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1 [The R.M.C. 803 session was called to order at 0909,
2 11 October 2016.]

3 MJ [COL POHL]: Commission is called to order. Trial
4 Counsel, please account for the members of the prosecution
5 that are here.

6 CP [BG MARTINS]: Good morning, Your Honor. Present for
7 the prosecution, Brigadier General Mark Martins, Mr. Robert
8 Swann, Mr. Edward Ryan, Mr. Clayton Trivett, Ms. Nicole Tate,
9 Ms. Danielle Tarin, Major Christopher Dykstra; Mr. Dale Cox,
10 paralegal; Petty Officer First Class Christopher Petril,
11 paralegal; and present in the back of the courtroom, Jeffrey
12 Fuhrer and Alicia Dorman of the Federal Bureau of
13 Investigation.

14 MJ [COL POHL]: Thank you. Mr. Nevin, who is here on
15 behalf of Mr. Mohammad? I will note for the record
16 Mr. Mohammad is here.

17 LDC [MR. NEVIN]: Yes, he's present. Mr. Sowards and
18 Major Poteet for Mr. Mohammad. Also present is Mr. Hasnain
19 and Ms. Leboeuf.

20 MJ [COL POHL]: Ms. Bormann, I notice Mr. Bin'Attash is
21 here. Who else is here on his behalf?

22 LDC [MS. BORMANN]: Judge, on behalf of Mr. Bin'Attash,
23 myself, Mr. Edwin Perry, Mr. Michael Schwartz, and Major

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1 Matthew Seeger.

2 MJ [COL POHL]: Thank you. I'll note for the record
3 Mr. Binalshibh is not here, which we will address in a minute.
4 Before we get to that, Mr. Harrington, who is here on behalf
5 of Mr. Binalshibh?

6 LDC [MR. HARRINGTON]: Major Alaina Wichner, Judge,
7 Captain Christopher Lanks, who has to be detailed, and one of
8 our analysts, Damon Farkas.

9 MJ [COL POHL]: Major Wichner, you were going to leave
10 active duty, I thought, last time we met?

11 DDC [MAJ WICHNER]: Yes, sir. I was scheduled to
12 demobilize on 30 September, but due to circumstances General
13 Baker had me extended for 30 days so that we can make sure
14 Captain Lanks got the credentialing and requisite detailing.
15 Additionally I was told there was virtually no way I could
16 come down here as a military member in September and leave as
17 a civilian the beginning of October. So to avoid all of the
18 issue, the CDC extended me until the end of October.

19 MJ [COL POHL]: Do you anticipate being retained as
20 civilian counsel?

21 DDC [MAJ WICHNER]: Yes, sir.

22 MJ [COL POHL]: Thank you.

23 Mr. Harrington, you indicated, although he's not

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1 here, that Mr. Binalshibh wishes to have Captain Lanks as part
2 of the defense team?

3 LDC [MR. HARRINGTON]: Yes, Judge.

4 MJ [COL POHL]: Captain Lanks, please put your detailing
5 qualifications on the record.

6 DC [Capt LANKS]: Good morning, Your Honor.

7 MJ [COL POHL]: Good morning.

8 DC [Capt LANKS]: Captain Christopher Lanks here. I have
9 been detailed to this military commission by Brigadier General
10 John G. Baker, Chief Defense Counsel, Military Commissions
11 Defense Organization. I'm qualified and certified under
12 Article 27(b) and sworn under Article 42(a) of the Uniform
13 Code of Military Justice. I'm also qualified and certified
14 under Rules of Military Commission 502 and 503. I have not
15 acted in any manner which might tend to disqualify me. My
16 detailing memorandum is at AE 004Q.

17 MJ [COL POHL]: Thank you. Mr. Ali is present in the
18 court. Mr. Connell, who is here on behalf of Mr. Ali?

19 LDC [MR. CONNELL]: Good morning, sir.

20 MJ [COL POHL]: Good morning.

21 LDC [MR. CONNELL]: Myself, James Connell, Lieutenant
22 Colonel Sterling Thomas, and making her appearance today, Alka
23 Pradhan.

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1 MJ [COL POHL]: Ms. Pradhan, could you please state your
2 qualifications on the record.

3 DC [MS. PRADHAN]: Good morning, Your Honor.

4 MJ [COL POHL]: Good morning.

5 DC [MS. PRADHAN]: My name is Alka Pradhan. I have been
6 detailed by the Chief Defense Counsel, Brigadier General John
7 G. Baker, to this military commission. I'm a U.S. citizen
8 admitted to the courts of the Southern District of New York,
9 the United States District Court of the District of Columbia,
10 and the District of Columbia court of appeals. I'm a member
11 in good standing of the bars of New York and the District of
12 Columbia, and I have agreed to comply with the rules,
13 regulations and orders of these military commissions.

14 MJ [COL POHL]: Have you signed the MOU on AE 013?

15 DC [MS. PRADHAN]: I have, Your Honor.

16 MJ [COL POHL]: And, Captain Lanks, I forgot to ask you
17 that. Have you signed that MOU?

18 DC [Capt LANKS]: Yes, Your Honor.

19 MJ [COL POHL]: Ms. Pradhan, will you raise your right
20 hand, please?

21 [Ms. Alka Pradhan was sworn.]

22 MJ [COL POHL]: Thank you. You may be seated.

23 I will note for the record that Mr. Hawsawi is here.

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1 Mr. Ruiz, who is here to represent Mr. Hawsawi.

2 LDC [MR. RUIZ]: Judge, Suzanne Lachelier, Lieutenant
3 Colonel Jennifer Williams, and Lieutenant Colonel Sean
4 Gleason, along with myself.

5 MJ [COL POHL]: Okay. Okay. Mr. Harrington, where is
6 your client?

7 LDC [MR. HARRINGTON]: Judge, he is -- my client came this
8 morning. He's back in the holding pen right now, and, Judge,
9 his failure to be here in the courtroom this morning is a
10 result of the continuing problem that we brought to the
11 attention of the court that's the subject of litigation right
12 now, and terms of the contempt which we allege of your order.

13 Mr. Bin'Attash -- or, I'm sorry, Mr. Binalshibh is --
14 went through another period of extreme frustration where these
15 things happen, he complains, he loses sleep, he loses his
16 temper. They end up imposing disciplinary status on him time
17 and time and time again, and it's reached a boiling point
18 again, and he's -- basically -- this is one of his pleas or
19 cries for help from the court to try to assuage the problem.
20 I have spoken with him this morning.

21 What I would suggest to the court is a way to --
22 initial way to try to resolve the situation of him being
23 present in the courtroom is to give me an opportunity to go

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1 back and speak with him again for a few minutes.

2 MJ [COL POHL]: Okay. I will give you a few minutes. But
3 understand this: There's a court order out there that says
4 all detainees have -- all accused have to be here today.

5 He cannot choose to disobey a court order. If he
6 chooses not to come in voluntarily, he will be brought in
7 involuntary. I will then give him his rights to be absent
8 with the other accused. At that time if he wishes to go back
9 to the holding cell, that's up to him.

10 But he doesn't have the right to boycott a proceeding
11 in contravention to a court order. I'll give you 15 minutes,
12 Mr. Harrington. Commission is in recess.

13 [The R.M.C. 803 session recessed at 0917, 11 October 2016.]

14 [The R.M.C. 803 session was called to order at 0931,
15 11 October 2016.]

16 MJ [COL POHL]: Commission is called to order. All
17 parties are again present. Mr. Binalshibh has now joined us.

18 At this time, I'm going to advise the accused of
19 their rights to be present and their option, if they so
20 choose, to be absent, again directed to all five accused.

21 You have the right to be present during all sessions
22 of the commission. If you request to absent yourself from any
23 session, such absence must be voluntary and of your own free

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1 will. Your voluntary absence from any session of the
2 commission is an unequivocal waiver of the right to be present
3 during that session.

4 Your absence from any session may negatively affect
5 the presentation of the defense in your case. Your failure to
6 meet with and cooperate with your defense counsel may also
7 negatively affect the presentation of your case. Under
8 certain circumstances, your attendance at a session can be
9 compelled regardless of your personal desire not to be
10 present.

11 Regardless of your voluntary waiver to attend a
12 particular session of the commission, you have the right at
13 any time to decide to attend any subsequent session. If you
14 decide not to attend the morning session but wish to attend
15 the afternoon session, you must notify the guard force of your
16 desires. Assuming there's enough time to arrange
17 transportation, you will then be allowed to attend the
18 afternoon session.

19 You will be informed of the time and date of each
20 commission session prior to the session to afford you the
21 opportunity to decide whether you wish to attend the session.

22 Mr. Mohammad, do you understand what I just explained
23 to you?

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1 ACC [MR. MOHAMMAD]: Yes.

2 MJ [COL POHL]: Mr. Bin'Attash, do you understand what I
3 just explained to you?

4 ACC [MR. BIN'ATTASH]: Yes, I do understand, but I would
5 like to note on the record that I oppose my lawyers.

6 LDC [MS. BORMANN]: Judge, can we turn on the microphone?

7 MJ [COL POHL]: Just a second, please. The
8 interpreters ----

9 ACC [MR. BIN'ATTASH]: On the record. I just want to put
10 my objection on the record.

11 MJ [COL POHL]: Interpreters, you need to turn up the
12 volume. We're having trouble hearing you.

13 INT: All right, sir.

14 MJ [COL POHL]: That's better.

15 LDC [MR. RUIZ]: Judge, I will just tell you,
16 Mr. al Hawsawi's headsets have too much static, and he's not
17 able to hear the translation. We tried to resolve that before
18 the court proceeding started, and it still has not been
19 resolved at this point. It has a great deal of static. I
20 have checked it a number of times, and it is correct, there is
21 static that interferes with the ability to hear.

22 MJ [COL POHL]: Okay, Mr. Ruiz. Mr. Bin'Attash, I'm going
23 to come back to you.

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1 I'm going to jump to you only on this particular
2 issue because it deals with a motion you had filed about your
3 client not wanting to be here today due to physical
4 discomfort.

5 LDC [MR. RUIZ]: Yes, that's correct.

6 MJ [COL POHL]: Does -- after I go over this proceeding
7 with him, does he wish to be excused?

8 LDC [MR. RUIZ]: It depends, I think, at least now,
9 because the damage is really done when -- the method of
10 transportation and the length of transportation. Of course,
11 prolonged sitting also does that. But it somewhat depends on
12 the order of business and what you intend to -- how you intend
13 to proceed. If you intend to proceed as before, then I need
14 to discuss that with him.

15 MJ [COL POHL]: Yeah. I'll proceed as we discussed at the
16 802.

17 LDC [MR. RUIZ]: Very well.

18 MJ [COL POHL]: All I was saying, if he wanted to leave,
19 then I won't -- but he does have the right to hear, so, if he
20 can't hear, we'll take another recess until the equipment is
21 fixed.

22 LDC [MR. RUIZ]: Well, I'll explain to him what you just
23 told me, but we would like him to have a working headset, Your

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1 Honor.

2 MJ [COL POHL]: Okay. Mr. Bin'Attash, I'll come back to
3 you in a second.

4 Mr. Binalshibh, did you understand what I just told
5 you about your right to be present and to waive said right?

6 ACC [MR. BINALSHIBH]: **[Speaking in English]** Not at all.
7 I didn't understand anything.

8 MJ [COL POHL]: You didn't understand anything?

9 ACC [MR. BINALSHIBH]: **[Speaking in English]** Nothing.

10 MJ [COL POHL]: Even though we have done this every
11 session, you don't understand about your right to be present?

12 ACC [MR. BINALSHIBH]: **[Speaking in English]** No.

13 MJ [COL POHL]: You don't understand your right to waive
14 the presence?

15 ACC [MR. BINALSHIBH]: **[Speaking in English]** I didn't
16 understand it.

17 MJ [COL POHL]: Until you do understand, Mr. Binalshibh,
18 then you will be here for every session.

19 ACC [MR. BINALSHIBH]: **[Speaking in English]** Then I need
20 you to force your orders on the guard exactly the same way you
21 force the orders on me.

22 MJ [COL POHL]: I'm not sitting here having you tell me
23 what I need to do.

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1 ACC [MR. BINALSHIBH]: **[Speaking in English]** I'm just
2 letting you know what's going on. Nobody is following your
3 order. You force us to come to the courtroom every times, and
4 you force the guard to bring us here, no problems. But the
5 same way, you have to force them. It is your order. It's not
6 my order.

7 MJ [COL POHL]: I got it, Mr. Binalshibh. I will do my
8 job as I see fit, and you will be quiet now. You say you
9 don't understand your right to waive your presence; therefore,
10 you are going to be here.

11 ACC [MR. BINALSHIBH]: **[Speaking in English]** I'm going to
12 be here.

13 MJ [COL POHL]: You're done.

14 ACC [MR. BINALSHIBH]: And I'm going to keep talking with
15 you about this.

16 MJ [COL POHL]: No, you're not going to keep talking.
17 You're going to stop talking now because I'm going to go
18 further with the proceedings.

19 ACC [MR. BINALSHIBH]: You need -- before you go to the
20 proceeding forward, you have to stop this now.

21 MJ [COL POHL]: I don't have to do anything that you tell
22 me to do. You are going to be quiet and wait for the due
23 course of business.

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1 ACC [MR. BINALSHIBH]: [Speaking in English] Okay. I'm
2 leaving. I'm leaving.

3 MJ [COL POHL]: You're not leaving. No, you're not
4 leaving.

5 ACC [MR. BINALSHIBH]: [Speaking in English] I'm going to
6 leave. Either I'm going to leave or I'm going to talk or you
7 are going to stop this abuse.

8 MJ [COL POHL]: Are you going to continue to disrupt these
9 proceedings?

10 ACC [MR. BINALSHIBH]: [Speaking in English] I'm going to
11 leave.

12 MJ [COL POHL]: No, I didn't ask you that.

13 ACC [MR. BINALSHIBH]: [Speaking in English] I'm going to
14 leave.

15 MJ [COL POHL]: Are you going to continue to disrupt these
16 proceedings?

17 ACC [MR. BINALSHIBH]: [Speaking in English] I'm go to
18 leave.

19 MJ [COL POHL]: I want you to understand something,
20 Mr. Binalshibh. If you keep disrupting these proceedings like
21 you are now, you will be escorted out of here forcibly to the
22 holding cell.

23 ACC [MR. BINALSHIBH]: That's exactly what I want. I

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1 don't want to listen to you. No exact -- everything ----

2 MJ [COL POHL]: You're choosing -- you're making this
3 choice. But after the lunch break, you're going to come back
4 in here because you -- same procedure. Okay.

5 ACC [MR. BINALSHIBH]: I'm going to do the same thing.

6 MJ [COL POHL]: The court makes a finding that
7 Mr. Binalshibh is being disruptive despite being warned. He
8 is now to be escorted out and put back in the holding cell.

9 ACC [MR. BINALSHIBH]: Fix the problems to force them ----

10 MJ [COL POHL]: Take him out of the proceedings. Goodbye.

11 ACC [MR. BINALSHIBH]: **[Speaking in English]** Goodbye.

12 MJ [COL POHL]: I'll just note for the record that at the
13 conclusion of the lunch break this afternoon --

14 Go. Take him out.

15 ACC [MR. BINALSHIBH]: **[Speaking in English]** Don't talk
16 with me like this. Shit.

17 MJ [COL POHL]: Mr. Harrington, just so everybody knows
18 the order of march here. So until he acknowledges knowing his
19 rights to waive his presence -- take him out.

20 ACC [MR. BINALSHIBH]: **[Speaking in English]** Don't take
21 me back here. Take me back there. I'm going to talk.

22 MJ [COL POHL]: If you wish to talk to him over the lunch
23 break, but until he says he understands his rights to be

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1 present and waives those rights, he's going to come back here
2 every time. And he'll be back here after the lunch break. I
3 mean, nobody wants disruption, but they want -- that's the way
4 it will be. Do you understand?

5 LDC [MR. HARRINGTON]: I understand.

6 MJ [COL POHL]: Okay. Mr. Ali, do you understand your
7 rights to be present, and if you so desire, to waive that
8 right?

9 ACC [MR. AZIZ ALI]: Yes.

10 MJ [COL POHL]: Okay. Mr. Ruiz, do we still have the
11 problem with the headset?

12 LDC [MR. RUIZ]: Yes, Judge. They say that there's
13 interference from the carts. So apparently the carts are
14 causing some kind of interference.

15 MJ [COL POHL]: The carts with wheels on them?

16 LDC [MR. CONNELL]: Yes, sir, they have wheels. Where
17 should we put them?

18 MJ [COL POHL]: Where they don't interfere.

19 LDC [MR. CONNELL]: Maybe we'll get guidance on that.

20 That might be ----

21 CP [BG MARTINS]: Your Honor, the explanation that we're
22 hearing is that the carts do interrupt the signal by being in
23 the way, so that they're physically in the path of a signal.

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1 MJ [COL POHL]: Okay. Has the problem been solved now
2 that the carts have been moved? Okay. Mr. Ruiz, can you hear
3 without static?

4 LDC [MR. RUIZ]: Judge, I think that's a little better.
5 They have indicated that he has to hold it so that it -- hold
6 it in the air so that it captures the signal. I'm not sure
7 how long that can last.

8 MJ [COL POHL]: Okay. If there's a problem with that,
9 just let me know.

10 LDC [MR. RUIZ]: I will.

11 MJ [COL POHL]: Because we currently have one spare
12 headset.

13 Mr. al Hawsawi, did you hear me earlier when I
14 explained your right to be present and, if you so chose, you
15 could waive that right?

16 ACC [MR. AL HAWSAWI]: Yes.

17 MJ [COL POHL]: Okay. Do you understand everything I
18 explained to you earlier?

19 ACC [MR. AL HAWSAWI]: Yes.

20 MJ [COL POHL]: Okay. Mr. Ruiz, it's the commission's
21 understanding that Mr. Hawsawi is scheduled for a medical
22 procedure on Friday.

23 LDC [MR. RUIZ]: Judge, that is my understanding. I

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1 learned that right prior to the 802 this weekend.

2 MJ [COL POHL]: Okay. So obviously he can't be in two
3 places at one time.

4 LDC [MR. RUIZ]: As I understand it, it's in the evening.

5 MJ [COL POHL]: Oh, it's in the evening.

6 LDC [MR. RUIZ]: That's my understanding.

7 MJ [COL POHL]: Okay. Just -- and we can clarify it, but
8 if he chooses not to come on Friday, okay, if he's making a
9 voluntary decision not to come on Friday, that's one thing.
10 If he's forced to make a choice between a procedure he wants
11 and to come in, I'm not sure that's a voluntary waiver.

12 LDC [MR. RUIZ]: Oh.

13 MJ [COL POHL]: It's similar to the issue that we had with
14 the ICRC.

15 LDC [MR. RUIZ]: It's not an issue. He intended to waive
16 his presence on Friday.

17 MJ [COL POHL]: But unconnected to the procedure, in the
18 sense that he's voluntarily choosing not to come and then
19 we'll have the procedure. He's not forced to make the choice
20 between coming and having the procedure.

21 LDC [MR. RUIZ]: What I can tell you, Judge, is that a
22 factor in his decision to waive is that he wants to rest, get
23 some rest in anticipation of the procedure. So that's a

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1 factor that exists, and it's one that I think I articulated in
2 the motion as to why we had asked for him to be excused for
3 today.

4 So it is a factor, so I can't necessarily say that
5 it's unconnected. But I understand what you're asking, but
6 that's where we are.

7 MJ [COL POHL]: Okay.

8 LDC [MR. RUIZ]: I do have a second issue, Judge, that I
9 need to address.

10 MJ [COL POHL]: Okay.

11 LDC [MR. RUIZ]: That relates to the notice that was filed
12 last evening, I think it's AE 457, under seal.

13 MJ [COL POHL]: Okay.

14 LDC [MR. RUIZ]: At this time, Judge, we would like to
15 withdraw that notice.

16 MJ [COL POHL]: Okay. Consider it withdrawn.

17 LDC [MR. RUIZ]: Thank you.

18 MJ [COL POHL]: As discussed at the 802, a couple of kind
19 of status things I want to discuss.

20 LDC [MR. RUIZ]: Judge, I'm sorry, may we have a moment?
21 We really need to try to work and rearrange this. I have no
22 sight lines in the way this is currently configured, and I'm
23 going to have to confer with counsel here and see if we can

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1 agree on this.

2 MJ [COL POHL]: Yeah, I can understand. Go ahead.

3 [Pause.]

4 LDC [MR. RUIZ]: Judge, I can't proceed without a
5 sightline.

6 LDC [MR. CONNELL]: Can we just have two minutes to work
7 this out?

8 MJ [COL POHL]: Okay. You got two minutes. We're not
9 going to sit here and delay about where a cart goes. It's
10 simply if Mr. Ruiz is in the fifth row back there and behind
11 him is Ms. Bormann, if they can't see, move your cart,
12 Mr. Connell. Stick it in the middle of the aisle. I don't
13 care.

14 LDC [MR. CONNELL]: I had it worked out previously, and
15 apparently there's an infrared issue. I'm not trying to block
16 anyone's sight. I'm trying to accommodate multiple
17 considerations.

18 MJ [COL POHL]: Okay. Go ahead. It appears that an
19 accommodation has been reached so, back to the issues I was
20 going to discuss.

21 425's an issue that has been out there, and we
22 were -- there were a couple of, just on the status of it, the
23 defense has filed a motion to compel discovery. The

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1 government response just came in. We know the defense
2 replied, so we have to have that litigated first.

3 There was an issue about declassification of certain
4 material, so we do all of 425 in an open session. It's the
5 commission's understanding that although it went for a
6 classified information review, some of the information is
7 still classified and will result in part of 425 being
8 litigated in a closed session. Is that correct, Trial
9 Counsel?

10 TC [MR. SWANN]: Yes, Your Honor.

11 MJ [COL POHL]: Mr. Bin'Attash?

12 ACC [MR. BIN'ATTASH]: I wanted to go on the record and
13 raise my objections because I have three points to make.

14 MJ [COL POHL]: Mr. Bin'Attash, are these the same points
15 you've already made?

16 ACC [MR. BIN'ATTASH]: Yes, and I have a third additional
17 point, too. It will make ----

18 MJ [COL POHL]: If you have a new point, you may make it.
19 Don't repeat what you've already said. Go ahead.

20 ACC [MR. BIN'ATTASH]: Yes, but even the old -- yes, I did
21 raise them, and we talked about them in the past, but I do
22 want to bring them up because they keep recurring at every
23 session.

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1 **[Speaking in English]** Something is missing in the
2 translation.

3 **[Translation continued]** At the beginning of every
4 session, the very first day only, it is important for me to
5 put my objection on the record one more time. The first
6 point, I consider my defense team not to represent me at all.

7 Second point is that there is no legal mail between
8 my defense team and myself since February of this year.

9 The third point, I have not had meetings with my
10 defense team since last year, 2015, except for one meeting
11 that took place about ten months ago.

12 The last point, the presence of the defense team with
13 me on this case, in this situation, which is ill, will make
14 them part of killing me. It will also make them part of the
15 government decision to issue the death sentence, and they will
16 not be an aid to me.

17 That's all.

18 MJ [COL POHL]: Thank you. As this may be interpreted as
19 somehow re-raising an issue that's already been resolved, the
20 commission adheres to its previous ruling with regards to
21 representation for Mr. Bin'Attash.

22 That brings us to 119.

23 LDC [MR. CONNELL]: Sir, I wish to be heard on 425.

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1 MJ [COL POHL]: Sure.

2 LDC [MR. CONNELL]: Sir, there are really two aspects of
3 425 that the military commission asked us to address in the
4 802. The first is the status of the declassification and the
5 second is the way forward, and I just want to address those
6 two points.

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: First, with respect to the
9 declassification, the original 505 notice was 425K, and the
10 military commission held a 505(h) hearing on 22 July of 2016,
11 the transcript of which is 435B.

12 At that time the parties agreed to review classified
13 portions of the motions at issue, 052, 425, and some others.
14 And on 22 July of 2016, the parties corresponded among
15 themselves regarding a list of items for declassification. I
16 have provided to the military commission a copy of that e-mail
17 which is now in the record at AE 425N. I don't wish to
18 display it. I just want it to be in the record.

19 The government has produced re-marked copies of all
20 of the pleadings on that list, except three, which are AE --
21 the three are AE 052, AE 052A, and AE 052EE. They may be in
22 the pipeline. I'm not casting any aspersion. I'm just making
23 the record clear.

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1 There is a bit of record confusion on AE 052A, which
2 I want to be clear for any later review. Originally,
3 Mr. Hawsawi filed AE 052A (MAH), and so the pleading itself
4 has the letter A written on it, but the trial judiciary later
5 renumbered AE 052A (MAH) to AE 052B (MAH), and that's how it
6 appears on the motions inventory at this time. So, the -- the
7 052A that I was referring to is the sort of real 052A, the one
8 which is reflected on the motions inventory.

9 We have received -- the other documents, the other
10 ten documents which we had requested classification review of
11 we had received and reviewed, and the -- it is correct that
12 those documents remain classified, but they are not classified
13 for any reason that was discussed at the 505(h) hearing or
14 that matches any guidance that we have.

15 So some of those -- the documents -- there are a few
16 items that I understand why they remain classified, because
17 there is either a phrase which remains classified or there's a
18 topic which remains classified, but there's a lot of other
19 classified material marked classified that just doesn't match
20 up with anything that we discussed.

21 And there's a solution to that, which the military
22 commission -- to this problem, I believe, and I think that it
23 would also let us do it in an unclassified session, and that

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1 is the military commission's order in AE 055. AE 055 was our
2 request for the military commission writ large, not
3 necessarily people who are in this room, but the
4 declassification review team and others to follow Regulation
5 for Trial by Military Commission 19-4.c.2 which requires the
6 public release of unclassified versions of classified
7 documents within 15 days. The military commission granted AE
8 055 on 29 January of 2013, which is reflected in the
9 transcript at page 1642.

10 What I am asking for is a -- we can, I think resolve
11 this problem and do 425 in open court if we knew what word it
12 is in these paragraphs that is classified. I think that
13 unclassified versions of these would be easily producible, and
14 the military commission has already ordered them produced, but
15 not in a written order.

16 So I'm ask for a written order associated with AE 055
17 as opposed to just a verbal order, because then we can present
18 that order to the other players in the system and request that
19 the unclassified documents be produced in accordance with
20 R.T.M.C. 19-4.c.2, and also R.T.M.C. 17-1.c.4.

21 With respect to the way forward, I -- so, I think
22 there is a solution that will ----

23 MJ [COL POHL]: Does the -- what the government has

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1 provided to you so far, the way I read this e-mail, is they
2 did a review of all you requested, and there's three reviews
3 pending.

4 LDC [MR. CONNELL]: That's my understanding, Your Honor.

5 MJ [COL POHL]: And some of this remains classified.

6 LDC [MR. CONNELL]: Of the ten documents that we received,
7 all of them are still classified at a lower level. One of
8 them is at ----

9 MJ [COL POHL]: Now, does this -- is it intertwined at all
10 with the motion to compel discovery?

11 LDC [MR. CONNELL]: Yes, and I'm going to address that in
12 the way forward.

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

14 LDC [MR. CONNELL]: There are really -- in 425, there are
15 really sort of three questions that have to be answered.
16 Question number one is what happened exactly; question number
17 two is why does that matter; and question number three is what
18 are we going to do about it, or what is the military
19 commission going to do about it.

20 So, 425L, which is the motion to compel that the
21 military commission referenced that the government just
22 answered in 425M addresses the what happened question. And I
23 believe that if we have unclassified versions of 425, the

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1 classification review is complete, and that the briefing on
2 425L is complete, which there's no reason why it shouldn't be,
3 then I think in December we could address 425L, that motion to
4 compel, and also conduct voir dire if the military commission
5 grants voir dire.

6 There are other pending issues that have become
7 entangled with this. AE 114 and AE 191 address the question
8 of why does it matter that the black site was destroyed. And
9 AE 443 is an ex parte motion that's pending. I know it's in
10 the 440s. I don't -- I'm not saying that the military
11 commission needs to be faster on it, but I just want to say
12 the question, the ex parte question in AE 443 is tied up with
13 the same issue.

14 There is one other pending discovery and witness
15 request, which is DR-260-AAA and WR-103-AAA, and which the
16 government answered on 16 August of 2016, provided a copy of
17 that to the military commission as 4250 (AAA). And in their
18 response, the government says essentially, among other things,
19 wait until you have the RDI discovery, which is in the
20 pipeline.

21 In AE 397G, the government represents that it has
22 produced what it plans to produce. We know now there's a
23 process involving the military commission, the government and

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1 the OCAs. We just briefed that process in AE 386A (AAA Sup),
2 which includes information about that process that was
3 revealed in the Nashiri trial.

4 I want to repeat something that I said at the last
5 hearing, which is that to the extent that the military
6 commission is sending ex parte communications to the
7 government outside of the record, we object to that. We think
8 communications from the military commission to the government
9 about things they need to fix or substitute or change need to
10 be of record.

11 Finally there's AE 114F, which is the motion to see
12 the black sites themselves. 052 has now become entangled by
13 order of the military commission with AE 114F, and that's
14 about the question of what are we going to do about this
15 situation.

16 Once the discovery is produced -- and the government
17 has produced a great deal of discovery over the past few
18 weeks, and I understand that it's produced voluminous
19 information to the military commission as well. Once that
20 discovery is produced, we will review it and litigate it as
21 necessary per your order in 397F, and at that point we can
22 address the sort of second two questions of why it matters and
23 what to do about it.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: Thank you.

3 MJ [COL POHL]: Now, Mr. Ruiz, you withdrew 119 requesting
4 a status determination of all the accused, or at least of your
5 client, true?

6 LDC [MR. RUIZ]: Yes.

7 MJ [COL POHL]: Okay. And correct me if I'm wrong, were
8 we at that point where we had automatic joinder or was there
9 individual joinder?

10 LDC [MR. RUIZ]: I believe at that point there was an
11 affirmative joinder procedure in place.

12 MJ [COL POHL]: Okay. Mr. Nevin, do you withdraw?

13 LDC [MR. NEVIN]: Your Honor, I take it that the
14 withdrawal rule in Rule of Court 3 makes that automatic.

15 MJ [COL POHL]: Okay. I just wanted to clarify this
16 particular issue on the record. So you joined in the
17 automatic withdrawal?

18 LDC [MR. NEVIN]: Yes, I do.

19 MJ [COL POHL]: Mr. Harrington, same position?

20 LDC [MR. HARRINGTON]: Yes, sir.

21 MJ [COL POHL]: Mr. Connell?

22 LDC [MR. CONNELL]: I wish to be heard.

23 MJ [COL POHL]: Okay. Ms. Bormann, before I listen to

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1 Mr. Connell, do you wish to be heard or do you withdraw?

2 LDC [MS. BORMANN]: I'd like to hear what Mr. Connell has
3 to say first.

4 MJ [COL POHL]: Okay. Mr. Connell.

5 LDC [MR. CONNELL]: May I approach the court security
6 officer for a moment?

7 MJ [COL POHL]: Sure.

8 LDC [MR. CONNELL]: Sir, AE 119 was a motion for an
9 Article 5 hearing under the Geneva Conventions to determine
10 the status of the defendants. Your original pleading was
11 AE 119 (MAH). Our affirmative joinder was AE 119 (AAA).

12 Under new Rule of Court 3.f.4 [sic], in a trial with
13 multiple accused, withdrawal by the original filing party
14 withdraws the motion from consideration by the commission as
15 to all parties. A different party may file the motion as a
16 new motion by following the procedures in -- I'm slowing down.

17 The thing that I want to address is the reason why
18 AE 119 got moved along so many times is that the Article 5
19 question in AE 119 got conflated with a personal jurisdiction
20 question under 10 U.S.C. 948c, which gives the military
21 commission personal jurisdiction over alien unprivileged enemy
22 belligerents.

23 Now, the case which most closely discusses this

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1 situation is the CMC decision in the United States v. Khadr,
2 which held that despite the language of the Military
3 Commissions Act at the time, the Geneva Conventions are
4 self-executing.

5 The -- that was applied by a different military
6 commission in United States v. Hamdan, and I have provided an
7 exhibit to the parties and to the military commission, which
8 is AE 119K (AAA), which is the ruling of the military
9 commission in United States v. Hamdan on the request for an
10 Article 5 status determination. I noticed that it was from a
11 different military commission and it wasn't already in our
12 record, so I wanted to make clear that it was.

13 The question under Article 5 is whether a defendant
14 is a POW under Geneva (III) or whether they are civilian.

15 LDC [MR. RUIZ]: Judge, I'm going to object to what
16 essentially amounts to argument on the motion that I have now
17 withdrawn. I believe the application of the rule should be
18 that the motion is withdrawn. This is not answering the
19 judge's question, which is do you join the joinder or not, so
20 I object to it since I moved to withdraw this motion.

21 MJ [COL POHL]: Okay. The objection is overruled. I'll
22 listen to what Mr. Connell says.

23 LDC [MR. CONNELL]: I'm not trying to argue. I'm trying

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1 to explain. I'm trying to untangle the two problems which
2 became entangled.

3 MJ [COL POHL]: No, but -- I always appreciate untangling
4 things, but the simple issue is, despite what the rule says,
5 I'm just making sure that everybody is withdrawing -- joins
6 the withdrawal of 119. Are you joining it, or do you wish to
7 somehow litigate it further?

8 LDC [MR. CONNELL]: No, I wanted to tell you exactly what
9 I want to happen. So what I want to happen is that I will
10 follow Rule 3.f.4, which says that Mr. Hawsawi's withdrawal
11 withdraws it to all parties. I don't have any control over
12 that one way or another.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: I'm not objecting to that. It's just
15 a fact. It's a legal fact.

16 But the -- what our way forward on this is that we
17 will refile an Article 5 motion as Rule 3.f.4 says we should.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: The reason I'm explaining all of this,
20 I don't want us to wind up in exactly the same situation again
21 that we wound up here. The government's response in 319 --
22 their response to -- excuse me, to 119 was -- didn't have to
23 do with Article 5 determination. It had to do with we will

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1 prove that the defendant was an AUEB.

2 MJ [COL POHL]: Mr. Connell, this is all very interesting,
3 but what you are doing is giving an advisory motion to the
4 government to don't make the same mistake again when I file my
5 next motion.

6 LDC [MR. CONNELL]: Fair enough.

7 MJ [COL POHL]: Would it not be more helpful to just file
8 the next motion and, if they make the mistake again, I am sure
9 you will point it out.

10 LDC [MR. CONNELL]: I can certainly do it that way, Your
11 Honor.

12 MJ [COL POHL]: Whenever we try to short-track things, it
13 doesn't usually work very well. But I understand your
14 position. Basically you see 119 as a moot issue because it's
15 been withdrawn by operation of the rule. But also I've asked
16 again, because of the nature of this issue, you're joining --
17 you don't want to pursue it as 119, although it may rear its
18 head again in another form ----

19 LDC [MR. CONNELL]: Right.

20 MJ [COL POHL]: ---- down the road.

21 LDC [MR. CONNELL]: The issue itself is not moot, but the
22 motion is withdrawn.

23 MJ [COL POHL]: Exactly.

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1 LDC [MR. CONNELL]: By the operation of the rule, there's
2 nothing I can do about it.

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

4 Ms. Bormann, after listening to Mr. Connell, do you
5 have ----

6 LDC [MS. BORMANN]: Judge, the issue is not moot, but by
7 operation of the law, we are also withdrawn.

8 MJ [COL POHL]: No, when I say the issue is moot, it is
9 moot as far as 119. It does not mean that you cannot re-raise
10 it if you desire.

11 LDC [MS. BORMANN]: That's our position as well.

12 MJ [COL POHL]: Trial Counsel, since the issue of 119 as
13 proffered by the parties has been withdrawn, if the government
14 wishes to pursue this issue on their own, you file your own
15 motion.

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

17 MJ [COL POHL]: Before we start taking the witnesses,
18 there's one other housekeeping thing I want to note for the
19 parties, is that due to the space limitations on the flights
20 down here, we have -- there are a limited number of court
21 reporters available. So when we recess and break, give them
22 time to take care of their personal business, which they may
23 need to do, rather than deluging them -- not that you deluge

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1 them, but particularly on the recesses, unless it's something
2 that absolutely has to be done, understand that those are the
3 only two that we have for this week, and they need their break
4 time, too.

5 LDC [MR. NEVIN]: Your Honor, on a similar matter, I spoke
6 to court staff this morning about a slight change in
7 the prayer time.

8 MJ [COL POHL]: Prayer time. I got. Yeah.

9 The original prayer time that I discussed the other
10 day is apparently from the Havana, Cuba, website which is
11 incorrect, and that prayer time is at 1247 and 1609 from here.
12 I think if we were in Havana it would be a different time, but
13 we're not. Therefore, we anticipate breaking at approximately
14 1245 to 1400. Thank you, Mr. Nevin.

15 That being said, anything to take up before we call
16 the first witness, understanding that this is only to cover
17 unclassified material.

18 General Martins?

19 CP [BG MARTINS]: Your Honor, I just wanted to -- I
20 neglected to say that these proceedings are being transmitted
21 by closed-circuit television to locations in the United States
22 pursuant to your order.

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

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1 A. I was Assistant Staff Judge Advocate for JTF-GTMO,
2 and I mostly served as a legal advisor to Camp VII.

3 Q. Okay. In that capacity, please tell the court what
4 duties were involved in your day-to-day activities.

5 A. In my day-to-day activities, if -- when -- my
6 interactions with the detainees mostly was to provide legal
7 mail and correspondence between defense counsel and the
8 detainees and also answer any questions that the camp
9 commander may have regarding any legal issues that are
10 springing up.

11 Q. So your duties would require you at times to visit
12 the detention facility in Camp VII?

13 A. Yes.

14 Q. But your office itself was not located within
15 Camp VII, correct?

16 A. Yes.

17 Q. It was in a separate location?

18 A. That's correct.

19 Q. How much time would you say you spent on average in
20 Camp VII on a -- say, for a daily -- on a daily basis during
21 the course of your tour?

22 A. Daily -- on a daily basis, probably 30 minutes a day
23 at Camp VII.

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1 Q. All right. So it's fair to say that your ability to
2 observe the inner workings of Camp VII was limited to that
3 exposure that you had when you were going over to interact
4 with the detainees or other reasons?

5 A. Yes, that's fair.

6 Q. Did you have an opportunity to interact with
7 Mr. al Hawsawi, who you would have known also as ISN 11?

8 A. Yes.

9 Q. Can you tell me approximately what was the extent of
10 your interactions with Mr. al Hawsawi?

11 A. I would provide him with legal correspondence between
12 yourself and Mr. al Hawsawi, and if he had any questions
13 regarding the legal mail or anything like that, I was happy to
14 answer it. But that was the extent of my interactions with
15 him.

16 Q. How would you characterize your interactions with
17 him, your communications?

18 A. It was very professional. I had no issues with him.
19 I don't believe he had any issues with me.

20 Q. Very good.

21 Now, in terms of the -- on February 5th of 2015, you
22 were working as the Staff Judge Advocate, as you've indicated
23 today, correct?

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1 A. Yes.

2 Q. So, now, I notice that you're referencing some notes
3 and your notepad. May I ask what that is?

4 A. Just some notes that I had written out before this
5 testimony.

6 Q. Okay. So I'm going to ask, Captain, if you need to
7 refresh your memory on a question I ask, if you could just let
8 me know, and then ----

9 A. Okay.

10 Q. ---- you're welcome to refresh your memory, but I
11 need to just ask what it is you're using to refresh your
12 memory, just for purposes of our record.

13 A. Okay.

14 Q. Very well.

15 Did you at some point become aware that some
16 materials had been seized from Mr. al Hawsawi?

17 A. On the 5th of February?

18 Q. On or about the 5th of February of 2015?

19 A. Yes.

20 Q. Do you recall the specific date that you learned
21 about that seizure?

22 A. It was on the 6th of February, the next day.

23 Q. Now, those documents were in fact seized on the 5th,

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1 correct?

2 A. I believe so, yes.

3 Q. Have you had an opportunity to review the chain of
4 custody in this case?

5 A. I did.

6 Q. Okay. And did that chain of custody refresh your
7 recollection as to when the date of seizure was?

8 A. Yes.

9 Q. And that in fact was the 5th of February of 2015,
10 correct?

11 A. Yes, that's correct.

12 Q. And you became involved on the 6th of February of
13 2015 when the documents were returned to you, correct?

14 A. Yeah, that's correct.

15 Q. All right. What did you do when those documents were
16 returned to you?

17 A. I was told that they were legal documents, and at the
18 time they were properly marked, so I returned them back to
19 Mr. al Hawsawi.

20 Q. Okay. Now, in terms of the -- when were you first
21 notified of that seizure?

22 A. On the 6th of February when I entered camp.

23 Q. So I'm assuming that you were not involved in the

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1 actual seizure itself?

2 A. No.

3 Q. You were not consulted prior to the search or during
4 the course of the search?

5 A. No.

6 Q. Or when the guard force made the actual decision to
7 seize these documents?

8 A. No.

9 Q. Are you familiar with the military judge's standing
10 order regarding privileged and written communications known as
11 018U?

12 A. Yes.

13 Q. Okay. What is your understanding of what the
14 military judge's order requires the guard force to do prior to
15 seizing any such materials?

16 A. Well, there's -- there's a lot of things in that
17 order that they must do. I mean, depends on the context.
18 There's context where if their documents were found in the
19 legal bin as well as outside the legal bin. So which one are
20 you referring to?

21 Q. Okay. Well, actually, I'm referring to both, because
22 really the procedures in 018U in terms of your involvement are
23 essentially the same, are they not?

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1 A. For our involvement, that's correct, yes.

2 Q. Sure. So the two provisions I'm referring to, of
3 course are 11 -- it's in 018U and it's 11.d.

4 A. May I review it?

5 Q. Absolutely. It's -- 11.c and 11.d are the two
6 provisions that I'm going to ask you about. If you need to
7 refresh your recollection, please go ahead.

8 A. Okay.

9 Q. Just take your time.

10 A. Okay.

11 Q. So first with regard to 11.c, and referring to the
12 bottom of what I have marked as page 18 of 20, the military
13 judge's order regarding privileged written communications
14 requires there to be a prior authorization from the attorney
15 representative of the SJA made in person -- made upon personal
16 inspection prior to seizure of those materials, correct?

17 In fact, the judge's order says "Seizure of such
18 material may occur only upon the prior authorization of an
19 attorney representative of the SJA, made upon personal
20 inspection," correct?

21 A. That's correct. That's only for contraband found in
22 legal bins.

23 Q. Actually, "c" says material other than physical

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1 contraband.

2 INT: Your Honor?

3 MJ [COL POHL]: Yes? Hold the phone. I heard a "Your
4 Honor."

5 INT: Your Honor, the interpreters are having difficulty
6 hearing the witness. The audio is not clear.

7 MJ [COL POHL]: Okay. Captain L, please just say "Can you
8 hear me?"

9 WIT: Can you hear me? Testing.

10 INT: Yes.

11 MJ [COL POHL]: Okay. Go ahead, Mr. Ruiz.

12 WIT: Okay.

13 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

14 Q. Captain, if I heard you correctly, you said that only
15 related to physical contraband?

16 A. Observed in legal bins, for "c." We are talking
17 about "c," correct?

18 Q. 11.c.

19 A. Right.

20 Q. 11.c refers to materials other than physical
21 contraband.

22 A. Right. Inside of the legal bins.

23 Q. Okay. Well, we can look at ----

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1 A. Okay.

2 Q. We can look at 11.d as well.

3 A. Okay.

4 Q. Okay. We can take a look at 11.d, which would be
5 material outside of the legal bins, correct?

6 A. Correct.

7 Q. Okay. So look at 11.d(1).

8 Now, this material refers to documents that are found
9 other than in the legal bin, correct?

10 A. Correct.

11 Q. Which is not referring ----

12 A. Which I think is the incident -- which is what
13 happened here.

14 Q. Sure. We can refer to 11.d(1) if you like, but ----

15 A. Okay.

16 Q. But it does refer to documents and we're not talking
17 about physical contraband. Can we agree on that?

18 A. Right. Yes. Right.

19 Q. So 11.d(1) also requires an immediate notification to
20 the Staff Judge Advocate, correct?

21 A. Correct.

22 Q. We can agree that didn't happen here because you
23 weren't notified on the same day, you were actually notified

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1 the second day?

2 A. That's incorrect. Staff Judge Advocate, who was at
3 camp that day, a representative of the Staff Judge Advocate
4 was notified of it.

5 Q. Who is that?

6 A. It's Captain E, who I believe will be testifying.

7 Q. Okay. All right.

8 And did the captain authorize that search, to your
9 knowledge, authorize that seizure?

10 A. Again, I -- not to my knowledge. I can't testify to
11 that.

12 Q. So if, in fact, that SJA was notified and informed of
13 the materials that were seized, why was that material not
14 returned to that Staff Judge Advocate?

15 A. I don't -- I don't know.

16 Q. You have said in fact it was properly marked,
17 correct?

18 A. When I received it, they were properly marked.

19 Q. And therefore you returned it to Mr. al Hawsawi?

20 A. Yes, but when -- my understanding was when they were
21 removed from his cell, they were not properly marked.

22 Q. In what way?

23 A. The ISN was handwritten on the bottom of the notepad,

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1 where camp's procedure is they would stamp it. So to them,
2 that was considered contraband that they confiscated outside
3 of the legal bin.

4 Q. But you personally did not actually interact in terms
5 of the -- you weren't there when the other Staff Judge
6 Advocate was reviewing these documents?

7 A. No.

8 Q. This is based on information that was provided to
9 you?

10 A. Yes.

11 Q. But you do agree that the military judge's order
12 requires immediate notification as well as prior authorization
13 for seizure?

14 A. For seizures of documents inside of the legal bin,
15 yes.

16 Q. Okay. Are you saying that that doesn't require it
17 for materials found outside of the legal bin?

18 A. For documents found outside of the legal bin does not
19 require -- according to the order ----

20 Q. Let me ----

21 A. ---- according to the order, it doesn't require
22 immediate -- prior authorization by the Staff Judge Advocate.

23 Q. Okay. Take another look at 11.d, number 1.

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1 A. Okay.

2 Q. Do you want to change your answer?

3 A. No. It's -- I don't believe that it has to be
4 properly -- priorly authorized by the SJA's office.

5 Q. Do you disagree with the ----

6 A. Only upon -- only upon personal inspection.

7 Q. Well, let me read what 11.d(1) talks about. First of
8 all, it talks about material found in locations other than the
9 legal bin of the accused, correct? That's paragraph d?

10 A. Right.

11 Q. Okay. It says that materials shall be segregated in
12 a sealed container, correct?

13 A. Correct.

14 Q. Labeled with the date and time and identification of
15 the U.S. Government personnel by whom it was observed,
16 correct?

17 A. Correct.

18 Q. And retained by the noncommissioned supervising --
19 noncommissioned officer supervising the inspection, correct?

20 A. Correct.

21 Q. And Paragraph 1 says in such an event an attorney
22 representing the SJA will be immediately notified, correct?

23 A. Correct.

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1 Q. Seizure of such materials may occur only upon the
2 prior authorization of an attorney representative of the SJA.

3 So what is it that you disagree with in terms of a
4 prior authorization requirement in this order? What is your
5 disagreement?

6 A. I have none. It appears to be similar to "c."

7 Q. Well, it's actually not similar, but identical,
8 correct?

9 A. Correct.

10 Q. So in fact it does require prior authorization?

11 A. Correct.

12 Q. And prior authorization made upon personal inspection
13 by an SJA or an attorney?

14 A. Correct. Correct.

15 Q. Okay. Now, Captain, it's fair to say in this case
16 you did not participate in the search?

17 A. No.

18 Q. You had no knowledge of why the search was being
19 conducted?

20 A. No.

21 Q. You were not consulted in any way, shape or form?

22 A. No.

23 Q. To your knowledge, the other Staff Judge Advocate

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1 which you referenced was also not involved in the search of
2 Mr. al Hawsawi's materials and the subsequent seizure without
3 prior authorization?

4 A. I can't testify to that.

5 Q. Okay.

6 A. I don't know what his involvement ----

7 Q. Well, you just testified ----

8 A. ---- included.

9 Q. ---- that he had provided you some information in
10 regards to what he in fact had reviewed. How did you come
11 about that knowledge?

12 A. No. I found out through the watch commander who
13 informed me of the incident ----

14 Q. Okay.

15 A. ---- that -- on the 6th when I was there.

16 Q. To your knowledge, are there any other personnel --
17 to your knowledge, who directs the searches in Camp VII?

18 A. I can't speak to that.

19 Q. Okay. So in terms of your involvement as the Staff
20 Judge Advocate, it's basically fair to say you're a liaison
21 between the Staff Judge Advocate's office and the detainees,
22 correct? You're the legal representative, and you have
23 certain -- in the course of your duties, you had certain

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1 duties and responsibilities that involved interaction with the
2 detainees based on your job obligations?

3 A. I wouldn't say I'm a liaison, no.

4 Q. Okay.

5 A. I -- I merely provided legal mail to the detainees,
6 and that's all I did.

7 Q. Okay. And if they had any particular issues that
8 came up, you were there to discuss those issues with them in
9 terms of materials that could be provided to them or seized
10 from them?

11 A. If it involved -- I'm sorry. If it involved legal
12 mail, then I could resolve it. But other than that, I -- I
13 did not go into -- any deeper into my involvement, interaction
14 with them.

15 Q. So you don't have the basis for knowledge to tell the
16 commission who made the decisions of what detainee cells to
17 search and why?

18 A. Nope.

19 Q. And why to seize those materials, because you simply
20 were not there?

21 A. And it's not the position of our office to get
22 involved with the operations of the camp.

23 Q. Well, but it is -- it is the judge's -- it is the

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1 judge's explicit ruling that you are to give prior
2 authorization before any seizure occurs, correct? So is it
3 your position that the military judge's order is overridden by
4 your policy?

5 A. No. But ----

6 Q. What's the issue?

7 A. If camp had a question regarding a legal issue
8 regarding the legal mail or whatever, we would provide it to
9 them. And we in fact trained them on how to, you know, search
10 legal -- they did not search any sort of legal materials at
11 all without, you know, us being involved in it. That includes
12 the legal bins. So they didn't touch anything inside the
13 legal bins, and if they did, they would inform us about
14 that ----

15 Q. So which would ----

16 A. ---- which would be in -- per the protective order.

17 Q. What protective order are you referring to, the
18 privileged communication?

19 A. The privileged communication order, right.

20 Q. When you say they would inform us, you don't mean
21 they would immediately inform you, but at some point they
22 would inform you?

23 A. Yes. We would know if something was ever removed

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1 from the legal bins.

2 Q. Right.

3 A. But if it was outside the legal bins, to them it was
4 fair game.

5 Q. What does "fair game" mean?

6 A. If it wasn't -- if it wasn't properly marked ----

7 Q. What does "fair game" mean?

8 A. ---- as in this case.

9 They could remove it if it wasn't properly marked,
10 such as the case here.

11 Q. All right.

12 LDC [MR. RUIZ]: May I have a moment, Judge?

13 MJ [COL POHL]: Sure.

14 [Pause.]

15 LDC [MR. RUIZ]: That's all I have, Judge.

16 MJ [COL POHL]: This appears to be a Hawsawi-specific
17 issue. If there's questions that other defense counsel wants
18 to ask, it's got to be only on the issue before me and not a
19 fishing expedition for other things.

20 That being said, Colonel Thomas, do you have
21 questions of this witness?

22 DDC [Lt Col THOMAS]: Your Honor, I'd note for the record
23 that counsel for Mr. Hawsawi filed 018QQ, a supplement to

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1 018PP, so we'd like to follow up with the witness about that.

2 MJ [COL POHL]: What do you want to talk about?

3 DDC [Lt Col THOMAS]: If I may, Your Honor, we're going to
4 get into whether he was involved in the seizure of
5 Mr. al Baluchi's documents.

6 MJ [COL POHL]: Did you file a motion to that effect?

7 DDC [Lt Col THOMAS]: We did, 018QQ.

8 TC [MR. SWANN]: They did file a motion, Your Honor. They
9 filed a motion in this instance for an event that took place
10 six months before this incident occurred. Now, I don't know
11 how this witness would know anything about that.

12 MJ [COL POHL]: Okay.

13 DDC [Lt Col THOMAS]: Your Honor ----

14 MJ [COL POHL]: Just be on notice here -- is that when we
15 discussed this at the 802, I talked specifically about 018PP.
16 I didn't hear anybody say I want to talk about other issues
17 for this witness. So I'm going to let you do it, but it works
18 better if we know what we're going to talk about.

19 DDC [Lt Col THOMAS]: I believe this will be brief, Your
20 Honor.

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

22 **DIRECT EXAMINATION**

23 **Questions by the Detailed Defense Counsel [Lt Col THOMAS]:**

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1 Q. Captain L, good morning.

2 A. Good morning, sir.

3 Q. I'm Lieutenant Colonel Thomas, I represent
4 Mr. al Baluchi. I want to get straight to the question here.
5 You arrived in Guantanamo in August of 2014; is that right?

6 A. That's correct.

7 Q. You were working as the Camp VII Assistant SJA on
8 14 August 2014?

9 A. I can't recall that I did and I was. It took some
10 time for me to get the proper documentation to be authorized
11 into Camp VII -- so I don't recall that I was working on
12 14 August in Camp VII.

13 Q. Do you recall addressing a seizure of
14 Mr. al Baluchi's legal papers on 14 August 2014?

15 A. I can't recall.

16 Q. Do you recall whether an SJA known as yourself,
17 Captain L, was notified of a seizure of Mr. al Baluchi's
18 papers on 14 August 2014?

19 A. I can't recall.

20 Q. Did you authorize a seizure of Mr. al Baluchi's
21 papers on 14 August 2014?

22 A. I can't recall.

23 DDC [Lt Col THOMAS]: Thank you, Your Honor.

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1 MJ [COL POHL]: Trial Counsel?

2 LDC [MS. BORMANN]: I have a question, if I may?

3 MJ [COL POHL]: Yes, ma'am.

4 LDC [MS. BORMANN]: Thank you.

5 MJ [COL POHL]: You have a separate pleading on this also,
6 Ms. Bormann?

7 LDC [MS. BORMANN]: It's regarding a question that
8 Mr. Ruiz asked, and I need it clarified for the record.

9 MJ [COL POHL]: Okay.

10 **DIRECT EXAMINATION**

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

12 Q. Good morning, Captain L. My name is Cheryl Bormann.

13 A. Good morning, ma'am.

14 Q. We've met before, haven't we?

15 A. We have.

16 Q. And we have met in Echo II during meetings with my
17 client, Mr. Bin'Attash, correct?

18 A. Correct.

19 Q. Now, Mr. Ruiz talked at length about AE 018U, that's
20 the judge's order on how material is to be handled when it's
21 legal mail, right?

22 A. Correct.

23 Q. And legal mail is different from contraband, physical

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1 contraband, right?

2 A. Yes.

3 Q. Physical contraband would be things like an
4 unauthorized cup or an unauthorized container that might,
5 like, have a sealing jar that had metal in it, something like
6 that, right?

7 A. Right. Among other things, but, yes.

8 Q. Here we're talking about a notepad, right?

9 A. Correct.

10 Q. A notepad that contained writing, correct?

11 A. Correct.

12 Q. The notepads themselves are free of contraband. They
13 don't contain staples or anything like that, right?

14 A. Well, contraband can also mean items that don't
15 belong, that's not -- they weren't authorized.

16 Q. We're talking now about physical contraband.
17 Physical -- a notepad or piece of paper is not physical
18 contraband, is it, as defined by 018U?

19 A. Well, it could be things that were not authorized to
20 the detainee.

21 Q. So your understanding of the judge's order is that a
22 piece of paper with writing on it can be construed by the SJA
23 as physical contraband?

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1 A. Yes, if it was not authorized for the detainee.

2 Q. Your other -- and I want to direct you back now to
3 something else Mr. Ruiz asked you.

4 In 018U, you expressed an opinion that materials that
5 were found inside a legal bin would be different from outside
6 a legal bin, right?

7 A. Correct.

8 Q. And so we can clarify here: A legal bin is a plastic
9 container of some sort that a detainee is issued to put
10 materials into?

11 A. Correct. Their legal materials.

12 Q. Sure. And over the years -- my goodness, this case
13 has been around for a while, and the previous iteration, there
14 is literally massive numbers of legal bins in a detainee's
15 cell, right?

16 A. That is -- if I can recall, yes. I believe they've
17 got numerous.

18 Q. So you explained to Mr. Ruiz early on that -- and I
19 think your word was "fair game" -- that anything outside the
20 legal bin was considered fair game by the guards to seize; is
21 that your testimony?

22 A. If it was not properly marked according to the
23 privileged communication order, correct.

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1 Q. And when you ----

2 A. It's fair game for inspection.

3 Q. Sure. And so when you were discussing what "fair
4 game" meant, you meant they could seize it without notifying
5 the SJA's office?

6 A. No. It's fair game that they could inspect it and
7 determine if it is in fact contraband.

8 Q. And when you said "fair game," you did not think that
9 it required inspection by SJA prior to seizure, did you?

10 A. No.

11 Q. That was ----

12 A. No, that's not what I thought.

13 Q. Right. You thought that there was a difference
14 between outside the bin and inside the bin as it pertained to
15 written documents, material like that, in terms of prior
16 authorization by an attorney for the SJA's office. You
17 thought there was a difference between those; is that right?

18 A. Correct. I did.

19 Q. And that was a mistake on your part?

20 A. It was.

21 Q. That was your understanding during the entirety of
22 the time that you were an assistant SJA, from August of 2014
23 until May of 2015?

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1 A. Yes.

2 Q. Today is the first time you realized that that was a
3 mistake?

4 A. I -- yes.

5 Q. And so when the camp would ask your advice regarding
6 how it is they should proceed, you would give them advice that
7 allowed them to seize material without your prior
8 authorization if it was outside the bin?

9 A. They never asked for my advice when it was outside
10 the legal bin.

11 Q. Final question: Were you ever asked to do any prior
12 authorization of any seizure from August of 2014 until May of
13 2015, the entirety of your time as an assistant SJA?

14 A. Yes, a couple of times, I believe. I can't specify
15 which date or time, but I do recall the watch commanders
16 asking me if it's okay if, you know -- they asked me certain
17 items, if it was okay, if it was in fact legal not.

18 Q. Did you -- where did -- did you personally observe
19 those items prior to their seizure?

20 A. Sometimes I would.

21 Q. How many times did that happen?

22 A. I can't recall, but it was multiple times.

23 Q. And "multiple" meaning more than ten or less than

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1 ten?

2 A. Probably less than ten.

3 LDC [MS. BORMANN]: I have nothing else.

4 MJ [COL POHL]: Mr. Swann.

5 **CROSS-EXAMINATION**

6 **Questions by the Trial Counsel [MR. SWANN]:**

7 Q. Good morning, Captain L. Let's talk about ----

8 A. Good morning, sir.

9 Q. Let's talk about what you do know about that event on
10 the 5th of February. As I understand it, you were handed a
11 set of documents to return to the accused in this case; is
12 that correct?

13 A. That's correct.

14 Q. And you were handed those documents or told to return
15 those documents by another Staff Judge Advocate, Captain E?

16 A. I was -- no, it was from the watch commander.

17 Q. Okay. Did the watch commander tell you that they
18 seized the documents because the documents weren't properly
19 marked?

20 A. Yes.

21 Q. And when you said earlier that the documents were
22 properly marked and returned to the accused, do you mean then
23 that they were subsequently reflected to be attorney-client

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1 information and then given back to the accused?

2 A. That's correct.

3 So they were -- it was confiscated because they were
4 not properly marked. Then it was reviewed to be legal
5 documents. So the guard force properly marked it, gave it
6 back to me, and then I returned it back to Mr. Hawsawi.

7 Q. All right. So if the documents had been properly
8 marked with an attorney-client stamp of some sort on those
9 particular documents, do you know whether they would have been
10 taken to begin with?

11 A. No. They would not have searched, even touched it,
12 if they saw the proper markings.

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

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

15 **REDIRECT EXAMINATION**

16 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

17 Q. Captain, in response to Mr. Swann's question about
18 the appropriateness or the propriety of the marks, you
19 answered that the documents were reviewed and determined to be
20 legal documents and were then properly marked and returned to
21 Mr. al Hawsawi, correct?

22 A. Correct.

23 Q. All right. My question to you is: Who reviewed

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1 those documents and what process did they use to determine
2 that they were legal documents in nature or, in other words,
3 attorney-client privileged materials? How is that
4 determination -- or how was that determination made by a
5 nonlawyer at that time? Who did that?

6 A. I was told that they were found to be legal
7 documents, and then they stamped it.

8 Q. Okay. So from that, is it fair to infer that
9 somebody read the documents and determined that it was
10 attorney-client privileged information, legal in nature?

11 A. Yes.

12 Q. Who?

13 A. I don't know.

14 Q. Okay. I know you may not know for this specific
15 instance, but who would engage in that type of analysis?

16 TC [MR. SWANN]: Your Honor, the next witness will be able
17 to answer this question.

18 MJ [COL POHL]: Let -- objection overruled.

19 You may answer the question if you know the answer.

20 A. It would be a translator and then the staff judge
21 advocate, who would have seen and would have made the
22 determination.

23 Q. So it was your interpretation of the military judge's

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1 ruling that if materials were not properly marked, the
2 materials could be substantively reviewed to determine if they
3 were in fact attorney-client privileged materials or not;
4 that's your understanding of what the military judge's ruling
5 regarding privileged communications was?

6 A. Yes.

7 Q. You would make a substantive legal determination
8 about the nature of that communication?

9 A. Yes. And we were always cautioned to, you know,
10 being abundant. We always -- it was normally legal mail, so
11 we would determine it to be legal.

12 Q. Well, when you talk about proper markings of
13 attorney-client privileged materials, what you're referring to
14 is does the document contain a marking that clearly identifies
15 it as attorney-client privileged material, correct?

16 A. Correct.

17 Q. If that marking is not present anywhere on the
18 document and there are no markings that identify that document
19 otherwise, then that document is not properly marked, correct?

20 A. Correct.

21 Q. The other marking that would be -- or potentially on
22 these documents would be a stamp on the bottom that has the
23 ISN of the particular person whose material it is, correct?

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1 A. Correct.

2 Q. So if that ISN is not on the bottom, then that's not
3 properly marked according to the instructions that you had at
4 the time, correct?

5 A. Correct.

6 Q. So I guess what I'm getting at is: If the material
7 did not have an attorney-client privileged material stamp on
8 the bottom or any other stamp, then it simply was not properly
9 marked, correct?

10 A. Correct.

11 Q. Why, then, would you need to engage in a substantive
12 determination of the document to determine the content or the
13 nature of the document itself?

14 A. Because it was in a yellow legal pad that's typically
15 used for communication with -- so the guard force just wanted
16 to ensure that what they were confiscating was not legal.

17 Q. Why? I mean, the instruction was if they're not
18 properly marked, you do X. If they are properly marked, you
19 do Y.

20 A. Again, the guard force wanted to proceed with an
21 abundance of caution, so if they confiscated a legal pad
22 that's what they used to communicate with their lawyers and
23 it's not properly marked, they wanted to make sure that what

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1 they're confiscating was not legal.

2 Q. Okay. So as I understand it in this case, the
3 incorrectness of the marking was that it was not properly
4 stamped with an ISN on the bottom that said 100011, correct?

5 A. Correct. I believe it was handwritten.

6 Q. Okay. So then what the person inside the camp did
7 was they stamped it with appropriate stamp and then sent it
8 back to Mr. al Hawsawi, right?

9 A. Correct.

10 Q. So it's not as though they labeled it attorney-client
11 privileged material and then gave it back, correct?

12 A. Right. Correct.

13 Q. The only thing that they did was just stamp it on the
14 bottom, send it back?

15 A. Correct.

16 Q. All right. So why did they have to translate the
17 contents of Mr. al Hawsawi's document before they stamped it
18 on the bottom with an ISN?

19 A. Can you ask that again?

20 Q. Sure.

21 Why did they have to review the substantive content
22 of Mr. al Hawsawi's legal documents if all they had to do was
23 stamp an ISN on the bottom of that document and send it back?

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1 A. Because they wanted to determine if in fact what they
2 confiscated was legal or not.

3 Q. Okay. How does that make any difference in whether
4 you put a stamp on the bottom of it or not?

5 TC [MR. SWANN]: Objection, Your Honor. Argumentative.

6 LDC [MR. RUIZ]: I just don't understand, Judge. I'm not
7 arguing with him. I don't understand the answer.

8 MJ [COL POHL]: Objection overruled. You may answer the
9 question.

10 WIT: Can you ask that question again, Mr. Ruiz?

11 LDC [MR. RUIZ]: Sure.

12 Q. I guess you've told me that the deficiency or the
13 defect in the document was -- in the appropriateness of his
14 marking was that it was not marked with a stamp that said
15 ISN 0011, right?

16 A. Right.

17 Q. And once that was done, it was sent back to
18 Mr. al Hawsawi, correct?

19 A. Right.

20 Q. Right. I'm asking why you had to translate the
21 contents of this document simply to mark -- every page --
22 every page of any notepad that Mr. al Hawsawi has is marked
23 with the ISN at the bottom, correct? That's the appropriate

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1 marking for any documents, any paper that he has, correct?

2 A. Correct.

3 Q. All right. So even if he's doing -- any document,
4 every paper that he has has this marking on the bottom because
5 you want to know whose it is, correct?

6 A. Right.

7 Q. Right?

8 A. And -- right.

9 Q. Right?

10 A. Right.

11 Q. That's not what distinguishes -- that's not what the
12 distinguishing marking was to determine whether it was legal
13 or nonlegal, correct?

14 A. You broke up at that part. Can you ask that question
15 again?

16 Q. Sure.

17 A. Sorry.

18 Q. The ISN stamp at the bottom of the document ----

19 A. Right.

20 Q. ---- that exists at the bottom of the document, is
21 simply there to indicate that the document belongs to a
22 particular detainee, correct?

23 A. Correct.

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1 Q. It's not there to provide whether the document is
2 legal or nonlegal. It's just there to indicate who the
3 document belongs to. Whether it's legal or nonlegal depends
4 on the labeling of the document, whether it's attorney-client
5 privileged material?

6 A. Well, no -- no, I wouldn't say that. The guard
7 force, they stamped the ISN number on the notepads and
8 indicating that that notepad would be used for legal
9 correspondence.

10 So if it was stamped on there, they know that that
11 notepad is used for legal correspondence so they will not
12 inspect it. But if it's handwritten, which indicates that
13 they did not provide that notepad to them, so that would be
14 one reason ----

15 Q. Your position is that the ISN ----

16 A. ---- that would be one reason why it would be
17 contraband and subject to inspection.

18 Q. Your position is that the ISN number designates
19 whether it was legal or nonlegal?

20 A. According -- for the purposes of the guard force
21 inspecting the document, yes.

22 Q. Okay. And you said the translator is used to
23 translate those documents and determine whether it's properly

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1 marked as legal or ----

2 A. No, not properly marked. To determine if what he's
3 writing down is legal.

4 LDC [MR. RUIZ]: One moment, Judge.

5 [Pause.]

6 LDC [MR. RUIZ]: Judge, that's all I have.

7 MJ [COL POHL]: Thank you. Any further questions? Trial
8 Counsel?

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

10 MJ [COL POHL]: Colonel Thomas, do you have any questions?

11 DDC [Lt Col THOMAS]: No, Your Honor.

12 MJ [COL POHL]: Ms. Bormann.

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

14 MJ [COL POHL]: Mr. Swann.

15 **RECROSS-EXAMINATION**

16 **Questions by the Trial Counsel [MR. SWANN]:**

17 Q. Captain L, if you recall, were the documents in
18 English or were they in Arabic?

19 A. They were in Arabic.

20 Q. And what you did or saw fit to do was to just give
21 them back to the accused, replacing them in the same position
22 they were in on the 5th of February; is that correct?

23 A. Correct.

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1 TC [MR. SWANN]: All right. Thank you. No further
2 questions.

3 MJ [COL POHL]: Captain L, thank you for your testimony.
4 You are excused.

5 WIT: Thank you, Your Honor.

6 [The witness was permanently excused and the VTC was
7 terminated.]

8 MJ [COL POHL]: We'll recess for 15 minutes, until 11:02.
9 Commission is in recess.

10 [The R.M.C. 803 session recessed at 1052, 11 October 2016.]

11 [END OF PAGE]

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