN'ATTASH]: No problem. I signed I don't come  
17 for this problem. I can leave.

18 MJ [COL POHL]: If you don't want to ----

19 ACC [MR. BIN'ATTASH]: Why I have to come today?

20 MJ [COL POHL]: Are you going to sit down and be quiet?

21 ACC [MR. BIN'ATTASH]: Why you bring me here?

22 MJ [COL POHL]: Are you going to sit down and be quiet?

23 If you don't sit down and be quiet, you will be escorted back

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1 to the holding cell.

2 ACC [MR. BIN'ATTASH]: I will leave back to my camp.

3 MJ [COL POHL]: Guards, escort him back to the holding  
4 cell. He has been warned.

5 Put that on the record.

6 [Mr. Bin'Attash was removed from the courtroom.]

7 MJ [COL POHL]: The commission is called to order. The  
8 commission will note for the record that prior to the  
9 commission being called to order, Mr. Bin'Attash refused to  
10 sit down, refused to be quiet, being warned a number of times  
11 that if he continued to disrupt the proceedings, he would be  
12 escorted back to his holding cell. Despite the warning,  
13 Mr. Bin'Attash chose to continue to be disruptive, and he was  
14 ordered back to his holding cell. That was done virtually one  
15 minute ago but prior to the commission being called to order.  
16 I directed the court reporters to put that session on the  
17 transcript.

18 That being said, Trial Counsel, any changes in  
19 the ----

20 CP [BG MARTINS]: Your Honor ----

21 MJ [COL POHL]: ---- counsel?

22 CP [BG MARTINS]: ---- all counsel are the same except for  
23 Major Dykstra, who is absent.

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1           Your Honor, I'd also like to say that these  
2 proceedings are being transmitted by closed-circuit television  
3 to the continental United States pursuant to your order, and I  
4 should have put that on the record yesterday. All of  
5 yesterday's sessions as well were similarly transmitted by  
6 closed-circuit television.

7           MJ [COL POHL]: Thank you.

8           Mr. Nevin, any changes.

9           LDC [MR. NEVIN]: No, sir.

10          MJ [COL POHL]: Ms. Bormann, any changes?

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

12          MJ [COL POHL]: Mr. Harrington?

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

14          MJ [COL POHL]: Mr. Connell?

15          LDC [MR. CONNELL]: No changes from the defense, Your  
16 Honor, but does trial counsel have additional personnel in the  
17 courtroom that they wish to put on the record?

18          CP [BG MARTINS]: Your Honor, I've named all of the  
19 counsel. I will mention LN1 Christopher Petrill is new to the  
20 courtroom.

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

22          Mr. Ruiz?

23          LDC [MR. RUIZ]: No changes, Judge.

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1 MJ [COL POHL]: I would note for the record that  
2 Mr. Mohammad is here and Mr. Binalshibh is here. And I will  
3 also note for the record, as I did earlier, that  
4 Mr. Bin'Attash was here briefly and due to his conduct was  
5 escorted back to the holding cell.

6 There are two detainees who are not here. Trial  
7 Counsel?

8 CP [BG MARTINS]: Major, if could you please move to the  
9 witness stand and raise your right hand for the oath.

10 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
11 was sworn, and testified as follows:

12 **DIRECT EXAMINATION**

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

14 Q. Major, are you the liaison between the Staff Judge  
15 Advocate's office and the camp where these individuals reside?

16 A. I am.

17 Q. All right. Did you have occasion to advise two of  
18 the detainees this morning of their right to be present?

19 A. I did.

20 Q. All right. Let's take 440, what's been marked as  
21 Appellate Exhibit 440, consisting of three pages. It's in  
22 reference to Mustafa al Hawsawi.

23 A. Okay.

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1 Q. What time did you advise him of his right to attend  
2 this morning?

3 A. Oh, I started to read the advisement in English at  
4 0601 hours. I read the entire English version, and he  
5 followed along with the Arabic version, and then I had the  
6 Arabic -- or I had the translator read the Arabic version to  
7 him.

8 Q. Did he execute the waiver for attending this morning?

9 A. He did. He actually filled out his name and the date  
10 and whatnot through the body of the Arabic document, and then  
11 he signed and dated the Arabic version of the advisement, and  
12 then I signed under him at 0603 hours.

13 Q. All right. You've done this many times before.

14 A. Yes.

15 Q. Do you believe that he understood his rights?

16 A. I do.

17 Q. And do you believe that he voluntarily waived his  
18 right to attend this morning?

19 A. I do.

20 Q. With respect to Ali Abdul Aziz Ali, that's 440A,  
21 consisting of two pages. What time did you advise him?

22 A. I just read the English version to Mr. Ali. I  
23 started reading that at 0607 hours.

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1 Q. Did he execute that waiver?

2 A. He did. He signed the document, and then I signed  
3 after him at 0609 hours.

4 Q. All right. Did you deviate in any way from what's  
5 contained on that document with either of these individuals?

6 A. I did not.

7 Q. Did you believe Mr. Ali understood his right to  
8 attend this morning?

9 A. I did. And he then advised that he may come to the  
10 afternoon session. He just wanted to be advised what time the  
11 afternoon session may begin.

12 TC [MR. SWANN]: All right. Thank you. I have nothing  
13 further.

14 MJ [COL POHL]: Any questions?

15 LDC [MR. CONNELL]: Your Honor, I don't have any  
16 questions. I do have our continuing objection to anonymous  
17 testimony without justification.

18 MJ [COL POHL]: Mr. Ruiz?

19 LDC [MR. RUIZ]: No questions.

20 MJ [COL POHL]: Dismissed.

21 WIT: Thanks, Judge.

22 [The witness withdrew from the courtroom.]

23 MJ [COL POHL]: Since this is the first time this has

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1 happened, I just want to make it clear that I'm speaking to  
2 the defense counsel and to the accused at this point. I know  
3 there's only two of them here. When they waive their presence  
4 to be here, if they change their mind, I'm not delaying the  
5 start of the commission. I gave Mr. Bin'Attash the benefit of  
6 the doubt this one time because, again, this has never come up  
7 before.

8           But if they tell the guard force they do not want to  
9 come and then they change their mind at 9:00 or whatever, we  
10 are starting as scheduled. If they come late, they come late,  
11 but I'm not letting the commission's schedule be dictated by a  
12 change of mind. Please convey that to the detainees who are  
13 not here. And of course, Mr. Mohammad and Mr. Binalshibh are  
14 here, but just understand that this is not a tolerable  
15 situation where a change of mind is going to dictate the  
16 commission's schedule.

17           LDC [MR. NEVIN]: Judge, Your Honor ----

18           MJ [COL POHL]: Yes.

19           LDC [MR. NEVIN]: ---- I want to ask the military  
20 commission, I understand that Mr. Bin'Attash drafted a  
21 document of some kind this morning in the nature of a waiver,  
22 by which I mean I believe there is a waiver form that the SJA  
23 uses and I believe that Mr. Bin'Attash filled that out. And I

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1 ask that that document be made a part of the record because  
2 this impacts all of these men, all of the defendants, and I  
3 think it's important for all of us to be able to understand  
4 what the sequence of events is and how the military commission  
5 is going to handle it. And I appreciate the military  
6 commission's remarks just now.

7 MJ [COL POHL]: Okay.

8 LDC [MR. NEVIN]: But to fully inform us on the situation,  
9 it would be useful to have that in the record. If it already  
10 is, my apologies.

11 MJ [COL POHL]: Now, hold. Ms. Bormann, do you want to be  
12 heard on this?

13 LDC [MS. BORMANN]: Yes, Judge. I was given a piece of  
14 paper earlier that I believe has now been withdrawn and no  
15 longer relevant for purposes of this hearing because  
16 Mr. Bin'Attash appeared in court.

17 MJ [COL POHL]: Okay. That being said, the piece of paper  
18 that you are referring to, I believe, is Mr. Bin'Attash's  
19 initial waiver, and there's some things in here he wanted to  
20 be read today by the SJA. I see no reason why not to include  
21 it in the record. It's -- if you give me a legal reason,  
22 Ms. Bormann ----

23 LDC [MS. BORMANN]: Because it's no longer relevant for

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1 purposes of waiver of appearance because he's -- he was  
2 present in court and waived his appearance personally.

3 MJ [COL POHL]: I understand that, but if it was a simple  
4 waiver, I might have a tendency to agree with you, but because  
5 it contains other information that may impact on things down  
6 the road, I don't agree with you. And therefore, it will be  
7 included as an exhibit, which is I think -- is it 440B? Okay.

8 General Martins, you stood up.

9 CP [BG MARTINS]: Your Honor, yes. I'd like to just put  
10 on the record for purposes of your order in the Appellate 037  
11 series related to presence of the accused that the accused,  
12 Mr. Bin'Attash, can hear these proceedings from the holding  
13 cell, so he's able to hear the proceedings and listen, and if  
14 he wants to come back in and will be appropriately respecting  
15 the decorum of the venue, that he would be able to come back  
16 in.

17 MJ [COL POHL]: Yes. And the normal course of business is  
18 when an accused has been removed from the courtroom for  
19 disruptive conduct, that the next session, which means this  
20 afternoon, he will be given an opportunity to come back and  
21 to -- and given an opportunity to participate if he wants to.  
22 If he doesn't want to, that's up to him, but that's -- he will  
23 be given that opportunity. Now, that's just the normal way we

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1 do these. Okay.

2 CP [BG MARTINS]: Your Honor, I would just like to flesh  
3 out a bit the sequence this morning because your statement to  
4 counsel and to the accused who are present is a little bit at  
5 odds with our understanding of what happened.

6 The accused wrote a statement on the exhibit that you  
7 were just asked to put into the record by counsel for  
8 Mr. Mohammad, and that led to the decision-making process  
9 about whether to bring him. So that document we also seek as  
10 being part of the record.

11 MJ [COL POHL]: Oh, yeah. Just to back up, and perhaps I  
12 paraphrased, rather, but given the fact that it's part of the  
13 record now is that Mr. Mohammad [sic] executed a voluntary --  
14 well, what's purported to be a voluntary waiver to be present.  
15 Of course the way it's worded, the question is really whether  
16 it's voluntary or not was going to have to be something we had  
17 to address. That's what he did initially and later on changed  
18 his mind and said I wanted to show up, and that precipitated  
19 the delay in the proceedings today.

20 CP [BG MARTINS]: Yes, Your Honor. That clarifies it.

21 MJ [COL POHL]: Mr. Connell?

22 LDC [MR. CONNELL]: Sir, you accidentally said Mohammad.  
23 I think you meant Bin'Attash.

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1 MJ [COL POHL]: I'm sorry. I did mean Bin'Attash. If I  
2 misspoke, I apologize.

3 LDC [MR. NEVIN]: I just wanted to say the reason I asked  
4 that be placed on the record, we were advised that  
5 Mr. Bin'Attash based on that was told that he had to come  
6 here, that he did not have the option to not come, and ----

7 MJ [COL POHL]: The record I have before me is that he was  
8 voluntarily here. If there's an issue about an FCE being done  
9 or something like that, that's somebody's -- I'm not going  
10 to -- as everybody knows, there's all sorts of information  
11 that flows on these transfers, okay? Nobody mentioned an FCE  
12 to me.

13 LDC [MS. BORMANN]: Judge, Mr. ----

14 MJ [COL POHL]: I think Ms. Bormann had already stated  
15 that she believed he had changed his mind and decided to come.

16 LDC [MS. BORMANN]: That's correct. Mr. Perry had  
17 conversations with him before court began, and there was no  
18 forcible cell extraction. I can assure the court.

19 ACC [MR. BINALSHIBH]: **[Speaking in English]** That's not  
20 right.

21 MJ [COL POHL]: Mr. Binalshibh and Mr. Mohammad, your  
22 attorneys talk.

23 ACC [MR. MOHAMMAD]: **[Speaking in English]** I want to talk

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1 to counsel. One minute.

2 LDC [MR. NEVIN]: Judge, can I have a minute?

3 MJ [COL POHL]: You may talk to him, fine. I have no  
4 problem. But they are not attorneys here and I don't want  
5 this continual -- well, not continual, the interruptions by  
6 their wanting to make their own record. You got me?

7 LDC [MR. NEVIN]: Say it again.

8 MJ [COL POHL]: I said, do you understand what I'm saying?

9 LDC [MR. NEVIN]: Yes, sir, I understand what you are  
10 saying, but if we could have a minute.

11 MJ [COL POHL]: You have a minute.

12 LDC [MS. BORMANN]: Judge, given what I just heard from  
13 Mr. Mohammad and Mr. Binalshibh, I would actually request that  
14 information as well, whether or not there was some sort of  
15 information conveyed to Mr. Bin'Attash that there might be a  
16 forced cell extraction. And I'm not aware of anything ----

17 MJ [COL POHL]: When we break for lunch, knock yourself  
18 out.

19 LDC [MS. BORMANN]: Okay.

20 MJ [COL POHL]: Because at the end of the day, he was  
21 here. Whether FCE or non-FCE, he was here, was disruptive,  
22 and was moved out.

23 LDC [MS. BORMANN]: That was my earlier position when I

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1 said that I didn't think that ----

2 MJ [COL POHL]: Yeah.

3 LDC [MS. BORMANN]: ---- the document was relevant. But  
4 now we have moved past that, and so now we're talking about  
5 forced cell extractions. I had been advised there was none  
6 used. But now, given what's been stated, the situation may  
7 have changed, so I'll be requesting that information from the  
8 government.

9 MJ [COL POHL]: Of course. I will note for the record  
10 that at the time of the movement, neither Mr. Mohammad nor  
11 Mr. Binalshibh were at the confinement facility.

12 LDC [MS. BORMANN]: I know.

13 MJ [COL POHL]: So whatever they say, I suspect where the  
14 information came from. But if you want to look through it  
15 during lunch and you think there's an issue I need to address,  
16 again, I will.

17 LDC [MS. BORMANN]: Thank you.

18 MJ [COL POHL]: Mr. Harrington?

19 LDC [MR. HARRINGTON]: Judge, my client advised me that  
20 Mr. Bin'Attash gave him other information other than what has  
21 been reflected here, but we'll look into it and we'll try to  
22 clarify it with the court, if it makes ----

23 MJ [COL POHL]: Okay.

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1 LDC [MR. HARRINGTON]: ---- a difference.

2 MJ [COL POHL]: If there's any reason to explore it. Got  
3 it.

4 [Pause.]

5 MJ [COL POHL]: Mr. Nevin, okay. You wanted an  
6 opportunity to do this, but we're not going into an  
7 evidentiary investigation, fact finding at this point. If  
8 there's an issue that needs to be addressed, look at it during  
9 the lunch period and we'll talk about it then. Because,  
10 again, whether he came through an FCE or not an FCE, I don't  
11 know if it makes any difference given the current state of  
12 where we're at, but if you certainly want to look into it, you  
13 want to talk to Mr. Mohammad or the SJA or anyone else at the  
14 lunch break, knock yourself out. I don't see any reason to  
15 delay, further delay, to explore this particular issue.

16 LDC [MR. NEVIN]: Okay. We would just say, Your Honor,  
17 that the issue is that apparently the nature of the waiver  
18 that Mr. Bin'Attash provided was considered to be inadequate  
19 in some way.

20 MJ [COL POHL]: Okay. Just to be clear, is that we've had  
21 this issue before ----

22 LDC [MR. NEVIN]: Yeah.

23 MJ [COL POHL]: ---- and if you look -- and you could read

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1 what he wrote a couple of different ways. You could read it  
2 as I don't like the judge's ruling, therefore, I'm not showing  
3 up. To me, that's a voluntary waiver. Or he says in there  
4 also it's involuntary. So you can read it a couple of ways.  
5 So if there's an issue of ambiguous waiver, okay, if it comes  
6 up when I'm here, as we've done it before, we'll talk about  
7 it, okay?

8           If I'm not here, if it's a decision made through the  
9 coordination of the SJA, I mean, I can't micromanage the  
10 prison ----

11           LDC [MR. NEVIN]: No.

12           MJ [COL POHL]: ---- if he says, I'm involuntary -- not  
13 coming in voluntary, how he gets to that door is not my  
14 concern. And by that I mean, that's an operational decision  
15 by the detention facility.

16           If there's a question whether the waiver is voluntary  
17 or involuntary, I would hope that it would be coordinated with  
18 the defense counsel ahead of time of the way ahead. But until  
19 I come in, I'm not going to sit in my office and make a  
20 decision of whether or not an FCE is warranted or not. I  
21 don't order the FCEs anyway. I'm just wondering whether the  
22 guy is going to be here.

23           LDC [MR. NEVIN]: Right.

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1 MJ [COL POHL]: That may be an issue of the way it was  
2 worded, does it amount to a voluntary waiver or an involuntary  
3 waiver, I would say it was ambiguous to a degree.

4 LDC [MR. NEVIN]: Yes. And the reason -- I recognize it's  
5 not my client, but the reason I ask is because it is important  
6 to our client and maybe to others as well to understand  
7 precisely the ground rules. And our understanding was that --  
8 that Mr. Bin'Attash was ordered to be here and that that was  
9 why he -- that was why he came.

10 MJ [COL POHL]: Well, it wasn't ordered by me, so I can't  
11 speak to what ----

12 LDC [MR. NEVIN]: It was not ordered by you?

13 MJ [COL POHL]: No.

14 LDC [MR. NEVIN]: I see.

15 MJ [COL POHL]: And I would not issue such an order  
16 ex parte, so ----

17 LDC [MR. NEVIN]: Yes, sir.

18 MJ [COL POHL]: If there's an issue that comes up where  
19 they want me to get involved, it would be with all of you  
20 present.

21 LDC [MR. NEVIN]: Yeah. Right. Well, we'll appreciate  
22 our opportunity to talk about it and make further record.

23 MJ [COL POHL]: Just, I mean, what -- and I don't want to

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1 beat this to death.

2 ACC [MR. MOHAMMAD]: [Speaking in English] We're being  
3 told the judge ordered that. Khallad had been told that judge  
4 ordered that he had to come.

5 MJ [COL POHL]: Mr. Mohammad, you do not have a speaking  
6 role.

7 Mr. Nevin, just to be clear, this is at the request  
8 of the defense, that the accused wanted to voluntarily waive  
9 their presence. It was over the government's objection. And  
10 so as I've said before, if there's an issue whether it's  
11 voluntary or not, they're just going to be coming. You know,  
12 I'm not going to start litigating these issues over and over  
13 again. The default is they will have to be here if we're  
14 going to quibble over what's voluntary and what's not  
15 voluntary. The form is very clear. The advice is very clear.

16 LDC [MR. NEVIN]: I ask only because there are two  
17 sidelines on this field, and we're trying to understand  
18 exactly where -- you know, how to move within them.

19 MJ [COL POHL]: Okay.

20 LDC [MR. NEVIN]: That's the reason for wanting you to  
21 clarify.

22 MJ [COL POHL]: I understand. I don't think I can make it  
23 any clearer than I have, so you have what I have. Okay.

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1           That being said, let's do -- we wanted to start with  
2 the 425 -- part of 425, and that was you, Mr. Nevin.

3           LDC [MR. NEVIN]: Your Honor, I asked for permission to  
4 address part of 425, which is a motion to recuse Your Honor  
5 and also the prosecution from participating in the case, but  
6 there's a part of this that can be excised out and dealt with  
7 separately, and that's what I'm asking the commission to do  
8 this morning, and that is the question of whether the military  
9 commission -- whether you should recuse yourself from  
10 consideration of the motion as distinct from the entirety of  
11 the motion itself.

12           And I think this begins with Rule 902 of the military  
13 commission rules. It's identical, as near as I can tell, to  
14 the Rule for Court-Martials -- or Courts-Martial, so I take it  
15 the military commission is familiar with it, probably more  
16 intimately than I am. But 902(a) states the general  
17 proposition that a military judge should disqualify himself in  
18 any proceeding in which his impartiality might reasonably be  
19 questioned. And that is followed -- that's subsection (a).  
20 That's followed in subsection (b) by a series of specific  
21 statements about when the military judge shall disqualify  
22 himself.

23           And those are the two situations that I will submit

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1 to you that are appropriate here, are where the military judge  
2 has personal knowledge of disputed evidentiary facts  
3 concerning the proceedings, number 1, and in number 5, where  
4 the military judge is known to have an interest that could be  
5 substantially affected by the outcome of the proceedings.  
6 That's actually 5(B).

7 I will point out that the rule goes on in 902,  
8 subsection (c), to provide that a proceeding includes  
9 pretrial, trial, post-trial, appellate review or other stages  
10 of the litigation. And I believe it's common, in my  
11 experience in civilian practice, for judges to step aside on a  
12 particular motion, to have other judges appointed for specific  
13 purposes, such as ruling on money requests, to refer matters  
14 to special masters, this kind of thing. And I am here today  
15 asking you to do that with respect to resolution of 425.

16 Just finally, subsection (d)(2) provides that each  
17 party shall be permitted to question the military judge. I  
18 believe what we said in our motion, and I mention it again  
19 now, is that we ask that our opportunity to question you occur  
20 after you have resolved the issue that I'm presenting to you  
21 today.

22 And I will say, Your Honor, I think these  
23 positions -- or these provisions of law are fairly clear and

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1 have been touched on in many -- as it happens, two days ago,  
2 the Court of Appeals for the Armed Forces decided United  
3 States v. Witt and touched on a number of these issues. In  
4 particular, they spoke of the requirement that -- sort of the  
5 idea that there is this general rule that cannot be -- that  
6 there's so many ways in which these kinds of issues present  
7 themselves that it's impossible to formulate one single rule  
8 that would apply in all situations.

9           Of course, we also have the decision of the United  
10 States Supreme Court in Williams v. Pennsylvania, and we did  
11 supplement 425 with this opinion to call it to the attention  
12 of the military commission. And the one thing that Williams  
13 adds, at least the one thing that I will mention right at this  
14 point, is that these kinds of issues -- in these kinds of  
15 issues, we're dealing with structural error.

16           And as the court said there, this kind of error is  
17 not amenable to harmless error review, and that was true even  
18 though the judge in that case was one member of a multi-member  
19 court, and the decision of the multi-member court was  
20 unanimous. The Supreme Court refused to conduct a harmless  
21 error analysis.

22           I think the next part of this that I want to urge on  
23 the military commission is that we are dealing here with

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1 possibly the most -- certainly among the most important  
2 evidence in the case, and we have emphasized this again and  
3 again to the military commission, the capital nature of this  
4 case, the fact that the -- Mr. Mohammad's torture at the hands  
5 of the United States Government, even though it occurs after  
6 the events of September 11, takes on huge significance with  
7 respect to the question whether he should be executed,  
8 assuming that he's found guilty of any of the capital charges.

9           And we have in so many motions -- and I believe the  
10 government pointed out that there were something on the order  
11 of 75 motions that had been litigated in this specific series,  
12 but I'm sure it runs into the multiple hundreds if you take  
13 all of the litigation that we've presented to you around the  
14 question of evidence related to Mr. Mohammad's torture and our  
15 desire to see it.

16           And I have specifically mentioned to you -- I know I  
17 have personally, and I believe other lawyers have as well,  
18 have mentioned to you on many occasions that our wish is to  
19 reconstruct as much as possible, and that we have a right to  
20 do this in order to provide the most powerful mitigation  
21 evidence possible, an obligation to reconstruct, as much as  
22 possible, all of the circumstances of Mr. Mohammad's torture.  
23 And our discovery requests and our motions have reflected

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1 that, and we are right here in the area where -- of greatest  
2 concern to us. And I know the military commission is aware of  
3 that.

4           So the situation, as we understand it, as we stand  
5 here now, is, first, that the military commission approved a  
6 substitution of evidence without having seen the original  
7 evidence. And I will be the first to admit to you that I have  
8 not had an opportunity to ask you directly whether that's true  
9 or not. I deduce it from the pleadings and from the -- from  
10 remarks that have been made.

11           And maybe I'm wrong about that, but if that's true,  
12 then I submit that in doing so the military commission -- and  
13 in finding that the substitution in question would provide  
14 substantially the same ability to make a defense, as would  
15 discovery of our access to the specified -- the specific  
16 classified information itself -- that's language, of course,  
17 from 949p-4 subsection (b)(3) -- that if that's true, that the  
18 military commission has allowed some other person to  
19 substitute him or herself for the military commission's own  
20 judgment on that question. The only way to know whether a  
21 substitution accurately -- sufficiently accurately represents  
22 the original is to see the original.

23           Second, the military commission issued an order,

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1 which I submit any fair-minded person would understand meant  
2 that we would be notified before a change in the status of the  
3 original evidence. I've called it a preservation order. I've  
4 called it a do not destroy order. You can give it any name  
5 you want, but that's what that order says. And it says that  
6 we will be given -- it says to any fair-minded person, anyway,  
7 that we will be given notice before anything about the status  
8 of that evidence, this evidence that I've described as being  
9 among the most important in the case -- that we will be  
10 advised before anything happens to that evidence.

11 Now, I will say -- and I acknowledge that the  
12 government tells me I'm wrong about that. The government says  
13 that that -- when you read that order closely, that that order  
14 doesn't -- it just says that the status quo will be maintained  
15 pending further order of the military commission. It doesn't  
16 say we will be given notice of that order. And they say any  
17 other understanding of the letter and spirit -- and I'm  
18 reading from 425C at page 7, this is an unclassified pleading,  
19 any other understanding of the letter and spirit of the  
20 military judge's order was not reasonable in light of the  
21 filings or the rulings. While the defense may have understood  
22 the spirit of the order in a way that comported with their own  
23 litigation wishes, that clearly was neither the military

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1 judge's nor the prosecution's understanding of the litigation,  
2 as the military judge's order authorizing the preservation  
3 and/or substitution of the information makes crystal clear.

4           Now, I recognize that the government also uses terms  
5 like regrettable and attributes all of this to simple  
6 miscommunication. That's at page 9 of 425C. But this same  
7 remark about this being our imagination, that this being our  
8 assumption about the meaning of the motion or -- sorry, the  
9 meaning of an order, also appears in this -- in another  
10 pleading that has been filed in this matter.

11           So I take it the government is saying something that  
12 does not appear to me on the face of the pleading, and to that  
13 extent, we know that the next thing that happened was that the  
14 government met with you in secret and secured an order from  
15 you to permit the destruction or the decommissioning of this  
16 evidence.

17           I mean, I'll be the first to acknowledge that the  
18 Military Commissions Act and if we were in federal court, CIPA  
19 would have permitted them to have an ex parte meeting of that  
20 sort, but it is nonetheless a secret meeting, one from which  
21 we were excluded, and one -- and of course, I recognize it  
22 could have been a presentation on -- a written presentation as  
23 well. But in any event, whatever form it took was one from

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1 which we were excluded and as to which we weren't allowed to  
2 be heard.

3 Now, the result of all of that was that an order was  
4 entered allowing the decommission or the destruction of the  
5 evidence, and by some sequence of events or nonevents, we were  
6 not notified of that. And the order, of course, says that we  
7 will be notified, but we weren't.

8 On the contrary, the do not distort -- the do not  
9 destroy order, the preservation order, remained in place so  
10 that we were misled by its presence on the docket. And while  
11 we acted under the assumption that we were being protected, or  
12 while we refrained from acting on that assumption, this  
13 important evidence I've referred to was destroyed and is gone  
14 now.

15 And this happened in one of several ways. And it --  
16 to my mind, it doesn't make any difference which one of those  
17 ways is actually the mechanism by which this occurred. It may  
18 be just that the order did not specifically state that we  
19 would be notified before the destruction or decommissioning  
20 took place. And the order doesn't say that.

21 Now, I notice that the government also says that they  
22 drafted, at least drafted the -- made the initial draft of  
23 that order for you to sign. That may be part of the problem,

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1 I don't know. But in any event, the order says what it says,  
2 and it does not specifically say that we would be given notice  
3 before the destruction occurs.

4 The order also doesn't state, for example, a time  
5 within which the notice will be given, and we know now in  
6 hindsight that during this period of time immediately after  
7 this order went on the docket sheet, and there was a  
8 placeholder put there, that Mr. Connell made inquiries of the  
9 trial judiciary staff about what that order was and what it  
10 meant, and he made a number of inquiries in that respect.

11 And this brings to mind the discussion we had a few  
12 days ago about 414 and the fact that a placeholder was put on  
13 the docket sheet, on the website. Many of us didn't receive a  
14 copy of the placeholder, but nonetheless it was there, and I  
15 think the military commission made the point that we should  
16 have been aware of that, and I believe you're right.

17 MJ [COL POHL]: Mr. Nevin, let's keep -- that came up in a  
18 discussion at an 802 discussing about e-mail procedures. So  
19 if you want to refer to it, you can, but I'm just simply  
20 saying that's not part of the record of anything like this.  
21 We simply -- that discussion was where I was simply discussing  
22 with counsel about -- to clear up e-mail procedures. When you  
23 say referred to a previous discussion, I just want to make it

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1 clear it was not an in-court session, it was simply an 802.

2 We were talking administratively of how to process e-mail.

3 LDC [MS. BORMANN]: Judge ----

4 LDC [MR. NEVIN]: My recollection is that we brought it up  
5 in -- that it came up briefly in open court, and I can ----

6 MJ [COL POHL]: When did we do that?

7 LDC [MS. BORMANN]: I'm sorry. I was trying to find a  
8 convenient break. I didn't mean to ruin the mojo. I was  
9 asking if Major Seeger can excuse himself momentarily.

10 MJ [COL POHL]: Yes, he can.

11 I don't recall discussing it yesterday. And the only  
12 time I recall discussing it -- because this came up last week  
13 when I was in Washington about the notice, and I thought we  
14 discussed it only at the 802. But your point, it's not noted,  
15 I just wanted to make the record clear that I don't think that  
16 discussion about the 414, the placeholder, is anywhere part of  
17 any type of record, unless my recollection ----

18 Trial Counsel, is that your recollection of the  
19 events here?

20 TC [MR. SWANN]: I'm sorry, sir, that is my recollection.

21 MJ [COL POHL]: Okay. But -- just a side point, just to  
22 clarify the record. But go ahead, continue, Mr. Nevin.

23 LDC [MR. NEVIN]: Right, Your Honor. And I mean -- I

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1 guess my point is only that I know that Mr. Connell made  
2 inquiries based on the presence of something on the website or  
3 on the filings inventory, and inquiries that would or should  
4 have brought to the military commission's attention that  
5 notice had not been given to us.

6           And then after that, the evidence is nonetheless  
7 destroyed. And it is after that, something on the order of  
8 14 months after that, that we are finally given notice that  
9 all of this has taken place in comments in a closed session in  
10 December and then finally with written pleadings in February  
11 of 2016.

12           So then the next part of this is that -- is indeed  
13 this time, and I understand it becomes -- it comes back to the  
14 military commission's desk in January of 2016, and that in  
15 February of 2016, shortly before our hearings in February, you  
16 issue an order, and we finally are provided a copy of this, a  
17 redacted copy of this order.

18           And in short, I know that you -- that you did learn  
19 at some point that we had not been given notice and that at  
20 that point, and before giving us an opportunity to be heard,  
21 you entered a ruling, and you included two things in that  
22 ruling. One was you decided that a summary of the  
23 substitution would be adequate under 949p-4, and the second is

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1 you decided that the government had fulfilled all of their  
2 notice obligations by telling us 20 months after the fact or  
3 ten months after the fact, depending on which occasion of  
4 giving notice is referred to, but long after the time of the  
5 destruction.

6           And I understand on that last score that -- I assume  
7 you were asked to make such a finding. I don't know. I  
8 gather possibly the government -- drafted was the original  
9 drafter or perhaps the only drafter of the order, and I know,  
10 however, that we were not given an opportunity to be heard on  
11 that question.

12           And I submit to you that at that point you had an  
13 interest -- and to quote from 902, you had an interest that  
14 could be substantially affected by the outcome of the  
15 proceedings, referring to 902(b)(5)(B), when you're ruling on  
16 that motion at that point.

17           And this is -- and I mean, obviously, I think also at  
18 that point under 902(b)(1) you had knowledge of disputed  
19 facts, personal knowledge of disputed facts. And I think both  
20 of those considerations should have required you to step aside  
21 from that, or at least make that an openly litigated matter at  
22 that point as opposed to doing it in secret.

23           And what I mean is if you decide at that point that

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1 that summary, the summary that you were asked to rule on at  
2 that point, is not adequate, there's no remedy anymore, in  
3 part because your order was not served on the parties and the  
4 destruction occurred without us having an opportunity to  
5 protect our rights and to exhaust all of our remedies.

6           And if you rule at that point that that substitution  
7 is not actually valid, then -- and, you know, there's  
8 reference to it being the summary of a substitution, the  
9 summary of a substitution of original evidence, but there's no  
10 such thing as a summary of a substitution. 949p-4 only speaks  
11 of three categories of material that can be provided in lieu  
12 of access to the original evidence.

13           When you ruled in January or February of 2016 on the  
14 adequacy of the summary, your ruling -- you're making a  
15 comparison between it and the original evidence. Now, maybe  
16 you saw the original evidence to begin with, but my point is,  
17 if you now conclude it's not adequate, there's no -- we're no  
18 longer in a position to do anything about that.

19           And the same is true with respect to the finding that  
20 their notice -- this notice being given 20 months late is  
21 fine, completely satisfies all of the government's obligations  
22 to give notice, and that's a matter that we're -- that we  
23 haven't been heard on and one that's made based on a record or

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1 based on knowledge that's not provided to us.

2           So my point is that because of this, we go back to  
3 the proposition under these rules that we have lost a valid  
4 and important evidentiary matter, a matter of interest to us,  
5 in violation of Mr. Mohammad's due process rights and also in  
6 violation of our right to access to the courts. And of  
7 course, also in the context of this case, in violation of the  
8 Eighth Amendment to the United States Constitution. Because  
9 we have -- because we weren't aware of the destruction of the  
10 evidence, we haven't sought an appellate remedy or an  
11 extraordinary writ, a remedy of that sort, that would allow us  
12 to stop the destruction before it takes place. And now, of  
13 course, at this point, it's too late.

14           I will say, Your Honor, I went back -- I know you  
15 were presented with a similar motion during the Abu Ghraib  
16 cases, and I tried to put my hands on the way -- I tried to  
17 understand the way that you dealt with that situation then,  
18 and the case was United States v. Davis. And you made  
19 remarks, and actually I think they were pretty prescient 15 or  
20 16 years later. The defendant moved to have Abu Ghraib  
21 preserved as a crime scene, and you said to the prosecution  
22 why shouldn't I do that?

23           And the prosecutor said, well, I understand your

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1 concern. Let me try to work this through channels.

2           And you said -- you said to the captain, who was the  
3 prosecutor, what happens if you work through your channels and  
4 they send the engineers out tomorrow and blow it up? Then  
5 what happens? Then you say, well, there's no court order  
6 preventing that. What you're telling me is you're going to  
7 work through your channels and preserve the prison.

8           And he says that's correct.

9           And you said since that's going to happen anyway, why  
10 don't I just order it to be preserved?

11           And I see you in that anticipating that the  
12 government, for whatever reason -- for whatever reason, may  
13 decide that it's in their interest to destroy the evidence,  
14 but it's -- that it's necessary to have a specific order that  
15 prohibits that. So if it is indeed the situation that the  
16 military commission has issued an order that was never  
17 intended to give us notice, then we have -- honestly, I can't  
18 believe that that's the case, but if that's the case, then  
19 we've been deliberately misled. And if it's just worked out  
20 that way because the government drafted the order and the  
21 military commission simply signed it, then the net effect of  
22 it is that we have been misled.

23           MJ [COL POHL]: Mr. Connell, you've said that a couple of

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1 times. I just want to make this clear ----

2 LDC [MR. NEVIN]: Well, I'm Mr. Nevin.

3 MJ [COL POHL]: Mr. Nevin, I'm sorry. I'm sorry. You  
4 referred to Mr. Connell.

5 LDC [MR. NEVIN]: Not that I don't benefit by the ----

6 MJ [COL POHL]: I apologize.

7 As a standard practice, both sides submit me orders  
8 to sign. If you're implying that I don't read them and simply  
9 sign them, I'm just telling you that is not true, and I'm not  
10 aware of any judge who knows what he or she is doing that  
11 would do that. Both sides provide orders. They may be the  
12 starting point, they may be the ending point, but at least for  
13 this judge, none are simply signed because the government  
14 hands them to me or the defense hands them to me.

15 Go ahead.

16 LDC [MR. NEVIN]: Okay. And I appreciate that. And as I  
17 said before, I don't know. I don't understand the process.  
18 And I see that the government drafted it, and I know it's  
19 common practice in a case like that, a party acts essentially  
20 as the scrivener and provides a first draft of something, and  
21 the military commission changes it.

22 But I go back to what I said before, if the  
23 prosecution's right and there was never any intention for us

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1 to be given advance notice, then that was -- if that was the  
2 military commission's intention as opposed to a simple error  
3 that arose from the process of signing and drafting and  
4 passing proposed orders back and forth, that's a serious --  
5 that's a serious situation.

6           And I think it connects directly to the point I was  
7 making that at that moment, when you are now considering this  
8 in January and in February of 2016, at that moment you have a  
9 personal stake in it. And the stake is that either there's  
10 been an intentional misleading of us or there's been an  
11 inadvertent one as a result of imprecise drafting or a lack of  
12 communication within the trial judiciary or whatever it is.  
13 But either way, now you either personally or as the  
14 representative of the trial judiciary or as someone  
15 supervising the prosecution in the course of -- in the course  
16 of dealing with them in ex parte sessions and taking actions  
17 of that sort, you now have a personal interest in this, and I  
18 think that is the time for a different approach to be taken,  
19 now -- a different approach than was taken.

20           I will say that the prosecutors, the government,  
21 responded to our motion approximately as I expected they  
22 would. They called it scorched earth and accused us of  
23 maligning your reputation.

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1 MJ [COL POHL]: Are we getting to the merits of the motion  
2 now? It's kind of hard to -- I guess, to ----

3 LDC [MR. NEVIN]: It's hard to -- it's hard to because  
4 this goes directly -- what I'm about to say goes directly to  
5 the question of whether you should step aside from hearing the  
6 motion.

7 MJ [COL POHL]: Well, do you want to argue the whole  
8 unclassified part of the motion now?

9 LDC [MR. NEVIN]: Well, I can argue the entirety of the  
10 motion that you not hear the motion ----

11 MJ [COL POHL]: I got that part, yeah.

12 LDC [MR. NEVIN]: ---- without being in a closed session.

13 MJ [COL POHL]: All right. Okay.

14 LDC [MR. NEVIN]: That's what I'm doing now.

15 MJ [COL POHL]: Okay. But what I'm asking you, though, is  
16 that -- well, here, we'll just -- we set up a  
17 do-this-small-bite process. Let's just follow that, okay?

18 LDC [MR. NEVIN]: Okay.

19 MJ [COL POHL]: So we'll just talk about the part that's  
20 relevant to have another judge hear the motion itself.

21 LDC [MR. NEVIN]: Yeah. And here's my point about this.  
22 The prosecution, as I said, calls this scorched earth and  
23 accuses us of maligning your reputation and their reputation

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1 and manufacturing nonsense and uses terms like "spewing" and  
2 so on. And I think the most important part of that is that --  
3 is this quote from 425C at page 5, "seeking to batter the  
4 reputation of the military judge who served his country  
5 honorably for more than 35 years."

6 And, you know, this -- in one sense, I want to say  
7 this motion doesn't have anything to do with that, by which I  
8 mean this doesn't make any difference whether this is your  
9 first case or whether it's your last case or it's your one  
10 thousandth case. We deal with what we have.

11 It also doesn't have anything to do with the number  
12 of victims of the attacks of September 11 or the  
13 outrageousness of those attacks which the prosecution invokes  
14 in their motion. And it's true, it doesn't have anything to  
15 do with either of those things, but I know the government  
16 leads with that for a reason. It's a reason that also bears  
17 on whether or not you should disqualify yourself from hearing  
18 the motion, because -- and, I mean, you know, one can say it's  
19 avoidance behavior. I would rather -- I would rather defend  
20 your reputation and service to the country any day than defend  
21 this motion, but it bears directly on the question here.

22 The Supreme Court -- and we asked for permission to  
23 supplement the record with the U.S. Supreme Court's decision

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1 in Williams v. Pennsylvania from June 9 of 2016, and one of  
2 the points that the Supreme Court made there was that a judge  
3 in -- one of the bases for their decisions was that -- and the  
4 judge in that case, a different factual situation, but the  
5 judge in that case had made decisions previously and then in  
6 another -- in another ----

7 MJ [COL POHL]: What was his capacity in the previous  
8 decisions? What was his job?

9 LDC [MR. NEVIN]: Well, he had been a prosecutor -- he had  
10 been the prosecutor during the time that Mr. ----

11 MJ [COL POHL]: So it wasn't a previous decision as a  
12 judge, it was a previous decision as a prosecutor?

13 LDC [MR. NEVIN]: Yeah.

14 MJ [COL POHL]: Go ahead.

15 LDC [MR. NEVIN]: But what the Supreme Court says is it  
16 cautions that the judge would be so psychologically wedded to  
17 his or her previous position as a prosecutor in the Williams  
18 case that the judge would consciously or unconsciously avoid  
19 the appearance of having erred or having changed position.  
20 And they go -- and that's quoting Withrow v. Larkin, that last  
21 language that I read. Williams is quoting Withrow.

22 And they go on to say it would be difficult for a  
23 judge in his position not to view the lower court's findings

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1 as a criticism of his former office and to some extent of his  
2 own leadership and supervision as district attorney, because  
3 the handling prosecutor had come to him when he was the  
4 prosecutor. So they're saying it would be hard for you not to  
5 see this, Judge -- the judge in that case -- it would be hard  
6 for you not to see this as a personal affront to you, as a  
7 personal attack on you. And as potentially as a criticism of  
8 your behavior at an earlier time.

9           And so when the government says that this impeaches  
10 your entire career and so on, even though I don't really think  
11 that's true at all and it's not intended that way when they  
12 say that, they're putting their finger on exactly the problem  
13 that I'm here talking about today.

14           It would be impossible for you, honestly, and I --  
15 you know, there's a part of me that would like to say how do  
16 you feel right now, because I can't imagine that it's  
17 pleasant. It's not particularly pleasant for me to be here  
18 having this discussion with you and I'm sure it's not pleasant  
19 for you. But it is necessary under the state of this record  
20 for it to be presented and presented to you in the first  
21 instance and put in -- and offered to you. But I can't  
22 imagine that it's pleasant because it calls your prior actions  
23 into question. That's exactly ----

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1 MJ [COL POHL]: Mr. Nevin, I take every motion filed in  
2 good faith. And the day that my decisions are not being  
3 criticized by at least 50 percent of the participants is the  
4 day I probably won't be a judge anymore, so I take none of  
5 this personally.

6 LDC [MR. NEVIN]: I appreciate that, Your Honor, and --  
7 but still, a motion to disqualify a judge, as we all know, is  
8 not something that happens very often, and it has a quality of  
9 being outside the norm.

10 And I'm not saying every time somebody moves to  
11 disqualify you you have to bring in another judge. I'm not  
12 saying that. Because some motions are so -- obviously going  
13 to be so frivolous that they don't -- that there is no reason  
14 even to entertain them. But I respectfully submit to you this  
15 is not such a situation. We have lost the ability to put our  
16 hands on some of the most important evidence in this case  
17 without being able to exhaust our remedies on the proposition  
18 that we were entitled to.

19 And it's extremely serious, and it -- because in  
20 part, because of the government's decision to have this -- to  
21 speak in terms of this implicating your service to the country  
22 and your career -- and in part because of the very nature of  
23 the motion, as I've said, I believe it's appropriate for you

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1 to recuse yourself from ruling on the motion itself.

2 Now, lastly, I just want to call three instances to  
3 your attention of other judges approaching similar problems  
4 and other public officials, let's say, approaching similar  
5 problems.

6 It was very prominent that Attorney General Lynch  
7 recused herself from the decision about Ms. Clinton's e-mails  
8 after Mr. Clinton, former President Clinton, took a trip to  
9 her airplane on the tarmac somewhere. And what it says is  
10 when there's the appearance of impropriety, when a reasonable  
11 person, in the words of -- in the words of the United States  
12 Supreme Court, when a reasonable person would hesitate to be  
13 confident in the decision-making process, it's appropriate for  
14 the judge to step aside.

15 We also quoted to you, Judge O'Toole's eloquent  
16 remarks in the Bahlul appeal. He's saying don't think I'm  
17 rely required, I'm not really implicated, there's really no  
18 reason, but look, we're here in a system that is new, that  
19 presumably will be here for a long time. We're making this  
20 all up as we go along, in other words, the way we treat it,  
21 and I am not going to do anything that would tend to call the  
22 sufficiency of our -- of the nature of these proceedings into  
23 question. I'm going to recuse myself.

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1           And finally, there's the Witt decision which was  
2 decided the day before yesterday by the United States Court  
3 of -- U.S. Court of Appeals for the Armed Forces, and then the  
4 judges there are saying, and it's -- again, it's a different  
5 situation, but they are expressing this general idea. These  
6 were judges who recused themselves from a case because they  
7 were new to the court at the time that it was argued and that  
8 it first was presented, not because they had any problem with  
9 the -- not because they had any conflict of interest or  
10 anything of the sort, but only because they were new and  
11 weren't prepared to argue it -- weren't prepared to deal with  
12 the arguments.

13           Later, when the case comes back again, they sit on  
14 the case, and the court is saying no, that's not -- everything  
15 has to be done punctiliously and with the highest degree of  
16 detail because the world is watching and because faith in  
17 these institutions is paramount, and it only comes from super  
18 attention to the detail of how these matters are structured.

19           So thank you for hearing my argument, and for all of  
20 those reasons, I ask that you recuse yourself from ruling on  
21 the motion to disqualify you. Thanks, Your Honor.

22           MJ [COL POHL]: Thank you, Mr. Nevin.

23           Ms. Bormann, do you wish to be heard about this part

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1 of 425?

2 LDC [MS. BORMANN]: Briefly. We adopt the arguments of  
3 Mr. Nevin and he put them very succinctly. I can count on one  
4 hand the number of motions to disqualify a judge from hearing  
5 a particular issue -- not necessarily the whole case, but a  
6 particular issue -- on one hand. It's a very rare  
7 circumstance.

8 And I just asked Major Seeger to pull for me the  
9 Judicial Canon of Ethics. It's the Judicial Code for the Army  
10 and Appellate Judges issued 16 May 2008, I think is the  
11 version that I have. I think the really important part here  
12 is regardless, as Mr. Nevin said, the evidence at issue here  
13 is essential to the defense.

14 So there's a justiciable issue whether that happened.  
15 And how that happened is an issue to be determined later and  
16 one that the defense has been barred from getting a peek at.  
17 So we can't really speak to it. So it needs to be fleshed out  
18 in some way to maintain the integrity of the system.

19 The question is, who should be hearing that fleshing  
20 out to maintain the integrity of the system. And the person  
21 who was part of the destruction or -- let's just use that  
22 word -- of the evidence probably is not the best person to sit  
23 in judgment of that.

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1           The Canon 1 of the Judicial Canons you're bound by  
2 says the judge shall uphold and promote the independence,  
3 integrity, and impartiality of the judiciary and shall avoid  
4 impropriety and, most especially, that's my addition here, the  
5 appearance of impropriety. The appearance of impropriety bars  
6 a judge from hearing a motion to disqualify himself unless  
7 it's patently frivolous. That's why in the five times in my  
8 life I've had to do this, each time the judge has shipped out  
9 the evidentiary hearing on the motion to disqualify to a  
10 neutral arbiter of the facts.

11           So I would ask Your Honor, without making any comment  
12 on the underlying situation, because I frankly don't know what  
13 happened, that Your Honor avoid the appearance of impropriety  
14 and allow another judge, assign another judge to hear the  
15 motion, the substantive motion itself because that's what  
16 justice requires.

17           MJ [COL POHL]: Thank you, Ms. Bormann.

18           Mr. Harrington, do you wish to be heard?

19           LDC [MR. HARRINGTON]: Judge, I think one of the threshold  
20 problems in terms of granting this particular part of the  
21 motion is that it's the implication that it's an admission  
22 that there is some wrongdoing. And if it were a clear-cut  
23 factual pattern here, I don't think that we would be having

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1 this argument or this motion would have been brought.

2 But we have a situation where at best, I think, the  
3 facts here are unfortunate in the way that this transgressed,  
4 and, at worst, there's a bit of a smell or a bit of an odor to  
5 it. And it may be that the odor can be put out by a hearing  
6 being conducted or by further argument being done, but that  
7 it's best for you and for everyone to have somebody else do  
8 it.

9 We heard -- we see in the response from the  
10 government this attack on the defense for this motion and this  
11 expression of indignity about it, which I find kind of  
12 indignant in a capital case that the government has fought so  
13 hard to keep this evidence from us and put barrier after  
14 barrier after barrier in front of us performing the obligation  
15 that we have, now to say that we should not litigate an issue  
16 like this. But that -- should you recuse yourself from this  
17 particular decision, and a decision is made that nothing was  
18 wrong, then the issue is dead. The issue is over. There's no  
19 appeal. There's not anything else. And it ----

20 MJ [COL POHL]: Why would it be over? If another judge  
21 came in and ruled that nothing -- that the same fact pattern,  
22 same thing, and he says, no, it was fine, why is the issue  
23 over? Why isn't it -- why wouldn't the issue just be

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1 preserved for appellate review for another person to check the  
2 work of that judge?

3 LDC [MR. HARRINGTON]: I was imprecise when I spoke. The  
4 issue of deciding whether it was over when you decided.

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

6 LDC [MR. HARRINGTON]: Because that's an appellate issue  
7 also, and depending on how close the factual issue is here and  
8 what determination is made, you do away with a problem that  
9 does not have to exist. And for the benefit of these  
10 commissions and the benefit of everybody, without casting  
11 personal aspersions on anyone, that's just -- it's better for  
12 this untried system that we have. Thank you.

13 MJ [COL POHL]: Thank you, Mr. Harrington.

14 Mr. Connell, do you want to be heard on this  
15 motion -- on this part of the motion?

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

17 Sir, our position is found in AE 425E. That pleading  
18 is marked classified, and I have three points that I would  
19 like to make in this forum.

20 The first one is I do not think that anything about  
21 this motion is any longer classified. I believe the  
22 government has declassified it. In all 505(h) motions since  
23 fall of 2012, we have taken the position that the facts

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1 underlying this issue are not classified. We -- the military  
2 commission may recall I filed an appeal with the relevant OCA  
3 which was denied on the basis that the issue was still in  
4 litigation. The facts underlying AE 425 are no longer  
5 classified after the government's pleadings.

6 In AE 425C at page 2, this is the government's  
7 pleading, the government writes, "On 6 June 2014, the trial  
8 judiciary sent all parties an unclassified placeholder for an  
9 ex parte in camera classified order in AE 051B and AE 052EE."

10 AE 051 and AE 052 were the prosecution filings in  
11 which the prosecution requested an order allowing for the  
12 preservation and the substitution of the information at issue.  
13 The linkage of 051 and 052 to this issue is no longer  
14 classified.

15 Most recently, on 8 July 2014 -- that's 2016, excuse  
16 me -- the government filed AE 425J, a government notice of a  
17 filing of an exhibit relevant to the AE 425 motion series. In  
18 its notice, the government states, "The attached exhibit is  
19 filed in support of the AE 425 motion series and is relevant  
20 to the issues cited therein." Among many other explanations,  
21 I'll give just one segment of the government's Attachment B to  
22 the AE 425J, which I note was premarked UNCLASSIFIED FOR  
23 PUBLIC RELEASE.

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1           From page 3 of Attachment B, as set forth above, the  
2 United States Government seeks to redact an overseas detention  
3 and interrogation facility where one or more of the  
4 petitioners were detained. As a substitute for preservation  
5 of the physical facility of site A, the government proposes to  
6 create a redacted digital recording of the areas of the  
7 facility to which the detainees had access and preserve  
8 redacted materials and equipment related to the detention  
9 program. Looking at who the petitioners are on this  
10 particular document, they include, as the lead petitioner,  
11 Ramzi Binalshibh and, as the fifth petitioner, Ammar  
12 al Baluchi. The -- there is nothing remaining that is  
13 classified in this series of issues -- in this series.

14           The one other point that I wish to make about the  
15 classification that I specifically part company with one  
16 comment of Mr. Mohammad's counsel in which he said that in a  
17 civilian court CIPA would allow secret meetings between the  
18 prosecution and the judge. That is the rule in the Ninth  
19 Circuit. It is our position that that is not the rule in the  
20 D.C. Circuit.

21           So that brings us to the portion which is being  
22 argued today. I want to be clear. I share the shock at the  
23 events which have transpired here. I did not want to believe

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1 them. I do not want to believe them now because they are  
2 heartbreaking. The question is, and the place where I part  
3 company with my colleagues, is whose fault this was.

4 In AE 052E, we do not join the motion for  
5 disqualification of the military judge either on the motion  
6 itself or generally on 425 or its underlying motion. This --  
7 on Tuesday, this position took an added significance because  
8 of the decision in the Witt case which as I read it on first  
9 and second read without benefit of mature consideration of it,  
10 seems to say that once a judge is disqualified, they are  
11 permanently disqualified; that a judge is either in or out,  
12 there is no piecemeal disqualification.

13 I'm not committing to that position. I've only read  
14 it twice and it's a brand new decision. It might not mean  
15 what it seems to say to me, but to me that raises the stakes  
16 on this motion and makes it equally more important and makes  
17 it equally more important for us to note that we do not join  
18 the motion -- that portion of the motion in its current  
19 configuration.

20 What we do, however, is seek voir dire of the  
21 military judge under R.M.C. 902(d)(2), which states that each  
22 party shall be permitted to question the military judge and to  
23 present evidence regarding a possible ground for

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1 disqualification before the military judge decides the matter.

2           There are two possible grounds for disqualification  
3 under Rule 902. The first of those arises under Rule 902(a),  
4 the question of impartiality. Counsel for Mr. Mohammad  
5 alluded to this question in that whether the military judge's  
6 order in AE 052HH ordering substitution arising after the  
7 destruction of the substituted property shows proper  
8 impartiality.

9           The second question arises under 902(b)(1), the  
10 question of whether the military judge possesses personal  
11 knowledge of disputed matters. There are three disputed  
12 matters where -- that it is important to know through voir  
13 dire. The first of those is the existence and possible  
14 content of an AE 052T, an AE 052U, and an AE 052V. These  
15 three pleadings are noticeably absent from the filings  
16 inventory, and the defense never received any notice of their  
17 existence. It may be that these are the secret pleadings that  
18 may exist.

19           The second area is the inquiries, which I have  
20 already made a part of the record, both my e-mail  
21 correspondence with appropriate members of the trial judiciary  
22 and my contemporary notes of my telephone conversation about  
23 this.

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1           The third area arises in AE 052KK, page 10, an  
2 unclassified paragraph of the government's pleading in which  
3 it claims that it also made inquiries about the existence or  
4 the -- whether AE 052EE had been sent to the defense.

5           If that turns out to be true, that casts more doubt  
6 on the trial judiciary. If it turns out not to be true, it  
7 casts more doubt on the actions of the prosecution, which is  
8 what I believe that ultimately will happen. But until we have  
9 some additional information on this opaque process, it is not  
10 possible for us to take a position on the appropriate  
11 disqualification or lack of disqualification of the military  
12 judge.

13           MJ [COL POHL]: Thank you.

14           LDC [MR. CONNELL]: Thank you.

15           MJ [COL POHL]: Mr. Ruiz, do you wish to be heard?

16           LDC [MR. RUIZ]: Judge, on this particular issue, on  
17 behalf of Mr. al Hawsawi we have moved to, in fact, unjoin the  
18 litigation in AE 425 that was done in AE 425A (MAH), and we  
19 submitted a supplement, AE 425B (MAH).

20           So our position on this issue is that we are not  
21 asking the military judge to recuse himself from hearing this  
22 issue. We're also not seeking the underlying relief in AE 425  
23 which seeks the recusal of the military judge from the

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1 remainder of the case as well as the prosecution team from  
2 recusing itself from the remainder of the case.

3           On behalf of Mr. al Hawsawi, we are prepared to  
4 proceed with addressing this issue as raised in our  
5 supplement. We have asked for different relief based  
6 essentially on the due process violations for lack of timely  
7 notice on a judicial order. We have submitted that, as I  
8 said, in 425B (MAH), and I understand that you want to simply  
9 address this issue at the time. But that's our position, at  
10 least for this portion of the motion.

11           MJ [COL POHL]: Thank you, Mr. Ruiz.

12           Trial Counsel?

13           I'm sorry, Ms. Bormann, you wanted to say something?

14           LDC [MS. BORMANN]: Just briefly, because -- because of  
15 the joinder issue, I just want to make it clear that with  
16 respect to what Mr. Connell argued, we do not join his  
17 interpretation of Witt. I've read it more than twice, and I  
18 don't believe that it bars the sending out of the issue of  
19 disqualification to another judge, and then that setting out  
20 so that we avoid the appearance of impropriety and affecting  
21 whether or not that judge would be barred from hearing the  
22 case substantively, because that turns the entire judicial  
23 system on its head and it would be impossible to operate that

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1 way.

2 But we do specifically join his argument about CIPA.  
3 The D.C. Circuit does not provide for secret ex parte CIPA  
4 considerations by the court, the Ninth Circuit does, and so we  
5 specifically adopt that.

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

7 Trial Counsel? Mr. Swann.

8 TC [MR. SWANN]: Sir, I'll have plenty more to say about  
9 the motion, but I'm going to try to confine myself to what the  
10 issue is here.

11 Before I do that, let me just go ahead and make a  
12 couple of observations based on what I've heard from counsel.  
13 Despite what Mr. Connell says or believes, the motion is still  
14 classified.

15 MJ [COL POHL]: Just to make it clear on that particular  
16 point, we're going to have a 505(h) hearing on this. We'll  
17 discuss whether it is or is not classified, and if it is  
18 classified, what the uses can be. So before we get into a --  
19 either this judge or another judge gets into the 425 substance  
20 itself, we will have the left and right lanes of the  
21 classified information issue addressed.

22 Go ahead, Mr. Swann.

23 TC [MR. SWANN]: All right. Ms. Bormann has indicated

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1 that she is not aware of all of the facts. I hope to educate  
2 some folks about those. With respect to Mr. Nevin, Mr. Nevin  
3 has indicated that he has deduced certain things. Well, the  
4 art of deduction is the craft of Sherlock Holmes and, from  
5 what I can see, Mr. Nevin is not Sherlock Holmes in this  
6 instance.

7           So let me go ahead and talk about the facts and why  
8 this event happened the way it did. There is a process. The  
9 government may request the commission, and I quote, delete,  
10 withhold, or otherwise obtain other relief with respect to the  
11 discovery of or access to any classified information, unquote.  
12 If the government provides the commission a declaration  
13 invoking the United States classification information  
14 privilege and setting forth the damage to national security  
15 that the discovery of or access to such information reasonably  
16 could be expected to cause. This declaration must be signed  
17 by a, quote, knowledgeable United States official possessing  
18 authority to classify information, citing 10 U.S.C.  
19 Section 949p-4(a)(1) and M.C.R.E. 505(f)(1)(A).

20           Now, when the government request the commission  
21 authorize substitution or other relief like I have just  
22 mentioned, the government may make an ex parte submission, or  
23 presentation to the commission, quote, to the extent necessary

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1 to protect classified information in accordance with the  
2 practice of federal courts under the Classified Information  
3 Procedures Act.

4           If the commission grants relief following an ex parte  
5 showing by the government, the entire presentation, to include  
6 the text, written submissions, verbatim transcript of the  
7 ex parte oral conference or hearing, and exhibits received by  
8 the commission as part of the ex parte presentation, shall be  
9 sealed and preserved for appellate review.

10           If the commission finds the classified privilege  
11 properly has been invoked, the commission may authorize the  
12 government to, one, delete or withhold specified items of  
13 classified information; two, substitute a summary for  
14 classified information; or three, substitute a statement  
15 admitting relevant facts that the classified information or  
16 material would tend to prove, citing various provisions of  
17 10 U.S.C. Section 949p-4 and M.C.R.E. 505 and M.C.R.E. 701.

18           Now, the commission must grant the government request  
19 to substitute a summary or a statement admitting relevant  
20 facts or to delete or withhold specified items of classified  
21 information, quote, if the military judge finds that the  
22 summary, statement, or other relief would provide the accused  
23 with substantially the same ability to make a defense as would

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1 the discovery of or access to the specified classified  
2 information, unquote. Again, citing various provisions of  
3 10 U.S.C. Section 949p.

4 This procedure is similar to the procedures for  
5 courts-martial and federal courts pursuant to the Classified  
6 Information Procedures Act. An order by this commission  
7 granting the government motion to, quote, substitute,  
8 summarize or withhold or prevent access to classified  
9 information is not subject to a motion for reconsideration by  
10 the accused if the order was entered pursuant to an ex parte  
11 submission or presentation by the government. Further, upon  
12 motion of the government, the commission shall issue a  
13 protective order preventing further disclosure of classified  
14 information that has been disclosed to the accused.

15 Now, in its brief the defense completely ignores any  
16 reference to Military Commission Rule of Evidence 505 or CIPA  
17 provisions. They fashion a label that fits their practice of  
18 obfuscation and call it secret proceedings. They ignore that  
19 it has a federal counterpart used in federal courts across  
20 this country. It is part of the Classified Information  
21 Procedures Act used in federal courts and in courts-martial.  
22 And over the last three decades, CIPA has set that balancing  
23 point between the government's interest in preventing

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1 disclosure of classified information and an accused's right to  
2 information. It has been used in prosecuting spies such as  
3 Aldrich Ames, Robert Hanson. It was used extensively in the  
4 terrorist bombing trials of those who murdered hundreds in  
5 Africa and in the trial of Zacharias Moussaoui. Its  
6 constitutionality is not subject to debate.

7           The rule is simple: Classified information is to be  
8 protected and it is privileged from disclosure if disclosure  
9 would be detrimental to national security. But in assessing  
10 the accused's access to classified information, the military  
11 judge -- and in this case you -- may delete or withhold  
12 specified classified materials or authorize a substitute. The  
13 rules allow for an ex parte presentation. It is not a secret  
14 hearing.

15           In fact, if there is a presentation, there is a  
16 verbatim record of what occurred that's ultimately sealed for  
17 appellate courts to look at. The rules then require the judge  
18 to substitute only if the judge finds that the summary,  
19 statement, or other relief would provide the accused with  
20 substantially the same relief, the same ability to make a  
21 defense as would discovery or access to the classified  
22 information.

23           This is not the case where the defense is being

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1 denied access to certain evidence. They in fact have the  
2 item. Here they have the item, but in substituted form. No  
3 one violated any rules here. They just don't like what the  
4 rules are. But everyone here and behind the bench works  
5 within the rules. Further, any notion that -- well, I'll  
6 leave that for later, sir. Let me just go on and say the  
7 following things.

8           They want another judge to hear the motion, and they  
9 find fault with our over-the-top patriotism and dramatic  
10 response, but when you not so subtly accuse people of  
11 wrongdoing or cheating, it requires calling it what it is.  
12 It's grandstanding. It's despicable. And to say that the  
13 prosecution secretly drafted and that the judge, quote,  
14 secretly ordered the destruction of certain evidence is a  
15 perverse distortion of the facts.

16           But it is a talking point. They assert that the  
17 judge here was shockingly indifferent, unquote, to his duty to  
18 preserving crucial evidence, and that we are engaging in a  
19 wide-ranging conspiracy against their clients and other  
20 Muslims. We are trying men for taking the lives of nearly  
21 3,000 innocent, and nothing more.

22           So what's the basis for the recusal? Those are the  
23 facts. That's what happened. On page 13 and 14 of our brief,

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1 those are the facts. So what's the basis for recusal here?

2 There is none.

3 Under R.M.C. 902(d)(1), a judge shall disqualify  
4 himself or herself when the judge's impartiality might  
5 reasonably be questioned. Judges are told not to step down  
6 unnecessarily. No reasons for recusal exist here. And, in  
7 fact, the Supreme Court has said in prior rulings -- excuse  
8 me. In fact, the Supreme Court has said that prior judicial  
9 rulings against a moving party, and that's all we have here,  
10 almost never constitutes a basis of bias or recusal.

11 There are no intemperate comments by you, just those  
12 lobbed at you by one defense team. But they can't manufacture  
13 a recusal by distorting the truth. Their needless comments,  
14 their sarcasm, their pompous condemnation are all undignified  
15 and lack civility. The United States would contend, sir, that  
16 you have never been a partisan advocate and certainly have not  
17 abandoned your role as anything other than impartial.

18 Now, when Justice Scalia faced a similar motion in a  
19 case involving him and the Vice President of the United  
20 States, he said, "The decision whether a judge's impartiality  
21 can reasonably be questioned is to be made in light of the  
22 facts as they exist and not surmised or reported."

23 One unnecessary excusal impairs the functioning of

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1 the court system. It invites those who know little to  
2 speculate where no wrongdoing exists. So why should you be  
3 excused? Is it because the defense paints a picture all with  
4 one aim of stopping a pursuit of justice in its tracks? A  
5 rule that would require you to remove yourself because  
6 Mohammad's team twists the facts to present them is hardly a  
7 reason. You did nothing wrong. And when appellate courts  
8 review your actions, and they will, they will find that your  
9 decision and your substitute that you put into the record is  
10 adequate. I would simply point out that it's more than  
11 adequate, because the only way to present the kind of evidence  
12 that they are complaining about is the very medium that they  
13 now have.

14 Now, in support of calling for another judge to hear  
15 the motion, the defense cites to United States v. Simmermacher  
16 at 74 MJ 196, but I would submit that that case is of no help,  
17 nor is the 1955 Supreme Court case of In re Murchison. In  
18 Murchison a judge served as a one man grand jury who compelled  
19 witnesses to testify before him in secret about suspected  
20 crimes as permitted by Michigan law. That same judge  
21 subsequently convicted two witnesses of contempt of conduct  
22 and occurred during that secret session. The Supreme Court  
23 held that the judge's dual functions violated due process

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1 requirements of an impartial tribunal. Now, Simmermacher  
2 dealt with the destruction of a urine sample. I don't know  
3 how that case even applies.

4 So let's talk about Williams v. Pennsylvania.

5 Williams was convicted and sentenced to death for the robbery  
6 and murder of a single human being, that's 2,975 less than we  
7 have here. In 1984, Williams and another man named Draper  
8 asked Mr. Norwood for a ride pretending that he would be  
9 driving them home. Instead, the two took him to a secluded  
10 area, to a cemetery. There the two then ordered Mr. Norwood  
11 out of the car, told him to face -- told him to lie face down  
12 near a tombstone. They removed \$20 from him that he had  
13 hidden in his sock. They removed his clothes, tied him up,  
14 and forcibly jammed his socks into his mouth. Williams then  
15 walked off to the car where he retrieved a tire iron.  
16 Williams then battered Norwood's head with the tire iron and  
17 Draper joined in using a socket wrench. The two then burned  
18 the body and drove off with Mr. Norwood's credit cards and  
19 drove to Atlantic City to gamble. At trial, Williams denied  
20 that he had any participation in the event, blamed it on  
21 Draper. The court nevertheless convicted.

22 Now, the elected district attorney was the man who  
23 approved seeking the death penalty. He served as district

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1 attorney throughout the trial, through the sentencing and  
2 direct appeal of Williams' case. He then campaigned  
3 successfully for election to the Supreme Court of  
4 Pennsylvania. In 2012, a lower trial court stayed Williams'  
5 scheduled execution based on allegations that the assistant  
6 district attorney had not turned over certain pieces of  
7 evidence suggesting that Williams might have been abused by  
8 the man he had killed.

9           Because this evidence might have cleared -- might  
10 have changed the result, the trial judge ordered a new  
11 sentence hearing. On appeal of that decision and while  
12 sitting as the Chief Judge of the Supreme Court of  
13 Pennsylvania, the same man who approved seeking the death  
14 sentence voted to vacate a stay of Williams' execution. In a  
15 five-three decision, Justice Kennedy writing for the court  
16 found that when the likelihood of bias is too high to be  
17 constitutionally tolerable, recusal is mandated.

18           Here the judge had prior involvement as a prosecutor.  
19 You can't serve as an accuser and an adjudicator. You can't  
20 sit in judgment of a prosecution in which you made a critical  
21 decision to ramping up the prosecution. It was this judge's  
22 express authorization that allowed the state to pursue the  
23 death penalty to begin with. It was the chief justice's vote

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1 that vacated the lower court's decision.

2 All that said, what does this case have to do with  
3 this case? Nothing. Deny the motion, the relief requested.  
4 There is no reason for you to recuse yourself. You have done  
5 nothing wrong, nor have we.

6 MJ [COL POHL]: Thank you, Mr. Swann.

7 Anything further, Mr. Nevin?

8 LDC [MR. NEVIN]: Yes. Well, you see there not a word  
9 about the arguments that we made to you about the improper  
10 actions, not a word about the fact that we relied on the order  
11 for the preservation of the evidence, not a word about the  
12 fact that the evidence was destroyed nonetheless without us  
13 being given notice, and not a word about the fact that in some  
14 way, as we -- as I tried to say as carefully as I could in my  
15 earlier remarks, not a word about the fact that the military  
16 commission had some role in that process. And it seems from  
17 the evidence that's available to us, it was more than a  
18 minimal or a passing role.

19 And of course, we don't know yet what that role --  
20 with precision, we don't yet know what that role was, and we  
21 don't know how it was that the inquiries that were made didn't  
22 come to the military commission's attention. We don't know  
23 how these orders took the precise form that they took. But

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1 these are serious questions, and the government said not a  
2 word about them. And the government, instead, goes back to  
3 the process that I described in my earlier remarks of  
4 referring to our actions as being -- in raising these issues  
5 on behalf of Mr. Mohammad as being improper.

6 This is the government that could easily have known  
7 that we had not been given notice simply by checking. Simply  
8 by looking at the docket sheet, they could have learned that  
9 we had never been given notice, that notice had never been  
10 served on us, and they go ahead and destroy this evidence that  
11 they know is important to us as well. They go ahead and  
12 destroy it anyway without us being given notice, and we are  
13 going to be lectured about cheating? That's despicable  
14 behavior. Now, that's not at issue. That will come up later.

15 What's at issue now is the issue of the military  
16 commission recusing itself, and more particularly, just the  
17 question of whether you're going to be the officer who manages  
18 that motion. And we are here in this world which -- and the  
19 reason we cited Williams v. Pennsylvania to you was not  
20 because I had a momentary lapse of judgment and thought this  
21 was a case in which you had served as a prosecutor before.  
22 This is not a case in which -- this is not a case in which  
23 someone was brutally murdered in a cemetery. I recognize

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1 that. The reason I cited Williams v. Pennsylvania to you is  
2 because it articulates principles that govern how you should  
3 resolve this case. And in particular the reason I cited it to  
4 you was that's what's contained in our supplement, and you  
5 will see that -- you will see by reviewing that, and the  
6 government, of course, well knows that those aren't the  
7 arguments that I made at all.

8           And it's important nonetheless, for the military  
9 commission to consider the principles that are present there.  
10 And we're locked here in this place that we began with 902  
11 about the distinction between appearances and fact. And what  
12 Williams is saying, what Witt is saying, what the standards of  
13 conduct for United States judges say, what 28 U.S. Code  
14 Section 455 says, what the Military Commissions Act says, what  
15 they all say is that if the appearance is that the judge's  
16 role in the thing could reasonably be questioned by a person  
17 on the street, by the average human being, then it becomes  
18 important for the judge to deal with that in a way that allows  
19 any taint whatever to be expelled. And Mr. Harrington  
20 referred to it as an odor but to allow for it to be clarified.

21           And that's all we're saying, is that in the first  
22 instance here, the -- you will achieve that by saying to the  
23 world I'll let someone else, someone who doesn't have any dog

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1 in this fight one way or the other, whether it's these  
2 allegations about your career or anything else, that you don't  
3 have a role -- that this person who would rule on it would not  
4 have any kind of a role and that's what we're asking for.

5           And finally, let me be clear. These were secret  
6 proceedings in any sense of the word. It may be that the  
7 Ninth Circuit -- just as Mr. Connell says, the Ninth Circuit,  
8 which is where I happen to live, that the Ninth Circuit allows  
9 it, but the D.C. Circuit doesn't, I don't know, but insofar as  
10 we are concerned, they are utterly secret. The idea that a  
11 record is made of it ----

12           MJ [COL POHL]: Does that apply to all of the 505  
13 presentations?

14           LDC [MR. NEVIN]: Absolutely.

15           MJ [COL POHL]: So all of the 505 ex parte presentations  
16 currently that you are no longer part of are in violation of  
17 the law in your view ----

18           LDC [MR. NEVIN]: No, I didn't say ----

19           MJ [COL POHL]: ---- therefore, if that's the position,  
20 there's not just this issue, there's ----

21           LDC [MR. NEVIN]: I didn't say it was in violation of the  
22 law. I said it was secret. I said it was done in secret and  
23 it was ----

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1 MJ [COL POHL]: Okay. Then -- was it author ----

2 LDC [MR. NEVIN]: That's all.

3 MJ [COL POHL]: Forget this one. Is the ex parte 505  
4 procedure authorized by law?

5 LDC [MR. NEVIN]: Yes.

6 MJ [COL POHL]: Okay. And ----

7 LDC [MR. NEVIN]: Never said otherwise.

8 MJ [COL POHL]: Well, I mean, I -- you guys lose me when  
9 you say that the Ninth Circuit says this is authorized and the  
10 D.C. Circuit says that's authorized. Well, what -- what are  
11 you referring to specifically?

12 LDC [MR. NEVIN]: I made a remark in passing that I  
13 believed ex parte -- I said when I first stood up here ----

14 MJ [COL POHL]: Yeah.

15 LDC [MR. NEVIN]: ---- that ex parte contact between you  
16 and the government in this case is permitted by CIPA, or in  
17 our case by the Military Commissions Act and by CIPA.  
18 Mr. Connell came to say he doesn't believe that's a correct  
19 statement of the law in the D.C. Circuit, and I defer to him  
20 on that. But my only point was just to say I understand it's  
21 permitted by the law, but it's still secret.

22 And when things go on in secret, while at the same  
23 time an order is -- of preservation is still out there, and in

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1 secret when the government knows we haven't been given notice  
2 the evidence is destroyed and becomes unavailable to us,  
3 that's wrong. And, you know, I'm sorry, but it is secret, and  
4 I spoke truthfully when I said that, and I wasn't cheating  
5 when I said that.

6 So that's our argument. Thank you, Your Honor.

7 MJ [COL POHL]: Thank you.

8 Ms. Bormann, anything else?

9 LDC [MS. BORMANN]: I have no comments.

10 MJ [COL POHL]: Mr. Harrington?

11 LDC [MR. HARRINGTON]: No, sir.

12 MJ [COL POHL]: Mr. Connell, hopefully you can clarify to  
13 me this Ninth Circuit/D.C. Circuit split, apparently.

14 LDC [MR. CONNELL]: Sure. On that particular issue, the  
15 question under CIPA is whether it authorizes ex parte  
16 meetings, in-person meetings between the judge and the  
17 prosecution, or whether it simply allows ex parte pleadings.

18 There is a -- the Ninth Circuit has held that  
19 essentially the -- their reasoning was that the ex parte  
20 communication on paper necessarily includes ex parte meetings.  
21 Other circuits have not followed them on that. That's the  
22 difference.

23 MJ [COL POHL]: And so let me just make -- so the

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1 D.C. Circuit says that the government can make ex parte  
2 submissions, but not presentations?

3 LDC [MR. CONNELL]: The D.C. Circuit has not ruled on that  
4 particular issue. The D.C. District has said that. The  
5 D.C. Circuit has not ruled on the question of meetings.

6 MJ [COL POHL]: Okay. So as you are aware of, last  
7 February there was an ex parte 505 presentation by the  
8 government.

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: Okay. And so under your theory on that,  
11 that may be problematical.

12 LDC [MR. CONNELL]: Yes. I can be more specific. The  
13 question that was under discussion, and the thing that I  
14 didn't want to waive my position on, was what the federal  
15 position under CIPA was. 505 is worded differently. As the  
16 government simply -- currently observed, there is a provision  
17 for transcripts, et cetera. So clearly 505, to the extent  
18 necessary to protect classified information, allows an  
19 ex parte presentation is the word of 505(f)(1).

20 Our position on that question, which I argued in June  
21 and have pled many times, is that there needs to be a  
22 motion -- slowing down -- needs to be a motion for leave to  
23 proceed ex parte. The military commission -- which is

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1 consistent with the rule of the D.C. Circuit in Ellsberg v.  
2 Mitchell, and that there has to either be a public invocation  
3 of classified information privilege, or there has to be a  
4 public explanation of why there cannot be a public implication  
5 of classified information privilege. Once that motion for  
6 leave for ex parte proceedings has been granted, then an  
7 ex parte proceeding is authorized.

8 MJ [COL POHL]: Do you see a distinction between an  
9 ex parte submission that's paper-only? Or rephrase that, that  
10 it does not include any interactions with the government, but  
11 is simply a presentation in paper and/or other media?

12 LDC [MR. CONNELL]: Under CIPA in a federal court, yes,  
13 because of the wording of CIPA. The Rule 505 does not draw  
14 that distinction.

15 MJ [COL POHL]: Okay. But CIPA would, in your view, draw  
16 that distinction, and that would be permissible under CIPA,  
17 the ----

18 LDC [MR. CONNELL]: The Ninth Circuit has held that  
19 meetings are allowed ----

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: ---- in addition to pleadings. The  
22 D.C. Circuit has not ruled on that, the D.C. District says no.  
23 That's my position.

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1 MJ [COL POHL]: Do you want to say anything else?

2 LDC [MR. CONNELL]: That's separate and apart from 505.

3 Now that we have got that straightened out, in its  
4 argument, and I will be quick, the government said it was  
5 going to explain the facts but it chose not to. And the  
6 government's claim, continuing claim, that some underlying  
7 facts are classified prevents us, prevents me now from  
8 detailing the events which are found in AE 052JJ. And we do  
9 object to the strategic use of claims of classification to  
10 prevent argument, especially where ----

11 MJ [COL POHL]: Can't we address that -- can't the judge  
12 who hears this motion address that in the 505(h) hearing?

13 LDC [MR. CONNELL]: Yes, sir. And our position in that  
14 505(h) hearing is, unlike usual, right, because we're very  
15 technical about our 505(h)s, our position in this is nothing  
16 about this is classified, and that will be our position.

17 MJ [COL POHL]: And we'll resolve that if the judge who  
18 hears the hearing resolves that. I got it.

19 LDC [MR. CONNELL]: Yeah. I understand that, too.

20 The last thing I want to say: We heard about -- we  
21 heard a lot about the text of 505(f)(1). This is a different  
22 level of secrecy that we are talking about. This is not  
23 notice to the opposite side, permission by military commission

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1 and proceeding with an ex parte proceeding. This instead is a  
2 situation in which the government publicly claimed compliance  
3 with the preservation order while secretly obtaining, without  
4 notice to the other side, a destruction order and delaying the  
5 communication of that destruction order for 20 months. That  
6 is different, completely different from what ordinarily  
7 happens in this or any other judicial forum.

8 Thank you.

9 MJ [COL POHL]: Mr. Ruiz, anything further?

10 LDC [MR. RUIZ]: Judge, how much time are you going to  
11 give me?

12 MJ [COL POHL]: Since you're not joining this part of the  
13 motion, how much time do you need?

14 LDC [MR. RUIZ]: Very little. I just didn't want to get  
15 cut off in the middle of it. That's all.

16 MJ [COL POHL]: No, we can -- you got time. I say that  
17 upon your representation that you have very little to add.

18 LDC [MR. RUIZ]: Judge, I will state the obvious in which  
19 you said I have been very judicious, I think, with the use of  
20 my time in adding or detracting from these issues, so I would  
21 ask for a little bit of leeway, particularly in light of the  
22 prosecutor's response to this particular issue and his  
23 determined efforts to continue to paint the left side of the

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1 room with the same broad brush and to ignore the differences  
2 between the litigation positions that have been taken by  
3 counsel. And I feel it necessary at times like this to  
4 highlight just that approach because it goes back to an issue  
5 that has been pending before this court and continues to be  
6 pending before this court, which is, of course, our standing  
7 request to sever Mr. al Hawsawi.

8           In this motion, AE 425, which ultimately seeks your  
9 recusal, not just from this issue, but from the entire case,  
10 as well as the prosecution's recusal from this entire case, we  
11 filed a motion purposely unjoined from specific portions of  
12 that motion based on our analysis and the legal position we  
13 wanted to take. We made the determination that we were not  
14 asking for the recusal of the military judge from either this  
15 issue or from the entire case as well as from the prosecution.  
16 That is our position and continues to be that position. Of  
17 course, we will press our legal issue with respect to the due  
18 process concerns that we have here.

19           But nevertheless, this is yet another instance where  
20 the prosecutor takes the deliberate opportunity to paint with  
21 a very broad brush, to talk in generalities about what the  
22 defense is doing. Calls us pompous. Says that we can cannot  
23 manufacture, they assert, shocking indifference. Judge, while

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1 we may be in a pretrial proceeding and arguing to a military  
2 judge and you are able to cut through those weeds and make the  
3 distinctions between the legal positions and the defendants, I  
4 will submit to you that this is not the first time, will not  
5 be the last time, that the prosecution is going to take this  
6 approach. I foresee that this is exactly what's going to  
7 happen when this case is tried in front of a jury who may not  
8 be able to make those distinctions.

9 In AE 299C, Your Honor held Mr. al Hawsawi's motions  
10 for severance in abeyance. And if I can just speak to that  
11 very briefly, Judge. I think this is an appropriate time to  
12 do so.

13 Judge, at that time, your ruling indicates that the  
14 motion will be held in abeyance pending resolution of other  
15 issues that are of interest to the parties, and you referenced  
16 299 which, of course, was the intrusion of the FBI, and you  
17 also referenced the mental health issue with respect to  
18 Mr. Binalshibh, and that was the extent of your order.

19 MJ [COL POHL]: Let me ask you this -- and I don't really  
20 want to get too much into 299, since that's a side issue for  
21 this case.

22 LDC [MR. RUIZ]: Sure.

23 MJ [COL POHL]: I see they're inter -- do you have any --

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1 I remember 299. I remember your basis for the severance in  
2 299. Do you have any additional basis that you wanted to  
3 submit?

4 LDC [MR. RUIZ]: I think we can.

5 MJ [COL POHL]: I'm not saying -- wait. I didn't say you  
6 can. I'm not asking. I'm not encouraging you to do anything.  
7 I'm just saying it was filed a while ago, and ----

8 LDC [MR. RUIZ]: Yes. The answer is yes.

9 MJ [COL POHL]: ---- based on certain factual  
10 representations, and I just don't know if anything has changed  
11 on it that would support your argument.

12 LDC [MR. RUIZ]: Well, the two issues that you referenced  
13 have been addressed, and yes, we have information that we can  
14 add. And you don't have to encourage me, Judge, on this  
15 issue, I think you know that.

16 MJ [COL POHL]: No, no.

17 LDC [MR. RUIZ]: I can do that myself, and the whole team  
18 that's also very strong in the belief ----

19 MJ [COL POHL]: But I think also you deserve an answer,  
20 and that's the other part.

21 LDC [MR. RUIZ]: Yes, sir. But like I said, I feel it  
22 important to, at times like this, point out the essence of  
23 what that motion goes to, and which is the deliberate attempts

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1 by the prosecutor to paint Mr. al Hawsawi with a very broad  
2 brush and to step away from individualized determinations  
3 based on legal positions and relative roles in this case. It  
4 hasn't changed. It won't change. Mr. Swann has proven time  
5 after time after time that he will take every opportunity he  
6 has to wallow in the mud and to impugn all of the defense  
7 counsel and all defendants regardless of what the legal  
8 positions that have been taken in this case.

9 I will also add that this week has previously  
10 illustrated as well that when events in the courtroom detract  
11 from the other proceedings -- in this instance, Judge, today  
12 you admonished all defendants in regards -- in my view it was  
13 an admonishment regarding the execution of the ----

14 MJ [COL POHL]: No, it was just to clarify. I didn't want  
15 any misunderstanding that the delay we were giving  
16 Mr. Bin'Attash today was going to be standard operating  
17 procedure. It's the first time it came up. I just wanted to  
18 inform your clients. Because again, you were the guys who  
19 were asking them to be voluntarily waived. It wasn't an  
20 admonishment, it was simply that if this happens again under  
21 this scenario, we're not delaying it, that's all. It's not an  
22 admonishment. I don't know who else I'm going to tell it to.  
23 The government?

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1 LDC [MR. RUIZ]: It's a caution. Respectfully, I believe  
2 it's one that's unnecessary to our team, to Mr. Al Hawsawi.

3 MJ [COL POHL]: It was prophylactic so that everybody  
4 understands what happened today doesn't happen again. It  
5 obviously doesn't apply to you. Is it doesn't apply to you.

6 LDC [MR. RUIZ]: You understand my issue.

7 MJ [COL POHL]: I understand your point.

8 LDC [MR. RUIZ]: I understand that's natural, that's the  
9 natural flow of what happens in the courtroom, but it's my job  
10 to be sensitive to those issues.

11 MJ [COL POHL]: I understand that. I was not accusing you  
12 guys, I was just making sure that everybody understands, as  
13 Mr. Nevin said, understands what the rulings are.

14 LDC [MR. RUIZ]: I understand that. I understand that.  
15 But, of course, what affects one affects all potentially, and  
16 that's the nature of the co-accused case.

17 MJ [COL POHL]: Yeah. To a degree, yeah. True.

18 LDC [MR. RUIZ]: Right? And in this instance, I think  
19 this is a situation that I think illustrates that. In our  
20 case, we have been prepared to proceed, and we have not been  
21 able to do that. I will submit additional materials to you in  
22 support of that request, Your Honor, and I wanted to highlight  
23 that for you at this point. Thank you.

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1 MJ [COL POHL]: Thank you.

2 Mr. Swann, anything more?

3 TC [MR. SWANN]: No, Your Honor.

4 MJ [COL POHL]: Okay. We're going to recess for lunch in  
5 a minute. I just wanted to go over a couple of things with  
6 Ms. Bormann.

7 As is normal practice, that when an accused has been  
8 directed out of the courtroom due to his disruption, is that  
9 he is allowed the opportunity to come back and to behave  
10 himself, for want of a better term. But also obviously  
11 Mr. Bin'Attash has the ability to waive his presence.

12 And so I'm going to give you -- it strikes to me  
13 under this scenario, there's no need for a further disruption,  
14 if he chooses to waive his presence. So one potential course  
15 of action would be for him to be re-advised of the voluntary  
16 waiver provision and understand that he can come back in if he  
17 wants to, or choose not to, but it's got to be a strict  
18 voluntary waiver, and then we don't have to address the  
19 potential redisruption issue. Because normally we would have  
20 him come back and say if you behave yourself, you get to stay.  
21 But it seems to me given his current state, he also could  
22 obviously execute the voluntary waiver of not coming back this  
23 afternoon, you know, so we -- it's a little unusual, but I

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1 just think to avoid the potential problem, that might be a way  
2 to go.

3 LDC [MS. BORMANN]: I suggest one further provision, and  
4 that is he and Mr. Perry spoke earlier today. In fact, I just  
5 had this conversation with Mr. Perry. We were going to ask to  
6 go back with the translator and Mr. Perry and just determine  
7 what his wishes were and make sure he's okay, and then I can  
8 better advise you -- Mr. Perry can provide to you whether or  
9 not that's suitable.

10 MJ [COL POHL]: Okay. When we come back into session,  
11 okay, if I don't have a voluntary waiver, before I order his  
12 return, I will give you an opportunity to be heard. But  
13 without a voluntary waiver, he's going to be ordered to  
14 return, okay?

15 LDC [MS. BORMANN]: That's fine.

16 MJ [COL POHL]: I want to make it very clear to the guard  
17 force, that until I tell you to bring Mr. Bin'Attash in the  
18 afternoon, do not bring him in. So there's no confusion,  
19 okay? And then you can talk to him and then we'll ferret the  
20 way ahead so we can reconvene.

21 LDC [MS. BORMANN]: So I would ask Mr. Perry and our  
22 translator go see Mr. Bin'Attash as soon as ----

23 MJ [COL POHL]: Is there usually -- does that usually

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1 require permission?

2 LDC [MS. BORMANN]: I don't know. I've never done this  
3 before.

4 MJ [COL POHL]: Okay. If Mr. Perry and the translator  
5 want to visit Mr. Bin'Attash in the holding cell during the  
6 afternoon -- during the lunch recess, that's so ordered.

7 LDC [MS. BORMANN]: Thank you.

8 MJ [COL POHL]: Okay.

9 LDC [MR. NEVIN]: Your Honor, when do we take up again?

10 MJ [COL POHL]: I'm going to -- normally go about an hour  
11 and 15 minutes for lunch. So given prayer time and  
12 everything, we will reconvene at 1415 hours. And just for  
13 planning purposes, we will probably go to approximately 1630,  
14 plus or minus, for the afternoon session.

15 Commission is in recess.

16 [The R.M.C. 803 session recessed at 1300, 21 July 2016.]

17 [END OF PAGE]

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