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1 [The R.M.C. 803 session was called to order at 1541, 26 July  
2 2016.]

3 MJ [COL POHL]: Commission is called to order. All  
4 parties are again present when the commission recessed.

5 Mr. Trivett.

6 MTC [MR. TRIVETT]: Thank you, sir.

7 ADC [MS. LACHELIER]: Judge, Judge, sorry. Mr. Ruiz is  
8 not here.

9 MJ [COL POHL]: Oh, sorry.

10 ADC [MS. LACHELIER]: He should be here any second.

11 MJ [COL POHL]: He should have been here two minutes ago,  
12 but that's okay.

13 [Pause.]

14 MJ [COL POHL]: The record should reflect that Mr. Ruiz  
15 has joined us.

16 Mr. Trivett.

17 MTC [MR. TRIVETT]: Following Mr. Connell's statement on  
18 the record in 2012, and consistent with Secretary England's  
19 2008 directive that all classified information be provided to  
20 the defense counsel only through Trial Counsel, ODNI raised  
21 concerns to the Secretary of Defense about OMC-wide access to  
22 SIPRNet or JWICS.

23 By SECDEF direction, Washington Headquarters Services

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1 was delegated the authority, for lack of a better term, to  
2 reset all OMC accesses, taking SIPRNet and JWICS browsing  
3 access from all OMC personnel and then requiring all OMC  
4 personnel, not just defense counsel, to justify a need to know  
5 the information. Clearly since 2008, at least since 2008, it  
6 was not the intention of the Deputy Secretary of Defense that  
7 the defense have direct access to classified information in  
8 their own, quote/unquote, information streams. They did at  
9 some point, which was incorrect, and it was remediated.

10           The threshold legal question for this commission to  
11 decide is the following: If the SECDEF cut off access to  
12 classified networks that the defense had no right to have  
13 access to begin with, does turning that access off constitute  
14 unlawful influence? If it does not, then the defense motion  
15 for discovery regarding the internal deliberations of the  
16 government on need-to-know determinations must fail. It does  
17 not constitute unlawful influence as it was done in order to  
18 properly limit the accesses to those with a need to know.

19           MJ [COL POHL]: Mr. Trivett, you indicated that all OMC  
20 entities were cut off from the access?

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

22           MJ [COL POHL]: And then they had to justify the need to  
23 know?

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

2 MJ [COL POHL]: Subsequent from that time, have any of the  
3 OMC entities established said need to know?

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

5 MJ [COL POHL]: Who would that be?

6 MTC [MR. TRIVETT]: I can't speak for the convening  
7 authority, but there are members of the prosecution team who  
8 have established that need to know and have access once again.

9 MJ [COL POHL]: It's individual members of  
10 the prosecution ----

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

12 MJ [COL POHL]: ---- of the prosecution team, not the  
13 prosecution team at large?

14 MTC [MR. TRIVETT]: It's not everyone in the Office of the  
15 Chief Prosecutor.

16 MJ [COL POHL]: Got it.

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

18 Part of the problem with having the defense have  
19 direct, unfettered access to classified networks is it  
20 completely deprives the United States of its statutory rights  
21 under Section 949p-1 to assert the national security privilege  
22 over any information. It deprives the United States of asking  
23 to delete specific information, substitute information, or

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1 admit relevant facts that the classified information would  
2 tend to prove. In other words, it completely circumvents all  
3 of the protections for classified information that are  
4 available to the United States in this prosecution.

5           So, therefore, if the commission finds that there is  
6 no right to have that access, then turning off that access  
7 when it was discovered that they had it would not constitute  
8 unlawful influence.

9           Subject to your questions.

10          MJ [COL POHL]: I have none.

11          MTC [MR. TRIVETT]: Thank you, sir.

12          MJ [COL POHL]: Thank you.

13          LDC [MR. CONNELL]: I always knew it, Your Honor. I  
14 always knew that this was a scheme that would not be applied  
15 neutrally. When we applied for our need-to-know access, it  
16 was denied after this memorandum.

17                I want to be clear. Prior to the -- this memorandum  
18 and the turning off of defense access to classified  
19 information streams, we would apply individually to agencies  
20 for their walled gardens and they would make individualized  
21 need-to-know determinations: Does this person need access to  
22 that information. Sometimes it was granted, sometimes it was  
23 denied, based on individual analyses which were made by the

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1 equityholders.

2           The question that we have now is not an unlawful  
3 influence motion. The question that we have now is a  
4 discovery motion, which just got a lot stronger because the --  
5 there are multiple bases for the discovery. One of them is UI  
6 that I mentioned; another is reasonable access to evidence.  
7 Because the argument that the prosecution just made, that it  
8 was not reasonable for us to have access in the first place  
9 like every other member of the Department of Defense, is one  
10 that will at some point have to be litigated on the  
11 substantive motion. In order to have the information  
12 necessary to argue that substantive motion, however, the  
13 military commission should grant the motion for discovery.

14       MJ [COL POHL]: Let me back up on the substantive motion  
15 itself. What information are you being denied access to that  
16 you are entitled to that the government is not already  
17 providing you with?

18       LDC [MR. CONNELL]: I can answer you with particularity in  
19 the 806.

20       MJ [COL POHL]: Okay. Now, from your last comment before  
21 my question, and I've said this before, is that sometimes --  
22 we've said this on 424. You have a motion for discovery here,  
23 and don't I have to address the -- I mean, if I -- I'm not

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1 saying I'm going to, so don't -- don't -- I want you to just  
2 understand ----

3 LDC [MR. CONNELL]: Of course.

4 MJ [COL POHL]: ---- is that if I look at the substantive  
5 motion -- this applies to any motion -- and underneath is a  
6 motion to compel discovery and I find there's no merit in the  
7 substantive motion, don't I just decide on that and then the  
8 discovery naturally flows.

9 LDC [MR. CONNELL]: We haven't filed the substantive  
10 motion yet, Your Honor.

11 MJ [COL POHL]: Okay. So this is -- you want me to take  
12 this strictly as a motion to compel discovery ----

13 LDC [MR. CONNELL]: Yes.

14 MJ [COL POHL]: ---- without addressing the underlying  
15 issue.

16 LDC [MR. CONNELL]: So ----

17 MJ [COL POHL]: Do you understand what I'm saying is ----

18 LDC [MR. CONNELL]: Because the way that it works is you  
19 gather facts and then we make a determination as we've  
20 gathered facts that are material to the preparation ----

21 MJ [COL POHL]: I've got that.

22 LDC [MR. CONNELL]: We might decide not to file the  
23 motion. We might come up with a solution. The government

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1 might present an explanation that they had nothing to do with  
2 it.

3 I thought there was a possibility -- I never really  
4 believed it, but I wanted to believe that there was a  
5 probability that the prosecution was playing by the same rules  
6 that we were. It's been confirmed today that they are not. I  
7 think our equality of arms argument just got a lot stronger.

8 MJ [COL POHL]: Doesn't the government, though, have  
9 access to all sorts of classified information that they have  
10 to cull through to see if it's discoverable and give you  
11 what's discoverable and take what's -- what they consider not  
12 discoverable and put that in -- return it to sender or ignore  
13 it? I mean, don't they have, in their job ----

14 LDC [MR. CONNELL]: Of course that's true.

15 MJ [COL POHL]: Okay.

16 LDC [MR. CONNELL]: But that is separate from taking away  
17 an existing tool from one side that was -- there was equality  
18 of arms between the two sides -- taking away an existing tool  
19 from one of those two sides. This was not a -- if we were  
20 here asking for access to begin with, we would be in an much  
21 different situation than having it taken away, probably, at  
22 the institution -- or at least I believe at the institution of  
23 the Office of the Chief Prosecutor.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: Thank you.

3 MJ [COL POHL]: Understand. Thank you.

4 Mr. Trivett, anything to add?

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

6 MJ [COL POHL]: That brings us to 36 -- that was 356.  
7 363.

8 LDC [MR. CONNELL]: Your Honor, the government -- the  
9 United States Government writ large, and the defense writ  
10 small, engage in debates on issues about Guantanamo in a  
11 variety of fora. They do so most prominently here in the  
12 military commission, but the -- both sides field people to  
13 represent their interests in other fora, which often  
14 ultimately impact directly on this commission.

15 I wanted to talk about three of those fora  
16 specifically. The first of those is the Committee Against  
17 Torture review of the United States in November of 2014. At  
18 the civil society consultation by the Committee Against  
19 Torture, the committee asked 15 questions; six of those were  
20 about Guantanamo, and five of them were fielded by a member of  
21 the Military Commission Defense Organization. At the U.S.  
22 Government consultation, one team of the Military Commission  
23 Defense Organization directly addressed the United States to

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1 advocate for their positions at a time when Brigadier General  
2 Richard Gross was in attendance.

3           The Committee Against Torture itself asked directly  
4 about these proceedings. The rapporteur, Dr. Modvig  
5 specifically referenced Protective Order Number 1, our  
6 Protective Order Number 1 ----

7           MJ [COL POHL]: I just want to state for the record I know  
8 General Gross. I have not been friends with him, I have not  
9 served with him. It the pass of our careers, I know of him.  
10 Put that on the record.

11           LDC [MR. CONNELL]: Thank you. Dr. Modvig asked the  
12 United States Government as for the Protective Order Number 1,  
13 high-value detainee who are victims of torture are prevented  
14 from seeking remedy because of the classification of the  
15 information surrounding their treatment. Could the state  
16 party -- referring to the United States -- please explain why  
17 victims of torture are silenced this way, prevented from  
18 seeking remedy with reference to state security, even  
19 including remedies abroad.

20           On -- furthermore, the government specifically  
21 addressed this information ----

22           MJ [COL POHL]: Just a second, please. Ms. Bormann?  
23 Okay. I'm sorry. Go ahead.

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1 LDC [MR. CONNELL]: ---- specifically addressed this  
2 information in its response. Brigadier General Gross himself  
3 specifically addressed the Committee Against Torture  
4 discussing the role of detainee counsel in the proceedings,  
5 the efforts that -- to ensure that counsel can communicate  
6 effectively and meaningfully with their clients. The United  
7 States also directly addressed the question of the  
8 applicability of the Convention Against Torture at  
9 Guantanamo Bay, a matter which had recently taken up quite a  
10 bit of time in the military commissions.

11 They found in November of 2014 that the language  
12 of -- clearly of the Convention Against Torture clearly  
13 governs the sovereign territory of the United States. We  
14 believe it covers other places that the United States controls  
15 as a governmental authority. We have concluded that the  
16 United States currently exercises such control at the U.S.  
17 Naval Station at Guantanamo Bay and over all proceedings  
18 conducted there.

19 On 24 November, two weeks later, the Committee  
20 Against Torture issued its concluding observations, which is  
21 like its report. They addressed a number of issues  
22 specifically important to the policies surrounding this case.  
23 They addressed classification in this case, they addressed the

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1 conditions at Camp VII, they addressed the rules governing  
2 so-called high-value detainees and the right to seek redress.

3 Two weeks later, the United States, partially  
4 fulfilling a call from the Committee Against Torture, though  
5 no doubt for other reasons as well, issued the redacted  
6 executive summary of the SSCI report. And then about two  
7 months later, on 30 January 2015, the government filed  
8 AE 013RRR, partially declassifying information about torture.

9 Do I know what internal mechanisms within the United  
10 States lead to decision-making? No, I do not. And I don't  
11 claim direct causality. At the same time, it's clear that the  
12 United States Government is engaging in these conversations  
13 with defense counsel, with -- within itself, with  
14 international bodies, which is why we seek to participate  
15 them -- in them.

16 The second forum I wish to talk to you about is the  
17 Inter-American Committee on Human Rights. On 16 March of  
18 2015, the Inter-American Committee held a thematic hearing to  
19 address medical issues of Mr. al Baluchi and Mr. al Hawsawi.  
20 They asked questions about classification, they asked  
21 questions about discovery, they asked questions about medical  
22 standards.

23 The United States Government in its answer

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1 specifically referenced the Chief Prosecutor, said that he  
2 wanted to be there, but he could not be there on this  
3 occasion. They had to defer those questions about discovery.  
4 Again, a forum where the conversations are taking place with  
5 the United States Government as a whole.

6           The third forum I want to talk about is the Universal  
7 Periodic Review of the United States. On 11 May of 2015, the  
8 Human Rights Committee of the U.N. addressed a -- conducted  
9 the Universal Periodic Review of the United States, which is a  
10 state-driven process in which other countries ask questions to  
11 the United States. Apparently, while sitting on the dais,  
12 Brigadier General Gross sent an e-mail to the supervisors of  
13 the Chief Prosecutor and the Chief Defense Counsel. This  
14 e-mail -- excuse me, I have forgotten my copy of the e-mail.  
15 I had -- I need a for-display copy of it. Just a moment.

16           May I approach the CISO?

17           MJ [COL POHL]: Sure.

18           LDC [MR. CONNELL]: Your Honor, I have -- this e-mail is  
19 attachment -- excuse me. It's Attachment F to 363. I would  
20 ask permission to ----

21           MJ [COL POHL]: Is it the base motion or your supplement?

22           LDC [MR. CONNELL]: Base motion.

23           MJ [COL POHL]: Okay. Go ahead. Go ahead and put it up.

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1 You saw it, Jeff?

2 LDC [MR. CONNELL]: Permission to have access to the  
3 document camera and display to the gallery?

4 MJ [COL POHL]: Yeah, sure.

5 LDC [MR. CONNELL]: This e-mail was sent by Brigadier  
6 General Gross to Darrin Hostetler, who is the supervisor of  
7 the chief -- the Chief Prosecutor, when the Chief Prosecutor  
8 is a general, and Mr. Koffsky, who is the supervisor of the  
9 Chief Defense Counsel, and references Mr. Preston -- copies  
10 Mr. Preston, the general counsel of the DoD, and to  
11 Mr. Taylor, his principal deputy.

12 The e-mail itself reads, "I am at the UNHRC in  
13 Geneva" -- the U.N. Human Rights Council -- "with the USG  
14 delegation for a report as part of the Universal Periodic  
15 Review. There are military members of the military  
16 commissions defense office here presumably at government  
17 expense, at least two of them, both Army officers, are in  
18 uniform. I question their presence here at government  
19 expense. They are here to publicly criticize and question  
20 U.S. policy at the civil society engagement, not defend their  
21 clients. The fact that some are in uniform makes this even  
22 more egregious. Many of the other members of the delegation  
23 from the other agencies have asked me about their presence as

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1 well.

2 "This is the second time this has occurred. The  
3 first was at the CAT presentation in November 2014. Lloyd  
4 Hager, from my office, contacted the MC/CDC in advance of this  
5 trip to address uniform wear and was assured they would be in  
6 civilian attire. Lloyd did not address whether they would be  
7 here at government expense.

8 "Can something be done to address this?" He then  
9 goes on to discuss his own attire.

10 The -- this was an e-mail sent not to -- not  
11 internally, but rather to someone directly in the chain of  
12 command of the affected -- of the Servicemembers concerned.  
13 As it happens, the Defense Attache Office had granted  
14 permission for the Servicemembers from our office to wear  
15 their uniforms. That was actually a red herring.

16 But the more important issue of whether we were being  
17 allowed to engage in this kind of advocacy shows an attempt --  
18 whether it was successful or not, but an attempt to unlawfully  
19 influence the Chief Defense Counsel and those operating under  
20 the Chief Defense Counsel.

21 What we are asking for is essentially the rest of the  
22 story. This was not an accident. We didn't stumble across  
23 this e-mail. This was sent by a staff member to

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1 Colonel Mayberry, the Chief Defense Counsel at the time,  
2 seeking information to ultimately provide as an explanation.  
3 It is the sort of reaching outside of a person's lane that we  
4 heard referenced earlier to directly impact the chain of  
5 command of the Servicemembers who represent Mr. al Baluchi and  
6 other detainees.

7           Nothing further.

8           MJ [COL POHL]: So again, this is a motion for discovery,  
9 not the underlying motion?

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

11          MJ [COL POHL]: Got it. Thank you. Any other defense  
12 counsel wants to be heard on this one? Apparently not.

13                 Trial Counsel? Mr. Swann, I've been told that this  
14 was given to the CISO about an hour and a half ago.

15          TC [MR. SWANN]: That is correct, Your Honor.

16          MJ [COL POHL]: Okay.

17          TC [MR. SWANN]: I apologize for that. I didn't know we  
18 were going to ----

19          MJ [COL POHL]: I understand you didn't think we would  
20 necessarily get to it, but as I told Mr. Harrington last time,  
21 I'll tell you the same thing, there needs to be time for it to  
22 be circulated, and therefore I'm not going to let you display  
23 it. You will have to argue without it or wait until tomorrow.

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1           Can you argue without it?

2           TC [MR. SWANN]: Yeah, I can argue without it, Your Honor.

3           MJ [COL POHL]: Okay. Go ahead.

4           TC [MR. SWANN]: On 11 May 2015 an Army captain, a lawyer,  
5 shows up in Geneva, Switzerland, and confronts an Army  
6 brigadier general, an Army lawyer, asking him several  
7 questions about the military commissions. The questions are  
8 designed to put him on the defensive based on the questions  
9 that are in the defense's brief. He chooses not to respond to  
10 the questions, but provides an overview of military  
11 commissions. Later, the general approaches the captain to  
12 explain why he didn't answer the question.

13           Now, counsel now believe that an e-mail that  
14 Brigadier General Gross wrote to those of equal or higher  
15 position -- and all individuals here are SES equivalents --  
16 complaining about the defense attendance at government expense  
17 amounts to unlawful influence.

18           There appears to be an earlier incident when a  
19 lieutenant colonel asked certain defense counsel who were in  
20 uniform at an international conference -- asked them not to  
21 wear their uniform because others, including Brigadier General  
22 Gross, did not wear uniform when attending these particular  
23 conferences out of respect for Switzerland's neutrality.

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1           Now, Mr. Connell took the e-mail down rather quickly.  
2 I read this e-mail. Although it does say he questions why  
3 individuals at government expense from the defense are  
4 attending these conferences, the gist of the e-mail and what  
5 Mr. Connell did not read was, "Oh, by the way, we are here in  
6 civilian attire out of respect for Swiss neutrality. I have  
7 never worn a uniform in Switzerland, as I've always understood  
8 it to be inappropriate."

9           Now, this e-mail, as I've indicated, went to four  
10 individuals. Two of the four are no longer with the  
11 Department of Defense, neither Mr. Hostetler or Mr. Preston,  
12 who was the counsel for the Department of Defense, are no  
13 longer here.

14           What came of this particular e-mail was a response  
15 from Mr. Dwight Sullivan, who worked for Mr. Koffsky, I  
16 believe, and in that e-mail to Brigadier General Gross,  
17 Mr. Sullivan said, "The Military Commissions Defense Counsel  
18 at the UNHRC Universal Periodic Review are there performing  
19 their official duties as determined by the Chief Defense  
20 Counsel. The convening authority of the military commissions  
21 system approved their travel at government expense. The  
22 counsel sought and obtained authorization from U.S. Defense  
23 Attache Office, American Embassy Bern, to wear their uniforms

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1 while in Switzerland."

2 General Gross's questions were answered.

3 MJ [COL POHL]: Did General Gross respond?

4 TC [MR. SWANN]: He did not.

5 MJ [COL POHL]: Okay. Go ahead.

6 TC [MR. SWANN]: That's the end of this issue.

7 Now, what the defense wants is for us to go back to  
8 September of 2011, I believe, and we're supposed to go through  
9 the e-mails of these four individuals and determine whether  
10 there were any other efforts to prevent the defense from  
11 attending these international conferences.

12 The pleading spends a good amount of time discussing  
13 what they believe as the many successes before these various  
14 international organizations that the defense has managed to  
15 achieve. They claim that many of their activities have a  
16 direct correlation to certain events or changes in the  
17 commission process and how it operates. I don't see it, but  
18 if they believe it, okay.

19 They want to know now what the chairman's office has  
20 done to prevent their pleas to the international community.  
21 They want access to an e-mail system of five senior Pentagon  
22 officials who have -- as I've indicated, at least two of those  
23 individuals have been gone for months; General Gross himself

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1 has been gone for many, many months, if not a year -- so that  
2 they can go through these e-mails to see whether or not any  
3 further efforts were made. And Mr. Connell indicates that he  
4 is looking to establish unlawful influence.

5 Now, counsel indicated in their brief this is a  
6 political case. I am not sure what that means, for I see this  
7 as a mass murder case. Mr. Ryan told you a few moments ago  
8 the number. It's a case where opportunists took advantage and  
9 sank to the depths of inhumanity. My focus here in this case  
10 is not political. We are not prosecuting anyone other than a  
11 group of mass murderers. So what is the impact on this trial  
12 of this event? None. Nothing.

13 Your Honor, for unlawful influence to exist, it has  
14 to be concerned with the fairness of the proceedings, not some  
15 counteroffensive in foreign countries. What about the captain  
16 who complained about it? Well, he was in Oxford last week  
17 along with another of the overworked Connell team, flaming the  
18 rage over Guantanamo, according to reports from Mr. Connell's  
19 own website.

20 Your Honor, this particular request for discovery  
21 should be denied because the defense is engaged in mere  
22 speculation, something that the cases address in the area of  
23 unlawful influence that we are not required to provide them.

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1           Subject to your questions.

2           MJ [COL POHL]: I have none. Thank you.

3           Mr. Connell.

4           LDC [MR. CONNELL]: Sir, the one observation I wish to  
5 make in rebuttal is that this is not a situation where the  
6 government looked at the evidence that we have asked for and  
7 decided that it wasn't material. This is, rather, a  
8 situation, as we just heard from the government, where they  
9 declined to look for it in the first place. I think that  
10 changes the weight that the military commission can give to  
11 the government's determination that it is not material.

12          MJ [COL POHL]: Well, that's where we come back to the  
13 discussion of the cart and the horse, because if they say ----

14          LDC [MR. CONNELL]: Well, this is the horse, sir.

15          MJ [COL POHL]: Yeah, well, I know your view it's the  
16 horse. I've got that. But what I'm saying is that the  
17 government's position is the underlying motion is not well  
18 taken to begin with. Why do we have to bother with searching  
19 for all of these e-mails?

20          LDC [MR. CONNELL]: Well, the government's position on all  
21 of these motions seems to be, we plan to win, so why should we  
22 have to do anything? And that's fine. I mean, optimism is  
23 great. But we haven't pled the actual motion yet. The -- all

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1 you really have to decide is is there some set of factual  
2 circumstances which review of the discovery might reveal in  
3 this particular situation.

4 I mean, I'll give you a perfect example. You asked  
5 the government did Brigadier General Gross respond, and the  
6 government said no. Brigadier General Gross didn't respond in  
7 the one e-mail chain to which we have access, but that doesn't  
8 mean that he didn't go on and respond in some other fashion.  
9 The -- because unlike the usual situation, the government has  
10 never looked at the information, doesn't know if it is  
11 material or not, and has simply chosen to rest on a legal  
12 claim as opposed to actually making -- figuring out whether  
13 this information is material or not.

14 MJ [COL POHL]: Understand. Thank you.

15 LDC [MR. RUIZ]: Can I have a moment, Judge?

16 MJ [COL POHL]: Sure.

17 LDC [MR. RUIZ]: Judge, I would like the opportunity to  
18 rebut a couple of points, characterizations about the defense  
19 efforts in this matter.

20 I will submit that the -- our team, Mr. al Hawsawi's  
21 team, was one of the teams who traveled to advocate to the  
22 Committee Against Torture on behalf of Mr. al Hawsawi, which  
23 we believed to be completely proper in accordance with our

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1 ethical obligations and duties in this case, to develop  
2 collateral mitigating potential evidence that at one point we  
3 can submit to a jury. We can put it to the commission for the  
4 question of admissibility as it relates to the issues before  
5 this court.

6 MJ [COL POHL]: But I thought you were giving them  
7 information.

8 LDC [MR. RUIZ]: Yes, sir. We're giving them  
9 information ----

10 MJ [COL POHL]: So you give them information and they come  
11 back with the information you give them, and now this is  
12 developing mitigating evidence?

13 LDC [MR. RUIZ]: Well, the way the process works is this,  
14 the Committee Against Torture asks the United States  
15 delegation to account for its record on torture. So in  
16 essence we send a delegation to Geneva to talk about our  
17 record on the question of torture.

18 The Committee Against Torture has an opportunity then  
19 to ask specific questions about our record on torture. We go  
20 there to advocate and provide the Committee Against Torture  
21 information about our record on torture, things such as --  
22 well, at the time we didn't have the information in regards to  
23 the Senate Torture Report, which as you now know talks about

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1 sodomy and additional forms of torture.

2           But to the extent the Committee Against Torture makes  
3 those questions and those inquiries directly of the United  
4 States and the United States takes legal positions in response  
5 to those questions, the positions the United States can take  
6 often and have been used in this court to litigate issues on  
7 the question of the admissibility of evidence and torture and  
8 those aspects. So yes, we provide evidence to the Committee  
9 Against Torture.

10           Based on the committee's report, it can provide  
11 mitigating evidence because some of those reports are critical  
12 of our record on torture. And that is information that we  
13 ultimately would like to admit to the jury in mitigation.  
14 We've talked about the moral authority for submitting someone  
15 to death when we have the obligation under the Committee  
16 Against Torture to rehabilitate victims of torture.

17           So to the extent that an international committee that  
18 is well recognized by the United States, is well thought of by  
19 the United States, and one that we send a delegation to  
20 voluntarily to speak to has a pronouncement on that issue, I  
21 think is an issue that we -- and we can disagree with the  
22 admissibility of that or the relevance of that.

23           I know the prosecution believes that the extent of

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1 our litigation should be to the four corners of Guantanamo.  
2 And as I referenced yesterday in one of my arguments, one of  
3 the -- the underlying conflict on many of these issues, as  
4 diverse as they may seem, is a struggle for control. And  
5 ultimately it is the prosecutors' and the government's attempt  
6 to continue to constrain the scope of the litigation, continue  
7 to stifle and constrain the scope of the defense function in  
8 this manner.

9           So one of the themes in Mr. Swann's response to you  
10 is the timeline in terms of when this happened. The passage  
11 of time, he says, should undercut the validity of our claim  
12 for discovery because this happened some time ago. What I  
13 would submit to the court, Judge, is that the passage of time,  
14 because of the nature of litigation being what it is, isn't  
15 something that ought to be held against us. And I believe you  
16 indicated to the effect that you reject that argument  
17 outright.

18           The point is that at the time that this incident  
19 happened, it was significant. We did face questions by people  
20 in positions of authority who were asking us as leaders of our  
21 team, military officers, to account for their conduct. And at  
22 that time it did cost us a great deal of time, a great deal of  
23 energy, and put people under the microscope for their conduct.

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1           As you know, wearing the uniform is a question that  
2 comes up time and time again, and the statements that are made  
3 while in uniform are subject to certain constraints. That is  
4 a tension that has always existed in military commissions.  
5 When I wore the uniform and represented Mr. al Hawsawi on  
6 active duty, I took the position that it was part of my job.  
7 I was an active duty Judge Advocate General carrying out the  
8 mission that was given to me to carry out, and that is the  
9 position that members on my team has taken, and that is why  
10 they traveled to Geneva as uniformed officers and advocated on  
11 behalf of Mr. al Hawsawi.

12           And I must point out that it was with absolutely no  
13 objection, no offense taken by the Swiss government. They did  
14 not ever feel that there was any disrespected ----

15           MJ [COL POHL]: General Gross asked a question about why  
16 are these people here in uniform at government expense. Is he  
17 supposed to -- if he thinks it's irregular, which just from  
18 the face of the e-mail he thought it was irregular, and then  
19 he asked a question. Now this -- now this becomes an unlawful  
20 influence issue permeating the entire upper echelons of the  
21 Department of Defense?

22           LDC [MR. RUIZ]: Well, that's part of the -- that's only  
23 part, and I understand that's part of the fact that you've

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1 been given. So let me give you a number of additional facts.  
2 That was only the top of ----

3 MJ [COL POHL]: That was -- just make it clear. You're  
4 going to give me additional facts that are in the pleadings?

5 LDC [MR. RUIZ]: Sure.

6 MJ [COL POHL]: Okay. You're not going to give me  
7 additional facts that aren't in the pleadings?

8 LDC [MR. RUIZ]: No.

9 MJ [COL POHL]: Okay. That's good.

10 LDC [MR. RUIZ]: He referenced Lieutenant Colonel Hager,  
11 who was his deputy. Lieutenant Colonel Hager was, in fact,  
12 the first person who was sent to talk to members of my team  
13 and dissuade them from wearing the uniform. The pleading also  
14 references a phone call to one of my paralegals, an E-6, from  
15 a chief asking my paralegal to account for why one of our  
16 paralegals was in uniform and failed to change out of uniform  
17 when he was directed to do so by a lieutenant colonel,  
18 Lieutenant Colonel Hager, who was the deputy for General  
19 Gross.

20 MJ [COL POHL]: So this concern that some members of the  
21 United States had for people appearing in uniform when their  
22 practice was not to appear in uniform is unlawful influence?

23 LDC [MR. RUIZ]: No. Their attempt to influence our

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1 judgment in carrying out our duties is the unlawful influence,  
2 because that's exactly what the Military Commissions Act says.

3 MJ [COL POHL]: No, just so I've got this straight is  
4 that, from what I've got before me, the big concern -- there  
5 was a concern about military expense, but it really was  
6 appearing in uniform in a situation where, at least according  
7 to the e-mail presented to me, is that General Gross doesn't  
8 wear a uniform. So he sees American soldiers -- rephrase  
9 that, American Servicemembers -- I'm not sure of the branch --  
10 in uniform at an event that he goes to regularly and outside  
11 of uniform, and he should then do nothing about it because it  
12 created an appearance that -- and once he gets the e-mail ----

13 LDC [MR. RUIZ]: No, that's not how it worked. So let me  
14 give you the facts because I think the facts matter.

15 General Gross knew who we were because when he sent  
16 his deputy out to confront us, we explained to him we were  
17 members of the military commissions office, that we  
18 represented a person that was facing the death penalty under  
19 this military commissions, and we were there in a  
20 representative capacity as ----

21 MJ [COL POHL]: So if he had concerns about a uniform,  
22 once he knows that, then he should just stop?

23 LDC [MR. RUIZ]: Yes. Absolutely.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. RUIZ]: And so but -- but the repeated  
3 attempts -- that was the first attempt. That was at one  
4 particular conference. There was a second attempt. The  
5 second attempt escalated once again. Now, this time what the  
6 General did, knowing who we were, knowing who we represented,  
7 and knowing that he once again has sent his deputy to try to  
8 dissuade our officers from wearing their uniforms in the  
9 course of carrying out their duties -- now, Judge, we are  
10 Judge Advocate Generals on active duty representing a person  
11 in this military commissions and we have been directed to do  
12 that. That's our mission.

13 So the General didn't just ask a benign question,  
14 Judge. You have been around long enough to know when you're  
15 just asking a simple question and when you're asking a  
16 question for an intended purpose. This was not a benign  
17 question. This was a, hey, I saw these military members in  
18 Geneva wearing uniforms at government expense embarrassing the  
19 U.S. Government, can you do something about that? In other  
20 words, do something about it. This is a general sending  
21 e-mail to high ranking members of the United States  
22 Government, Judge. So this wasn't Walter Ruiz just sending an  
23 e-mail saying, hey, did you see those guys over there in

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1 Geneva wearing a uniform, what is that about? That is a  
2 significant difference, to characterize it, that undercuts the  
3 general's communications.

4 Not only that, he then had somebody call one of our  
5 paralegals, an enlisted member, and hold him and dress him  
6 down and account for why he was wearing a uniform and why a  
7 member of our legal team was wearing a uniform in Geneva. The  
8 other piece of that is, unbeknownst to the general,  
9 unfortunately for him, we had followed appropriate channels  
10 and requested permission to wear the uniform from the embassy.  
11 The embassy itself had granted us permission to wear the  
12 uniform in Geneva.

13 Those are the underlying facts. The passage of time  
14 doesn't dissuade the fact that at this point in time he tried  
15 to dissuade us from carrying out our mission, affect our  
16 judgment, talk to the members who were in the position of  
17 authority in our office, essentially asking to cut us off from  
18 carrying out some of this -- some of this important work that  
19 we do.

20 You may want to look at this in the abstract, but we  
21 don't look at these things in the -- separately. Not in the  
22 abstract, but separately. This, for us, is a consistent  
23 pattern of different onslaughts by the United States

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1 Government to continue to constrain our ability to carry out  
2 our function. And every time it happens, we have to be in a  
3 position where we provide -- we are provided all of the  
4 information that we can get so that we can properly bring this  
5 issue to the court.

6           Judge, now, you talk about the cart and the horse.  
7 Well, there's been times where I have filed a motion and then  
8 requested the discovery. And you said, well, you filed the  
9 motion, why do you now need the discovery? So I think many of  
10 us have adjusted and are now filing motions for discovery so  
11 then we can address the underlying motion. But it's got to be  
12 one or the other. And I think in this case the appropriate  
13 first step is for us to obtain that information. And as  
14 Mr. Connell said, Judge, we may look at that and it may be the  
15 end of the road, there may not be a strong UI analysis; but we  
16 believe that the likelihood is that there probably will be.

17           So I join in this request to provide that information  
18 to us so we can then take the next step, Judge, and litigate  
19 this issue. The passage of time has not ameliorated the  
20 effects. It continues to be an issue for us and it is one  
21 that we must follow through completely.

22           One other fact that I will leave you with, Judge, is  
23 that on multiple times members of our investigative team went

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1 to try to interview General Gross and he declined to be  
2 interviewed on this issue. So we made attempts to obtain  
3 information as well from him personally.

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

5 Sure.

6 LDC [MR. NEVIN]: Thank you, Your Honor. This is a motion  
7 to compel a discovery response, of course, it's not the motion  
8 itself. So the facts didn't get laid out in as great a detail  
9 as they would if we were litigating the underlying motion.  
10 But the motion itself, the motion that we're dealing with  
11 today, argues at page 15 that Brigadier General Gross brought  
12 the weight of OCJCS to bear against OCDC by asking the Chief  
13 Defense Counsel supervisor and other senior defense officials  
14 to, quote, do something to address, close quote, defense  
15 advocacy in international fora at government expense.

16 So it goes beyond the issue of wearing or not wearing  
17 a uniform. I can tell you that I was present, and if we did  
18 litigate this motion, the facts would reveal that General  
19 Gross addressed several members of the -- of Mr. Mohammad's  
20 team as well as Mr. al Baluchi's team in my presence and told  
21 them that it was inappropriate for them to be there arguing  
22 against the position of the United States Government. It was  
23 not limited simply to them being in or out of uniform.

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1           And it is -- it is in that sense that it is -- in  
2 addition it is in that sense that Brigadier General Gross is  
3 making -- is doing more than making a comment on how people  
4 should be attired. He's talking about whether we should be  
5 representing our clients in that setting at all. The people  
6 who were addressed directly -- and I was not addressed  
7 directly, but the people who were addressed directly were  
8 military Servicemembers. And, of course, Brigadier General  
9 Gross is a senior officer with respect to them and is telling  
10 them directly -- in his capacity as a senior military officer,  
11 is telling them directly that what they're doing there  
12 representing their clients is inappropriate.

13           And it is a political case directly in the sense that  
14 the term was used during Mr. Connell's argument, Mr. Swann's  
15 remarks notwithstanding, it is clearly a political case in the  
16 sense that there is political -- the political branches weigh  
17 in, both with respect to the fact that we are here at all and  
18 also with respect to the ongoing progress of the case.

19           As the military commission knows, this case was  
20 returned to federal court for a while, or it was headed in  
21 that direction, and these proceedings were dismissed. And the  
22 contemporaneous reporting and the subsequent reportage was  
23 that that was as a result of the invention of the political

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1 branches, in particular the -- members of the United States  
2 Senate.

3           You enter an order here on a matter having to do with  
4 the handling -- the relationship between detainees with  
5 particular religious views and the guard force, and soon  
6 there's hearings, open hearings in the Congress, people in  
7 high ranks of authority are calling it outrageous.

8           If at this point we don't recognize that there is a  
9 political component to this case, then we just haven't been  
10 paying attention. Of course there's a political component to  
11 this case.

12           And so when you have someone in Brigadier General  
13 Gross' position telling directly -- looking down at junior  
14 members of the military and saying you don't have any business  
15 being here, or words to that effect, you should not be doing  
16 this, that's a serious matter of influence as such.

17           And that's what the underlying motion would show.  
18 But, of course, that motion would be filed only after our  
19 request for discovery was completed. Thanks, Your Honor.

20           MJ [COL POHL]: Thank you. Mr. Swann, last word.

21           TC [MR. SWANN]: When everyone stops thinking about this  
22 case as a political case and starts thinking about what it is,  
23 what occurred on September 11 and how 2,976 men, women, and

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1 children were summarily executed, when over 3,000 children  
2 were left fatherless or motherless or without grandparents to  
3 help them be raised ----

4 LDC [MR. NEVIN]: Your Honor, I object. Having what to do  
5 with unlawful influence?

6 MJ [COL POHL]: Mr. Nevin, you argued this. You are  
7 inviting this response, so ----

8 LDC [MR. NEVIN]: I did not invite this response, Your  
9 Honor.

10 MJ [COL POHL]: Okay. In my view you did. Objection is  
11 overruled. Go ahead.

12 TC [MR. SWANN]: So let me go back. It's not a political  
13 case.

14 MJ [COL POHL]: Let's get -- I got it.

15 TC [MR. SWANN]: Okay. With that said, Your Honor, I have  
16 seen nothing that what General Gross did that day had any  
17 impact on these individuals not attending the many conferences  
18 that they attend throughout the world. And while as a  
19 taxpayer I might have difficulty with it, I'm not the man who  
20 makes that kind of decision. The Chief Defense Counsel does.  
21 If he says it's appropriate, then we're going to leave it at  
22 that, and they can attend every conference in the world they  
23 want to. Nothing further.

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1 MJ [COL POHL]: Thank you. We're going to recess for the  
2 day, but just to kind of give the way ahead, 266, 079, 233,  
3 306, 320, and I believe it's 399C. Is that correct,  
4 Ms. Bormann?

5 LDC [MS. BORMANN]: Yes.

6 MJ [COL POHL]: And 415, 4-1-5.

7 LDC [MS. BORMANN]: Judge, in 266, I've had a chance to  
8 review it. It was filed over two and a half years ago. It  
9 has in large part changed significantly, and I need to omit  
10 parts of it and supplement parts of it, so it ----

11 MJ [COL POHL]: We'll defer.

12 LDC [MS. BORMANN]: We will be filing a supplement on it,  
13 it will be much more efficient when we argue it, and I  
14 anticipate that will be filed within the next two weeks, but  
15 we won't be ready to argue that tomorrow.

16 MJ [COL POHL]: We'll defer 266 but keep it on the docket.

17 Mr. Ryan.

18 TC [MR. RYAN]: Your Honor, 415, I think the commission  
19 knows that the United States will be withdrawing that motion,  
20 and it's our motion.

21 MJ [COL POHL]: Okay. Okay. Just I can issue an order  
22 saying it's moot based on your representation?

23 TC [MR. RYAN]: Yes, sir.

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1 MJ [COL POHL]: Okay. We'll just do it.

2 TC [MR. RYAN]: Thank you.

3 MJ [COL POHL]: Got it. Mr. Connell?

4 LDC [MR. CONNELL]: Sir, three of the four motions that we  
5 put in that we suggested are essentially 30 seconds each.  
6 They're much like what some of -- they bear relationship to  
7 what the government just did. 306 will, you know, take  
8 20 minutes or so.

9 But my point is, we have maybe an hour or slightly  
10 more than that of work remaining. Might I suggest that the  
11 parties prepare for the 806 tomorrow afternoon?

12 MJ [COL POHL]: What we'll do is this. That's actually my  
13 next point, is I've -- given what's left, I think a cleaner  
14 way of doing it is we'll do the 806 on Thursday and then we'll  
15 do -- assuming if we get done with everything tomorrow, we'll  
16 do the 806 closed session on Thursday starting at 9:00. If we  
17 don't get everything done with tomorrow, we'll pick it up on  
18 Thursday, and that will leave Friday open if we -- if there's  
19 any extraneous business we need to address or don't hold a  
20 session that day.

21 LDC [MR. CONNELL]: Sir, your decision, of course. I was  
22 just going to say, we're going to be done tomorrow by the  
23 morning break. Four of the remaining five items ----

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1 MJ [COL POHL]: Let me put it this way, Mr. Connell, if  
2 we're done that soon, I can adjust fire.

3 LDC [MR. CONNELL]: Very good.

4 MJ [COL POHL]: At Mr. Connell's request, everybody should  
5 be prepared to talk about the 806 issues, which on my list are  
6 321; 386; 441, et al.; 373; 018Y/AA; 01800, TT, WW.

7 And, Ms. Bormann, you had a -- something you wanted  
8 to mention on 396.

9 LDC [MR. RUIZ]: Judge, we have a couple of motions that  
10 we'd like to suggest to the court.

11 MJ [COL POHL]: Did you send me an e-mail like I asked you  
12 to?

13 LDC [MR. RUIZ]: Unfortunately, no. It got saved in the  
14 drafts box and didn't get sent. But I think you can adjust  
15 fire, Judge, it's not ----

16 MJ [COL POHL]: I'm an adjustable guy. Has it been fully  
17 briefed?

18 LDC [MR. RUIZ]: Yes.

19 MJ [COL POHL]: What numbers are they?

20 LDC [MR. RUIZ]: It's actually on the docket. It's  
21 AE 227.

22 MJ [COL POHL]: Okay.

23 LDC [MR. RUIZ]: 333 will require a closed session.

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1 MJ [COL POHL]: Have we had a 505(h) on it yet?

2 LDC [MR. RUIZ]: We have not had a 505(h).

3 MJ [COL POHL]: Okay.

4 LDC [MR. RUIZ]: And we'd ask that you also consider 336,  
5 AE 336, which was not on the docket but is fully briefed.

6 MJ [COL POHL]: Okay.

7 LDC [MR. RUIZ]: So 227, 336, and I suppose 333 will have  
8 to wait for a 505(h).

9 MJ [COL POHL]: Okay. So now that you've added two more  
10 to it, if we get done early enough tomorrow, that would make  
11 sense to do the 806 closed hearing tomorrow afternoon, we'll  
12 do it. If we don't, we'll do it on Thursday. So be prepared  
13 to go tomorrow, but again, you know, we've got time to adjust  
14 fire.

15 LDC [MR. NEVIN]: Your Honor, excuse me, we also need to  
16 address the way forward on 425.

17 MJ [COL POHL]: Well, I think we're still in a -- we can  
18 address it tomorrow while we're still on the record.

19 LDC [MR. NEVIN]: I don't anticipate it taking a long  
20 time.

21 MJ [COL POHL]: No, I mean, yeah. Where I think it's left  
22 is this, is that Mr. Connell and Mr. Ruiz are waiting for a  
23 document that they're being assured is going to be

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