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1 [The R.M.C. 803 session was called to order at 1137, 2 June
2 2016.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present except for Major Seeger.

5 And Ms. Bormann, you indicated that you would proceed
6 without him until he returns?

7 LDC [MS. BORMANN]: Yes, Judge.

8 MJ [COL POHL]: Okay. Mr. Connell, just so I'm clear
9 where we're at with 321 and 399 ----

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

11 MJ [COL POHL]: ---- your argument yesterday focused
12 primarily on 321; is that correct?

13 LDC [MR. CONNELL]: No, sir. They're equally applicable.

14 MJ [COL POHL]: Okay. Okay. I mean, do you -- we're
15 going to focus on 321 right now. I just want to know whether
16 you still want to be heard on 399.

17 LDC [MR. CONNELL]: No. I weaved my 399 argument into my
18 321 argument. In my mind, they're the same principles.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: And I differentiated in my argument
21 when I was talking about the right to family visits and when I
22 was talking about the right to simultaneous communication. So
23 I feel -- I am not asking for a separate argument on 399, if

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1 it that's what the military commission is asking.

2 MJ [COL POHL]: Just so I'm clear, the legal basis is the
3 same for both ----

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: ---- but we're talking about family visits
6 versus telephonic -- or I don't want to use telephonic because
7 apparently that was not ----

8 LDC [MR. CONNELL]: No, no, no. We are asking for
9 telephonic. What they have now is not telephonic.

10 MJ [COL POHL]: Okay. But same legal basis for both, just
11 one executed family visits, one ----

12 LDC [MR. CONNELL]: Simultaneous communication.

13 MJ [COL POHL]: Electronic communication of a simultaneous
14 nature.

15 LDC [MR. CONNELL]: Yes. That's right.

16 MJ [COL POHL]: Does any other defense counsel ----

17 LDC [MR. CONNELL]: Though I could repeat it all if you
18 would like, Judge.

19 MJ [COL POHL]: No. That's what we have a transcript for.

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

21 MJ [COL POHL]: Any other defense counsel wants to be
22 heard on 321? And although Mr. Connell conflated it with 399,
23 just let me know if you wish to be heard separately on 399.

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1 Mr. Schwartz.

2 DDC [MR. SCHWARTZ]: Good morning, Your Honor. If
3 Mr. Connell would repeat his argument from yesterday, I
4 probably would be proficient with this law by the end of the
5 day.

6 The -- to your question, 321 and 399 are very much
7 intertwined because it's the same law that applies. And I
8 think really what the commission is going to do on these two
9 motions is establish the minimum threshold that's required,
10 establish the law of the cause on family communications.

11 I'd like to adopt ----

12 MJ [COL POHL]: Is the government -- I know Mr. Connell
13 has equated the two. Is the governmental interest the same?
14 I mean, right now there is some ability to -- and I'm not
15 going to go down the road of exactly the precise terms, so I'm
16 going to say there's some ability to electronically
17 communicate with the family. Okay. There's a much -- but to
18 bring a family member into Guantanamo Bay would seem to be --
19 implicate other stakeholders.

20 DDC [MR. SCHWARTZ]: Depending on factors I think that we
21 don't know today, that could be true. There could be some
22 kind of balancing test, I suppose, but that's not really, I
23 don't think, the initial approach. The approach should be

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1 what's the law. So what is required. 321 talks a lot about
2 electronic communications, you know, an improvement on
3 basically just letter writing.

4 The supplement, the al Baluchi supplement talks about
5 in-person visitation, and then 399 focuses solely on in-person
6 visitation. The impetus for these motions was both the
7 limitation that a detainee has in written communication and
8 also failures with the written communication process. And so
9 in 2014, when 321 was filed, the concept of a VTC or a
10 Skype-like option was something that seemed just completely
11 foreign to JTF-Guantanamo. That has no bearing on whether
12 in-person visitation is the lawful standard.

13 So, you know, it was sort of a, I think, a decision
14 to file 321 for the purpose of providing some level of
15 communication that simply doesn't meet what international law
16 and domestic law requires, and that's why 399 followed it.

17 So -- but as I said, I mean in the end, the
18 commission is going to have to decide what is the law of the
19 case here. What is the minimum threshold that the government
20 has to support, regardless of difficulties of being in
21 Guantanamo Bay. It's -- as I said, it's not like there's some
22 kind of balancing interest where we look at the government,
23 and I don't want to get too much into the details on this,

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1 because we don't really have evidence before the commission.
2 But I would proffer that in-person visitation here really
3 wouldn't be that difficult. And we can get into that at a
4 future point, if it the commission needs it, more information
5 on that; even though I don't think it bears on the legal
6 question of what's required, we certainly could provide it.

7 And to that end, I would ask that we keep 321 and 399
8 open until we have a ruling on 360, 360 being the discovery
9 motion regarding the 7 December 2014 video that was not
10 broadcast to Mr. Bin'Attash's family, and instead was held.

11 MJ [COL POHL]: Why -- you've connected those two up, and
12 I'm trying to figure out, and help me here, is -- 321 and 399
13 are saying international law requires two things, the 321
14 remedy and the 399 remedy. Okay. Whether or not you get the
15 video back that he made, because that could be decided on just
16 a rule-based decision, that's got nothing to do with
17 international law, true?

18 DDC [MR. SCHWARTZ]: It does have to do with pretrial
19 punishment. If you grant the motion, if you grant 321 and
20 399 ----

21 MJ [COL POHL]: No, let's say -- I'm saying let's say 360,
22 if I grant 360 just on the statement of the accused and the
23 possession of the government under the rule, and I believe

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1 there's a philosophy to decide decisions on a narrower ground
2 rather than a greater ground, and that's really the gravamen,
3 I believe, of your argument, what's that got to do with 321
4 and 399?

5 DDC [MR. SCHWARTZ]: Right. 360 could be granted just
6 based on 701(c)(3). I don't have any issue with that at all.
7 But if the video is provided -- when the video is provided, I
8 should say, from a legal standpoint, we're going to have more
9 evidence in support of 321 and 399, the evidence of the
10 arbitrary interference with family communication.

11 And so it goes to relief, in a sense.

12 MJ [COL POHL]: But don't you already have that without
13 any relief on 360? What I'm saying if 360 -- what you have
14 right now, is that interference? Now, the only question is
15 whether you get the -- the only question before me is whether
16 you get the thing, the video, back or not. But if you talked
17 about interference -- because I believe the video was 2014?

18 DDC [MR. SCHWARTZ]: Correct.

19 MJ [COL POHL]: And now we're in 2016.

20 DDC [MR. SCHWARTZ]: Correct.

21 MJ [COL POHL]: And for two years the government prevented
22 this from going to his family?

23 DDC [MR. SCHWARTZ]: Right. If the commission makes a

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1 finding that the interference or the refusal to broadcast the
2 videos was arbitrary, yes. That's true. I didn't consider
3 that to be before the commission.

4 MJ [COL POHL]: Oh, I didn't -- I didn't think it was
5 either.

6 DDC [MR. SCHWARTZ]: Right.

7 MJ [COL POHL]: I thought the sole issue was returning the
8 video to the defense team, not what happens to it after that.

9 DDC [MR. SCHWARTZ]: Right. And that's where we got into
10 the discussion about our intent to, you know, broadcast it
11 ourselves at some point, and the 018Y issue, and clearly that
12 was not our purpose. Our purpose in 360, as it says, was to
13 obtain information to provide the commission in support of
14 321. And then 399 also references the fact that there's this
15 video out there that would show the commission the
16 government's arbitrary interference with Mr. Bin'Attash's
17 ability to communicate with his family.

18 MJ [COL POHL]: Understand. Go ahead.

19 DDC [MR. SCHWARTZ]: Okay. So adopting Mr. Connell's
20 argument, I do want to reserve the ability to argue in the
21 future just one point that could change based on the facts
22 that we know today. He mentioned the IAC versus NIAC issue
23 and civilian status, and I would simply reserve the ability to

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1 argue the possibility of some kind of different status in the
2 future depending on what discovery and investigation uncovers.

3 There is a procedural issue that's sort of a case of
4 first impression before the commission on this motion.

5 Attachment D to AE 321 is a sealed attachment. It contains
6 information that was provided by the commission in 108BB. And
7 I would request the ability to argue from Attachment D in open
8 court today.

9 MJ [COL POHL]: Why was it sealed?

10 DDC [MR. SCHWARTZ]: This is the ICRC report litigation.

11 MJ [COL POHL]: Major Schwartz, you caught me a little bit
12 at a loss here since I know have to go back and look at why I
13 did what I did in 108.

14 DDC [MR. SCHWARTZ]: Okay. The 108 centered around
15 originally a discovery request for ICRC reports. There was
16 discussion over whether they could possibly be classified.
17 The commission held that they're not classified, but sealed
18 them. I don't know that there's a clear answer on whether we
19 would consider this a government document, which potentially
20 would trigger M.C.R.E. 506, or if we would consider this
21 ICRC-produced material.

22 MJ [COL POHL]: Which tab are you talking about?

23 DDC [MR. SCHWARTZ]: D. In 321 (WBA), tab D.

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1 MJ [COL POHL]: Yeah.

2 DDC [MR. SCHWARTZ]: So the state of the law on the use of
3 ICRC reports, specifically these ICRC reports that were
4 provided in 108BB, is that any party wishing to use them seeks
5 the commission's authority, approval, to file them sealed.
6 And so in this instance we did. I don't have the appellate
7 exhibit number, but the commission granted our ability to
8 attach them in a sealed attachment to 321. And that's where
9 we are today.

10 So if you go to the website, you will see AE 321, but
11 you won't see Attachment D.

12 [Pause.]

13 MJ [COL POHL]: One moment, please.

14 DDC [MR. SCHWARTZ]: Your Honor, may I approach to work on
15 an exhibit, an exhibit number while you consider this?

16 MJ [COL POHL]: Sure. Sure. Go ahead.

17 [Pause.]

18 MJ [COL POHL]: Trial Counsel, do you have a position on
19 this? As I recall, it was the government who was originally
20 concerned about publication of ICRC reports.

21 MTC [MR. TRIVETT]: Yes, sir. We received a conference
22 request this morning from Mr. Schwartz on a motion to allow
23 for this -- for its use. And certainly I don't want to have

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1 to take all two weeks to brief it. I want to get an answer to
2 the commission on it. Certainly he can reference it. We
3 never opposed him using it once you determined it was
4 discoverable, but the public presentation of it may be a
5 different issue, and I would just ask more time to look into
6 the public presentation piece of it. I just got the motion
7 this morning, and I wasn't prepared.

8 This is -- it's a more complicated matter than it
9 might appear at first blush with ICRC documents.

10 MJ [COL POHL]: The ICRC documents are a somewhat, I don't
11 want to say unique, but different from many other documents.
12 They're not produced by the United States. And when the
13 original government motion was to treat them as classified,
14 that was by saying treat them as classified because you
15 couldn't treat them because they weren't classified because
16 they weren't a United States government document.

17 And there's longstanding policy reasons of why the
18 ICRC documents are considered, in some foreign courts at
19 least, privileged, because to do their mission they have a --
20 they want to be forthright with the detaining power, in this
21 case to ensure proper conditions of confinement and not to be
22 used for other purposes.

23 And in the 108 series, I found that there was no

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1 privilege recognized in American courts, which some disagree
2 with, but it's not the first ruling I've had that people
3 disagree with.

4 But on the other hand, I do recognize the sensitivity
5 of the documents. So rather than -- since this is just coming
6 to me now, I don't want at this point to unseal them because,
7 quite frankly, it -- there's a lot of moving pieces on this.
8 Because the question is if you don't understand seal them, can
9 they be discussed in a closed session? If not, whatever.

10 So I have the document in front of me. If you wish
11 to refer to it only by paragraph number and substance at this
12 time, you may, but you cannot discuss the substance of it.
13 And this is just a tentative ruling because, quite frankly,
14 this just came up. And if I unseal it now, there's no way to
15 re-seal it unless we do -- as we have found in other scenarios
16 is once it's out there, it's out there.

17 I'm not saying I won't unseal it. I'm not going to
18 say you can't discuss it in open court, but I'm not going to
19 treat this issue from the seat of my pants of unsealing it at
20 this point for public presentation.

21 That being said, if you want to refer to the document
22 by paragraph number only, say, Your Honor, look at
23 paragraph 3(b), 3(c), 3- whatever and that's it, and then

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1 I'll -- assuming I can connect it up with your other
2 arguments, I've got it. But other than that, I'm not going to
3 unseal it at this time, with the understanding that there's a
4 very good chance we're going to revisit this issue.

5 Did I make that sufficiently clear?

6 DDC [MR. SCHWARTZ]: Yes, sir. I -- that was kind of the
7 conclusion that I came to this morning when I figured out that
8 this is a case of first impression here.

9 My question, then, was do we just wait on the whole
10 thing to put it together, because I think referring to the
11 paragraph numbers is clunky, but I'll give it a shot.

12 MJ [COL POHL]: I know it's clunky. Up to you. I mean,
13 the bottom line is this, is that if you don't think you can
14 make your argument without referring to the ICRC materials,
15 then we have to address whether or not they can be referred to
16 in open court.

17 DDC [MR. SCHWARTZ]: Right.

18 MJ [COL POHL]: That's the only issue. And then, of
19 course, if you look at 806 about closure, this doesn't fit
20 neatly into that either. But again, I'd rather not address
21 this at this -- just from here, from the seat of my pants.
22 But if you would wish to defer the argument until we've
23 decided on the proper use of the ICRC documents in open court,

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1 you certainly can do that, and that maybe would make the most
2 sense, or -- you can do what you want, the work-around I
3 discussed now, but it strikes to me as if we're going to come
4 back to it anyway, does it make sense to piecemeal it?

5 DDC [MR. SCHWARTZ]: Right. May I have a moment?

6 MJ [COL POHL]: Sure.

7 [Pause.]

8 DDC [MR. SCHWARTZ]: Your Honor, I think it makes ----

9 MJ [COL POHL]: Mr. Schwartz.

10 DDC [MR. SCHWARTZ]: Your Honor, I think it makes more
11 sense to push the entire argument until the next session once
12 I know ----

13 MJ [COL POHL]: Okay. I'm going to ask you to retrieve
14 those documents you had marked.

15 DDC [MR. SCHWARTZ]: Okay.

16 MJ [COL POHL]: And understanding is that since some of
17 them are in Arabic, there's no way we can do a review now.

18 DDC [MR. SCHWARTZ]: The document that I provided to ----

19 MJ [COL POHL]: What I'm saying is you're not going to
20 introduce it anyway, so just retrieve it, but make sure it
21 goes through some type of review ahead of time.

22 DDC [MR. SCHWARTZ]: Okay. I have an English version that
23 can accompany it. It's meant for publication in the first

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1 place, but if you'd like me to introduce it when I make my
2 argument in the future ----

3 MJ [COL POHL]: Do it then.

4 DDC [MR. SCHWARTZ]: Fine.

5 MJ [COL POHL]: You may have an English version, and
6 that's not the point. The point is there's a non-English
7 version also, and I think at least one stakeholder would want
8 to know what the Arabic version says before we treat it as an
9 unclassified document.

10 DDC [MR. SCHWARTZ]: Of course.

11 MJ [COL POHL]: So it's not been introduced. Just
12 retrieve the copies and make sure that's gone through and then
13 we can go from there. Okay. Don't consider it a marked
14 exhibit.

15 DDC [MR. SCHWARTZ]: And with respect to argument on the
16 currently sealed ICRC pieces ----

17 MJ [COL POHL]: Okay.

18 DDC [MR. SCHWARTZ]: ---- I think it just makes sense that
19 we brief that before July, if that's what the commission's
20 looking for.

21 MJ [COL POHL]: Well, you apparently have filed a pleading
22 to unseal it, in essence?

23 DDC [MR. SCHWARTZ]: No. What happened was in recognizing

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1 that this was a sealed attachment, and then reviewing 108BB,
2 there's sort of a void of guidance on how to proceed with
3 respect to, not publication, but just reference to this
4 information in open court, and so I sought the government's
5 position on that. So to the extent that this is an oral
6 motion to refer to a sealed attachment, it's an oral motion
7 but there's no written motion yet.

8 MJ [COL POHL]: Okay. Just so I understand what we're
9 talking about, although the attachment itself is not a -- is a
10 summary of the ICRC report, okay, it's not the report itself.
11 But it's the same facts or the facts in it ----

12 DDC [MR. SCHWARTZ]: It quotes it.

13 MJ [COL POHL]: Okay, it quotes it. And whether it's --
14 the question is how can it be used in open court.

15 DDC [MR. SCHWARTZ]: Right.

16 MJ [COL POHL]: And what it seems to me is there might be
17 a distinction without a difference of publishing it through
18 the ELM0 or saying the exact same thing, because I think at
19 the end of the day it's a public publication of it, and so --
20 and again, this is an odd animal, for want of a better term,
21 so let's resolve it. We know what your position is.

22 Mr. Trivett, you just need to see guidance, I'm
23 assuming, on the way ahead on this?

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

2 MJ [COL POHL]: Okay. So let's do this. You go ahead and
3 do that. If you guys can confer and arrive at a conclusion
4 that we need to litigate it, we'll litigate it. Okay.

5 MTC [MR. TRIVETT]: Understood, sir.

6 MJ [COL POHL]: Okay.

7 DDC [MR. SCHWARTZ]: Thank you, sir.

8 MJ [COL POHL]: Okay.

9 Mr. Ruiz, Mr. Harrington or Mr. Nevin, do you want to
10 be heard on 321 or 399? Is that a no, Mr. Ruiz?

11 LDC [MR. RUIZ]: That's a no.

12 MJ [COL POHL]: Mr. Harrington?

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

14 LDC [MR. NEVIN]: No, thank you.

15 MJ [COL POHL]: Trial Counsel.

16 MTC [MR. TRIVETT]: Sir, as to 321 and 399, we agree
17 they're together. We rest on brief subject to any questions
18 you have, and with the ability to perhaps respond to
19 whatever maybe Mr. Schwartz would say in his motion.

20 MJ [COL POHL]: Okay. So in essence we have started these
21 two oral arguments but, because of the nature of what
22 Mr. Schwartz had said, we will come back to them.

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

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: Sir?

3 MJ [COL POHL]: Mr. Connell.

4 LDC [MR. CONNELL]: There's also -- we have to come back
5 to 321 anyway because there's a 505 notice on it. But if we
6 are going to be dealing with a couple of other issues, I'd
7 like the permission of the military commission to brief the
8 question the military commission asked me yesterday about the
9 authority of the military commission to grant the relief
10 requested.

11 MJ [COL POHL]: Sure.

12 LDC [MR. CONNELL]: Thank you.

13 MJ [COL POHL]: Sure. Are you asking me because you got
14 to know whether you have to file a motion for leave to file
15 out of time or something like that?

16 LDC [MR. CONNELL]: Sir, I don't want to go down the rules
17 rat hole.

18 MJ [COL POHL]: Good.

19 LDC [MR. CONNELL]: But truthfully, the current supplement
20 rule, which is terrible, prohibits me from filing a supplement
21 unless I can say that it is new facts or law not previously
22 known at the time of the original pleading.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: And, you know, in my mind, your
2 important question to me is sort of a new fact, but ----

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: ---- so really I'm just asking for
5 permission to ----

6 MJ [COL POHL]: File a supplement and say, the judge
7 interjected a new fact justifying it to be a supplement. Got
8 it?

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

10 MJ [COL POHL]: And I'm sure my crack staff will recognize
11 that, won't you? Yeah. Okay.

12 LDC [MR. CONNELL]: Yes, sir. Thank you.

13 MJ [COL POHL]: Go ahead. That brings us to 335. And the
14 only other one for this -- these sessions that I have is 371,
15 with the understanding that we have some witness testimony to
16 take this afternoon. 335.

17 LDC [MR. RUIZ]: Judge, I actually have a question for you
18 on 335 that could obviate the need for any argument or
19 anything further from that.

20 As I understand AE 335, where we are is that some
21 documents were provided to the commission for an in camera
22 review, and that we were awaiting the commission's review of
23 those documents. 335 (MAH) is, of course, our follow-up

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1 request for the production of discovery records from the
2 International Committee of the Red Cross. As we know and have
3 referenced briefly here today, we raised that issue some time
4 ago.

5 The commission ultimately determined that those
6 records were to be released to the defense. And, Judge, at
7 that time you ordered that the records be produced up to 15
8 October of 2013, which was the last International Committee of
9 the Red Cross visit prior to the issuing of your order.

10 Subsequent to that, we filed a number of discovery
11 requests, follow-ups with the prosecution, requesting that
12 those documents be provided to us on a rolling basis. They
13 responded twice and indicated that they were conducting their
14 due diligence. And ultimately the prosecution responded,
15 indicating that they would provide the documents to the
16 commission for an in camera review.

17 And I believe, I don't -- I didn't obviously get the
18 documents, but I believe that happened on 12 February 2015.
19 There was an unclassified notice of an ex parte under-seal
20 filing by the prosecution in reference to this motion. As I
21 said, that's 12 February 2015.

22 So my question is, are those documents under review?
23 And if so -- I mean, I really don't see the need to argue the

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1 production of the records again and go through all of that
2 again.

3 MJ [COL POHL]: Well, let me -- I'm reading the government
4 response.

5 As I understand it, Trial Counsel, you don't oppose
6 the base motion.

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

8 MJ [COL POHL]: Okay. And I should know the answer to
9 this question but I'm going to ask it anyway, did you submit
10 the documents to my office?

11 TC [MR. SWANN]: Your Honor, I can tell you this: By
12 looking at footnote 1 on page 4 of our pleading, it appears we
13 did. And I've checked around the office, and it does appear
14 that we did. I just can't tell you -- I know that we were to
15 provide anything after what, 13 October 2013. I can tell you
16 that I don't know exactly what we provided because of the way
17 the order reads, and what was contained in those.

18 But I've had a further conversation this morning, and
19 what we will do -- well, apparently it looks like there's 33
20 pages provided. But what we'll do is we'll further identify
21 what we haven't given to the court all the way up through now,
22 and then give the court another dose of these documents so
23 that we can fulfill our discovery obligations.

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1 But there is a second part to this, I think. There's
2 a supplement that's filed with respect to 335. I believe that
3 belongs to -- it's under seal. And if I were to address it, I
4 would simply point to the document and the paragraph that it
5 makes reference to as to whether it's going to provide it or
6 not provide it because they don't appear to be conditions of
7 confinement that would be falling under the court's order.

8 MJ [COL POHL]: To your point, Mr. Ruiz, let me
9 confer ----

10 LDC [MR. RUIZ]: If I can just point it for you a little
11 bit better, Judge. The appellate exhibit I'm looking at is
12 335B, government. And I believe that was developed on
13 February 12 of 2015.

14 MJ [COL POHL]: Yeah.

15 LDC [MR. RUIZ]: Ex parte and under seal.

16 MJ [COL POHL]: I got it. I will track it down. I will
17 take the government at their word.

18 LDC [MR. RUIZ]: Sure. In regards that the second part
19 that Mr. Swann referenced, Mr. Connell will address that. But
20 I will only say obviously we remain joined to that request and
21 we affirm that request, to the extent that it applies to
22 Mr. al Hawsawi rather than Mr. Connell specific to
23 Mr. al Baluchi in that regard, but we also believe that there

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1 is applicability as it relates to Mr. al Hawsawi, so we would
2 affirm ----

3 MJ [COL POHL]: And what I will do just kind of close the
4 loop so we're not all hanging, I will have a review of my
5 records and will provide notice to all parties of what I
6 currently have by page numbers, and so you can ----

7 LDC [MR. RUIZ]: Sure.

8 MJ [COL POHL]: ---- and date range so you know what I
9 have, and government, you know what I don't have and you will
10 know what I don't have. And then assuming that I have those
11 documents, they will be expeditiously reviewed.

12 LDC [MR. RUIZ]: Okay. One quick question, because I know
13 there was some back and forth with Mr. Schwartz and I don't
14 always hear every single thing that was said, but I did hear,
15 I think, you make mention to determining how we would handle
16 the ICRC records in open court. Is that -- are we going to be
17 able to argue that at some point or how do you ----

18 MJ [COL POHL]: Well, in my never-ending hope that both
19 sides will agree on a procedure that's ----

20 LDC [MR. RUIZ]: Sure.

21 MJ [COL POHL]: ---- acceptable to me, I mean just because
22 you agree, that's just the first step.

23 LDC [MR. RUIZ]: I will simply leave it.

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1 MJ [COL POHL]: But if there's an issue about one side
2 doesn't want them in open court and the other side does, then
3 we're going to have to address it. And so the answer to your
4 question is yes, Mr. Ruiz, if everybody agrees and there's
5 sufficient legal authority that the agreed-upon path is the
6 proper path, that's what we'll do. If there's a
7 disagreement -- because, again, the ICRC is a different kind
8 of animal.

9 LDC [MR. RUIZ]: Well ----

10 MJ [COL POHL]: It doesn't fit neatly. And I'm not -- I
11 understand what the rules say, and that's why it causes me
12 pause to say that they can't be argued in open court, but
13 before I unseal a document which was sealed for what I
14 consider a good reason, I've got to look into it more closely.

15 So ----

16 LDC [MR. RUIZ]: Very well. What's the timing on that,
17 and the -- so you don't want us to get together and talk about
18 this and bring it to you?

19 MJ [COL POHL]: My understanding is where we're at right
20 now is Mr. Trivett and Mr. Schwartz and whoever else wants
21 will see if they can arrive at a conclusion. If the
22 government -- let's go this scenario, because I think it's
23 probably the most likely contentious scenario, where the

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1 government says no, they can't be discussed in open court.
2 Okay. Then the party that wants them in open court, since
3 they're government -- well, they're my sealed documents --
4 currently, right now, they're sealed documents ----

5 LDC [MR. RUIZ]: I understand.

6 MJ [COL POHL]: ---- therefore they can't. So if there's
7 a motion to unseal it, that would be by the proponent of the
8 party that wants them unsealed.

9 LDC [MR. RUIZ]: Very well. Thank you.

10 MJ [COL POHL]: Ms. Bormann.

11 LDC [MS. BORMANN]: Thank you.

12 I just want to clarify. We're seeking to be able to
13 argue a total of five quotations out of what amounts to more
14 than 200 pages of ICRC records. So, you know, I -- when we're
15 issuing and maybe breaking out into agreement with the
16 government, I'd rather not to have to conquer the entire world
17 of ICRC records, because some of the material might be more
18 sensitive than others. But this particular material is very
19 germane to this particular issue. So we only intend to ask
20 the government for agreement on the use of those five pieces
21 of ----

22 MJ [COL POHL]: Okay. You want to limit it to what's in
23 your Attachment D?

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1 LDC [MS. BORMANN]: Right. And if some other party wishes
2 to expand that, have at it, but that's not our position.

3 MJ [COL POHL]: Okay. Understand.

4 Mr. Connell.

5 LDC [MR. CONNELL]: I completely understand that
6 everybody's going to go back and look at what they have and
7 figure out where we are. That's fine with me.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: There are two observations I wish to
10 make. The first one is that the government introduced a
11 caveat in oral argument that doesn't appear in its brief, and
12 I can only imagine -- does the military commission have AE
13 335AAA supplement in front of it? I can refer to paragraph
14 numbers.

15 MJ [COL POHL]: Looking right at it.

16 LDC [MR. CONNELL]: Paragraph two would not fall -- would
17 not have anything to do with the concern that they just
18 identified. Paragraphs one and three do relate to issues
19 other than directly to conditions of confinement, and so at
20 the appropriate time I would like to argue those, if the
21 government opposes producing that information because I can
22 explain why they need to be produced.

23 MJ [COL POHL]: Okay. Because this is a more expansive

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1 time -- geographic and time frame.

2 LDC [MR. CONNELL]: Yes. That's right.

3 MJ [COL POHL]: I understand Mr. Ruiz's motion we're
4 talking about I believe 13, October 13 going forward, so
5 that's obviously just Guantanamo Bay.

6 LDC [MR. CONNELL]: Right. I saw the opportunity to talk
7 about ICRC records and, you know, grabbed on with both hands.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: So I understand that there's -- that's
10 going to be a different day. But in preparation for that day,
11 and this is my second point that I want to make, I think that
12 the process that the military commission just articulated,
13 upon mature review, may turn out not to be the correct
14 process.

15 My position is that the correct process in this is
16 governed by M.C.R.E. 506(i) because the government has made an
17 invocation of government information privilege for these ICRC
18 records. And at that point under M.C.R.E. 506(i), the
19 government has to file a motion for an in camera proceeding;
20 not ex parte, but in camera. So I think that that is the
21 proper fashion.

22 MJ [COL POHL]: So is the government ----

23 LDC [MR. CONNELL]: It's a matter of who pleads first, but

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1 still ----

2 MJ [COL POHL]: Okay. But the issue is this, we have the
3 Attachment D and, as Ms. Bormann said, there's five facts from
4 the ICRC report. The government wants -- or the defense wants
5 to argue in open court.

6 LDC [MR. CONNELL]: Right.

7 MJ [COL POHL]: And you're right, the government is the
8 one who -- although it's sealing it pursuant to a government
9 request is what the bottom line is, my point is that if the
10 government says, and I'm not necessarily disagreeing with what
11 you're saying, but if they've already been sealed, isn't it a
12 motion to unseal?

13 LDC [MR. CONNELL]: No. It's actually not, because if --
14 to unseal them would mean that -- I mean, unseal can have
15 multiple reasons -- or multiple definitions, but in general,
16 to me unsealing would mean that they would then be available
17 to the public, right, because unsealed judicial documents are
18 available to the public.

19 MJ [COL POHL]: Right.

20 LDC [MR. CONNELL]: I think that what M.C.R.E. 506(i)
21 deals with is slightly different in that M.C.R.E. 506(i) is
22 regarding the disclosure in open court, like the -- if I were
23 to argue, you know, 335AAA supplement here by -- in its detail

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1 instead of referring to it by paragraph numbers or if
2 Mr. Bin'Attash's team were to make similar argument using
3 their documents, in that situation it's not so much unsealing
4 the documents because the documents remain sealed.

5 It is, rather, that the -- under 506(h) there's a
6 prohibition against the defense disclosing information,
7 subject to a claim of privilege, until you authorize it. And
8 then under (i) there's a process by which the government can
9 move for an in camera proceeding, attempt to demonstrate the
10 public interest nature of the information and seek a ruling
11 from the military commission on whether we can argue it in
12 open court or not.

13 MJ [COL POHL]: Okay. I understand your point.

14 Trial Counsel, do you -- there's a question of who
15 goes first.

16 MTC [MR. TRIVETT]: Sir, it seems to me that if there's a
17 motion to unseal, then in our reply, to the extent we need any
18 relief under -- you know, to the extent we don't oppose the
19 unsealing, we may oppose the unsealing and still ask for some
20 relief under 506(i). But I just need more time to brief the
21 issue, think it through, and coordinate with other components
22 of the U.S. Government.

23 LDC [MR. CONNELL]: That's fine with me, Your Honor. I

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1 don't have any objection to that.

2 LDC [MS. BORMANN]: And to be clear, I mean, we actually
3 aren't -- Mr. Connell is right, we actually aren't seeking to
4 unseal them because that would be the document that you've
5 sealed. We're actually asking to publish five pieces of
6 information from a sealed document, which is a very -- it's a
7 very -- it's much more limited.

8 MJ [COL POHL]: No. I understand that part, Ms. Bormann,
9 but I got it. I got it. Okay. If you can work it out, work
10 it out. If we're going to -- if the government, if you're
11 treating this as a claim of privilege under 506, the burden is
12 on you.

13 If it's simply an unsealed document for some other
14 reason, the burden is on the defense. But it strikes to me
15 other than 506, I'm not sure what your other basis would be,
16 so understand that. If it's a 506, the government goes first.
17 If the government says we're not going to claim 506, then it's
18 up to the defense. But, again, I -- the defense may simply
19 say there's no legal basis for them not to be unsealed, so
20 this will come right back to you anyways, but at the end of
21 the day, it's the government -- the sealing was done at the
22 government's request, so it's your burden to show why they
23 should remain sealed.

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

2 MJ [COL POHL]: Okay. Good. Okay.

3 And the last motion that we have scheduled actually
4 for this entire session is 371. Is that yours, Mr. Nevin?

5 LDC [MR. NEVIN]: Excuse me. Thank you, Your Honor. This
6 motion, I guess -- or this motion series can be approached in
7 a number of different ways. It has a more general and a less
8 general and a, you know, most-general-of-all components. It
9 has a bunch of different components. And I assume we're just
10 going to talk about all of them and -- but I know the military
11 commission will tell me if I'm misunderstanding the scope of
12 what you want to hear.

13 So at its most basic level, Mr. Mohammad wanted to
14 write a letter to the President of the United States, and
15 that's something that the Bureau of Prison Regulations
16 provides that every prisoner in the United States is allowed
17 to do without limit to -- without limitation as to pages or
18 content or anything else. Contraband, of course, but
19 substantive content -- I'm sorry, without limitation.

20 And that extends, by the way, to Congresspersons and,
21 you know, and other officials within the United States
22 Government. Because a number of the United States Supreme
23 Court opinions that we cited in our moving papers speak of a

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1 right to seek redress, a right to communicate with public
2 officials, a right to -- something on the nature -- in the --
3 when you're -- I think when you're talking about an Article I
4 tribunal, you're probably also talking about something like
5 access to courts, although that's a slightly different idea if
6 you're talking about an Article III tribunal. And much of the
7 law comes out of that context, but it's the same idea. You
8 have me detained. You are prosecuting me. I have a right to
9 be heard in response.

10 It is true that Mr. Mohammad has a right to be heard
11 within the context of these proceedings, but the law is clear
12 that we -- the law we cited, I think, is clear for the
13 proposition that you have a right to reach out to any official
14 who might be able to do something about your incarceration or
15 the conditions of your incarceration if you believe that your
16 incarceration is wrongful or if you believe the conditions are
17 wrongful. You have a right to be heard.

18 And that in itself is not a particularly problematic
19 or, I mean, controversial idea, and it's one that, when we
20 initially filed 371, we wanted to present in a fairly simple
21 way. Then a whole lot of other things happened, and those
22 things are maybe the more -- what I was referring to as being
23 the more specific things that involved, in our view,

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1 application of the rules being made not in an even-handed way.

2 And so we had some back and forth, let's just say,
3 about that, and we objected to -- we -- our feeling was that
4 the rules of -- the filing rules and the timing rules and so
5 on were applied unequally, and we thought that -- anyway, I
6 mean, it was clear that the government got the benefit of the
7 unequal filings. We were hampered and excluded from making
8 certain filings and the government was permitted to make
9 filings without complying with all of the rules.

10 And so we ended up in the position then of
11 complaining that a filing at 1609, at 4:09, nine minutes after
12 the deadline should not have been received, and so there is
13 a -- that's a separate aspect of this argument.

14 MJ [COL POHL]: Let's move to your substance. Okay.
15 You -- Mr. Mohammad drafted this letter.

16 LDC [MR. NEVIN]: Right.

17 MJ [COL POHL]: You tried to go through the JTF nonlegal
18 mail system?

19 LDC [MR. NEVIN]: Right.

20 MJ [COL POHL]: And they said it's more than two pages and
21 rejected it on that basis?

22 LDC [MR. NEVIN]: No. I mean, I just wrote down -- I
23 finally ----

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1 MJ [COL POHL]: I'm just kind of reading your pleading. I
2 thought ----

3 LDC [MR. NEVIN]: Yeah. That's true.

4 MJ [COL POHL]: Go ahead.

5 LDC [MR. NEVIN]: It's not -- it's both less and more than
6 that in this sense, that I approached an assistant SJA here in
7 court and offered her the letter and she refused to take it.
8 And so you might say she just said, I'm not going to take it
9 without offering any reasons.

10 Later another official told me that the limitation
11 was the one that was referred to yesterday in discussion, that
12 of a certain number of pages and a certain number -- and a
13 card. But I wrote down -- in this part of my remarks to you,
14 I just wrote down, quote, you can't get there from here, close
15 quote. Because I -- as our pleading indicates, we went to a
16 lot of places trying to deliver these materials. I went to a
17 component of JTF-GTMO and said, I think I've been told that
18 you are who I'm supposed to give this to. And that led to a
19 contretemps that I was not supposed to have gone to that
20 office or knew that it existed.

21 And in the course of that, someone said give it to
22 Mr. Chalmers, your court security officer, your -- not the
23 gentleman who is present today but your court security officer

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1 who is normally here. And we went to him finally and said,
2 well, okay, we'll give it to you. And he said, no, you
3 shouldn't give it to me, either, you should give it to someone
4 else. And finally we filed the motion.

5 MJ [COL POHL]: Okay. Okay.

6 LDC [MR. NEVIN]: Okay.

7 MJ [COL POHL]: Just so I can review the bidding, you
8 attempted to use the nonlegal mail process.

9 LDC [MR. NEVIN]: Yes.

10 MJ [COL POHL]: And for whatever reason, whether it's the
11 two things, okay, then you used the -- then the document
12 eventually went through your DISO and then through the folks
13 for the -- to review it for classification issues.

14 LDC [MR. NEVIN]: Correct. The so-called privileged
15 classification review.

16 MJ [COL POHL]: I know we're going to come back to that.

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

18 MJ [COL POHL]: Then it comes back -- or I don't know, did
19 it come back and did it get returned as nonlegal mail?

20 LDC [MR. NEVIN]: It may have. You may have ----

21 MJ [COL POHL]: I'm just trying to follow it in your
22 brief.

23 LDC [MR. NEVIN]: Yeah. My recollection of it is that we

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1 submitted it for classification review first and it came back
2 unclassified. Then we set about the process of -- well, I
3 mean, the government points to the fact that there were
4 certain delays over time before -- while we got around to
5 doing things, and I'm very mindful of the arguments that have
6 been made about 018Y and the military commission's observation
7 that this connects to 018Y.

8 I'm very mindful that the al Baluchi team withdrew
9 from this motion or withdrew, in a sense, saying you don't
10 need -- you don't need these permissions. You don't need to
11 go through JTF-GTMO to do this, as I -- referring to
12 Mr. Connell -- as I have argued repeatedly. And we did it
13 anyway, and we did it out of an excess of caution, and we did
14 it because of my remark to you at an earlier time that I felt
15 like I was huddled around a campfire with the wolves howling.
16 I did not want -- you know, we just wanted to do this in an
17 excess of caution.

18 But after having determined that it was unclassified,
19 we then sought to put it through the nonlegal mail process and
20 we weren't successful at being able to achieve that. And
21 that's when we filed the motion. At least that's my
22 recollection of it.

23 MJ [COL POHL]: Okay. But there's a piece of this where,

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1 and correct me if I'm wrong, because I'm trying to -- I'm
2 reading your motion here, where it was returned to you as --
3 where the Privilege Review Team said this was nonlegal mail,
4 do you know what I'm -- I'm just reading your pleading here,
5 and the DoD further advised that they had no equities but they
6 considered the letter to the President being nonlegal mail
7 within the meaning of AE 018U.

8 LDC [MR. NEVIN]: Oh, I see.

9 MJ [COL POHL]: My question is, when you say DoD, who do
10 you mean by that?

11 LDC [MR. NEVIN]: Yeah. I didn't realize what the
12 military commission was referring to. When ----

13 MJ [COL POHL]: Yeah.

14 LDC [MR. NEVIN]: When we submitted it for classification
15 review, the classification review authorities, whoever they
16 may be, wrote back and said it's unclassified, A; but B, we
17 consider that you have to put this through the nonlegal mail
18 process.

19 MJ [COL POHL]: Because, as I think when we talked earlier
20 over 018Y, you had some concerns about that done by the
21 Privilege Review Team.

22 LDC [MR. NEVIN]: Well, my concern was that the -- was
23 that a later filing by the government indicated that this

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1 letter came to light because it was intercepted in the
2 privilege review process, the privilege classification review
3 process, and then was routed to JTF-GTMO. And I took it that
4 that meant that the privileged classification review process
5 is not privileged at all; that rather, under whatever
6 circumstances material that's submitted is going to be shared
7 with other parties.

8 MJ [COL POHL]: But if the way -- correct me if I'm wrong,
9 but the privilege team is designed quite primarily for
10 classification review.

11 LDC [MR. NEVIN]: Okay. So there's a privilege team that
12 we use for written communication between us -- from --
13 in-going mail to our client from us. There's also what is
14 said to be a privileged classification review process. Those
15 are two separate things.

16 MJ [COL POHL]: Okay.

17 LDC [MR. NEVIN]: We're talking about -- you're talking
18 about ----

19 MJ [COL POHL]: The classification review.

20 LDC [MR. NEVIN]: ---- the classification review.

21 MJ [COL POHL]: And you understand they're chartered to be
22 classification review, not interpreting 018U, whether this is
23 legal or nonlegal mail. Is that one of your concerns here?

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1 LDC [MR. NEVIN]: Yes.

2 MJ [COL POHL]: Okay.

3 LDC [MR. NEVIN]: That's true.

4 MJ [COL POHL]: That's kind of the 018Y component of this
5 for want of a better term, as opposed to the gravamen of the
6 complaint of your motion is that you ought to be able to send
7 this letter to the President of the United States?

8 LDC [MR. NEVIN]: Yes. And that -- that separate question
9 sort of ends up almost as like a subset of a bunch of other
10 things that have happened in this process that have to do with
11 the process that I think are important.

12 MJ [COL POHL]: Uh-huh.

13 LDC [MR. NEVIN]: But at the end of the day, mainly what
14 we want is for -- to be able to -- this fairly unremarkable
15 request is to send a letter to the President.

16 MJ [COL POHL]: Yeah. And that's the unique part of 371,
17 and the other piece we talked about illustrates perhaps the
18 issues with the -- actually the 018U order.

19 LDC [MR. NEVIN]: Exactly.

20 MJ [COL POHL]: So let's just -- and I read your brief, as
21 I read all of your briefs, and your argument on basically
22 order the relief -- order the letter be put in the mail to the
23 President is just based on your Fifth Amendment redress

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1 argument that we already discussed?

2 LDC [MR. NEVIN]: Yes. Exactly as I said, put it in the
3 mail and mail it to the President, or another way of
4 delivering it as the military commission may direct. We can
5 simply hand deliver it as well or maybe there's some
6 semi-official way of delivery, but obviously it's
7 unclassified. The normal thing you would do would be to put
8 it in an envelope addressed to 1600 Pennsylvania Avenue,
9 Washington, D.C., and deliver it.

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: And whatever effect it has, it has. So,
12 you know, basically that's what we asked the military
13 commission to say is that we may do that, in that way or in
14 another way, but nonetheless, to permit us -- permit
15 Mr. Mohammad to communicate with the President.

16 Now, there, I think -- I think maybe I better clarify
17 something that was said a moment ago. We didn't ask the
18 classification folks, the privileged classification review, we
19 didn't ask them for an opinion on whether or not this writing
20 was or was not legal mail or did or did not have to go through
21 a process. And we did not make any suggestion to them that we
22 intended to release this publicly in the sense of, you know --
23 you know, submitting it to a newspaper or something to that

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1 effect.

2 MJ [COL POHL]: Uh-huh.

3 LDC [MR. NEVIN]: We simply said we'd like to provide
4 this -- we'd like to put this before the eyes of the President
5 of the United States. That's all.

6 MJ [COL POHL]: Yeah. Just so I understand, because I
7 know that's -- when the government stands up, I'm going to --
8 I can anticipate part of their argument. But your requested
9 relief here is simply to deliver this to whoever picks up mail
10 at the White House, and that is the only dissemination that
11 you're requesting to be approved?

12 LDC [MR. NEVIN]: Exactly. And so ----

13 MJ [COL POHL]: I got it.

14 LDC [MR. NEVIN]: ---- when we filed this 15 days
15 typically before it would have been released on the military
16 commission's website, and there was all manner of
17 consternation that we had -- about the -- about filing it at
18 all. It took us by surprise.

19 MJ [COL POHL]: Okay.

20 LDC [MR. NEVIN]: And that led to a bunch of other
21 complaints and counter-complaints, and maybe those -- I think
22 those are still relevant. But I also in a way really want to
23 say to the military commission, please let us send a letter to

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1 the President of the United States, and possibly we can argue
2 about fair or unfair application of the rules at another time
3 and in another context.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: But finally, the last aspect of this is
6 the question of whether or not the contents of the letter are
7 propaganda. And this became -- this became -- this also
8 became injected into the discussion between the parties about
9 this letter, whether what was contained in Mr. Mohammad's
10 letter to the President was, quote/unquote, propaganda.

11 So again, I -- the purpose was to provide it to the
12 President of the United States. The purpose for the
13 classification review was to determine how we were supposed to
14 handle it. I take it that the President of the United States,
15 as the Commander in Chief, the commander of the entire
16 military, at the top of every chain of command, is qualified
17 and that it's safe to provide classified information to that
18 person.

19 MJ [COL POHL]: Nothing in here is classified.

20 LDC [MR. NEVIN]: Well, no. No, no, of course not. It's
21 not. It's determined to be unclassified. But my point is,
22 the classification review was not for the purpose of saying,
23 well, maybe the President doesn't have a high enough clearance

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1 to read Mr. Mohammad's letter. Presumably he, in this case,
2 does have that much of a clearance.

3 MJ [COL POHL]: Uh-huh.

4 LDC [MR. NEVIN]: But it was only for the purpose of
5 determining how to -- figuring out how to handle it to get it
6 from my hands to the President's hands. Okay?

7 But then we get into the whole issue of propaganda.
8 And I -- that is not a discussion that we injected into 371
9 because we filed it with you. We didn't make it an open
10 letter to the President in *The New York Times* or something.
11 We filed it in a pleading with you. And our experience is,
12 and, indeed, the Rules of Court require that before something
13 that's filed goes out to the website, it's going to go through
14 some review process, which I'm not entirely clear I understand
15 who conducts it vis-a-vis the privilege classification review
16 that we've talked about clearly, but there -- clearly doesn't
17 hit the website automatically the minute we press send on our
18 filing, on our electronic filing.

19 So again, it may be that the propaganda discussion
20 isn't one that needs to be had right now, but it's an
21 important discussion, and it has tentacles that will reach all
22 the way through this case.

23 MJ [COL POHL]: Let me ask you this, labeling something

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1 propaganda, first of all, requires a content review; and
2 secondly, requires a judgment. Under your legal authority to
3 send this to the President, does it make any difference
4 whether somebody considers it propaganda?

5 LDC [MR. NEVIN]: None.

6 MJ [COL POHL]: Okay. Anything further?

7 LDC [MR. NEVIN]: No, sir.

8 MJ [COL POHL]: Okay. Thank you. This appears to be a
9 Mr. Nevin-only argument, understanding how it implicates 018Y.
10 But I'm really kind of focusing on the uniqueness of 371 as it
11 deals with Mr. Mohammad's letter.

12 Trial Counsel. Mr. Ryan.

13 TC [MR. RYAN]: Sir. Your Honor, the defense refers to
14 the letter as correspondence seeking redress for grievances.
15 The letter, which is approximately 19 pages in length, the
16 letter just -- just the letter to the President is hardly a
17 petition for redress since it is one long insult to the
18 President and the United States. The document attached to it
19 is sort of stream of consciousness on behalf -- on the part of
20 Mr. Mohammad. So counsel says we don't have to get into
21 propaganda, but I do label it as propaganda.

22 And as to JTF, they are in the position of
23 responsibility of controlling what comes out from that man to

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1 the rest of the world. And being given that responsibility,
2 they should have the right to be careful and do as they see
3 fit. This man does not have a right, quote/unquote, to write
4 a letter to the President. This is not BOP, although people
5 in BOP's custody can have severe restrictions put on them.

6 I would submit that the military commission should
7 only become involved when it concerns rights of the accused
8 within the Military Commissions Act and within the case that
9 might be flowing within the commissions itself.

10 For all of those reasons, Judge, and resting again on
11 our paperwork, I would submit that this is a motion that
12 should be denied, understanding, of course, that there was a
13 lot of argument as to 018Y and any revisions to 018U and
14 understanding Your Honor's taking that into account.

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

16 TC [MR. RYAN]: That's all I have, sir.

17 MJ [COL POHL]: Mr. Nevin.

18 LDC [MR. NEVIN]: Well, look, I don't know what -- I don't
19 know where counsel gets the idea that something that's
20 insulting can't be a petition for redress.

21 MJ [COL POHL]: May hurt your chances to get redress, but
22 I understand that.

23 LDC [MR. NEVIN]: Well -- or it might help them.

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1 MJ [COL POHL]: Might.

2 LDC [MR. NEVIN]: Sometimes telling the truth, you know?
3 And sometimes, you know, the recipient of information may well
4 regard it as insulting when the person making the statement is
5 just telling about the world from his point of view ----

6 MJ [COL POHL]: Uh-huh.

7 LDC [MR. NEVIN]: ---- and which happens to be exactly the
8 situation that we're dealing with here.

9 So then there's nothing left but the question of
10 whether there's a right, and we can also rely on our moving
11 papers for that very clear proposition that there is a right.

12 So, thanks, Your Honor.

13 MJ [COL POHL]: Thank you.

14 It appears that we've discussed/argued all pending
15 motions scheduled for this session. So the way ahead is going
16 to be at approximately 1400 we'll hear from Mr. Zubaydah.
17 Tomorrow morning, we will hear from -- I don't know whether
18 the -- his name is -- has been released or not.

19 MTC [MR. TRIVETT]: He testified as Former Camp Commander.

20 MJ [COL POHL]: Former Camp Commander in open session at
21 0900 and we will need to do a closed session shortly.

22 LDC [MR. NEVIN]: Former Camp Commander or present?

23 MTC [MR. TRIVETT]: I'm sorry. At the time he testified

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1 as Current Camp Commander. He is now the former camp
2 commander. My apologies.

3 MJ [COL POHL]: Okay. But 9:00 is when he's scheduled to
4 start. So we'll start at 9:00 and it will be with him. And,
5 of course, the detainees will be allowed to be present for the
6 morning session. We will then take the classified portion of
7 the proceedings in the afternoon. As far as I can see, that's
8 the only thing on the docket for tomorrow.

9 Mr. Connell.

10 LDC [MR. CONNELL]: Your Honor, since we're discussing
11 path forward, I do have one quick question.

12 MJ [COL POHL]: Sure.

13 LDC [MR. CONNELL]: Which is that yesterday or Tuesday,
14 the military commission mentioned that there was a revision in
15 perhaps of the rules of court that is being contemplated.

16 MJ [COL POHL]: It's being drafted now; that's correct.

17 LDC [MR. CONNELL]: I am not saying that the commission
18 would necessarily follow any of my suggestions ----

19 MJ [COL POHL]: Would you like to see -- would you like to
20 have a draft circulated ----

21 LDC [MR. CONNELL]: Yes, sir. You know ----

22 MJ [COL POHL]: ---- before I sign off on it?

23 LDC [MR. CONNELL]: We're a stakeholder and our comments

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1 might be helpful.

2 MJ [COL POHL]: Okay. That's reasonable. Although I may
3 have already signed off on it, I can un-sign off on it,
4 because they weren't going to go into effect until the first
5 of July anyway. No, that's reasonable. I'll ----

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

7 MJ [COL POHL]: While we're kind of on a procedural aspect
8 here -- you can sit down, Mr. Connell. I just want to discuss
9 globally about expert assistance requests that I'm getting ex
10 parte to kind of -- because there's going to be a lot of paper
11 going back and forth and I want to -- and I'm saying this now,
12 and if you wish to present a counter-argument, I'm going to
13 listen to you.

14 But I'm just saying two points, is that when you have
15 an expert assistance request, the request has to have the
16 total dollar value for the mission, okay? And if things
17 change, I've got it, but you cannot piecemeal it. By that I
18 mean we want 1,000 hours now and do the exact same thing and
19 another a thousand hours. So you may see some things coming
20 back to you that says I want an averment of the total costs --
21 not the cost for this week's work, the total cost for the
22 mission that the expert's being hired for.

23 LDC [MS. BORMANN]: Question. So the convening authority

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1 has taken the position that we cannot request -- let's say we
2 have a request for a consultant who is in consultant stage
3 early on but will likely become an expert and testify later.
4 Their position has been that we are barred from requesting
5 testifying dollars until and unless we get to that point.

6 MJ [COL POHL]: Okay. I'm not ----

7 LDC [MS. BORMANN]: So, well ----

8 MJ [COL POHL]: I'm not talking about that part. Okay.

9 LDC [MS. BORMANN]: Okay.

10 MJ [COL POHL]: I'm not talking about production of an
11 expert witness. Now, you read the rules, and the way the
12 rules are read they talk about expert witnesses and they don't
13 really mention expert consultants that much, but quite
14 frankly, the same rules apply to both. I'm talking about
15 primarily expert consultants. If you want the convening
16 authority -- rephrase that -- the U.S. Government to pay for
17 an expert consultant, I'm just saying in your request, say we
18 want this consultant to perform this mission and the mission
19 will be completed with this much effort. Okay.

20 LDC [MS. BORMANN]: This many hours.

21 MJ [COL POHL]: Whatever. Whatever.

22 LDC [MS. BORMANN]: Okay.

23 MJ [COL POHL]: It's the total cost. Now, if things

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1 change, if something comes up and I get -- I'm not going to go
2 through all of the possible scenarios, but certainly they can.
3 Things can change, something would develop that was
4 unanticipated, that's a different -- that's the -- to quote
5 Mr. Connell's kind of a motion to supplement. But my concern
6 is that I -- it's got to be, if you hire somebody for mission
7 X, that's what you get or that's what's going to be decided
8 on, and if you got additional things, you need it.

9 But sometimes it appears to me that it's simply, we
10 started with this and we're doing the same thing, we just need
11 more hours, we still need more hours. Do you understand what
12 I'm saying?

13 LDC [MS. BORMANN]: I think so. So let me -- I need to
14 clarify a little bit more. There are differences between --
15 so for instance ----

16 MJ [COL POHL]: There's differences in kinds of experts
17 and kinds of missions. I've got it.

18 LDC [MS. BORMANN]: No, no. But some individuals that are
19 part of a defense team are continuing. Like me, for instance.
20 So trying to predict my hours until I don't know what year
21 would be impossible. And there are other members that are
22 part of a team, mitigation specialist comes to mind, that are
23 required to be on a team throughout the pendency of a case.

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1 So those people, I can't, as I stand here ----

2 MJ [COL POHL]: And if there is a particular expertise,
3 and a mitigation expert may be one of those, that you say at
4 best we think we can get the mission accomplished with this,
5 but the nature of this expertise may develop other areas of
6 inquiry and it may come back for more.

7 LDC [MS. BORMANN]: Okay.

8 MJ [COL POHL]: So I understand.

9 LDC [MS. BORMANN]: I'm just talking ABA Guidelines here
10 because they have to be part of the teams at all times because
11 of the nature of their work.

12 MJ [COL POHL]: I got it. I'm saying ----

13 LDC [MS. BORMANN]: You mean other kinds of things.

14 MJ [COL POHL]: I'm looking at other kinds of things more
15 than that.

16 LDC [MS. BORMANN]: Okay.

17 MJ [COL POHL]: So that's number one. That's number one
18 when it deals with experts.

19 LDC [MR. CONNELL]: I have a question, Judge. Or I can
20 wait until later.

21 MJ [COL POHL]: No. Go ahead.

22 LDC [MR. CONNELL]: Because ----

23 MJ [COL POHL]: Because I'm sending paper back to you to

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1 this effect, I just want to let you know the thought process.

2 LDC [MR. CONNELL]: And I appreciate it very much because
3 it's actually the very exact opposite of what I thought the
4 convening authority and you wanted us to do.

5 MJ [COL POHL]: Okay. I don't speak for the convening
6 authority.

7 LDC [MR. CONNELL]: Of course. I understand. So I
8 thought -- you know, my sort of global requests were getting
9 denied so I thought the appropriate way was to chunk it,
10 saying, all right, we have this motion coming up, I need the
11 expert for that, and next time we're going to have this other
12 motion coming up and I need the expert for that. But you're
13 saying if there's missions X, Y and Z, you would like to
14 see ----

15 MJ [COL POHL]: No, I'm not saying that. I'm saying this,
16 if you want an expert for an issue, so -- and under your
17 scenario it may be the same guy, if it -- he relates to
18 different things, you can put them together if you so choose.
19 I'm just saying we want this guy to perform this expertise,
20 and if it's the same expertise for three separate motions,
21 that's total costs for the -- for the mission you're giving
22 him. One cost per mission, even though the mission may cover
23 more than one issue. That's what I'm saying. Total costs.

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1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: Not this week's cost and then next year a
3 new cost and next year a new cost, because it's the way it's
4 supposed to work.

5 LDC [MR. CONNELL]: That makes sense to me, especially for
6 expert witnesses or people with a very discrete mission.

7 MJ [COL POHL]: Yes.

8 LDC [MR. CONNELL]: The sort of, you know, the different
9 people for the defense are hired on different models, right?
10 Sometimes a contractor will provide a contract service.
11 Sometimes a personal services contractor, you need the
12 individual person or whatever.

13 MJ [COL POHL]: I got it.

14 LDC [MR. CONNELL]: So there are people, like the
15 mitigation specialist as an example, who could -- the
16 convening authority could have chosen to deliver the service
17 via some other contract vehicle, has chosen the 703D process
18 as the proper vehicle. And so those -- you know, if we are
19 requesting, say, a full-time employee, they're not going to be
20 time-boxed.

21 MJ [COL POHL]: I understand. And what I'm just simply
22 saying is, the general rule is total cost for the mission,
23 given -- and the mitigation expert is probably the best

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1 example. You don't have that. Got it. Got it.

2 LDC [MR. CONNELL]: Right.

3 MJ [COL POHL]: And that would be the exception justified
4 by the facts of the case. But there's a lot of other people
5 that are mission specific that should be there. Okay.

6 LDC [MR. CONNELL]: Got it.

7 MJ [COL POHL]: That's all I'm saying.

8 LDC [MR. CONNELL]: Understood.

9 MJ [COL POHL]: Not being -- just when you see this stuff
10 coming back to you, I just wanted to give you an opportunity.

11 The other point I want to make on experts ----

12 LDC [MR. CONNELL]: Thank you.

13 MJ [COL POHL]: ---- is that the request you send to the
14 convening authority, whatever that justification is, has got
15 to be the same basis you send to me. Sometimes they morph
16 into a much more robust request to me than goes to the
17 convening authority. The way the system works is the
18 convening authority gets first chop on it on the money. You
19 can disagree with it philosophically, that's not how they do
20 it in federal court. I got it. Let's not revisit that.

21 He then approves or disapproves or sometimes proposes
22 an adequate substitute, which amounts to an approval if the
23 substitute is adequate. If he disapproves it, then I get to

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1 look at it myself. That's the way it works. But he gets the
2 first chop and I'm going to chop on what he chopped on. So
3 your request to me will be -- will be -- whatever you put in
4 your motions, fine. But anything that's not gone to the
5 convening authority will not be a basis to grant it.

6 LDC [MR. RUIZ]: Can I be heard?

7 MJ [COL POHL]: Sure.

8 LDC [MR. RUIZ]: I understand that, Judge, and I've seen
9 your pleading on that, and since you're sending paper our way
10 I'm going to let you know that we're sending paper back your
11 way on this issue.

12 MJ [COL POHL]: Absolutely.

13 LDC [MR. RUIZ]: So since you've taken the opportunity to
14 highlight it and I want to highlight for you a fundamental
15 difference in why that happens. The fundamental difference is
16 when we submit information to you that supports our request
17 for an expert, we know that the commission's not going to
18 share that information outside of the appropriate channels,
19 some of that information being the attorney-client privileged
20 information that supports our ongoing litigation efforts.

21 And as I said, you've got paper coming back your way
22 on this issue, and, that is, we believe that the convening
23 authority does, in fact, share confidential information that

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1 we provide outside of the appropriate channels; and that has
2 been not only a current issue, but it has been a longstanding
3 issue. So it affects our confidence in providing the
4 convening authority with ex parte strategy-based information
5 that we don't have the same reticence providing to the
6 commission which with, to this point, has always safeguarded
7 that information when it comes to experts.

8 So that's not reality for us. And we can't be in a
9 position where we provide information to the convening
10 authority ----

11 MJ [COL POHL]: I understand that.

12 LDC [MR. RUIZ]: ---- it becomes public.

13 MJ [COL POHL]: Just like I said in the first part, the
14 second part's the general rule. If there's something that you
15 say we want to go just to you and not to the convening
16 authority, but justification for, I will consider it. Because
17 there is a balance here.

18 LDC [MR. RUIZ]: Sure.

19 MJ [COL POHL]: There is a balance here. I've got it.
20 But the bottom line is, is the convening authority should get
21 a first informed cut and there should be enough in there that
22 he can make -- so when they make a decision, and I know
23 sometimes they don't, but he has enough in there to make an

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1 informed decision.

2 Now there's certain elements that you think that
3 should not go to him for your basis, then if you put them it
4 to me, put them in a separate part with a justification of
5 why ----

6 LDC [MR. RUIZ]: Very well.

7 MJ [COL POHL]: ---- and okay, I'll certainly consider
8 that, because again, this is just the general rule is --
9 because sometimes there's things that are much more robust
10 that are not -- how much more robust that are not falling in
11 your category.

12 LDC [MR. RUIZ]: I understand.

13 MJ [COL POHL]: So that's where we're at on that.

14 LDC [MR. RUIZ]: Just one more question since we're on the
15 expert issue, and this is a complex one. A long time ago in a
16 place far, far away, but in a place not so far, far away. I
17 raised the issue to you for the length of time that it takes
18 for the convening authority to act on these requests. And he
19 responded by instituting the 28-day rule, the 28-day response
20 by the convening authority: If there is no response, consider
21 it a denial and file a motion to compel with the commission.

22 What we're getting now are interim responses. And
23 the interim response is basically, we've got your request and

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1 we're researching it. We're on -- I think our longest one is
2 maybe five interim responses. But what is the commission's
3 position on whether that actually satisfies the response
4 requirement? The position I've tried to take is that ----

5 MJ [COL POHL]: Did I put this in writing?

6 LDC [MR. RUIZ]: Yes. Yes, you did.

7 MJ [COL POHL]: Okay.

8 LDC [MR. RUIZ]: So -- but they interpreted this as a
9 response as saying, hey, we're responding and we're telling
10 you we're working on it.

11 MJ [COL POHL]: I'm going to give you my fall-back answer
12 on something like this: File a motion to amend whatever that
13 order was.

14 LDC [MR. RUIZ]: I think your order says specifically that
15 if the convening authority doesn't respond, then I consider it
16 a denial.

17 MJ [COL POHL]: Then if you believe the order does not
18 need amending ----

19 LDC [MR. RUIZ]: Then I'll just file the motion.

20 MJ [COL POHL]: ---- and you believe that an interim
21 response is not -- is not an answer in accordance with the way
22 the order is currently drafted, then you have your position.
23 And if I disagree with you, I'll let you know.

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1 LDC [MR. RUIZ]: Right. Very well.

2 MJ [COL POHL]: But the reason why I said is maybe it's
3 better to amend the order is to let the convening authority
4 know, too.

5 LDC [MR. RUIZ]: I understand.

6 MJ [COL POHL]: Because they may -- as we all know, the
7 current convening authority wears another hat, and I don't
8 know how easy or hard it is to get to him.

9 LDC [MR. RUIZ]: Well, I think it's more than that.

10 MJ [COL POHL]: This is nothing to do with you. This is a
11 self-inflicted wound by the government. Apparently nobody
12 wants to be an SES for this job. I don't know. I can kind of
13 understand why, but that's not my issue. That's my issue.
14 But I think perhaps if we -- if we laid out to them that says
15 this -- an interim response is not -- so let me look at it.
16 I'll look it over myself and sua sponte amend it so they're on
17 the same footing.

18 LDC [MR. RUIZ]: I think that would be very helpful. I
19 think it would expedite things, Judge.

20 MJ [COL POHL]: Okay. We're sliding into prayer time and
21 I want to recess for lunch. We have the next witness coming
22 at 1400. I know we went a little late now.

23 LDC [MR. HARRINGTON]: Judge, could we start it at 1415?

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1 MJ [COL POHL]: Who is in charge of the guard force here?
2 Okay. Mr. Zubaydah, if we transported him to be here at 1430,
3 would that work?

4 SPEAKER: [Microphone button not pushed; no audio.]

5 MJ [COL POHL]: That's what I was afraid of. What we'll
6 do is -- okay. Thank you. That's why I asked that question.

7 Okay, we will anticipate starting at 1415, and so
8 have Mr. Zubaydah ready at 1415. Okay.

9 Commission is in recess.

10 [The R.M.C. 803 session recessed at 1300, 2 June 2016.]

11 [END OF PAGE]

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