[The R.M.C. 803 session was called to order at 1328, 12 February 2015.]

MJ [COL POHL]: The commission is called to order. All parties are again present. General Martins, we have a return?

CP [BG MARTINS]: Ms. Tarin has returned, so we are back to the way we were before her absence.

MJ [COL POHL]: Mr. Ruiz, 214A and 214.

LDC [MR. RUIZ]: All right, Judge. Okay.

MJ [COL POHL]: Go ahead.

LDC [MR. RUIZ]: Judge, it is inexplicable and unacceptable and of great concern to the most senior leaders in the United States Government that the air crew has been held incommunicado for over 32 hours. The Chinese so far have given us no explanation for holding this crew incommunicado. 24 crewmembers were held for over 32 hours without access to United States diplomatic or consular members in 2001 in the Hainan Island incident. That's our dispute with China over access to those 24 crew and servicemembers who we disputed must have access to diplomatic and consular officials.

The United States has frequently chastised Iran for depriving the hikers of their right to consular representation. A State Department spokesperson, Mark Toner, protested on May 23 of 2001, "We urge Iran to permit immediate

1 consular access by the Swiss protecting power," and that's
2 obviously an issue. Swiss officials were given access to
3 Americans on just four occasions over their 26-month
4 detention. Of course, the Swiss officials, as we know, have
5 been acting as our surrogates since 1980 when Iran also held
6 American hostages and refused to grant access to our diplomats
7 and our consulars. Most recently, Judge, a United States
8 prisoner in North Korea got a consular visit on February 7 of
9 2014.
10 Judge, that's what this motion is all about. It is
11 about meaning what we say and acting in conformity with the
12 standards that we project not only for our citizens, but for
13 those who come into our custody in complying with the law,
14 complying with our policies, and complying in the manner in
15 which our government has asked other nations to comport
16 themselves.
17 In each of the cases I have just referenced for the
18 court, we were able to obtain access to American citizens, in
19 one case four times over 26 months, in one case after
20 32 hours, and most recently on February 7, 2014, another
21 consular visit, this time in North Korea by our surrogate.
22 Judge, since 2003 Mr. al Hawsawi has not been allowed
23 to meet with representatives of Saudi Arabia to speak with

1 them. Representatives of Saudi Arabia have requested on more
2 than one occasion to meet with their citizen, Mustafa
3 al Hawsawi, who has been held and detained by the United
4 States Government. What we are simply asking you to do is to
5 order that Mr. al Hawsawi be allowed to meet with
6 representatives from his government and that these
7 representatives who have asked our government, as we ask
8 governments throughout the world to meet with our citizens, be
9 permitted to do exactly that.
10 As it has been well briefed in our submission to you,
11 Judge, the Vienna Convention on Consular Relations is the
12 authority that we cite. It is Article 36. And also a
13 bilateral agreement between the United States and Saudi Arabia
14 which says, and I quote, "Subjects of His Majesty of the
15 Kingdom of Saudi Arabia and United States territories and
16 possessions shall be treated in accordance with the
17 requirements and received those protections and practices of
18 generally recognized international law."
19 In this instance we are asking that that generally
20 recognized international law and those practices include that
21 he be allowed to meet with those representatives from Saudi
22 Arabia.
23 Judge, I would like to direct your attention to

1 what's been previously marked and submitted along with this
2 pleading as AE 214D (MAH) supplement. Judge, this is the
3 consular notification and access policy of our State
4 Department. And I want to follow up my comment about the
5 bilateral agreement with Saudi Arabia and about Article 36 of
6 the Geneva Conventions with what our State Department says
7 what in 2014 they have indicated is some of the rationale for
8 that.
9 So at this time I would like to publish to you,
10 Judge, a portion of that exhibit that is contained in our
11 motion for your review as well as the review of other counsel
12 in the courtroom, and I will do that utilizing the overhead
13 device.
14 MJ [COL POHL]: This is the one you gave for review this
15 morning?
16 LDC [MR. RUIZ]: Yes, Judge. And it was filed October 14,
17 2014.
18 MJ [COL POHL]: Okay. Go ahead. Go ahead, you can put it
19 on the overhead.
20 LDC [MR. RUIZ]: I have.
21 MJ [COL POHL]: I meant the big picture.
22 LDC [MR. RUIZ]: Judge, I'd ask that I be allowed to
23 publish this.

1 MJ [COL POHL]: Go ahead.
2 LDC [MR. RUIZ]: If we can publish this to the overhead.
3 Judge, this is from our State Department Guide on Consular
4 Access 2014, and it basically affirms what I have just said.
5 Now, I realize you have the exhibit, so I am not
6 going to take you through every page of that exhibit. I have
7 essentially three or four that I would like to highlight and
8 to -- just for the sake of argument. So this is the first one
9 that simply affirms that it is not my say-so. This is a
10 representative of the United States Government who is
11 entrusted with our foreign policy and our diplomacy and is
12 entrusted with the care of our citizens overseas. And this is
13 their policy, this is a mutual obligation.
14 Judge, I have a second portion of that exhibit, which
15 is page 29 of the same exhibit that I have recommended that
16 I'd ask you to review and then afterwards seek permission to
17 publish.
18 MJ [COL POHL]: Go ahead and publish it.
19 LDC [MR. RUIZ]: I'm waiting for it to be published to the
20 overhead, Judge.
21 MJ [COL POHL]: Okay.
22 LDC [MR. RUIZ]: Judge, the blue tab is where I want to
23 focus your attention where this motion ultimately keys in on,

1 and it is, as our State Department has recognized, the most
2 significant consequence perhaps is that the United States will
3 be seen as a country that takes its legal obligations
4 seriously.
5 And I know that when I am finished with my
6 presentation, either the General or one of his representatives
7 is going to stand up and is going to argue -- and if it is
8 consistent with the motion and the legal position they have
9 taken in their response to this motion, they are going to
10 argue a position that is completely inapposite to our own
11 State Department as well as to the methods and procedures that
12 we have followed when we seek access to our citizens abroad.
13 I'm trying to figure out how to get this off the
14 screen here. There we go, okay. Got it.
15 Judge, this is the third of four that I would like to
16 highlight for the court, and I would ask that after your
17 review I be allowed to publish that.
18 MJ [COL POHL]: Go ahead, I have seen it. Put it on the
19 big screen.
20 LDC [MR. RUIZ]: Judge, the portion of that that I wish to
21 highlight is this is, of course, guidance to state, federal
22 governments, and government officials, including judges, and
23 part of it sets it forth in a litany of questions. It says,

1 "Do I have to permit a consular officer to have access to a
2 detainee?" I don't have to read the exhibit myself, I think
3 we can all read it for ourselves.
4 Judge, I would ask you to review this and allow me to
5 publish that as well.
6 MJ [COL POHL]: You can put it on the big screen. Go
7 ahead. Go ahead.
8 LDC [MR. RUIZ]: Yes, sir. I'm just looking for one piece
9 here. As I just indicated, of course, Your Honor, the 1933
10 bilateral agreement makes reference to customary international
11 law and all of the protections afforded under customary
12 international law, and it is an agreement between ourselves
13 and the government of Saudi Arabia.
14 Of course, here we talk about the Department of State
15 taking the view that "consular notification and access is a
16 universally accepted -- universally accepted basic practice
17 that should be followed even for nationals of other countries
18 who are not a party to the VCCR or other applicable bilateral
19 agreements." Our own State Department says that these
20 practices should be followed even in a situation unlike the
21 one we have here, where not only Saudi Arabia has a bilateral
22 agreement with Mr. Hawsawi, but we have consistently said that
23 we will abide by these protections. And, of course, the

1 underlying reason -- one of the underlying reasons is that we
2 seek reciprocity in treatment of United States citizens
3 abroad.
4 And so, Judge, at the end of the day, we are only
5 asking you to affirm and to permit, to direct that we comply
6 with our law, that we comply with the guidance from our State
7 Department, and then we do for people who are detained and
8 imprisoned by us what we ask our own government to do for our
9 own citizens, and we are asking you to grant the relief we
10 have requested, Judge. Thank you.
11 MJ [COL POHL]: Let me ask you a question. The government
12 response says this is really a writ of mandamus and then
13 discusses the law around those writs. Do you agree?
14 LDC [MR. RUIZ]: No. I think you can simply order that
15 Mr. Hawsawi -- Mr. Hawsawi have access to representatives from
16 the government of Saudi Arabia.
17 MJ [COL POHL]: Who am I ordering?
18 LDC [MR. RUIZ]: The United States Government.
19 MJ [COL POHL]: Okay.
20 LDC [MR. RUIZ]: And I also think that you have the
21 inherent authority, and we have cited that in our motion here,
22 to provide a remedy any time there is, throughout the course
23 of the process, inherent unfairness in the proceedings. The

1 Military Commissions Act provides you that authority. In this
2 case, you know, I think very clearly and consistently that
3 Mr. al Hawsawi's rights and Saudi Arabia's are not being
4 complied with.
5 And if you just give me one second I will -- the
6 proposition we cited for that, Judge, was R.M.C. 906 for that
7 authority, which it says that the commission has regulatory
8 authority to order, to cure a defect and to deprive a
9 defendant of a right in fundamental fairness. That's from the
10 military commissions R.M.C. 906.
11 Additionally, we have also cited in our pleading the
12 case of Sanchez-Llamas v. Oregon, 548 U.S. 331, and that case
13 says when you -- when a criminal defendant raises an
14 Article 36 claim during trial or a violation during trial, the
15 court can make -- the court can make appropriate
16 accommodations. And that's referenced in our pleading again,
17 Judge, in Sanchez-Llamas v. Oregon, 548 U.S. 331.
18 And, of course, we have affirmed -- the United States
19 has affirmed that we recognize customary international law.
20 The State Department acknowledges that. And there is also
21 some federal authority, Judge. There is a Federal Circuit
22 split in the Seventh Circuit, Jogi v. Voges, 480 F.3d 822,
23 which does indicate that at least in that court's judgment the

1 convention grants private rights to aliens. So I don't think
2 you have to approach this as a writ of mandamus, I think there
3 is ample, ample authority from you to issue such an order.
4 MJ [COL POHL]: Thank you.
5 Trial Counsel?
6 Mr. Ruiz, before you walk away, let me just ask you a
7 question. Is 214A still in play, or were you able to resolve
8 that over the lunch?
9 LDC [MR. RUIZ]: 214A still needs a ruling. The way we
10 were able to move forward on that is that General Martins and
11 the prosecution and I agree that the government of Saudi
12 Arabia had, in fact, on multiple occasions requested to meet
13 with Mr. al Hawsawi. The prosecution did not provide the
14 documentation to confirm that, but we agreed to, I guess, a
15 stipulation of that.
16 Their position is that until we sign the MOU, we
17 cannot have access to the actual documents. Our position
18 remains that we should have access to those documents.
19 MJ [COL POHL]: Okay.
20 LDC [MR. RUIZ]: So in that sense 214 still needs a
21 ruling, but I don't think it needs further argument.
22 MJ [COL POHL]: Okay. What I am going to ask you to do,
23 since it was filed a long time ago, is I need an updated

1 pleading from both sides on the current status of it, and then
2 you will get a ruling without further argument on it.
3 LDC [MR. RUIZ]: On 214A?
4 MJ [COL POHL]: On 214A, yes.
5 General Martins?
6 CP [BG MARTINS]: Good afternoon, Your Honor.
7 MJ [COL POHL]: Good afternoon.
8 CP [BG MARTINS]: I would like to first address the core
9 legal issue here, which is whether the accused al Hawsawi has
10 an individual judicially enforceable right under the Vienna
11 Convention on Consular Relations and the 1933 provisional
12 bilateral agreement referenced by counsel, first issue, legal
13 issue.
14 And then second, I would like to speak to this topic
15 you were referring to at the end of the argument of counsel
16 relating to the standard of review, the standard you should be
17 looking to apply, whether it's mandamus or some other
18 standard.
19 So first, the question of whether the accused,
20 Mustafa al Hawsawi, a Saudi national, is given under the
21 Vienna Convention on Consular Relations and this bilateral
22 agreement an individual judicially enforceable cause of
23 action. The context is important.

1 The accused stands charged of multiple sworn concrete
2 allegations in a publicly available charge sheet; that the
3 accused personally was involved in al Qaeda's terrorist
4 self-named Planes Operation that resulted in the crashing of
5 four airliners into large buildings and the killing of 2,976
6 persons. That charge sheet is fully available, as is the word
7 and the information that the accused has adequate, robust
8 legal representation.
9 The consular treaty states in its preamble, "The
10 purpose of such privileges and immunities in the treaty is not
11 to benefit individuals, but to ensure the official performance
12 of functions by consular posts on behalf of their respective
13 states." And it does refer to rights of access, but those
14 rights vest in the consular officials to do the duties that
15 the countries agreeing in this treaty seek to have done in
16 other countries' territorial limits.
17 An important distinction is between whether a treaty
18 is self-executing and whether it is giving an individual right
19 of action. The consular treaty and the 1933 provisional
20 agreement are self-executing, and that means there is nothing
21 additional that Congress needed to do to give it domestic
22 effect. Hence, the need to explain, as State Department
23 publications do to officials, that this treaty without a local

1 law that you might point to needs to be taken seriously, needs
2 to be given its due effect. But the rights that are discussed
3 in there under the Article 36 provision, speaking now to the
4 Vienna Convention, addressed the consular's office, consular
5 officials' access and notification, receipt of notification
6 that someone has been arrested.
7 So context is very important. This right is not an
8 unfetterred right. It is to be exercised through diplomatic
9 channels through appropriate officials to say yes, we want to
10 see this individual; but the powers retain the authority to
11 apply other sources of law and other rights and privileges
12 that bear upon that relationship. So it's something that is
13 intended to be effected through diplomatic channels.
14 Now, the controlling case in our reviewing court on
15 the Vienna Convention on Consular Relations' ability to be
16 invoked by an individual is the Allaithi v. Rumsfeld and other
17 DoD officials' case that we submitted in our supplement,
18 AE 214B of August 2014. It's a June 2014 decision by the
19 United States Court of Appeals for the District of Columbia
20 Circuit, and it deals with a Guantanamo detainee.
21 Your Honor, I see no way around this case for
22 Mr. Ruiz or for this court. This case very clearly says that
23 the Vienna Convention does not provide that individual right

1 of action. And I say that it's that clear because although
2 it's doubting the argument of detainee Allaithi in how robust
3 he makes the argument, it also cites to two cases approvingly
4 that I also believe are worth the court's attention.
5 The first one is a tough one to pronounce, United
6 States versus -- and I think I am saying this correct,
7 Emuegbunam, and I will spell it for the record,
8 E-M-U-E-G-B-U-N-A-M. That's at 268 F.3d 377, point cite 392
9 to 94. This is a Sixth Circuit case that clearly rejects the
10 very Article 36 argument that Mr. Ruiz is making and states
11 that it is a consular official right, and the D.C. Circuit
12 points specifically to those pages as -- that it's agreeing
13 with those pages.
14 The second case that the D.C. Circuit cites is
15 United States v. Jimenez-Nava, 343 F.3d 192, and the
16 D.C. Circuit points us to 197, 198. That's a Fifth Circuit
17 case that specifically addresses whether an individual gets a
18 right. So that's the controlling case, the Allaithi case, and
19 the two most important cites within it.
20 The consular law is directed toward making sure that
21 consuls know when the citizens of their country are in
22 detention, are they getting an attorney. Saudi officials, if
23 they are interested, could be watching this very proceeding

1 from the United States. They can talk to Mr. Ruiz. And in
2 light of the nature of the charges and the context, this court
3 ought to defer to the executive branch, the elected branch
4 officials and the Congress, in how this is set up and how it
5 is to be implemented, how the consular relations should be
6 implemented.
7 Your Honor, that brings me then to the standard of
8 review that we recommend. We do believe this is in the nature
9 of a writ of mandamus and that that standard should be
10 applied. We have an individual coming before you asking you
11 to direct to a person or officer an order that commands the
12 performance of a particular duty that results from either the
13 official station of the one to whom it is directed or by
14 operation of law. That's what a writ of mandamus has
15 traditionally been when brought before any court, a direction,
16 a command to officers. And Mr. al Hawsawi is asking you to
17 direct the Secretary of Defense and other appropriate
18 officials to allow access, do something within this facility.
19 So it is a writ even though it comes into our process through
20 Rules for Military Commission 905 and 906. It is an
21 extraordinary remedy that they are asking you to take.
22 The standard for a writ of mandamus and the
23 authority, best authority is the Supreme Court case of

1 Cheney v. United States District Court for the District of
2 Columbia, 542 United States 367 at pages 380 and 381. The
3 court lays out three tests. The first is that the individual
4 has no other adequate means of attaining the desired relief,
5 and looking at what his cognizable relief is, the adequate
6 representation, the awareness of his government officials that
7 he has the rights to a fair trial. Those are all present
8 here. And in light of the context of the body of
9 representation that he has, this is an adequate means of
10 obtaining the desired relief and to communicate his status
11 with his country.
12 The second test is that the writ is appropriate under
13 the circumstances. Again, in light of -- and this is a test
14 that allows one to look at the specific nature of the charges,
15 what are the executive branch officials doing, and how are
16 they carrying out their obligations. In light of that, I
17 would say again that cuts strongly against taking this
18 extraordinary relief.
19 The third test is that he has a clear and
20 indisputable right to the issuance of the writ. And in light
21 of the D.C. Circuit's case in Allaithi, and really no
22 persuasive authority on the other side -- there is one Seventh
23 Circuit case cited in the materials for this, but even if you

1 were to grant that there is a dispute based on that one
2 circuit's analysis that, if you look at it, you see that it's
3 not persuasive when compared to Allaithi, in your jurisdiction
4 you certainly can't say that he has a clear and indisputable
5 right to the issuance of the writ.
6 So in light of that test, which we believe is the
7 right one to apply before inserting a judicial effort into a
8 place where the foreign relations interests of the United
9 States, the national security interests carried out by dutiful
10 public officials with a full awareness of the bilateral
11 relationships involved and a commitment to ensuring the
12 consular relations integrity and carrying that out dutifully
13 around the world, that those are the people who ought to be
14 entrusted with those obligations and that the court should not
15 take this extraordinary measure in commanding through a writ
16 of mandamus the Secretary of Defense to do something.
17 Subject to your questions, I will yield the lectern.
18 MJ [COL POHL]: I don't, thank you.
19 CP [BG MARTINS]: Thank you.
20 MJ [COL POHL]: Mr. Ruiz, anything further?
21 LDC [MR. RUIZ]: Judge, again, I can only imagine what --
22 how we would react if a North Korean general stood up in a
23 North Korean court and said the American diplomats and

1 government officials can watch on television and they can talk
2 to their lawyer, and that will satisfy their obligations. In
3 fact, I don't have to imagine that. I have given you three
4 real world examples of how we would not stand for that
5 argument. And you should not stand for it either.
6 Judge, with respect to an argument that I have
7 seen -- and I will get into some of the specifics on General
8 Martins' argument. One of the arguments you have heard is
9 that because these men -- because Mr. al Hawsawi is charged
10 with these very serious crimes, it somehow justifies this
11 alternate view or alternate interpretation of what he should
12 be allowed to have in terms of, in this particular motion, a
13 consular visit or representation. I think it's very clear --
14 I think you know this -- that the quality or the charges that
15 he faces do not drive the interpretation of our obligations.
16 And it shouldn't here either.
17 General Martins references the Allaithi case. We
18 have rebutted that in our reply, but I will only say that the
19 essence of the Allaithi opinion was exactly that the parties
20 had not appropriately briefed this issue and the court
21 actually used some fairly colorful language to describe the
22 inadequacy of the argument that was briefed before the court
23 and then argued that we doubt that, even had it been briefed,

1 the position would be a correct one. Nevertheless, the
2 essence of what the court said in that case is that bare bones
3 assertions were not enough to raise the issue before the court
4 and then have the court -- I think they said something to the
5 effect of put the flesh on the barebones argument of counsel.
6 So the representation that this is an insurmountable
7 obstacle has to be weighed against the court's own
8 observations that the argument that was presented in that case
9 was in and of itself inadequate, and therefore I don't think
10 it carries the weight that General Martins would accord to it.
11 There is also a footnote in the prosecution's
12 response, and that footnote I think addresses a number, Judge,
13 of the legal arguments that they made for why the convention
14 does not create an individual right of action. The point that
15 I want to highlight for you on that, Judge, is that in every
16 one of those cases the court was looking backwards. The court
17 was looking at different situations, and this was
18 post-conviction review of what had happened, and the defendant
19 was seeking relief based on the lack of access and consular
20 relations. That involved a civil complaint, voluntariness of
21 a guilty plea, dismissal of a criminal indictment, and those
22 types of issues.
23 However, Judge, the case that we have cited for you,

1 Sanchez-Llamas v. Oregon, 548 U.S. 331, says that when this
2 issue is raised at trial, you have the authority -- a trial
3 judge has the authority to provide adequate and appropriate
4 accommodations at trial. In other words, we don't need this
5 to be reviewed looking backwards. We are here now and we are
6 raising this issue.
7 I want to be very clear, Judge -- and I think you
8 know this -- this motion is not focused on asking some sort of
9 relief from this court based on the infirmity of lack of
10 consular relations. That may very well come in future
11 pleadings and be focused on what, if any, effect or what, if
12 any, legal argument we believe attaches to not having had
13 consular access, whether it's to voluntariness or the
14 admissibility of those statements, but that's not where we
15 are.
16 What we are simply asking right now is at this stage
17 of the proceedings, pretrial stage of the proceedings, we are
18 raising this issue to you. And there is very clear case law
19 to say you have the authority to appropriately accommodate at
20 trial, and we are asking you to make that appropriate
21 accommodation to simply be an order that dictates -- that
22 says, look, Mr. al Hawsawi should have the right and the
23 opportunity to meet with his foreign government.

1 The argument that there is no individual right, I
2 must also point out there was, as I said, a companion
3 pleading -- there was somewhat of a companion pleading where
4 there is a greater degree of discussion about the Iran
5 situation. In that case, our own government argued that an
6 individual right should attach, not just to the consular
7 officials but also to the individuals most importantly.
8 I would ask you to review that when you have the
9 Chief Prosecutor and representative of our Armed Forces stand
10 up and say the United States takes the position now here in
11 this courtroom that viewing this on television, because of the
12 charges and because we can read a charge sheet on a publicly
13 available website, should satisfy the provisions of the
14 consular relations.
15 MJ [COL POHL]: Mr. Ruiz, how does this -- if you are
16 asking me to enforce this treaty, how does this impact his
17 representation at this trial? I mean, what's the connection
18 between the treaty and this trial?
19 LDC [MR. RUIZ]: You mean his access to representatives
20 from Saudi Arabia?
21 MJ [COL POHL]: Yes.
22 LDC [MR. RUIZ]: Well, Judge, there is a significant ----
23 MJ [COL POHL]: In your view, does there need to be?

1 LDC [MR. RUIZ]: There absolutely needs to be contact with
2 Mr. al Hawsawi.
3 MJ [COL POHL]: No, I am saying does there need to be a
4 connection between your requested relief and these
5 proceedings?
6 LDC [MR. RUIZ]: No. I think consular access is an end in
7 and of itself, which is consistent with our law and consistent
8 with our foreign policy, so I don't think there needs to be
9 that kind of nexus.
10 But if you are asking me if there is that kind of
11 nexus, the answer is yes, there absolutely is that kind of
12 nexus. And I can elaborate on that to a certain degree.
13 MJ [COL POHL]: Go ahead.
14 LDC [MR. RUIZ]: I can tell you that I have for numerous
15 months attempted to and had meetings and conversations with
16 representatives from Mr. al Hawsawi's government, the Saudi
17 Arabian embassy. They have expressed their desire to meet
18 with Mr. al Hawsawi and confirmed what the general confirmed
19 today, that the government continued to deny that access.
20 The same reasons that we have articulated for our own
21 also apply to Mr. al Hawsawi. On our end, from
22 Mr. al Hawsawi's perspective and his desire to meet with the
23 government officials of Saudi Arabia, the essence of it is

1 this, Judge -- and I will take you as far as I can in terms of
2 privilege, but there is a very important problem that we have
3 been trying to overcome, and that is a problem of trust.
4 Mr. al Hawsawi needs to meet with representatives of his
5 government because he needs their assistance and he wishes to
6 enlist their assistance in numerous tasks that relate directly
7 to his representation in Saudi Arabia.
8 Now -- and I am trying here not to get into too much
9 privileged information. I have been the go-between just as
10 the government has said, and I have been the go-between now
11 for an extensive period of time. And I will tell you that I
12 have been unsuccessful in getting either really the government
13 of Saudi Arabia to fully trust me, because I'm part of the
14 government who is denying access to their own witness, and
15 Mr. al Hawsawi himself, I think, is frustrated by the fact
16 that, as his representative, I am unable to make this happen.
17 So there is an issue that is a fundamental issue of
18 trust that we have discussed and we have talked about from the
19 very beginning. Our ability to represent Mr. al Hawsawi is
20 dependent very much on the amount of trust we are able to
21 engender with him.
22 Here we have a situation where I have, Judge, been
23 doing everything I can to try to put these two parties

1 together so they can have their conversation, so they can do
2 the things that they need to do. And I do believe that his
3 defense, development of his defense, if there ever is a
4 sentencing procedure, this is critical contact that must
5 happen. Not only must it happen, it's the appropriate thing
6 to do.
7 If I may have one second just to make sure I have hit
8 all these points?
9 MJ [COL POHL]: Sure.
10 LDC [MR. RUIZ]: May I have one second?
11 MJ [COL POHL]: Sure.
12 LDC [MR. RUIZ]: That's all I have, Judge.
13 MJ [COL POHL]: General Martins, anything further?
14 CP [BG MARTINS]: Nothing further, Your Honor, from us.
15 MJ [COL POHL]: That would appear to conclude the list of
16 standalone Hawsawi motions. As I stated before lunch, we have
17 this scheduled to go tomorrow and next week. Does either side
18 believe anything fruitful can be done, given where we are at
19 with 292 and 350?
20 Mr. Connell, you are standing up so you get to answer
21 first.
22 LDC [MR. CONNELL]: Your Honor, I would renew my request
23 from yesterday for -- under Rule 702 for a deposition of the

former CIA interpreter utilized by Mr. Binalshibh's team. My fear is that if we don't do it, we will never see him again.

CP [BG MARTINS]: I take it you are looking to us for a response to that?

MJ [COL POHL]: Yes.

CP [BG MARTINS]: Your Honor, we believe that in light of the nature of that argument and the legal requirements and procedural prerequisites for a deposition, that would need to be argued in a closed session. So we would -- to the extent we all agree ----

MJ [COL POHL]: Let me ask you this: Does the government oppose a deposition?

CP [BG MARTINS]: Your Honor, we do oppose it, but there are other aspects associated with appropriate access to witnesses and evidence that we could talk about, other modalities, but we oppose the motion.

MJ [COL POHL]: Mr. Connell, since they oppose it, file a motion.

LDC [MR. CONNELL]: Yes, sir.

MJ [COL POHL]: Mr. Ruiz?

LDC [MR. RUIZ]: Judge, just a couple of issues that I have the opportunity to bring to you on motions that you can rule on without argument that are currently in your

1 possession.
2 MJ [COL POHL]: Okay.
3 LDC [MR. RUIZ]: 341J is an ex parte submission that is
4 awaiting a ruling from you, as well as the AE 248 series. I
5 believe you recently received some supplemental information on
6 that from the convening authority. I would ask you just at
7 the earliest opportunity if you could address those two
8 motions.
9 MJ [COL POHL]: Okay.
10 LDC [MR. RUIZ]: I would also just want to inform the
11 court that myself and my legal team are scheduled to be here
12 throughout the rest of this week and next week, given the
13 scheduling of the commissions, and should Your Honor rule on
14 our request to interview medical professionals and
15 Mr. Hawsawi's medical providers, we are in a position that we
16 could do that, either the remainder of this week or next week.
17 So I just want to inform you of that for your own purposes.
18 MJ [COL POHL]: Okay.
19 LDC [MR. RUIZ]: And along with that -- along the line
20 with that in terms of the medical records, the last batch we
21 received was, in fact, August 14 of 2014.
22 MJ [COL POHL]: Okay. Thank you.
23 Trial Counsel, back to you, the question I asked

1 originally.
2 CP [BG MARTINS]: That is if there is any additional
3 business?
4 MJ [COL POHL]: Yes.
5 CP [BG MARTINS]: A moment to confer?
6 MJ [COL POHL]: Sure.
7 **[Pause.]**
8 CP [BG MARTINS]: Your Honor, if we could receive rulings
9 without oral argument, we would waive oral argument on the
10 discovery aspects associated with Appellate Exhibit 254. This
11 is the female guards issue.
12 MJ [COL POHL]: I have that written down as a request that
13 you had yesterday and I am considering that, but that's not
14 really my question. My question isn't what rulings you can
15 give without oral argument, the question is whether there is
16 any in-court business we can do. I can do that from anyplace.
17 CP [BG MARTINS]: Your Honor, of course with our
18 objections to the approach that Your Honor has taken to these
19 things, we would acknowledge there is no further business.
20 MJ [COL POHL]: Okay.
21 LDC [MR. HARRINGTON]: May we confer?
22 MJ [COL POHL]: Sure. Mr. Harrington?
23 LDC [MR. HARRINGTON]: Judge, mindful of your disapproval

1 of bringing things up without motions, there is a simmering
2 problem that exists right now. It has only arisen recently,
3 but it is affecting all of the defendants and it's affecting
4 our ability to visit with them, and it goes to the use of
5 restraints in moving our clients no matter where they move.
6 But we have repeated problems with the way that they are
7 handcuffed and shackled.
8 It has not happened before except on very rare
9 occasions. We have never brought it to the court's attention
10 before. I have asked General Martins to look into it. We
11 have tried to work it out through the SJA. We get no relief
12 from it. It's something relatively recent. We don't know if
13 it's in retaliation for something, but it is drastically
14 affecting our ability to meet with our clients.
15 This past weekend, two of the visits that we had, our
16 client did not come because of the way that he was treated the
17 day before and the pain and suffering that he incurred on his
18 wrists as a result of it. And it's an extension of the things
19 that are mentioned in the Senate report, and it just
20 continually, continually disrupts our clients and makes it
21 extraordinarily difficult for us to do the business that we
22 need to do to move these proceedings along because we
23 constantly have to deal with these issues. And we are asking

1 the court's intervention on that in some way.
2 MJ [COL POHL]: Mr. Harrington, can I -- I understand why
3 you mention it to me, but am I in a position to make any type
4 of position on this without hearing the other side?
5 LDC [MR. HARRINGTON]: Judge ----
6 MJ [COL POHL]: I mean, what are you asking me to do, tell
7 them to change their restraint policy?
8 LDC [MR. HARRINGTON]: No. I am asking them to comply
9 with the policies that they are supposed to, Judge, and I'm
10 asking you to direct Trial Counsel to do everything that they
11 can to make sure that that happens.
12 MJ [COL POHL]: Well, if you are asking me to direct the
13 Trial Counsel to tell the JTF to comply with their procedures,
14 and you seem to be saying they are not ----
15 LDC [MR. HARRINGTON]: That's correct.
16 MJ [COL POHL]: ---- this all kind of falls in an order to
17 follow the law. Mr. Harrington, I understand your position,
18 but I assume you understand mine, is you are making an
19 allegation of not following things. I'm assuming that they
20 follow the rules until shown otherwise. I'm sure their view
21 of this is maybe much different than yours.
22 If it's interfering with your ability to deal with
23 counsel, then Trial Counsel should look into it to see if

1 there has been any type of change in policy. But other than
2 that, absent an ability to flesh it out totally, there is
3 really not much I am going to do at this time.
4 LDC [MR. HARRINGTON]: Thank you, Your Honor. It never
5 hurts to have a reminder from the court.
6 MJ [COL POHL]: I am with you.
7 LDC [MS. BORMANN]: Judge, may I?
8 MJ [COL POHL]: Mr. Connell was already on his way.
9 LDC [MS. BORMANN]: Okay.
10 LDC [MR. CONNELL]: Your Honor, I take your guidance as to
11 filing a motion, but ----
12 MJ [COL POHL]: But you want to be heard anyway?
13 LDC [MR. CONNELL]: The military commission ruled in the
14 Nashiri case that it did not have authority to cause a
15 civilian to travel from the United States to Guantanamo for
16 the purpose of a hearing.
17 If the former CIA linguist utilized by
18 Mr. Binalshibh's team is located in the United States, then if
19 the military commission follows that same position, then
20 essentially it's the equivalent of deportation cases where the
21 government deports witnesses and places them beyond the reach
22 of service.
23 MJ [COL POHL]: Oh, really?

1 LDC [MR. CONNELL]: Yes.
2 MJ [COL POHL]: Why can't he be ordered to appear
3 someplace in the United States as a place of the deposition?
4 LDC [MR. CONNELL]: I think that's an excellent idea.
5 MJ [COL POHL]: I am not asking your approval. I am
6 simply stating what I kind of view what the authority is to
7 move people around, without deciding.
8 LDC [MR. CONNELL]: Of course. The other solution is --
9 and I always get in trouble on the military law. In a
10 civilian court there is a recognizance. Is the military
11 commission familiar with recognizance? It's the idea
12 that ----
13 MJ [COL POHL]: No, enlighten me.
14 LDC [MR. CONNELL]: If a hypothetical witness is located
15 in a hypothetical place, they can be ordered by a judicial
16 body to appear again. It is essentially a substitute for a
17 subpoena. Rule 703 -- let me find the right -- (e)(2) allows
18 the military commission to issue a subpoena, and a subpoena
19 for the April hearing would solve this problem altogether.
20 MJ [COL POHL]: But wouldn't I then be ordering somebody
21 to come from the United States to Cuba?
22 LDC [MR. CONNELL]: The answer to that is classified.
23 MJ [COL POHL]: Unless I use your legal fiction that I'm

1 not doing that because this person -- let's assume -- I don't
2 know whether he is here or not. I don't want to address his
3 actual location. I'm saying hypothetically if a person is
4 here today ----
5 LDC [MR. CONNELL]: Hypothetically, yes.
6 MJ [COL POHL]: ---- and I have no subpoena power to order
7 him to come from the United States into Cuba, but if he
8 happens to be here, it's like serving -- you've been served.
9 LDC [MR. CONNELL]: Yes.
10 MJ [COL POHL]: So when you go back to the United States
11 there is a ----
12 LDC [MR. CONNELL]: Once you have served him, Your Honor,
13 where he goes and what he does is up to you as long as he is
14 back for ----
15 MJ [COL POHL]: I can order him to stay in Cuba?
16 LDC [MR. CONNELL]: I think that you could order him to
17 stay at least in Guantanamo, at least.
18 MJ [COL POHL]: Well, I wasn't referring to the rest of
19 Cuba. I got that.
20 LDC [MR. CONNELL]: But you -- you are not in control, I
21 take it, of his movements other than the requirement that he
22 be at a place that you designate at the time that you
23 designate it. And if that time is April and that place is

1 Guantanamo, then that's where the witness has to be, the
2 hypothetical witness.
3 MJ [COL POHL]: If I had the hypothetical authority to
4 order a witness to come to a foreign country.
5 LDC [MR. CONNELL]: You are not ordering a witness in that
6 hypothetical to come to a foreign country. You are ordering a
7 witness to appear. And whether that witness chooses to --
8 what countries that witness chooses to be in before the
9 witness has to appear is up to the witness, not to you. You
10 are not ordering him to move anywhere.
11 MJ [COL POHL]: Mr. Connell, if you want to file some type
12 of a brief that would give me that authority, I will look
13 forward to reading it.
14 LDC [MR. CONNELL]: Yes, sir. But I need a ruling on my
15 request now.
16 MJ [COL POHL]: I am unfamiliar with that type of process
17 in a military court.
18 LDC [MR. CONNELL]: I still need you to rule on my
19 request.
20 MJ [COL POHL]: Which request is that?
21 LDC [MR. CONNELL]: The request to issue a subpoena or a
22 recognizance or order the witness to be here in April ----
23 MJ [COL POHL]: I am unfamiliar with the recognizance

1 procedure because I have never done it before, so I don't
2 know. I am unfamiliar with the authority to order a subpoena
3 for a witness to come from the United States to Cuba,
4 Guantanamo Bay. I am familiar with the ability to issue a
5 subpoena for a witness in the United States to be at a
6 particular place at a particular time to be subject to a
7 deposition.
8 So you say you want some type of ruling on your -- I
9 am not sure what you want from me now. I'm telling you that's
10 what I consider my authority.
11 LDC [MR. CONNELL]: I take it it is denied.
12 MJ [COL POHL]: The answer right now is I am not granting
13 anything until I get a written motion. I will defer ruling on
14 it.
15 LDC [MR. CONNELL]: Well, deferring ruling makes the
16 answer predetermined because of ----
17 MJ [COL POHL]: If that's how you determine it, then
18 that's fine.
19 LDC [MR. CONNELL]: It's not me who is determining it. I
20 like one of the remedies you have suggested. I like the
21 subpoena remedy ----
22 MJ [COL POHL]: If you are asking me to order a deposition
23 right now, that request is denied.

1 LDC [MR. CONNELL]: And with respect to some sort of
2 process to require the witness to be here in April, that
3 request is denied for now?
4 MJ [COL POHL]: I am not going to grant or deny or rule on
5 a legal procedure I am totally unfamiliar with. That's my
6 answer to that one. So if you take that as a de facto denial,
7 so be it.
8 LDC [MR. CONNELL]: Thank you, Your Honor.
9 MJ [COL POHL]: Ms. Bormann?
10 LDC [MS. BORMANN]: I have nothing to do with any
11 witnesses whatsoever. I do have a question, though, for the
12 commission.
13 On Tuesday it was reported -- you filed a notice, and
14 I'm unfamiliar with the number, about the EO complaint that
15 you never received a copy of. I don't remember the AE number,
16 3 ----
17 MJ [COL POHL]: I know what you are talking about.
18 LDC [MS. BORMANN]: On Tuesday we were informed that
19 findings were made pursuant to that EO complaint and that the
20 appellate review process had begun. I am wondering if you
21 were informed of what those findings were.
22 MJ [COL POHL]: We are slightly premature here because
23 there is a motion on this, but I will tell you what I know

1 right now.
2 LDC [MS. BORMANN]: Thank you.
3 MJ [COL POHL]: I was verbally informed about the EO
4 complaint on the same day I sent notice to everybody. That is
5 my sum and substance of the knowledge of it. The only other
6 thing was an e-mail request to my staff for my bio by the
7 investigating officer, which since it was a public document we
8 saw no reason to -- I have had no contact whatsoever, I have
9 directed any contact be done with my office, and I have told
10 my office to tell them I do not intend and will not be
11 interviewed in this process, and I've seen zero paper on it.
12 LDC [MS. BORMANN]: If you receive a copy of the findings,
13 I request you inform the parties ----
14 MJ [COL POHL]: I will update everybody sua sponte
15 anything I hear, but that's the sum and substance of my
16 knowledge.
17 LDC [MS. BORMANN]: Thank you.
18 LDC [MR. RUIZ]: Judge, if I may, that -- to me, that
19 exchange right there I think is akin to a voir dire. I simply
20 want to preserve the right for Mr. al Hawsawi the ability to
21 voir dire you or ask for you to be a witness at a future time.
22 We do not consider that to be our opportunity to do that.
23 MJ [COL POHL]: I understand. It was only a supplemental

1 update, but it has nothing to do with what will happen during
2 the motion that's been filed and discussed.
3 LDC [MR. RUIZ]: I understand that. I just wanted to make
4 it very clear, since it came up, that at least our position is
5 that you are a witness, and a voir dire would not be enough to
6 satisfy that requirement. I want to make that very clear
7 right now.
8 MJ [COL POHL]: That's fine. That being said, commission
9 will be in recess -- not yet -- until April, but understand
10 there are some things that need to happen so we can meet in
11 April, so we will see how they progress.
12 That being said, the commission is in recess.
13 **[The R.M.C. 803 session recessed at 1426, 12 February 2015.]**
14 **[END OF PAGE]**
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