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1 [The R.M.C. 803 session was called to order at 1432, 21 July  
2 2016.]

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

4 Any changes, Trial Counsel?

5 CP [BG MARTINS]: No, Your Honor.

6 MJ [COL POHL]: Any defense counsel changes? Except for  
7 we've now added -- Mr. Ali has joined us.

8 LDC [MS. BORMANN]: Mr. Perry is otherwise occupied doing  
9 some motion writing.

10 MJ [COL POHL]: Okay. And, Ms. Bormann, what's the status  
11 of Mr. Bin'Attash's desires? I will note for the record that  
12 he's currently absent.

13 LDC [MS. BORMANN]: Mr. Bin'Attash addressed a letter to  
14 the court which I'm having translated. It was given to me by  
15 the SJA because of the concerns about attorney-client  
16 privilege and just -- it addresses how we wound up here this  
17 morning, the issues raised by Mr. Mohammad and Mr. Binalshibh.

18 MJ [COL POHL]: We'll get to that in due course.

19 LDC [MS. BORMANN]: Right.

20 MJ [COL POHL]: My concern is his current absence.

21 LDC [MS. BORMANN]: Right. I understand that. And I'm  
22 told Mr. Perry informed him that he would be asked to sign a  
23 waiver or -- you know, evincing his presence or not having his

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1 presence and as I understand it, the waiver, and I only got a  
2 peek at it, basically says, I signed it this morning and I  
3 signed it earlier so why are you asking me again? I am  
4 paraphrasing ----

5 MJ [COL POHL]: Who did he tell that to?

6 LDC [MS. BORMANN]: The SJA.

7 MJ [COL POHL]: Okay. Let's call the SJA as a witness,  
8 then.

9 MAJOR, U.S. Army, was recalled as a witness for the  
10 prosecution, was reminded of his previous oath, and testified  
11 as follows:

12 **DIRECT EXAMINATION**

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

14 Q. Major, I remind you that you are still under oath.  
15 Over the lunch hour, did you have occasion to talk with  
16 Khallad Bin'Attash?

17 A. I did.

18 Q. All right. It was regarding, again, the waiver form  
19 that you have in front of you which has been marked as  
20 Appellate Exhibit 440C?

21 A. That's correct.

22 Q. All right. Okay. Did he sign that form?

23 A. He did not sign the form. I read the entire form to

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1 him in English, and then it was translated. The translator  
2 read the Arabic version. He asked for the English version  
3 only. I asked him if he was going to sign, and he filled out  
4 the note section again. He did not sign the document.

5 Q. All right. The bottom of the page 2, I believe,  
6 there is written material?

7 A. That's correct.

8 Q. All right. Did he write that?

9 A. He did write that.

10 Q. All right. Can you, just for the court's purposes,  
11 read what he wrote?

12 A. He writes, "I have signed the morning form. Why I  
13 have to sign this one again?"

14 Q. Any further discussion at all about that?

15 A. I asked him if he was going -- I go, "So that's a  
16 refusal to sign?" And he said, "Yes, I already signed."  
17 Prior to this document, he wrote the letter referenced by  
18 Ms. Bormann; asked me to give it to the judge. I asked the  
19 guard force to bring Ms. Bormann back so I could give it to  
20 her and then we brought the forms inside.

21 TC [MR. SWANN]: All right. I have no further questions.  
22 Thank you.

23 MJ [COL POHL]: Did he indicate anything one way or the

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1 other whether he wished to come back now or basically ----

2 WIT: I explained to him that if he signed the waiver  
3 form, he would then be able to return to camp if that's what  
4 he wanted to do, and he said, "I'm not going to sign the  
5 waiver form."

6 MJ [COL POHL]: Okay. Did he indicate whether he wanted  
7 to return to the camp or whether he wanted to stay?

8 WIT: He wouldn't give me an answer. I asked him if he  
9 was planning to come back to court and he would not answer the  
10 question.

11 MJ [COL POHL]: Ms. Bormann, I hate to revisit old mail  
12 here, but is this an equivocal or unequivocal waiver of his  
13 presence?

14 LDC [MS. BORMANN]: I can't answer that question, Judge.  
15 I can say to you that I think if he wanted to be here, he  
16 would be here. I can tell you that.

17 MJ [COL POHL]: I'm not going -- I'm not inferring that.

18 LDC [MS. BORMANN]: Right.

19 MJ [COL POHL]: He was given an opportunity to say whether  
20 he wanted to come or not. He says, I'm -- and he's given --  
21 what I'm hearing from the SJA, he's refusing to answer;  
22 therefore, he needs to come.

23 LDC [MS. BORMANN]: I think if I can approach the witness,

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1 I have the letter, Judge, and I'd like to have it introduced  
2 and made part of the record because ----

3 MJ [COL POHL]: Is the letter relevant to whether he wants  
4 to come or not?

5 LDC [MS. BORMANN]: Yes, I think so. It explains what  
6 happened this morning, which I think will tell you why his  
7 response was, I signed it this morning.

8 MJ [COL POHL]: Okay.

9 LDC [MS. BORMANN]: Okay.

10 **[Military Judge conferred with the court reporter.]**

11 MJ [COL POHL]: Ms. Bormann, is there some reason why it's  
12 useful for me to get a document that I can't read?

13 LDC [MS. BORMANN]: Because right now, I'm getting it  
14 translated. We should have it forthwith, but I wanted to at  
15 least ----

16 MJ [COL POHL]: Okay.

17 LDC [MS. BORMANN]: ---- make this part of the record, and  
18 then you will get an Arabic translation, but we can only work  
19 so quickly.

20 MJ [COL POHL]: I got it.

21 LDC [MS. BORMANN]: So one foot in front of the other.

22 **CROSS-EXAMINATION**

23 **Questions by the Learned Defense Counsel [MS. BORMANN]:**

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1 Q. Assistant Staff Judge Advocate, is that a copy of the  
2 document that you saw Mr. Bin'Attash writing today at  
3 approximately 1410?

4 A. Yeah. I mean, he handed me the piece of paper. I  
5 immediately folded it in half, but I recognized the 10014 at  
6 the bottom and the same style of paper, so I assumed it's the  
7 exact same letter. And I walked out and immediately handed it  
8 to you.

9 Q. And then I had with me an Arabic translator, correct?

10 A. That is correct.

11 LDC [MS. BORMANN]: Okay. Judge, at this time, I have no  
12 further questions of this witness, but we do have an Arabic  
13 translation done by our interpreter, who is a qualified  
14 interpreter.

15 MJ [COL POHL]: Okay.

16 LDC [MS. BORMANN]: So how would you like to address that?

17 MJ [COL POHL]: Just make it part of the exhibit you  
18 already gave me.

19 LDC [MS. BORMANN]: Yes.

20 MJ [COL POHL]: It will be a two-page exhibit.

21 LDC [MR. CONNELL]: While things are being handed out, do  
22 we have a number for that exhibit? 440D, thank you.

23 LDC [MS. BORMANN]: Yes. It's there -- as I understand

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1 the military judge, they're combined and they're now  
2 two-page 440D.

3 MJ [COL POHL]: Right.

4 LDC [MS. BORMANN]: Thank you. I have no further  
5 questions of the assistant SJA.

6 MJ [COL POHL]: Okay. Just stand by.

7 [Pause.]

8 MJ [COL POHL]: Just to be clear, this letter has not been  
9 cleared for display yet.

10 LDC [MS. BORMANN]: No.

11 MJ [COL POHL]: Okay. So ----

12 LDC [MS. BORMANN]: No.

13 MJ [COL POHL]: Waiting for my court information security  
14 officer to look at it before we do anything.

15 Okay. That appears to clarify the earlier thing,  
16 unless you have an issue with it -- I mean, the factual  
17 inaccuracies in this thing, I don't need to discuss. Just so  
18 it's clear, make sure -- excuse me? Make sure it's  
19 understood, I'm not saying what he's submitted was what he  
20 was told or not told, but if I say something to be done,  
21 that's one thing, but don't -- I'm not saying you did.

22 WIT: I understand what you are saying, Judge. I know  
23 where you are going with it. I understand his confusion.

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1 MJ [COL POHL]: Yeah. It alleges I had some role in this  
2 today ----

3 WIT: Right.

4 MJ [COL POHL]: ---- which I had zero role in.

5 WIT: Correct.

6 MJ [COL POHL]: Don't speak for me there. I'm not saying  
7 you did ----

8 WIT: Right.

9 MJ [COL POHL]: ---- but make sure everybody else knows  
10 that.

11 General Martins, you wanted to be heard on this?

12 CP [BG MARTINS]: Your Honor, the issue right now is, do  
13 we have a waiver. The government's interpretation of this is  
14 he left as a disruption to the court. You used authority to  
15 not have him be here under the statute. He is now in a  
16 close-by facility where he's able to view the proceedings and  
17 hear them, and if he wants to come back in, he can make that  
18 known, which is an important part of the record of absence.

19 Our interpretation of what we just heard is that he  
20 is not willing to come back in and not be a disruption, and  
21 that your continuing the proceedings is in light of an  
22 adequate waiver at this point, with him nearby, able to notify  
23 the court if he wants to come back in, and that we could

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1 proceed. That's how we read this. Right now we have an  
2 adequate waiver.

3 MJ [COL POHL]: Okay.

4 CP [BG MARTINS]: But that this process that we just went  
5 through here should not be seen in any way as undercutting the  
6 established protocol with the very specific way in which they  
7 can waive their right to presence, which you've established on  
8 the record ----

9 MJ [COL POHL]: Okay.

10 CP [BG MARTINS]: ---- in the camp.

11 MJ [COL POHL]: Got it. Thank you. Thank you.

12 WIT: Thanks, Judge.

13 [The witness withdrew from the courtroom.]

14 MJ [COL POHL]: And I want to -- and, Ms. Bormann and  
15 Mr. Ruiz, don't take this as an admonition for everybody.  
16 This is simply an observation. We have wasted two and a half  
17 hours today on an issue that should be very simple. We took a  
18 75-minute lunch break with specific directions what to do.  
19 Just so everybody's clear going forward, as guidance and  
20 information and nothing more, if I don't get clear waivers in  
21 a timely fashion, then they're going to be here.

22 If this same scenario happened again at 1415, I would  
23 have ordered Mr. Bin'Attash to be here, because this

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1 constant -- rephrase this -- these recent delays for this  
2 purpose is not conducive to running an efficient proceeding.  
3 I respect Mr. Bin'Attash's issues, and I think I've given him  
4 a great -- we've spent a lot of time on his issues, but issues  
5 of wasting time is not going to be tolerated.

6           Maybe there was legitimate confusion this morning. I  
7 got it. I got it. But if that comes up again, then tell me,  
8 we'll come into court and we'll go the way ahead, okay? And,  
9 again, I'm looking at -- for that part, Mr. Ruiz, I'm looking  
10 at the government. If there's a confusion on whether the  
11 waiver is clear or not, we can discuss it.

12           CP [BG MARTINS]: Your Honor, I mean, that's not how we  
13 understand it. There's one way for him to waive in the camp.

14           MJ [COL POHL]: Right.

15           CP [BG MARTINS]: We understood your guidance; if there's  
16 any confusion, he comes. That's from your December 9  
17 statement on the record in court.

18           MJ [COL POHL]: Okay. I'm not going to -- okay. That's  
19 true, General Martins. I got it. But what I'm saying is if  
20 there's some way that is read as a waiver and people are not  
21 clear, that's another issue altogether. But you're right, the  
22 direction has got to be an unequivocal waiver. If it's not an  
23 unequivocal waiver, then he's going to come. And you need

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1 them to understand that, if that means an FCE decided by them,  
2 because my standing order is they come unless they waive.

3 LDC [MS. BORMANN]: So I just want to explain what the  
4 delay was. So we went in and -- Mr. Perry went in and  
5 informed Mr. Bin'Attash, and then we attempted to find an  
6 assistant judge advocate, who, for other reasons that are not  
7 related to this case, had to be away from the court.

8 So our first opportunity to have the assistant SJA  
9 actually inform Mr. Bin'Attash was right before 2:00. So it  
10 was through no fault of ours, through no fault of  
11 Mr. Bin'Attash's, and through no fault of the government's or  
12 the assistant SJA, who didn't know he was going to have this  
13 duty. We all tried to do our due diligence and we actually  
14 got it done in 15 minutes. We just didn't know it was  
15 necessary. So my apologies if I was in any way responsible  
16 for the delay, but we tried to get it done, but a lot of  
17 moving pieces.

18 MJ [COL POHL]: I hear what you are saying, Ms. Bormann.  
19 I just want to make sure that you hear what I am saying,  
20 because there's a very simple solution for this. Just have  
21 him here.

22 LDC [MR. NEVIN]: Your Honor, could I ask you, when I have  
23 taken it -- I have taken it that when a writing on that form

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1 appears to be less than a voluntary waiver, that that would be  
2 presented to you and you would make the call as to whether  
3 it's equivocal or not.

4 MJ [COL POHL]: The problems coming here, Mr. Nevin, is  
5 that form is not -- is not designed to send me missives of  
6 what they -- their complaints. It's a yes/no, go/no-go form.  
7 So I'm saying if it's -- for us then to come into court and go  
8 through this drill and say, no, that's not a voluntary waiver,  
9 go get him, is -- then two hours later we start, it's just --  
10 we have enough trouble doing stuff when we're here. But this  
11 is unacceptable.

12 And so if it's not an unequivocal waiver, they are to  
13 be brought here. And if your client or any client chooses to  
14 editorialize or something else, they do that under that risk,  
15 because this is something that you've requested on their  
16 behalf, and I'm not going to sit here and litigate it over and  
17 over again. I will tell you this: Absent the thing that  
18 Mr. Bin'Attash just gave me, I would have said bring him in.  
19 He's sitting, you know, 100 yards away.

20 LDC [MR. NEVIN]: Right.

21 MJ [COL POHL]: But this is -- you understand how  
22 difficult it is to bring him in here. Sign it or don't sign  
23 it. If you editorialize on it, and it appears in any way to

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1 equivocate the waiver, then they're going to come.

2 LDC [MR. NEVIN]: Understood.

3 LDC [MR. RUIZ]: Judge, I have a question on that.

4 MJ [COL POHL]: Mr. Ruiz.

5 LDC [MR. RUIZ]: So the difficulty I'm having is because  
6 the language that I'm looking at from 440D seems to explain  
7 that he unequivocally waived his presence this morning. I  
8 don't think we've seen the waiver that he apparently signed  
9 this morning or the ----

10 MJ [COL POHL]: It's part of the record. You can see it  
11 at your convenience.

12 LDC [MR. RUIZ]: Right. So I think the difficulty we're  
13 having is trying to determine what is an unequivocal waiver.

14 MJ [COL POHL]: Okay. I'll tell you what an unequivocal  
15 waiver clearly is, they sign the form without any additions.  
16 That's what an unequivocal waiver is.

17 LDC [MR. RUIZ]: Okay.

18 MJ [COL POHL]: If you look at what he submitted, it can  
19 be read a couple of different ways, and you will see it as  
20 part of the record, and so you will see where we're at, okay?  
21 Okay.

22 The issue before me as to whether or not I need to  
23 detail another judge to hear AE 425, after considering the

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1 pleadings and reading the argument, that motion is denied.  
2 We'll pick up the rest of 425. The plan forward is we'll  
3 discuss it tomorrow in the 505(h) hearings to see whether or  
4 not there's classified information that's necessary for it.  
5 Perhaps there isn't and we go from there.

6           Also just to put both sides on notice that if you  
7 wish to -- if a question about voir dire comes up, that's --  
8 the same rules apply. So if you wish to have voir dire of me,  
9 I will permit it, assuming it's relevant, but if it may touch  
10 classified information, we have to discuss it tomorrow.

11           LDC [MR. CONNELL]: Do you need a separate notice, sir, or  
12 if it's fairly encompassed in what we have already given ----

13           MJ [COL POHL]: If it's fairly encompassed, what I'm  
14 saying is tomorrow tell me what your voir dire questions are.

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

16           MJ [COL POHL]: I may see the answer leading to something  
17 that's classified. I certainly don't mind answering it in  
18 open court, but I am reluctant until I know exactly what they  
19 are, because they easily could touch on a classified matter.  
20 So just keep that in mind for tomorrow.

21           That being said, I want to do 355.

22           LDC [MS. BORMANN]: Judge, at this point, we're going to  
23 rest on the pleadings.

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1 MJ [COL POHL]: Okay. I'm assuming nobody wants --  
2 because there's automatic joinder, everybody is resting on the  
3 pleadings. Okay.

4 That brings us, I think, to Mr. Schwartz and 426.

5 One other point while he's coming up. On the 505(h)  
6 tomorrow, I'm going to go over the whole list before we recess  
7 today, but the 152GG, HH, II are now 441, 441A, 441B. They  
8 really shouldn't be part of the 152 series.

9 LDC [MR. CONNELL]: I'm sorry, sir, could you repeat that?

10 MJ [COL POHL]: Sure. 441, 441B, and 441A.

11 LDC [MS. BORMANN]: Are part of the 052 series?

12 MJ [COL POHL]: No. They were accepted as part of the 152  
13 series.

14 LDC [MS. BORMANN]: 152.

15 MJ [COL POHL]: And they were really accepted as 152GG,  
16 HH, II -- three Gs, three Hs and three Is, and they really --  
17 they're more of a stand-alone issue in my view, and I'd like  
18 to stop with letters as quickly as possible.

19 Sir.

20 LDC [MR. CONNELL]: Sir, I can't resist the temptation to  
21 say what a good example of that is why it would make sense to  
22 assign the AE numbers after we file the pleadings instead of  
23 before we file the pleadings.

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1 MJ [COL POHL]: I got your input on that rule change  
2 Mr. Connell, and let me tell you this: It's been rejected for  
3 a different reason altogether. It's -- there's a reason why  
4 it's done the way it is as far as our view of processing  
5 stuff. I understand what you're saying.

6 LDC [MR. CONNELL]: Thank you, sir.

7 MJ [COL POHL]: Mr. Ryan?

8 TC [MR. RYAN]: Judge, I'm sorry. I'm asking to interrupt  
9 very briefly for a housekeeping matter. When we established  
10 the schedule for the week back at the 802 session, I think it  
11 was based on the assumption that we would have several good  
12 days of work in open session, which has not occurred. I'm  
13 going to ask Your Honor to consider using tomorrow for  
14 continuing the open court sessions on the matters we haven't  
15 reached thus far yet. Part of the reason being that the items  
16 that happen in open sessions often impact what happens in the  
17 505(h), and that may very well be the case here.

18 One other reason I'll state, and I'm not suggesting,  
19 Your Honor, that this is something you have to take into  
20 consideration, you run your courtroom as you see fit, sir, but  
21 there are, as Your Honor knows, many folks who come down as  
22 observers of the proceedings, and this week they're getting  
23 shortchanged to a certain extent, certainly no fault of the

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1 court. And that's my request, Your Honor.

2 MJ [COL POHL]: Okay, Mr. Ryan, your second part of the  
3 request, I understand that. That may be the reality, but that  
4 plays no role in my decision.

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

6 MJ [COL POHL]: I have no problems switching the 505(h)  
7 until Monday, if that -- it just -- the reason why I like to  
8 have it on Friday is because it gives my staff an opportunity  
9 to put stuff together and give you guys notice of what we'll  
10 switch to 806s.

11 That being said, unless there's an objection ----

12 LDC [MR. CONNELL]: Well, sir, it's not so much an  
13 objection, because as Mr. Ryan says, we'll show up for a  
14 505(h) whenever you want. We also like the 505(h) on Friday,  
15 both because it means that clients who -- you know, don't have  
16 to face a conflict between prayers and coming to court, but it  
17 also means that we can get the 505(h) orders in place by the  
18 following week, and so we have a good sense of what's granted  
19 and what's not.

20 LDC [MR. RUIZ]: Judge, we concur with that.

21 MJ [COL POHL]: Okay.

22 LDC [MS. BORMANN]: As do we.

23 LDC [MR. RUIZ]: As a matter of judicial economy, it makes

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1 sense for us to do that.

2 MJ [COL POHL]: Mr. Ryan, let me take that under  
3 advisement and I'll let you know before we recess today.

4 TC [MR. RYAN]: I appreciate your consideration, Judge.

5 MJ [COL POHL]: No, believe me, I understand your  
6 position, and I -- I understand your position.

7 TC [MR. RYAN]: Thank you, sir.

8 MJ [COL POHL]: Mr. Schwartz?

9 DC [MR. SCHWARTZ]: Good afternoon, Your Honor.

10 MJ [COL POHL]: Good afternoon.

11 DC [MR. SCHWARTZ]: Quote, at this time the potential  
12 cancer risk and noncancer health effects associated with Camp  
13 Justice and any final conclusions and resulting risk  
14 management actions cannot be determined. That comes from  
15 a 23 February 2016 Navy and Marine Corps Public Health Center  
16 Industrial Hygiene Report, page iii, which is in the record at  
17 AE 426 (WBA) Attachment I, page 6.

18 That fact, that the cancer and noncancer health risks  
19 associated with what we now know to exist in terms of toxins  
20 in Camp Justice, was true in February and it's true today, and  
21 nothing seems to be changing on behalf of the government.

22 MJ [COL POHL]: What's the government's -- what's the  
23 government's official position about the health risk?

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1 DC [MR. SCHWARTZ]: Your Honor, in the record, the  
2 government's official position is this, this sentence: There  
3 have been summary conclusions and proffers in the motion.  
4 There have been oral statements outside of the record  
5 indicating that it's safe. So that's the starting point for  
6 the government.

7 MJ [COL POHL]: Don't they have some report from the Navy  
8 saying it's safe?

9 DC [MR. SCHWARTZ]: Well, that's -- no, Your Honor, they  
10 don't.

11 MJ [COL POHL]: They have a report from the Navy saying  
12 it's not safe?

13 DC [MR. SCHWARTZ]: They have a report from the Navy  
14 saying what I just quoted you, and so we are left trying to  
15 determine what that means. When I read that statement, I  
16 found it concerning. I started investigating, and that's what  
17 led to AE 426. 426 is a motion for funding for an expert  
18 consultant, and then 426A is a discovery request for  
19 information that the expert consultant would need to rely on.

20 MJ [COL POHL]: Now, your expert consultant, what's he  
21 going to do?

22 DC [MR. SCHWARTZ]: Well, Your Honor, he's really, it  
23 seems like, the only person who can help us interpret the

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1 reliability of this language. You have in the record before  
2 you already an opinion that this 23 February report does not  
3 stand for the proposition that Camp Justice is safe.

4 MJ [COL POHL]: So what's he want to do, then? Conduct  
5 his own investigation?

6 DC [MR. SCHWARTZ]: He doesn't want to do anything.  
7 What ----

8 MJ [COL POHL]: Okay.

9 DC [MR. SCHWARTZ]: ---- we're entitled ----

10 MJ [COL POHL]: I mean, then we're done. I mean, what are  
11 you asking me to order the government to fund?

12 DC [MR. SCHWARTZ]: If he has funding, he would conduct an  
13 assessment, first, on the reliability of the information that  
14 the government has put forth. On its face, the information we  
15 have at our disposal now, the information from the government  
16 in the 23 February report and a variety of other interim  
17 updates, does not stand for the proposition that Camp Justice  
18 is safe. The government represents that it does, but on a  
19 scientific level, it doesn't. And so funding for an expert  
20 would allow -- not just an independent, but actually a  
21 thorough examination of the information that's available to us  
22 now.

23 I said this several times last hearing, this is not a

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1 challenge to the safety of Camp Justice. This motion  
2 specifically is a request for funding. So the standard that  
3 we're working with here is the Article III court standard  
4 under U.S. v. Anderson of whether a reasonable attorney would  
5 request this assistance now ----

6 MJ [COL POHL]: What -- what -- okay. What's it got to do  
7 with the commission? You believe part of the environment here  
8 is unsafe, and so now it's in my purview to determine the  
9 safety -- the safetiness of the Cuzcos down here?

10 DC [MR. SCHWARTZ]: Your Honor, I don't believe it's  
11 unsafe. I don't know.

12 MJ [COL POHL]: You want me -- okay. And then wouldn't I,  
13 if I granted your motion and this guy came and he did his  
14 tests, and you -- on one point you say in your pleading that  
15 we want an independent person doing this, but on the other  
16 hand we want it cloaked with attorney-client privilege. So  
17 we're not going to see the results unless you want to disclose  
18 them?

19 DC [MR. SCHWARTZ]: Your Honor, hopefully you wouldn't see  
20 the results because there would be nothing there. I mean,  
21 that's the starting point. But no, this is not covered by  
22 attorney-client privilege. This request went in ex parte  
23 originally. Most of the information was filed open. That's

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1 what we try to do with all of our filings. If there's  
2 something to be protected, we redact it or file it under seal.

3 MJ [COL POHL]: Mm-hmm.

4 DC [MR. SCHWARTZ]: Here the original request went to the  
5 convening authority as an ex parte request. We don't do this  
6 just as a matter of course, but there's been a lot of  
7 confusion over how to request resources when they should be  
8 requested without the government's oversight. There's no  
9 attorney-client privileged information as usual here, but the  
10 request went to the convening authority for his analysis, and  
11 that information wasn't provided to the government.

12 I think as a result of what has been confusion over  
13 how we do confidential -- what the military calls confidential  
14 expert appointments. You know, early on in the 036 series in  
15 this case we discussed Garries a lot, and Garries isn't really  
16 an issue that gets much challenge, I don't think, at  
17 courts-martial. The idea of an ex parte resourcing request  
18 just isn't very common. What is common in military courts is  
19 a confidential request, so that if the government -- knowing  
20 or not knowing of the independent expert's identity, the  
21 government doesn't have access to the expert during the  
22 process.

23 Here what we're asking for -- and ultimately, I mean,

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1 this -- the point really on this issue is this has become an  
2 open motion. I mean, there's nothing secret, really, anymore  
3 about this motion. We have filed open in 426D the identity of  
4 the expert, so there's nothing left to be protected here, and  
5 that's really not a concern. I also just want to note this  
6 isn't just about Cuzcos; this is about the entirety of Camp  
7 Justice.

8           But getting back to your first point, the military  
9 judge must have some discretion, some jurisdiction over the  
10 safe environment here in the courtroom and buildings that are  
11 immediately adjacent to the courtroom and necessary to the  
12 preparation of the defense. There's no way that the judge --  
13 you know, if we knew that there was a bomb sitting under this  
14 podium right now, there's no way that the judge couldn't do  
15 something about that.

16           So, yes, this is highly unusual in terms of  
17 litigating a resource for a toxicologist to determine the  
18 safety of the courtroom, but it's just the nature of where we  
19 are.

20           MJ [COL POHL]: What are you -- let me go back to my first  
21 question. What do you want this guy to do?

22           DC [MR. SCHWARTZ]: So he would -- it depends, right? I  
23 mean, this is what requires his scientific input to determine

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1 what he would have to do. But the problem is, starting with  
2 this quote, if we're being told, all of us, come work here,  
3 it's safe, but the only official conclusion that we've seen so  
4 far is this sentence, those things don't match up.

5 And so the first step that an expert would take is to  
6 determine is it safe. Now, that's a pretty generic question  
7 that I would be asking.

8 MJ [COL POHL]: What would he examine to see if it's safe?

9 DC [MR. SCHWARTZ]: Well, to start with, he would examine  
10 what would have been provided, so this 23 February report.

11 MJ [COL POHL]: Which he doesn't think much of.

12 DC [MR. SCHWARTZ]: He doesn't. That's right. He needs  
13 more information than that.

14 MJ [COL POHL]: All right.

15 DC [MR. SCHWARTZ]: So now he has available to him a 20 --  
16 I forget the day, but it's an August 2015 report that's been  
17 made available. At some point, the government is going to  
18 make available a final report. But what we have requested in  
19 426A is the limited information that he would need to make  
20 this initial assessment.

21 So on its own, we know that this report is not a  
22 self-supporting document. An expert scientist can't say --  
23 essentially, there can't be peer review on this, he needs more

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1 data. But that data should exist. It should have. And the  
2 presumption is -- slowing down -- the presumption is you  
3 couldn't possibly write a report without the underlying data,  
4 and that's really what we're asking for here.

5 I contemplated at one point only asking for the  
6 background information because I figured, look, if I can see  
7 what the actual testing levels are in particular locations, if  
8 I can see the methodology, I might be satisfied myself that we  
9 don't really have an issue here. We've just never gotten to  
10 that point, and I don't want to, you know, tie my own hands by  
11 saying the burden is on me to have the scientific knowledge  
12 that if the government were to provide the 426A evidence, I  
13 could say with certainty that it's safe for our team to come  
14 down here. I don't want to do that.

15 But to the question of what would the expert do, it  
16 kind of depends on what's available. If the government  
17 refuses to provide any of the evidence, any of the discovery  
18 that we've requested in 426A, you know, it's going to require  
19 more work. Probably would require some kind of in-person  
20 analysis.

21 I don't suspect that that would be ----

22 MJ [COL POHL]: What type of in-person analysis?

23 DC [MR. SCHWARTZ]: Well, in order for the government to

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1 come to the conclusion that they have, which I would submit is  
2 no conclusion at all, there was sampling that was done. I  
3 mean, we now know there was a walk-through examination in  
4 August of 2015. There were samples taken in October. There  
5 was analysis of those samples. There was retesting done in  
6 April.

7 I don't propose that that's what an independent  
8 expert would need to do. I think that we can get to a  
9 conclusion on this issue in a much easier way if the expert  
10 simply has access to the data that we've requested. If he  
11 doesn't, and this is where -- I think the commission would  
12 find this as concerning as I have. If the government refuses  
13 to turn over the information so that an independent assessment  
14 can be done, I mean, that, I think on its face, would be a  
15 reason to kind of take a step back and consider what other  
16 options we have here. Because it's absurd to think that just  
17 because you don't have jurisdiction or just because the  
18 government is unwilling to provide -- let me take a step back.

19 Let's say we have a building right outside, and I  
20 look at it and I say, well, that building looks old and rusty  
21 and I'd like to know if it's safe or not before we send our  
22 people in. You know, the government could do a walk-through  
23 and say, all right, at this time we don't know if it's safe,

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1 but we're going to do some analysis, and we can say in our  
2 expert opinion it's safe enough. That's not what we're  
3 talking about here, where we have already been provided notice  
4 that there are unsafe levels in some locations of a lot of  
5 different toxins.

6 MJ [COL POHL]: So your position is that based on the  
7 current level of the science in these reports, is there areas  
8 that are unsafe, but the government's saying we don't care  
9 about the risk, go ahead and do it? I mean, basically, aren't  
10 you saying that the government is not taking its  
11 responsibility seriously and is somewhat -- I mean, don't you  
12 say that in your motion, that they don't want to disrupt the  
13 proceedings and, therefore, their science is suspect?

14 DC [MR. SCHWARTZ]: I submit that as an argument for why  
15 there should be more scrutiny given to this issue. But again,  
16 I'm not saying that it is unsafe here. I'm not saying that  
17 the government is wrong in the way this assessment ----

18 MJ [COL POHL]: You just want -- so you want to get your  
19 own expert to confirm or not confirm what the government is  
20 saying on the environmental conditions of the area down here?

21 DC [MR. SCHWARTZ]: That's right, and only because of the  
22 government's conduct so far.

23 If -- let me put it this way: We didn't start this

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1 issue, right? This came out of the newspaper, effectively.  
2 There were people who were sick. A newspaper story broke.  
3 There was an investigation that the government decided to do.  
4 I didn't request it. We probably would have at some point,  
5 but the government endeavored to do some kind of assessment,  
6 risk assessment of the safety and habitability of Camp  
7 Justice.

8           If that assessment had been done in an orderly  
9 fashion in accordance with the Navy's own regulations  
10 consistent with the state of science and epidemiology and  
11 toxicology, and a report had been provided under the normal  
12 course of business, even if it had taken some time because  
13 this is a complex issue, if the methodology had been apparent  
14 and explained -- and I'm not saying in a way that I need to  
15 understand it, but in a way that at least an expert could take  
16 a look and say, yeah, that's how it's done in this field of  
17 science, this makes sense -- you know maybe we wouldn't be  
18 standing here. That's just not what happened in this case,  
19 and that's why this has become such a serious problem.

20           You -- I believe the commission is starting to  
21 suggest that there should be this presumption that the  
22 government talks about, and so I want to address that. But I  
23 don't want to lose sight of the fact that this presumption of

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1 regularity standard really hasn't been triggered yet because  
2 we're not challenging the conclusion that Camp Justice is  
3 safe ----

4 MJ [COL POHL]: Then why ----

5 DC [MR. SCHWARTZ]: ---- if there's a conclusion at all.

6 MJ [COL POHL]: Well, if there's a conclusion that it's  
7 safe, then why do you need anything? If you're not  
8 challenging that conclusion, what's your argument?

9 DC [MR. SCHWARTZ]: Because the events surrounding that  
10 conclusion, which I really want ----

11 MJ [COL POHL]: So you are challenging the conclusion?

12 DC [MR. SCHWARTZ]: Well, we might challenge the  
13 conclusion, but where we are today ----

14 MJ [COL POHL]: So you want me to provide you expert  
15 assistance because you might have a disagreement with  
16 something you currently do not have a disagreement with  
17 because you don't have enough information to know whether or  
18 not you disagree or not?

19 DC [MR. SCHWARTZ]: That's exactly right, and it's simply  
20 because the process has been so unusual and so irregular.

21 If I had an expert right now, I could put him on the  
22 stand and I could say, you know, Mr. Expert, please tell us  
23 that -- considering the findings of benzene in this camp, is

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1 it true that we in this room might be exposed in a way that  
2 could increase our chances to contract leukemia or develop  
3 leukemia.

4 MJ [COL POHL]: Let's say he says yes. Then what's next?

5 DC [MR. SCHWARTZ]: Then we have a big problem, if  
6 assuming ----

7 MJ [COL POHL]: What's next? The government calls their  
8 expert and says, that's not true, and all of a sudden we're  
9 now in an environmental civil lawsuit of some ilk under some  
10 statutes that I am totally unfamiliar with. That's not --  
11 there's a lot of statutes I'm unfamiliar with, so that's not a  
12 big deal, but this turns into an environmental action, doesn't  
13 it, kind of a civil action, talking about CERCLA and all of  
14 these other things that may or may not have extraterritorial  
15 effect?

16 DC [MR. SCHWARTZ]: It could, certainly.

17 MJ [COL POHL]: It could.

18 DC [MR. SCHWARTZ]: But that's not -- if that's what  
19 happens, if we have a battle of the experts over whether this  
20 facility is safe, I would suggest that that -- I have no  
21 intention of flying down team members, enlisted paralegals,  
22 contractors, DoD civilians at my request, knowing that I have  
23 an independent qualified expert saying it is dangerous to be

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1 here. I mean, that's different than a battle of the experts  
2 over, you know, a psychology issue ----

3 MJ [COL POHL]: So if your expert comes in, just so -- the  
4 way this goes down, and says we think this is unsafe -- the  
5 government has said it's safe but because your expert says  
6 it's unsafe, that gives you authority to tell nobody to show  
7 up, is that what you just told me?

8 DC [MR. SCHWARTZ]: Depending on the explanation and the  
9 analysis.

10 MJ [COL POHL]: Is that what you just told me?

11 DC [MR. SCHWARTZ]: Yes, sir.

12 MJ [COL POHL]: That a defense expert has -- based on his  
13 opinion, gives you the right not to show up at trial?

14 DC [MR. SCHWARTZ]: Not me, Your Honor. I'm here. I'd  
15 like not to be here right now until we resolve this. I'm  
16 talking about the people who have to support Mr. Bin'Attash  
17 and have to support this table.

18 MJ [COL POHL]: If you choose not to bring people here for  
19 your own reason, you accept that risk.

20 DC [MR. SCHWARTZ]: Our choice, absolutely.

21 MJ [COL POHL]: If you want to be -- you don't think  
22 they're necessary and you don't come, aren't you setting  
23 yourself up to be a self-inflicted ineffective assistance?

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1 DC [MR. SCHWARTZ]: I don't think you can choose to set  
2 yourself up for IAC. Yes, that would be a potential issue and  
3 I can have claims brought against me.

4 MJ [COL POHL]: I know.

5 DC [MR. SCHWARTZ]: This is an analysis that I have spent  
6 the last two months working on. What I'm saying, if we have a  
7 battle of the expert -- forget the battle of the experts. If  
8 we have a defense expert who comes in here and says to us, we  
9 have a problem, these substances are subjecting you to  
10 potential health risks now or in the future, then we shouldn't  
11 be here. Now, if ----

12 MJ [COL POHL]: Who decides that, you?

13 DC [MR. SCHWARTZ]: ---- on the question of ----

14 MJ [COL POHL]: You say we shouldn't be here. I'm just  
15 trying to figure out who is the "we" and who decides.

16 DC [MR. SCHWARTZ]: I think that speaks for itself. Now,  
17 if government expert came in and followed that and rebutted  
18 that, then it would be the commission to decide.

19 MJ [COL POHL]: Now I'm back into my environmental  
20 lawsuit. You know, do -- let me ask this: Do those -- what  
21 environmental laws apply to this situation? Do any?

22 DC [MR. SCHWARTZ]: That sounds like a Pandora's box. I  
23 agree, I don't think that's the issue. I mean, this is what

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1 judges do. Military judges specifically have to deal with the  
2 expertise in whatever field that arises in court ----

3 MJ [COL POHL]: That's relevant to the trial before them.

4 DC [MR. SCHWARTZ]: That's relevant to the trial, sure.

5 So this is never going to develop -- I shouldn't say that.

6 This is never going to develop into a civil issue in this  
7 room. I don't believe we're ever going to be dealing with the  
8 EPA or CERCLA or any other statute that might apply in this  
9 situation simply because that question can't be raised before  
10 the commission.

11 MJ [COL POHL]: Don't we get into what's -- what are  
12 acceptable standards? I mean, do we apply the World Health  
13 Organization standards? Do we apply the OSHA standards?  
14 Doesn't it make a difference? And then aren't we getting into  
15 the morass of environmental law here?

16 DC [MR. SCHWARTZ]: To the extent that the commission has  
17 to determine whether this room can be safely occupied, yes,  
18 there would be some of that. I don't suggest that that would  
19 result in some kind of major toxic tort type litigation.

20 MJ [COL POHL]: I mean, clearly, there's no tort. It's  
21 not civil. That's not what I'm saying. It sounds like it's  
22 going to look a lot like one when I get the government view of  
23 what tests were done and what were adequate and benzene levels

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1 or whatever this -- all this other chemical stuff is.  
2 Understand, I'm not minimizing the risk here, I'm just trying  
3 to minimize -- rephrase that. I'm trying to identify what is  
4 a proper issue before a military commission, and if I'm -- and  
5 that's kind of my question here is where does this lead us?

6 DC [MR. SCHWARTZ]: Yeah. I think that's right. And I  
7 think that's something that the commission, acting as a  
8 military judge in the past and acting as the commission  
9 officer, commission judge in this case, will often have to  
10 deal with complex scientific issues that you haven't  
11 encountered before. I imagine that we're going to have  
12 torture expertise, mental health expertise, international law  
13 expertise. I mean, the law at least as -- at least we're  
14 getting into the field, but all sorts of expert fields that  
15 you have to consider opinions from both sides in order to come  
16 to a conclusion on an issue that is relevant to this case.

17 Now, the relevance here ----

18 MJ [COL POHL]: No, I understand. I understand that part  
19 of it. It just -- this is a different kind of issue that I'm  
20 just -- do you have any -- any military justice or any case  
21 where a court addressed this type of issue?

22 DC [MR. SCHWARTZ]: Your Honor, I looked for cases where a  
23 temporary structure was set up on an abandoned airfield that

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1 had been subject to fuel spills and all sorts of other  
2 chemicals and then put into use for a court-martial or a trial  
3 for the next, you know, five to 15 years. No, I didn't come  
4 across that. And I would concede, this is weird. This is an  
5 odd motion.

6 MJ [COL POHL]: Okay. You and I can agree on that.

7 DC [MR. SCHWARTZ]: It has to be a threshold agreement  
8 between all of the parties that the commission has some say in  
9 ensuring the security and the safety of the facility. I don't  
10 have a case to say that the commission then is responsible  
11 therefore over the habitability vis-a-vis the toxins that are  
12 found in any given location.

13 But here what we have is a legitimate threat to  
14 health. And I absolutely would love to step back and say, all  
15 right, Navy/Marine Corps Public Health Center, which I  
16 understand sort of the equivalent of a CDC-type body here and  
17 is staffed by full-time experts in that field, we rely on you  
18 to give us the information that the military commission is  
19 going to rely on here. I think that's the starting point. I  
20 think that is the presumption of regularity that the  
21 government proposes here.

22 The problem is, what we've seen -- even without  
23 relying on an expert opinion, what we've seen in the unfolding

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1 of these events tells us we have a problem. I have a couple  
2 of examples of why the presumption of regularity is rebutted  
3 in this situation, even without an expert opinion, and even  
4 without being at that point where we're challenging an  
5 official opinion of an agency or a government official.

6 Here we have a 23 February report that is considered  
7 by the government, by the Public Health Center, to be still an  
8 initial report. It's not a final report, but it's dated  
9 February 23, and we see it. We hear about it for the very  
10 first time in April. This report contains information about  
11 the formaldehyde in the Cuzcos. And again, these toxins exist  
12 throughout Camp Justice, but let's just talk about the Cuzcos  
13 and the formaldehyde for a moment.

14 The government's conclusion on the formaldehyde in  
15 the Cuzcos is that the levels are unacceptable. If you had an  
16 expert testifying on behalf of the government, you would hear  
17 testimony from him -- at least this is what was provided to us  
18 outside of the record at a town hall meeting last Friday. You  
19 would hear that the maximum and the average levels of  
20 formaldehyde were unacceptable and needed remediation.

21 The Public Health Center knew that clearly by  
22 February 23rd of this year. This report was then provided to  
23 the convening authority, and yet for the next five weeks we

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1 continued to send down our team, our people, to stay in the  
2 Cuzcos while the Public Health Center knew -- or at least the  
3 convening -- yeah, the Public Health Center knew that the  
4 levels of formaldehyde could be making the occupants sick.  
5 That's a very good reason to question the regularity of this  
6 report and this analysis.

7 Another great example exists, and this has been  
8 cleared by the court security officer. This is 426 (WBA) Sup,  
9 Attachment D, page 6. I have copies, but this is already in  
10 the record. Your Honor, if I could have your permission to  
11 use the ELM0.

12 MJ [COL POHL]: Have you seen this? Let me see -- the  
13 CISO wants to take a look at the copy first, please.

14 Okay. Go ahead. You may display it.

15 DC [MR. SCHWARTZ]: As our motion explains, this is a  
16 slide published by the Navy and Marine Corps Public Health  
17 Center to explain the 23 February report. And when I saw  
18 this, I thought, well, this isn't so bad, because look, the  
19 background soil levels in Florida for arsenic are higher than  
20 the maximum concentration found here and far higher than the  
21 mean concentration found here, so we shouldn't be very  
22 concerned about this, right? The slide says these are typical  
23 background concentrations.

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1           But I Googled it because there's no cite, also  
2 irregular in the field of toxicology, any cite here. There's  
3 no citation to the source of this information, so I Googled  
4 it. I typed in something like background soil levels of  
5 arsenic in Florida, 38.2 milligrams per kilogram. I came  
6 across an article that we cite to in our motion published by  
7 the University of Florida, and it explained in terms that as a  
8 nonscientist I could understand very clearly. 38.2 milligrams  
9 per kilogram isn't nearly what you would expect to find in  
10 Florida. It is what was found on one case in a coastal area  
11 that contained a high concentration of mollusk shells which  
12 are apparently known to be high in arsenic. So yes, there is  
13 a location in Florida where 38.2 milligrams per kilogram of  
14 soil was found in background soil, and whether that is  
15 dangerous is a whole other question because it depends whether  
16 that's organic or inorganic, without getting into the science.

17           MJ [COL POHL]: So Florida is doing something to clean it  
18 up?

19           DC [MR. SCHWARTZ]: Florida is doing something to clean it  
20 up to the point that their goal, the level after the cleanup  
21 is .8 milligrams per kilogram. So not only is this not a  
22 typical concentration in Florida, but everything beneath it,  
23 this yellow section, isn't at all what you would expect to

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1 find in Florida and is not what the Florida environmental  
2 agency wants. They in fact want it less than half of what the  
3 mean concentration is here.

4           Now, again, I am not being an expert. I'm not  
5 testifying in support of the fact that the arsenic levels here  
6 are dangerous. What I'm suggesting is it's alarming that the  
7 Public Health Center would issue a report and follow it up  
8 with a slide like this and suggest to me and to everybody else  
9 here that -- don't worry about this because this is what you  
10 just find in Florida. And then in one Google search, the very  
11 first hit I find tells me that's absolutely false. That's  
12 another reason why the presumption of regularity here has been  
13 rebutted.

14           I don't want to get into too much detail about the  
15 2012 asbestos incident here, but if we're talking about  
16 rebutting a presumption, if we're talking about not giving the  
17 government deference, we can't ignore the fact that an  
18 industrial hygiene concern in this facility, in this case in  
19 2012, led to the publication of a false report at the  
20 recommendation of JTF personnel.

21           We complained about the potential for asbestos in  
22 buildings in this facility. We go into a lot of detail in  
23 this motion and in past motions, in 095 also, discussing the

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1 fact that pursuant to your order, Your Honor, the prosecution  
2 was forced to turn over e-mails that revealed the fact that  
3 when the asbestos remediation was being done, the industrial  
4 hygienists here, the Navy industrial hygienist, fabricated his  
5 report at the direction of the Navy captain running this  
6 facility at the time.

7           Now we're talking about different people. It's a  
8 different Navy captain who runs this facility now. It's a  
9 different Navy industrial hygienist who's responsible for this  
10 report. But we can't escape the fact that in a prior  
11 industrial hygiene question in this case, the government  
12 representation to everybody, not just the defense teams, was  
13 that asbestos remediation was being done correctly when it  
14 knew it was not. That's another reason why this presumption  
15 of regularity has been rebutted.

16           The last example I'd like to present, Your Honor, is  
17 probably the strongest in legal terms, and it's something that  
18 I think is the most striking to us as lawyers, and that's  
19 simply that the Navy/Marine Corps Public Health Center's work  
20 on this case, its publication of this document and these  
21 slides, this 23 February report, is in contravention of its  
22 own regulations. The Public Health Center operates its Navy  
23 industrial hygiene function under a field manual called the

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1 Navy Industrial Hygiene Field Manual, and that field manual  
2 lays out how industrial hygiene reports are to be written,  
3 specifically how initial industrial hygiene reports are to be  
4 written.

5           And in this case what we have, absent any expert  
6 testimony from any scientist, the appearance that the Navy  
7 Public Health Center has violated its own regulation. The  
8 regulation which we cite to in our motion discusses the fact  
9 that the initial report should be issued 90 days after a  
10 walk-through for an industrial hygiene survey.

11           Here we have a report that was issued more than  
12 180 days after the initial walk-through, and I don't have a  
13 problem with that necessarily because you're going to have  
14 complex scenarios. You're going to have situations where you  
15 can't meet the normal time frame because something is just  
16 more complicated and you want to do it right. Fine.

17           But this 90-day requirement is important simply  
18 because it acknowledges the fact -- the Public Health Center  
19 acknowledges how transparency matters here, how getting  
20 information out to interested parties is part of the  
21 responsibility of the Public Health Center, and yet here we  
22 have a report that took over 180 days and then wasn't  
23 distributed to the public for another 48 or 50 while the

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1 convening authority sat on it.

2           What's worse, though, than the timeline is simply the  
3 absence of information. The field manual talks about the  
4 importance of identifying the locations of the suspected  
5 toxins, of the harm, and that's for good reason. If you have  
6 people who are occupying a ship or an FOB or any kind of  
7 military building, naturally they're going to want to know the  
8 results of an important assessment like this. Here, we got  
9 the results. We have a summary conclusion -- again, not in  
10 writing anywhere, but what I'm told from the government is  
11 that it is safe, but we get almost no information about where  
12 these toxins exist.

13           And the reason that's important to me is, you know,  
14 Camp Justice isn't small. We're talking about a couple  
15 hundred acres, I think. If we knew that the exceedances, the  
16 samples that were selected that exceeded exposure levels or  
17 permissible exposure levels were located in a specific area, I  
18 don't know that this motion wouldn't be brought at all. We  
19 probably wouldn't be talking about this. And yet the only  
20 information that we have been provided about exceedances is  
21 evidence of samples collected that are -- really are in  
22 locations that we could avoid.

23           So for example, if we are just talking about arsenic

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1 again, this 25-milligram-per-kilogram sample, this is the  
2 maximum concentration of arsenic that was collected, and we  
3 know that this sample was collected just south of the hangar.  
4 And I was thrilled to see that, because I don't go just south  
5 of the hangar. Nobody does. It's avoidable. What I want to  
6 know before I decide to fly people down here to be living in  
7 Camp Justice and working in this facility for 16 hours a day,  
8 there are six samples -- and this is in our motion, but there  
9 are six samples that are well above the mean and yet below  
10 this maximum concentration and they are double and triple and  
11 quadruple the screening levels.

12           And I asked the question of the government, where are  
13 these samples coming from? Just show me that they are also  
14 south of the hangar. Show me they are somewhere along the  
15 beach where we don't spend any time. The answer we got last  
16 Friday at the town hall is we can't tell you because it's a  
17 security issue. That just doesn't make any sense. You know,  
18 I have complete access to this entire facility. I know ----

19           MJ [COL POHL]: [Sneezed] Excuse me.

20           DC [MR. SCHWARTZ]: ---- I know that the toxins exist.  
21 Bless you, Your Honor.

22           I note that samples have been taken in certain  
23 locations but I don't know where in the facility these high

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1 samples are being collected, and so I can't tell my people and  
2 I can't myself avoid them.

3           Last point on why the presumption of regularity is  
4 rebutted here is the expert opinion that we did provide you,  
5 the opinion that this document is not self-supporting. And I  
6 didn't come up with that language. The reason that you have  
7 an expert opinion that the 23 February report is not  
8 self-supporting is because it's the Navy Industrial Hygiene  
9 Field Manual that requires its own reports to be  
10 self-supporting. They have to be stand-alone documents. They  
11 have to be subject to some kind of review. I don't know that  
12 it's necessarily a peer review, but it's got to be accessible  
13 to people who have some understanding of the science to say,  
14 look, you know, we see the results. We see ----

15           MJ [COL POHL]: When you say "self-supporting," do you  
16 mean the underlying data is included in the report?

17           DC [MR. SCHWARTZ]: Yes, sir. The data, the methodology.  
18 I would agree that there are some things that are probably  
19 irrelevant, but it's got to be enough for an independent  
20 person who wasn't part of the investigation to look at the  
21 report and say, all right, I get it. I see what the purpose  
22 of the investigation was. I see what the methodology for  
23 sampling was. I see what the methodology for analysis was,

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1 and I can -- it's like showing your work on a math problem. I  
2 see how you got to that result. This report doesn't do that.  
3 It makes it a not self-supporting document, and that's a  
4 violation of the Navy's own regulations.

5 Your Honor, I'll conclude with one more comment, and  
6 that's that, you know, as off-topic as this issue seems to be,  
7 as strange of a motion that it is, this is something that  
8 really has been a distraction for us for the past couple of  
9 months. And I have been approached outside of the courtroom  
10 hearing gratitude for bringing it. I've also been told that  
11 this is a scandalous waste of time.

12 You know, this is a question of whether we can run  
13 this team without distraction in a way that a capital  
14 defendant deserves, in a way that the enlisted officers,  
15 contractors, DoD civilians deserve, in the course of doing a  
16 historic case like this. Whether it is a scandalous waste of  
17 time, Your Honor, I leave to you, but ----

18 MJ [COL POHL]: How do you respond to the government's  
19 position that this is non-justiciable, it's not covered by the  
20 enabling statute?

21 DC [MR. SCHWARTZ]: Well, I think it's inherent. I think  
22 it's inherent in the function of the commission to provide a  
23 safe place to hold the commission. If this is

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1 non-justiciable -- take it from the back end. It's an absurd  
2 result that in order to make sure this is a safe room, I have  
3 to go to federal court, I guess, and sue the Navy for not  
4 providing me a safe place to work. That can't be the result  
5 here, is that if I -- let's say I had a pro bono expert who  
6 could come in and actually testify and say, you know, Judge  
7 Pohl, beyond any doubt, you're all going to get cancer now.  
8 Right? We don't have that, but let's say we did. There's no  
9 way that you can turn around and say to that, sorry, hope  
10 somebody fixes that. Right?

11 I mean, there has to be some authority inherent in  
12 your position on the bench here to make sure that this  
13 facility is safe, and that's why we're coming to you, in the  
14 most minimally invasive way we can, which is just to get the  
15 evidence that an expert would need, the funding that an expert  
16 would need to do, you know, an initial analysis of this work.

17 MJ [COL POHL]: So if he got all of the background data,  
18 you're not going to come back to me and say he needs more, he  
19 has to do his own testing? You can't tell me that, can you?

20 DC [MR. SCHWARTZ]: I can't. You're right.

21 MJ [COL POHL]: You're saying he will get this and then  
22 we'll see where we're at.

23 DC [MR. SCHWARTZ]: That's true.

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1 MJ [COL POHL]: For a guy who's already taken a position  
2 that the report is not scientifically supportable?

3 DC [MR. SCHWARTZ]: Different guy, but yes, even -- we're  
4 at the point where ----

5 MJ [COL POHL]: Isn't that affidavit in your ----

6 DC [MR. SCHWARTZ]: Different expert.

7 MJ [COL POHL]: Okay.

8 DC [MR. SCHWARTZ]: The affidavit came from a pro bono  
9 expert. The expert we would like to fund is a different guy.

10 MJ [COL POHL]: Well, how do you know this guy -- does  
11 this guy criticize the report, the guy you want?

12 DC [MR. SCHWARTZ]: He -- yes. He has issued -- he hasn't  
13 issued anything. He has done what I would say is a cursory --  
14 I don't want to represent to you that he has ----

15 MJ [COL POHL]: Okay. But I'm saying he's coming from a  
16 position that what's been done -- the nature of your request  
17 is the support for that request is because they're coming to a  
18 position that the current state of the science, for want of a  
19 better term, is inadequate, and it's ----

20 DC [MR. SCHWARTZ]: That's all true.

21 MJ [COL POHL]: So once we go down this road, if I believe  
22 it's an appropriate issue for the court to address, then you  
23 have to go all the way down, wouldn't you, if they come back

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1 and say this data is all messed up, we have to generate our  
2 own data.

3 DC [MR. SCHWARTZ]: I can only think of two alternatives.  
4 One, we do nothing and hope it works out. I don't like that  
5 one.

6 MJ [COL POHL]: No, no, I'm just saying I'm just getting  
7 the scope of your request.

8 DC [MR. SCHWARTZ]: The other is ----

9 MJ [COL POHL]: It does go down to the jurisdiction of the  
10 court. I'm using that term now, you know, but if the logical  
11 way this goes down is that basically you want an independent  
12 evaluation of the -- of the environmental concerns you have,  
13 and to get that, if they don't like the current data, they  
14 would say, okay, we've got to generate our own data, and then  
15 they generate their own data and then we come in and then we  
16 start litigating. I know judges litigate between experts in a  
17 field the judge may not be familiar with, I got that. But I'm  
18 just saying this evolves into a -- into basically an  
19 environmental lawsuit of some ilk, and it comes back to me to  
20 decide, yes, it's safe, no, it's not safe, whatever it is, I  
21 mean, if you go down that road.

22 DC [MR. SCHWARTZ]: Right.

23 MJ [COL POHL]: But my question is, is that within the

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1 charter of the enabling statute?

2 DC [MR. SCHWARTZ]: Clearly it's not explicitly in the  
3 charter. That should be our starting point. But my  
4 alternative here was to come to the commission and request a  
5 full, independent analysis. I mean, this report, I imagine,  
6 took thousand of hours to research and compile and publish,  
7 and I'm not asking for that. I proffer to you that the  
8 independent expert we have requested has suggested it's very  
9 unlikely -- and again, that's not a certainty -- but it's very  
10 unlikely that he would have to do independent testing. All he  
11 would need to see is the background data and the methodology,  
12 and that's what we have requested in 426A.

13 So, you know, I get that it's an unusual question.  
14 It might require the commission to interpret the authority of  
15 the military judge broader than anything that we've discussed  
16 so far, but the alternative, again, to me, seems absurd. It  
17 can't be that the military judge can't ensure the habitability  
18 of this room and of the facilities, you know, immediately  
19 outside this room that are required for the team ----

20 MJ [COL POHL]: Well, wouldn't it, under your logic, cover  
21 any place, any office, any housing area you're in, that people  
22 are living not here, living somewhere else, and now we're  
23 saying, well, this is uninhabitable, because it's got mold,

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1 Judge, your problem? Where is my authority to do -- it  
2 apparently is unfettered to be the -- I don't know what the  
3 Navy calls it, but we used to call it the DEH, the Department  
4 of Engineering & Housing, an Army installation, to go around  
5 and say, well, you know, I mean, if that's what you're saying  
6 is that ----

7 DC [MR. SCHWARTZ]: It could be. I haven't thought  
8 through the extent of it, because all we're dealing with here  
9 is a facility that clearly is a very specific facility.

10 MJ [COL POHL]: I understand that, and sometimes I get  
11 criticized by taking arguments to, some say, illogical  
12 conclusions. I've got that. My point being, though, is it's  
13 a jurisdictional matter, if I have jurisdiction -- that's what  
14 we're talking about here -- to resolve this type of issue,  
15 does not it raise it for other types of issues?

16 Now, the fact that you can't go somewhere -- now, I  
17 don't know quite frankly whether the federal court has any  
18 jurisdiction over here when with it comes to these types of  
19 issues, but whether they have it or not, it's not -- does not  
20 confer jurisdiction on me. The only thing that confers  
21 jurisdiction on me is what Congress wrote in the statute. And  
22 if I can't find it there, the fact that it may exist nowhere  
23 and in the unique status of Guantanamo Bay, there may be no

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1 other place, but that's not a jurisdiction-enabling provision  
2 because you can't go somewhere else or somewhere else less  
3 convenient.

4           So that's where I come back to the argument -- or the  
5 point is if this is -- where is this line drawn? Because  
6 you're talking about the living areas here. So we're not just  
7 talking about the courtroom. We're talking about the living  
8 areas, we're talking about ----

9           DC [MR. SCHWARTZ]: The line is drawn where there's impact  
10 to the operation of the defense that infringes on the  
11 defendants' ability to have access to counsel. I really think  
12 that's how you have to define it. If that means that my  
13 office in Washington, D.C., which is far removed from  
14 here ----

15           MJ [COL POHL]: Uh-huh.

16           DC [MR. SCHWARTZ]: ---- is inaccessible to me because the  
17 government is not following its own OSHA requirements then,  
18 yes, the commission has some ability to act to remedy that  
19 problem.

20           Now -- and this is an age-old problem in  
21 courts-martial, is the commission's ability, is the military  
22 judge's authority limited to abatement? Maybe. But that  
23 still is authority. That still has a remedy. That still is a

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1 way to force the Navy to act to make sure that when we send  
2 our people down here there's no chance -- there's never no  
3 chance -- that there's no unreasonable or unfair exposure to  
4 toxins that are going to make people sick. That's why we  
5 brought this motion. Thanks.

6 MJ [COL POHL]: Thank you.

7 Does any other defense counsel want to be heard on  
8 this particular motion? Mr. Nevin.

9 LDC [MR. NEVIN]: Your Honor, thank you. Only to say that  
10 I believe the rules provide that it is the convening  
11 authority's obligation to ensure that an appropriate location  
12 and facilities for military commissions are provided,  
13 referring to Rule 504, and if the -- if the environment in  
14 which we litigate these proceedings are harmful to health, the  
15 convening authority has failed in that respect, and I believe  
16 that the military commission's charter includes requiring that  
17 the convening authority comply with the rules -- with the  
18 military commission rules.

19 In the normal situation, I would go -- I have an  
20 office. I have a home. I go to court. If there's a problem  
21 at my home, the court doesn't have anything to say about that.  
22 I live where I choose to live, and similarly with respect to  
23 my office.

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1           If there's a problem with the court facility, the  
2 court is going to have authority, of course, to say, we're not  
3 going to hold court here, we're going to hold court somewhere  
4 else, or we're going to wait until it gets fixed.

5           But here, the unique nature of this situation is that  
6 we all have to come here. We don't have any choice. And we  
7 have to live in places that we're assigned to live or stay in  
8 places that we're assigned to stay in.

9           MJ [COL POHL]: Just to be fair, Mr. Nevin, you are  
10 correct in the sense that you don't -- not everybody gets --  
11 there's limited choices of where people live and you're told  
12 where to live. But all that being said ----

13          LDC [MR. NEVIN]: Yeah.

14          MJ [COL POHL]: ---- as far as just coming to Guantanamo  
15 and it's going to be the nature of this thing, everybody chose  
16 that when they chose to go on this case, true?

17          LDC [MR. NEVIN]: No, not true.

18          MJ [COL POHL]: Oh, when you chose to defend Mr. Mohammad,  
19 you didn't know you were going to have to defend him down  
20 here?

21          LDC [MR. NEVIN]: Well, yeah.

22          MJ [COL POHL]: That's my point.

23          LDC [MR. NEVIN]: I knew I was going to have to defend him

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1 down here.

2 MJ [COL POHL]: Okay. So you knew ----

3 LDC [MR. NEVIN]: I didn't know that being down here in  
4 itself was going to be -- if it was going to be harmful to my  
5 health.

6 MJ [COL POHL]: I understand that point, but what I'm  
7 simply saying is -- is ----

8 LDC [MR. NEVIN]: Oh, no, I'm not saying that somebody  
9 tricked me into coming here ----

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: ---- without telling me.

12 MJ [COL POHL]: Knowing that you were going to live in  
13 government-supplied housing and your staff would, too ----

14 LDC [MR. NEVIN]: Right.

15 MJ [COL POHL]: That's my point.

16 LDC [MR. NEVIN]: No, all of that was understood, but I  
17 think it was also understood that appropriate location and  
18 facilities for military commissions would be provided, to  
19 include a healthful living environment, and, you know,  
20 transportation that works and so on. So I think it is within  
21 the military commission's authority to ensure this.

22 Thank you, Your Honor.

23 MJ [COL POHL]: Thank you.

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1 LDC [MR. RUIZ]: Judge, if I may.

2 MJ [COL POHL]: Yeah, Mr. Ruiz.

3 LDC [MR. RUIZ]: Judge, just a couple of points. As I was  
4 listening to the argument of Mr. Schwartz and some of your  
5 questions, inevitably I always read things into your  
6 questions, and perhaps there are sometimes things that you  
7 don't want me to read into them. And it seemed to me that you  
8 were asking for nexus, and I think that's fairly safe to say,  
9 nexus between this issue and the military commissions  
10 jurisdiction.

11 I disagree however that the nexus between this issue  
12 and the military commission is as tenuous as it appears to be,  
13 and I would not necessarily concede that, having been joined  
14 to this motion and being purposely not unjoined, we do have a  
15 very serious concern when it comes to the health and  
16 well-being of the people that have pledged to work and to  
17 support this effort.

18 You are correct that we made an affirmative decision  
19 to be part of these proceedings, but as Mr. Nevin indicated,  
20 there is that knowing and voluntariness that comes with having  
21 full disclosure of what you're getting into. And I would  
22 submit to you that if there was even a risk or a potential  
23 that it would be harmful to the long-term health of myself or

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1 somebody on my team, that analysis would have been very  
2 different regardless of anything else having to do with this  
3 case.

4           And I want to point out two things in  
5 Mr. Bin'Attash's brief that I think are important and I think  
6 highlight why this commission has authority and why the  
7 commission has the responsibility to act in this matter.

8           On page 26 of Mr. Bin'Attash's brief, his counsel  
9 indicate that, "Much like the conflict of interest can cause a  
10 defense attorney to pull punches, counsel for Mr. Bin'Attash  
11 until this matter is resolved will operate under the suspicion  
12 that they are unsafe in Camp Justice."

13           Judge, I think what is simmering beneath the water of  
14 this motion is a conflict of interest or at least a potential  
15 conflict of interest. What is that conflict? Well, in my  
16 view, the conflict would come from a counsel having to make a  
17 choice, a choice to the detriment of his client against the  
18 best interests of the case because they are concerned about  
19 their health or because they are concerned about the health  
20 and welfare of their personnel.

21           If counsel were in a position where they had to  
22 choose to leave personnel behind because they'd rather not  
23 expose them to an uncertain risk rather than bring them here

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1 and have them work and assist and support the defense of the  
2 person they represent, that is a conflict of interest that  
3 affects directly the accused in the case.

4           Now, in the course of your recitation with  
5 Mr. Schwartz -- or your discussion with Mr. Schwartz, you  
6 said, well, if you choose to make that choice, then that's  
7 your choice and you are making that choice knowingly. But  
8 what I would say to you is if the lawyer makes that choice,  
9 and the choice is I need three paralegals in Guantanamo Bay in  
10 order to properly defend this case, and you leave two of those  
11 paralegals behind, number one, you are correct, you are  
12 exposing yourself to an ineffective assistance of counsel  
13 issue. But at the same time, it is the conflict of interest  
14 between the welfare and the well-being of the attorney and the  
15 welfare and the well-being of the person that they represent.

16           If the attorneys are put in such a position, what it  
17 seems to me that this is screaming out is that there are a lot  
18 of people who are integral in the defense of these cases who  
19 may be heading in the direction of having that potential  
20 conflict of interest, and what this motion is asking you to do  
21 is to assist in easing that potential conflict of interest by  
22 appointing an expert that would help either confirm or deny  
23 the concerns of not only the lawyers, but of the personnel and

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1 the people who we are responsible for.

2 MJ [COL POHL]: If you or any defense counsel become aware  
3 of any he potential conflict of interest, don't you have an  
4 affirmative duty to apprise the court of it?

5 LDC [MR. RUIZ]: I do. And what I'm saying to you is I  
6 believe, I would submit, that this motion raises a potential  
7 conflict. I'm not saying that that conflict necessarily  
8 exists now or is an actual conflict, and I don't want to speak  
9 for counsel for Mr. Bin'Attash, but I am pointing out to you  
10 that in the brief that was submitted to the court, that issue  
11 is at least raised. And I think if you're searching for  
12 authority and you're searching for a link, I think it would be  
13 good for the court to contemplate a potential conflict of  
14 interest when personnel are placed literally in a  
15 relatively -- a concern for their life and their well-being  
16 versus doing certain things for their case.

17 MJ [COL POHL]: Where does this lead logically at the end  
18 of the day then, is that what we have here is a Navy report  
19 that somebody -- that Mr. Schwartz and others don't like that  
20 says everything's habitable. You have a criticism that it may  
21 not have followed appropriate scientific methodology;  
22 therefore, we're not sure whether there's a problem or not;  
23 therefore, go give us an expert so we can be sure. Until we

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1 are sure, we operate under this fear that's founded in this  
2 uncertainty. Isn't that kind of the logic train that I'm  
3 asked to get to?

4 LDC [MR. RUIZ]: Yes, but I think that that goes to -- you  
5 have to look at what concerns the lawyer and the legal teams  
6 are operating under and whether those concerns ultimately  
7 affect the defense of the case. And I think you are in that  
8 position where you can help alleviate that, and should, in the  
9 face of a potential conflict of interest.

10 And the other piece is the effectiveness of the  
11 representation. And there is a statutory right to effective  
12 representation of counsel; it's representation of counsel  
13 along with the effectiveness of that representation. To the  
14 extent that this issue impacts directly on those choices and  
15 the health and well-being and the mindset of the person at  
16 work, it can very well affect the quality of representation  
17 that they are receiving.

18 Again, you are asking for authority and you were  
19 asking for why this ought to, I think, matter to the  
20 commission. And I'm simply making those two observations, is  
21 that I'm not willing to say that this motion is necessarily so  
22 far afield or so unusual that it doesn't impact directly what  
23 happens in these proceedings and the quality of the

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1 representation that these men are receiving or may receive in  
2 the future.

3 MJ [COL POHL]: I understand. Thank you.

4 LDC [MR. RUIZ]: Thank you.

5 MJ [COL POHL]: Mr. Harrington or Mr. Connell, do you have  
6 anything to add?

7 Not from Mr. Connell. Mr. Harrington has something  
8 to add.

9 LDC [MR. HARRINGTON]: Judge, just a couple of comments.  
10 I don't have really much substantively to add, but I just  
11 wanted to point out a couple of things to the court and to  
12 also express my concern with respect to my team, but there's a  
13 dichotomy here in terms of the housing that's provided whereas  
14 I and some of the other people on my team get to stay at a  
15 place where there apparently is no problem, and other people  
16 who are in a support situation get to stay in a place where  
17 there potentially is a problem, and that can -- it hasn't yet,  
18 I don't think -- can lead to a real difficulty with respect to  
19 the support people for how they perceive they are being  
20 treated and very well affect the work in this case.

21 But, Judge, you've asked a lot of questions about,  
22 you know, well, how far do we go, where do we go, and all of  
23 this. This is not some idle thing. I mean, seven people have

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1 died of cancer who worked for extensive periods down here.  
2 There's no proof that we have in the record yet that there's  
3 a -- there's proof that there's a connection to the fact that  
4 they worked here and they got cancer and that they died. May  
5 well be true. May not be true. We don't know. We don't have  
6 the expertise with which to establish that, but that's in the  
7 mind and the background here of the context of this.

8           And it's not like we're saying, we're here, Judge,  
9 and we want you to give new air conditioners to the Cuzcos  
10 because the air conditioners aren't right. That's not what  
11 we're talking about here. We're talking about a legitimate  
12 issue. And when Mr. Schwartz says they have an expert who's  
13 reviewed the Navy report and says the methodology is wrong,  
14 that's enough to confirm the concern that people have. And to  
15 be quite frank, Judge, none of us trust the Navy or the other  
16 governmental agencies when they are at a point of defending  
17 themselves.

18           Judge, I live in Buffalo, New York. 25 miles from me  
19 is the Love Canal zone, one of the worst toxic problems in the  
20 history of this country. And for years and years and years  
21 governmental agencies denied that there was any problem. And  
22 people in this country know that corporations pollute, that  
23 there's -- that there are real problems, and the governmental

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1 agencies are not necessarily attuned to being forthright about  
2 it. And I think that that context has to be considered by the  
3 court.

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

5 Trial Counsel? General Martins.

6 CP [BG MARTINS]: Your Honor, before beginning argument,  
7 I'd like to just supplement the record with something that  
8 Mr. Schwartz mentioned twice, and it is a document that the  
9 Navy/Marine Corps Public Health Center provided to the OMC  
10 community on July 15th.

11 Is there any objection to the slides being provided  
12 that you were describing, Mr. Schwartz? I've got copies. I  
13 can -- it's a slide package, but because he raised it, I think  
14 it's important to talk a little bit about a couple of the  
15 conclusions in there.

16 MJ [COL POHL]: Do you plan to display them?

17 CP [BG MARTINS]: I don't intend to display. And I would  
18 point out, Your Honor, I would ask that you provisionally take  
19 these under seal because they are going to undergo review. I  
20 understand and have been talked to about what I can say in  
21 court relating to it.

22 MJ [COL POHL]: These are pending classification review?

23 CP [BG MARTINS]: They are not classified. They're

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1 unclassified slides, but because the information is originally  
2 owned by the Navy IG, that's the only thing that requires it  
3 to be looked at. So I do wish to make a reference to a couple  
4 of things because of what counsel said.

5 MJ [COL POHL]: They're going to be made available to the  
6 defense counsel?

7 CP [BG MARTINS]: I'm going to give them each a copy now.

8 MJ [COL POHL]: Okay.

9 CP [BG MARTINS]: I'll bring a copy forward for you.

10 MJ [COL POHL]: Any objection to temporarily submitting  
11 these documents?

12 CP [BG MARTINS]: They're going to post them eventually on  
13 the web page.

14 MJ [COL POHL]: Apparently not. General Martins, I don't  
15 like to have open-ended orders, so within one month from  
16 today, I want them either -- I want a notice of the status of  
17 whether they're unsealed or not.

18 CP [BG MARTINS]: I will do that, Your Honor.

19 MJ [COL POHL]: If you want them to continue to be sealed  
20 after that, you need to file a written motion, okay?

21 CP [BG MARTINS]: Understood. And, again, they're about  
22 to put these on the website, if they haven't while we've been  
23 in here, and I think a version of these is going up.

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1 MJ [COL POHL]: Do you have a copy for the court  
2 reporters?

3 CP [BG MARTINS]: I do.

4 DC [MR. SCHWARTZ]: Right. The fact that these likely  
5 will be published soon, if they're sealed, it's going to make  
6 them tough for us to work with experts, with others.

7 MJ [COL POHL]: Were these the slides ----

8 DC [MR. SCHWARTZ]: They're FOUO.

9 CP [BG MARTINS]: These are. These are the slides that  
10 were shown on July 15th.

11 MJ [COL POHL]: To the -- for want of a better term, the  
12 OMC community?

13 CP [BG MARTINS]: Yes.

14 MJ [COL POHL]: Do you have any objection to anybody  
15 sharing them with members of the defense team since they've  
16 already ----

17 CP [BG MARTINS]: They've already seen them, I don't have  
18 any objection.

19 MJ [COL POHL]: Mr. Schwartz is indicating if he wanted to  
20 have his expert look at them.

21 DC [MR. SCHWARTZ]: Right. Our expert wasn't allowed.  
22 Our expert wasn't allowed to attend the town hall.

23 CP [BG MARTINS]: They're marked right now FOR OFFICIAL

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1 USE ONLY. The version that goes up on the web page may not  
2 eventually bear that, so provisionally he should live by  
3 those.

4 MJ [COL POHL]: How long will it take to review the FOUO  
5 designation?

6 CP [BG MARTINS]: It's in the process of being reviewed  
7 now, Your Honor, by the DoD review team under the reg. So  
8 that process is supposed to take 15 business days -- or  
9 15 days.

10 MJ [COL POHL]: Thank you. That would be 15 business days  
11 since the briefing?

12 CP [BG MARTINS]: Your Honor, I don't want to say that. I  
13 note -- I got word today that they had been submitted for  
14 review to the DoD security classification/declassification  
15 review team and -- for information review. So I wouldn't want  
16 to say that it started on the 15th of July.

17 DDC [MAJ WICHNER]: Your Honor, if I may put something on  
18 the record in somewhat of an objection at least at this time.

19 Regarding these slides, Mr. Harrington and I weren't  
20 allowed to see the VTC or the presentation on the 15th because  
21 we were en route here to GTMO to meet with our client before  
22 the hearings. I asked -- my understanding is it was something  
23 that was done in the NCR region and there was a VTC here to

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1 GTMO for people who were here on island. We were on a plane  
2 at that moment in time.

3 I put a request in for a recording of it so that  
4 Mr. Harrington and I could watch it once we were on island. I  
5 was denied that request by a Navy counsel. I could come up  
6 with that information if need be. But because of that, these  
7 slides were part -- my understanding is right now that these  
8 slides were part of that presentation. So therefore, at least  
9 I object until such time as Mr. Harrington and I can do a  
10 decent review of them.

11 MJ [COL POHL]: Okay. Here's what we're going to do. For  
12 seven days they'll remain sealed. If you want to go beyond  
13 that, you file an appropriate motion to continue it, okay?  
14 They're standing in the FOUO category.

15 CP [BG MARTINS]: Yes, sir.

16 MJ [COL POHL]: If you want those markings changed, you  
17 file a motion of why, at least at a minimum, the defense  
18 cannot share them with potential experts. And, Major Wichner,  
19 if your late notice puts you in a disadvantageous position to  
20 argue this -- any further part of this motion, it's not going  
21 to be decided today, you will have an opportunity to either  
22 supplement a pleading or present if you request an oral  
23 argument yourself, okay?

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1           That being said, go ahead, General Martins.

2           DDC [MAJ WICHNER]: Thank you.

3           LDC [MR. CONNELL]: Your Honor, do we have an AE number?

4           MJ [COL POHL]: I'm sure I do. 426E. Go ahead.

5           CP [BG MARTINS]: Good afternoon, Your Honor.

6           MJ [COL POHL]: Good afternoon.

7           CP [BG MARTINS]: Your Honor, the defense motion to compel  
8 the appointment and funding of an confidential expert  
9 consultant should be denied because on these facts we  
10 respectfully maintain that the -- maintain that the commission  
11 is required to accord a presumption of regularity to the  
12 impartial and professional assessments of the Navy and Marine  
13 Corps Public Health experts that these facilities are safe for  
14 occupancy. We respectfully maintain that under these facts  
15 the commission is also required to respect the decisions of  
16 other lawful authorities that assigned missions here must  
17 continue. And the commission should also deny the motion to  
18 compel because the defense fails to meet its burden for  
19 receiving expert consultant funding at the American public's  
20 expense.

21           I'll briefly outline the limited number of facts that  
22 are relevant to the commission's decision, and then I will  
23 highlight these two legal standards that are applicable here,

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1 namely, the presumption of regularity to be accorded the  
2 official acts of public officers and the standard for a  
3 requesting party to receive expert consultant funding.

4           So here are the relevant facts: On 23 July 2015 --  
5 and excuse me for reading these. I don't want to leave any of  
6 these few facts out. Each one is important. The Commander  
7 Navy Region Southeast, this is 23 July 2015, submitted a  
8 request to the Navy and Marine Corps Public Health Center to  
9 conduct a public health review of the Office of Military  
10 Commissions' facilities located on Camp Justice at Naval  
11 Station Guantanamo Bay, Cuba.

12           This was as a result of a hotline complaint by a  
13 former military commissions defense counsel to the DoD  
14 Inspector General in which it was alleged that since 2004  
15 military and civilian members working for the Office of  
16 Military Commissions have been exposed to carcinogens in the  
17 area surrounding OMC trailers, tents, offices and courtrooms.

18           Over the past year, Naval and Marine Corps Public  
19 Health Center experts have undertaken methodical and, from all  
20 indications, impartial, competent and professional actions.  
21 These have included the conduct of an initial industrial  
22 hygiene walk-through of OMC buildings in early August 2015;  
23 the conduct of a site scoping visit in September 2015; the

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1 conduct of a four-day environmental sampling site visit in  
2 October 2015, which sampled air, drinking water, paint chips,  
3 ionizing radiation in soil; the issuance of a 23 February 2016  
4 preliminary public health screening risk assessment report;  
5 the taking of additional air samples in April 2016;  
6 participation in a series of briefings for the military  
7 commissions population in May through July; frequently  
8 updating a website for all to remain apprised of their work;  
9 and the commencement of epidemiological studies that require  
10 more time and are necessary to fully address the original  
11 complaint of a -- of this former defense counsel to the DODIG.

12 Over the past year, the Office of Military  
13 Commissions staff have also taken a range of appropriate  
14 actions to include disseminating information, implementing  
15 heating, ventilation and air conditioning modifications, HVAC  
16 modifications, and organizing information exchanges to keep  
17 all participants in the military commissions process up to  
18 date with public health information.

19 Meanwhile, Naval Station Guantanamo Bay command and  
20 staff have also taken appropriate actions. Most important,  
21 Navy and Marine Corps Public Health Center experts stated in  
22 August 2015 that the facilities where personnel live and work  
23 here were, quote, habitable for occupancy, end quote. And,

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1 contrary to defense claims, this habitability conclusion has  
2 neither changed nor been retracted.

3           At page 2 of the 23 February 2016 report, that the  
4 Navy/Marine Corps Public Health Center issued, and that was  
5 referred to by counsel at page 2, the center reiterated the  
6 August 2015 habitability finding and also its finding that  
7 none of the military commissions personnel working here need  
8 be enrolled in occupational, medical surveillance or require  
9 occupational certification examinations. And I understand,  
10 Your Honor, you have the 23 February report in the record.

11           On 19 May 2016, the Navy/Marine Corps Public Health  
12 Center reaffirmed the safety of the living area at Camp  
13 Justice in the Containerized Housing Units. And in its  
14 15 July 2016 summary of findings, what I just offered to you,  
15 which I think is 426E -- yeah, Appellate Exhibit 426E now --  
16 the Navy/Marine Corps Public Health Center yet again confirmed  
17 that the facilities here are such for occupancy. And I would  
18 refer the military commission to these following slides for  
19 one of the suspected toxins, slide 10, conditions are safe.

20           Another potential toxin, slide 12. While the level  
21 of total risk is still to be determined, conditions are safe  
22 for individuals to live and work in Camp Justice per  
23 Environmental Protection Agency guidance, and I would submit

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1 that that qualifier relates to the fact that they still have  
2 to provide a full answering of the full IG inquiry, and to not  
3 have a final level of total risk determined is completely  
4 appropriate.

5 Another potential toxin, slide 13, the next one,  
6 while the level of total risk is still to be determined,  
7 conditions are safe for individuals to live and work in Camp  
8 Justice per Environmental Protection Agency guidance.

9 Next potential toxin, slide 17, quote, air  
10 concentrations are safe for occupancy, end quote.

11 Next potential toxin, slide 19, quote, concentrations  
12 in these buildings are safe, end quote.

13 And then on the epidemiological studies that are  
14 underway, slide 26, quote, the numbers, types, and average  
15 latency periods of each of nine cases of cancer investigated  
16 did not meet the Centers for Disease Control definition of a  
17 cancer cluster, end quote. Still a -- the Center states that  
18 a case series analysis, which is the appropriate type for this  
19 situation, will be conducted, as well as a medical review of  
20 all military personnel assigned to the military commissions in  
21 order to address the original Inspector General complaint.

22 Your Honor, we would submit those are the relevant  
23 facts for the decision before this commission.

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1           Now, to those two ----

2           MJ [COL POHL]: On page -- or on slide 31 it talks about  
3 some things of what's left. Do we have an idea of when this  
4 will be completed?

5           CP [BG MARTINS]: Your Honor, I don't have a specific date  
6 for those.

7           MJ [COL POHL]: Okay.

8           CP [BG MARTINS]: The complete epidemiological evaluation  
9 that's undergoing is a result of the case series analysis of  
10 the records. They don't have the Centers for Disease Control  
11 numbers and suspected or potential toxins that enable a case  
12 cluster to be found. I can seek to get you time limits.  
13 They're going to post these facts as they are available on the  
14 website.

15           But this -- Your Honor, if I may, this goes to the  
16 point. I mean, this is being handled competently, impartially  
17 and professionally. And the standard for according a  
18 presumption of regularity is that absent clear evidence to the  
19 contrary, the official acts of public officers are to be  
20 accorded that.

21           This is one piece in our brief of this  
22 non-justiciability aspect. I mean, this is what makes it  
23 non-justiciable. This commission should not be turned into a

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1 process for safety and industrial hygiene. The Navy has set  
2 that up and has provided a process that it is following, and  
3 it is doing so in response to a somewhat unusual entry into  
4 the occupational safety complaint. It's coming in through the  
5 IG, but the Navy is doing its job here, as are all of the  
6 officials who are dealing with it.

7           That's the first standard, Your Honor, the  
8 presumption of regularity, and I would refer you to the  
9 Latif v. Obama case, the 2012 authority that we cite in our  
10 brief for the presumption of regularity. We simply do not  
11 have clear evidence to the contrary here. None of the  
12 examples cited by counsel even approach this level.

13           Your Honor, the second standard is the standard for a  
14 requesting party to receive expert consultant funding at  
15 public expense, and that standard, we're drawing from who  
16 cases, United States v. Freeman and United States v.  
17 Bresnahan, the two Court of Appeals for the Armed Forces cases  
18 that we cite in our brief. By the way, let me mention, the  
19 Latif cases are reviewed in court, that's the United States  
20 Court of Appeals for the District of Columbia Circuit. So  
21 Freeman and Bresnahan now on this second relevance standard  
22 relate to the burden that a requesting party has in receiving  
23 expert consultant funding. And to meet that burden, the

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1 requesting party must show a reasonable probability, indeed  
2 more than a mere possibility, that the requested expert would  
3 be of assistance, and -- and it's "and" here; both these  
4 things have to be there -- and that the denial of such an  
5 expert would result in a fundamentally unfair trial.

6 That first prong of that test, of the Freeman test  
7 that I just gave you, that a requested expert would be of  
8 assistance, is itself broken down into three prongs by the  
9 Bresnahan case cited in our brief. And there, whether an  
10 expert would be of assistance requires the commission to ask  
11 why the expert assistance is needed, what the expert  
12 assistance would accomplish for the accused, and then why  
13 defense counsel were unable to gather and present evidence  
14 that the expert assistance would be able to develop.

15 Your Honor, under these tests, both these legal  
16 standards, we do not have a situation where the commission  
17 should become involved in this and should grant either the  
18 motion to compel for appointment and funding of a confidential  
19 expert consultant, nor the motion for compelling discovery.  
20 It's just simply not a justiciable issue. And the ----

21 MJ [COL POHL]: So the request for the background data,  
22 the support data ----

23 CP [BG MARTINS]: Your Honor, there is a final report

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1 ultimately that will be issued that will have more  
2 documentation. We submit that, to date, what is happening is  
3 what should be happening in terms of the information that's  
4 being provided, the expertise that's being employed, the  
5 impartiality of those efforts. There is an appeals process in  
6 this whole matter. One of the OPNAV instructions cited by  
7 counsel ----

8 MJ [COL POHL]: How does the appeals process work?

9 CP [BG MARTINS]: Your Honor, ultimately, a complaint  
10 receives an output. This is now coming in through the  
11 Inspector General process, so there's Inspector General  
12 mechanisms here and legal mechanisms and then there's also the  
13 Navy Safety and Occupational Health Program Manual procedures.  
14 This is one of the references cited by counsel. That  
15 ultimately goes up through an appeal process up to the  
16 Undersecretary of the Navy for that body of disciplines. So  
17 there's a process here that should cause the commission to  
18 abstain from getting involved in this.

19 The defense has made no showing calling into question  
20 either the official report results or the 6 June 2016 denial  
21 by the convening authority of an expert consultant in  
22 industrial hygiene and industrial toxicology.

23 In closing, Your Honor, subject to your questions, of

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1 course, safety of the personnel, of the Soldiers, Sailors,  
2 Airmen, Marines, Coast Guardsmen, civilians, is an inherent  
3 responsibility of command and of leadership. Those of us who  
4 have had to visit our personnel in field hospitals in  
5 southwest Asia and in deployments feel this as acutely as  
6 anyone, I would submit.

7           This right now is about a process that is working and  
8 that this commission, with respect, should defer to.

9           MJ [COL POHL]: If the Navy or whomever is in charge of  
10 this said these are unsafe and the convening authority said  
11 we're going to keep on going because I want to move these  
12 along, would I have any role at that point?

13           CP [BG MARTINS]: Your Honor, you often tell us not to  
14 engage in hypotheticals. I mean, that's just simply not what  
15 we have here. There are different authorities, commanders,  
16 officials, involved in the delivery or the posturing of any  
17 soldier or sailor in a place to do a mission. There's someone  
18 who provides the troops. There is someone who maintains the  
19 installation. There may be another commander involved who can  
20 dislodge the mission, turn it off, in some way, by doing --  
21 taking some action.

22           Surely this commission has the job of making sure  
23 this proceeding is fair, and I refer you again to that

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1 presumption of regularity standard or to -- I'm sorry, to the  
2 Freeman standard, denial of this would yield a fundamentally  
3 unfair trial. That's your nexus to this. Nowhere near being  
4 present here.

5           But you have a number of different people who can  
6 turn things off. Here in this case what you've got in these  
7 facts saying these facilities are safe for occupancy, and you  
8 have a convening authority and other officials saying assigned  
9 missions in Guantanamo must continue. And on these facts,  
10 Your Honor, we would submit the court -- the commission is  
11 required to accord that regularity.

12           MJ [COL POHL]: I have no further questions. Thank you.

13           Mr. Schwartz?

14           DC [MR. SCHWARTZ]: I think it's a minute until prayer  
15 time, but I think I can do it. Your Honor, the day that I get  
16 up here and you don't challenge me with hypotheticals will  
17 probably be the day that I'm not on this case.

18           MJ [COL POHL]: We're not coming back to that issue.

19           DC [MR. SCHWARTZ]: Good.

20           MJ [COL POHL]: Right now. Go ahead.

21           DC [MR. SCHWARTZ]: Counsel for the government proposes  
22 that under Latif the standard here is clear evidence to the  
23 contrary and that's a misstatement of the law. Latif does not

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1 propose a clear evidence to the contrary standard, it's simply  
2 evidence to the contrary, is there a reason to question it.  
3 The case that Latif, at least in the dissent, relies on is  
4 Thompson v. Estelle, 642 F.2d 996. I'm not suggesting that  
5 the government's not doing something in trying hard to solve  
6 this, but if it we're talking about competence here -- may I  
7 have a moment? May I have a moment?

8 MJ [COL POHL]: Sure.

9 DC [MR. SCHWARTZ]: I'll just point out one more example.  
10 The government's new exhibit, page 25, lays out that the  
11 National Cancer Institute requires a minimum of 16 cases of  
12 the same type of cancer to calculate a rate. The town hall  
13 this past Friday, as the government expert would tell you, has  
14 determined that there are only nine cases, not 16. He then  
15 goes on to say that that was determined through a records  
16 review of military personnel of cases that were brought by  
17 people in uniform.

18 I haven't counted in this room, but when I look  
19 around, I see about half uniforms. Now, there's a caveat to  
20 that because it talks about the same type of cancer, and there  
21 were a variety of cancers found. But the point here is in  
22 order to determine the total number of cancer cases, what the  
23 Public Health Center did was look at cases brought by people

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1 in uniform. That's a completely -- I don't know if you call  
2 it unscientific or scientific. It's just not rational. It  
3 doesn't get us where we need to be, unless where you want to  
4 be is below the threshold.

5           The other standard that the government misstates is  
6 with respect to expert assistance. We've been through this in  
7 AE 036, it's an Article III standard, it's a reasonable  
8 attorney test, it's not reasonable probability of the  
9 assistance plus unfair trial. But if we were to apply that  
10 standard, the reasonable probability here could be served by  
11 an expert coming in and providing us the assurance that yes,  
12 the Public Health Center, even though they aren't giving you  
13 the underlying data, they got it right. They are not giving  
14 you the methodology, but we've reviewed the underlying data,  
15 and we're telling you it's safe. That is the assistance in  
16 this case.

17           And the unfair trial prong of that is that the  
18 defense team can operate -- slowing down -- without the fear  
19 that we're being exposed to toxins that are lethal.

20           Subject to your questions.

21           MJ [COL POHL]: I have no further questions. Thank you.

22           Anything further from other defense counsel?

23           Apparently not.

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1           General Martins, do you have any ----

2           CP [BG MARTINS]: Your Honor, we just would like to refer  
3 the commission to Latif, since counsel mentioned it. This  
4 is -- Latif at 677 F.3d 1175 is the start of the case, and  
5 this is on that page. "The presumption of regularity supports  
6 the official acts of public officers and in the absence of  
7 clear evidence to the contrary, courts presume that they have  
8 properly discharged their official duties." And it's quoting  
9 Sussman v. United States Marshals Service, 494 F.3d 110, 1117.  
10 That's a D.C. Circuit 2007 case. Thank you.

11          MJ [COL POHL]: Thank you. Okay. I'll take 426 under  
12 advisement and issue a ruling in due course.

13          Mr. Ryan, I understand your position on what we've  
14 done this week and next week, but after looking at what we  
15 have scheduled, I wanted to adhere to the original schedule of  
16 doing the 505(h) tomorrow. I think it makes more sense to tee  
17 up things for next week. I understand this -- I understand  
18 your points but I want to continue with our previously decided  
19 schedule.

20          TC [MR. RYAN]: Yes, sir. Thank you.

21          MJ [COL POHL]: That being said, tomorrow, just so  
22 everybody understands, we're going to have a closed session to  
23 discuss potential uses of classified information under

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1 Military Commission Rule of Evidence 505(h) and it will also  
2 discuss the 802. But just to put on the record here, the list  
3 that I have is AE 321, 399, 386, 018FFF/P, as stated before,  
4 441, 441A, 441B, 425, and I've added 437. The 437 is the one  
5 that -- I think it's kind of the most recent pleading from the  
6 Bin'Attash team dealing with the nondisclosure of evidence,  
7 for want of a better term. I don't want to go into any more  
8 detail than that, but it does implicate classified information  
9 to see whether we need to address it, okay?

10 LDC [MR. RUIZ]: Judge, I don't think you mentioned 367.

11 MJ [COL POHL]: Oh, I'm sorry. It was on my list, I just  
12 overlooked it. Thank you. And 367.

13 LDC [MR. CONNELL]: Sir?

14 MJ [COL POHL]: Mr. Connell.

15 LDC [MR. CONNELL]: You also mentioned in the 802 373.

16 MJ [COL POHL]: Refresh my memory. What's 373?

17 LDC [MR. CONNELL]: It's the seizure of the  
18 attorney-client DVDs from Mr. al Baluchi.

19 MJ [COL POHL]: Okay. Okay. Also 373.

20 LDC [MR. CONNELL]: Sir, the one thing that I will add is  
21 after the 802, I went back and checked the docket and there is  
22 no 505 notice associated with 399. Just in case you can't  
23 find it, we don't think there is one.

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1 MJ [COL POHL]: Okay. Neither side believes there's a  
2 need for a 505(h) on the 399?

3 LDC [MR. CONNELL]: The defense does not, Your Honor.

4 MTC [MR. TRIVETT]: No, sir.

5 MJ [COL POHL]: Okay. Okay. It's now 1626. We're going  
6 to recess for the day. The accused will be given an  
7 opportunity to pray, which is about now, and on or about  
8 1700 hours, once they're completed with prayer, return to the  
9 camp. Today I think everybody's had plenty of time -- well,  
10 most everybody has had plenty of time to talk with the accused  
11 who have come in today. So that's the way ahead.

12 The commission is in recess.

13 [The R.M.C. 803 session recessed at 1626, 21 July 2016.]

14 [END OF PAGE]

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