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1 [The R.M.C. 803 session was called to order at 1053,
2 21 August 2017.]

3 MJ [COL POHL]: Please be seated.

4 The commission is called to order. All parties are
5 again present, all detainees are again present, unless
6 somebody is not present.

7 Mr. Harrington.

8 LDC [MR. HARRINGTON]: We're missing Ms. Wichner, Judge.
9 She's on her way.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: Your Honor, I've asked Ms. Pradhan to
12 step out, but we don't need her to go forward.

13 MJ [COL POHL]: Okay.

14 Just -- Ms. Wichner has now joined us.

15 To join -- or to close the loop on 502 where we're at
16 right now, it appears to me, and subject to obviously other
17 people that have a different view, that we're prepared to go
18 forward on Mr. Hawsawi's motion, as we discussed.

19 Mr. Connell, your motion we're going to -- this way,
20 I put you in the other camp until we get the discovery issue
21 resolved.

22 [Microphone button not pushed; no audio]

23 LDC [MR. CONNELL]: Sure.

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1 Sir, in 519D, I briefed why, because we are not
2 voluntarily opting not to participate in the military
3 commission, it's not appropriate to decide issues that
4 implicate Mr. al Baluchi's interests and hold us to them at
5 the end of that brief.

6 So if the issues do not involve the same issues that
7 involve Mr. al Baluchi, of course, I have no objection. But
8 if they do involve the same issue as Mr. al Baluchi, then
9 because we involuntarily can't participate, I object to going
10 forward on them.

11 MJ [COL POHL]: You've lost me a little bit there. Let
12 me ----

13 LDC [MR. CONNELL]: Let me give you an example.

14 MJ [COL POHL]: No, I got it. Go ahead.

15 LDC [MR. CONNELL]: Some of the objections by the
16 government are the same to Mr. al Hawsawi's witness as they
17 are to some of Mr. al Baluchi's witnesses; for example,
18 whether it is proper to call an expert witness on the law of
19 war. We have briefed that issue in some detail in the
20 pleading that -- the latest pleading that we were not allowed
21 to file.

22 So what I -- I completely understood what you meant
23 in 502I when you said that some teams can opt out if they

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1 choose, but they're bound by the rulings that come before
2 them, and that's their strategic choice.

3 This is different. This is not our strategic choice
4 not to participate. I would like to be arguing 5020 today,
5 but the 505 notices that I need to do and the pleadings that I
6 have prepared on it are not before the court, not through the
7 court's fault but through something that is not controllable
8 by any of us. So for issues that implicate both
9 Mr. al Hawsawi and Mr. al Baluchi, I object to go forward --
10 going forward without our being able to participate.

11 There may be aspects of ----

12 MJ [COL POHL]: Just so I'm clear here, you object going
13 forward with Mr. Hawsawi's 502 motion?

14 LDC [MR. CONNELL]: I object to you deciding any question
15 that implicates Mr. al Baluchi's interests when he does not
16 have an opportunity to participate by briefing and argument.

17 MJ [COL POHL]: Okay. And right now, until we resolve the
18 marking issue, you're not prepared to go forward on 502 as it
19 relates only to Mr. al Baluchi, correct?

20 LDC [MR. CONNELL]: That's correct, sir.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: For reasons beyond my control or your
23 control, to be fair.

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1 MJ [COL POHL]: Okay. Got it.

2 DC [MAJ WILKINSON]: Sir, I just wanted to reiterate that
3 our request for an early hearing related to Mr. al Hawsawi
4 only was on the assumption that if we have the hearing and
5 hear the witnesses, that you could then make a ruling with
6 respect to Mr. al Hawsawi only. In other words, we're not
7 asking to have a hearing and then wait for any number of other
8 issues with other parties to be resolved before you can rule
9 on it. That was all, sir.

10 MJ [COL POHL]: Okay. I understand your position. Thank
11 you.

12 DC [MAJ WILKINSON]: Sir.

13 MJ [COL POHL]: Ms. Bormann, do you have a computer update
14 for me?

15 LDC [MS. BORMANN]: I do. Sometime after I began speaking
16 at around 9:10 a.m. and the time we broke, the electricity was
17 restored to our trailer. Because it was a shutdown
18 completely, I haven't actually been able to cycle on my
19 computer yet, but I am told that there was a filing by
20 Mr. al Baluchi I haven't yet received. Our paralegal is in
21 the process of trying to print it out. I think it's 517D. So
22 I haven't read that, but I don't think we're going to touch on
23 that right now, so I should be ready to go.

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

2 LDC [MS. BORMANN]: Thank you.

3 MJ [COL POHL]: Okay. Then we're back to the regular
4 order of march we discussed earlier, which brings us to 396-1,
5 which is a -- I think a government motion.

6 Mr. Trivett.

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

8 I just wanted to certainly be available for any
9 questions that the military judge might have on our briefing,
10 but when we -- when the original classification authority set
11 forth on complying with the 1 September order, they had looked
12 at and had asked us, because we were certainly aware of what
13 was put back through the process because it was discovery we
14 gave and it was an issue that Mr. Ruiz raised on the record,
15 what we had given them up to that point in time in the October
16 time frame, and that was the 3480 pages.

17 So that's what they were working on, that's what they
18 resourced. When they got the follow-on supplemental ruling,
19 there was no way that they could do the 19,000 pages in the
20 time that they had allotted resources to do 3480 pages. So
21 that's why we filed our motion asking for 2,270 pages on the
22 first of each month up through 1 April 2018, in order to
23 comply with the order.

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1 MJ [COL POHL]: Okay.

2 MTC [MR. TRIVETT]: So subject to your questions, that's
3 our motion.

4 MJ [COL POHL]: Okay.

5 Mr. Ruiz, do you have any comments on this?

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

7 MJ [COL POHL]: Sure.

8 [Pause.]

9 LDC [MR. RUIZ]: Your Honor, more of a comment than a --
10 than really a challenge, really. But you have the timeline
11 before you in terms of when we submitted these documents for
12 classification review. You've certainly got the background
13 and the case history of the litigation over who owns the
14 classification responsibility.

15 This is another example of documents that the defense
16 put through the process that was made available to us that for
17 a while we have been saying it is inadequate. We put it
18 through that process as expeditiously as we were able to do
19 so, and we have received absolutely no response from it.

20 Now the government is asking for an additional
21 timeline to provide that information.

22 That's fine, Judge, but I just simply want the court
23 to be mindful of these issues. Later on, I think we'll be

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1 arguing about trial scheduling, orderly process, and what this
2 particular motion, and what this particular issue identifies
3 is exactly the kind of problem that we have with the avenues
4 that are made available to us to put forth this information.

5 We obviously just need to get to a point where we
6 have this information put through classification review. And
7 from all accounts, looking at the timeline, looking at the
8 prosecution's response, it leaves us to wonder what, if
9 anything, was done prior to the commission's ruling, based on
10 the timeline that they've now proposed.

11 That's all I have, Judge.

12 MJ [COL POHL]: Thank you.

13 LDC [MR. CONNELL]: Sir, may I add something?

14 MJ [COL POHL]: Sure.

15 LDC [MR. CONNELL]: Sir, I rise only to express the fear
16 that my pleadings that we just discussed in the 502 series are
17 behind the 19,000 pages in the pipeline. I don't know if the
18 military commission is contemplating issuing an order
19 directing or suggesting or however one controls those people,
20 that we get the 502 stuff reviewed. But I merely say if the
21 396 material won't be done until April, maybe that means that
22 the 502 material is not done until May. I hope that's not the
23 case, but ----

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1 MJ [COL POHL]: Well, yeah, I thought it was two different
2 stacks. Okay?

3 LDC [MR. CONNELL]: It's all one pipeline.

4 MJ [COL POHL]: Yeah, but the 502 material is classified.
5 It's already marked.

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: Okay. The question is nobody knows what
8 the marks mean, apparently.

9 LDC [MR. CONNELL]: Sure.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: I hope you're right, sir.

12 MJ [COL POHL]: Well, no, I'm just telling you. Another
13 thing is, just to be fair here, I have no motion in front of
14 me on the 502 materials.

15 LDC [MR. CONNELL]: Of course.

16 MJ [COL POHL]: Yeah, so I don't know what quantity we're
17 talking about here. We have tried to articulate what the
18 problem is, which seems to me is easily fixable, but
19 apparently it's not. But I understand these are a
20 classification review issue, what we're talking about with
21 Mr. Ruiz; and what you're talking about, it's not a
22 classification review issue, it's to define my classifications
23 that have already been reviewed.

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1 LDC [MR. CONNELL]: Sir, I want to be 100 percent clear on
2 that. We are talking about a classification review issue with
3 502. When all you have is a hammer, everything looks like a
4 nail. But I only have one tool available to me is that is the
5 classification review process.

6 MJ [COL POHL]: Yes.

7 LDC [MR. CONNELL]: The same one that Mr. al Hawsawi put
8 the PCR documents through. It's all the same process.

9 MJ [COL POHL]: Okay, but yours already have markings on
10 it. You're just asking what do those markings mean, and what
11 programs do I need to be read on, if any.

12 LDC [MR. CONNELL]: Well, I don't get to pose questions to
13 them. You know, I ----

14 MJ [COL POHL]: If you could, would that be the question?

15 LDC [MR. CONNELL]: Yeah. I think, as I understood it
16 from discussing with all of the parties, there is a belief
17 that perhaps markings B, C and D have either been merged into
18 some other compartment or have been disestablished, and that
19 this process is to find out what live compartments govern this
20 information so that all of the relevant parties can
21 request ----

22 MJ [COL POHL]: So it sounds like a classification review.

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

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1 MJ [COL POHL]: Got it.

2 LDC [MR. CONNELL]: Okay.

3 MJ [COL POHL]: But it's different than Mr. Hawsawi's
4 classification review issue.

5 LDC [MR. CONNELL]: Well, it's different documents, but
6 it's the same process and the same ----

7 MJ [COL POHL]: Yeah. Got it.

8 LDC [MR. CONNELL]: So out of my control.

9 MJ [COL POHL]: Okay. That brings us to 425, the open
10 session part of it.

11 LDC [MR. CONNELL]: Sir, we need to do the 505 first.

12 MJ [COL POHL]: Okay. I just look what's on my list.

13 ADC [MS. LACHELIER]: Judge, we had 336 on there.

14 MJ [COL POHL]: Yeah. We can do that. We can do 336.

15 ADC [MS. LACHELIER]: Judge, the government approached us
16 yesterday or two days ago to suggest that they're going to
17 provide us DIMS records again on the whole series, this time
18 marked FOR DISPLAY ONLY, which would mean in our commission
19 parlance that Mr. al Hawsawi and the other accused would be
20 able to examine DIMS records in the presence of counsel. Even
21 though those records are marked CLASSIFIED, SECRET, we have
22 done that with a few other items that have been produced.
23 This would apparently be the solution as to all DIMS.

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1 I want to, on the one hand, agree to the solution; on
2 the other, preserve for the record that these records are
3 improperly marked. These records, and I've said this 100
4 times in front of the commission, these DIMS records were
5 provided to us with dates and guard pseudonyms marked
6 unclassified in other -- not just in the first round of the
7 proceedings but in earlier iterations of this commission.

8 The government has simply decided to change the
9 classification over time, and they're still not claiming that
10 they're classified. So there is a problem with the process
11 and the process the government has used to mark these as
12 SECRET. They have not employed, and in their latest pleading
13 336K, they specifically said they're not invoking the
14 classified information privilege, they said that on the record
15 at the last hearing of this commission, and yet they're
16 marking these SECRET.

17 So the only reason they've given is force protection
18 for wanting to protect these documents. So we retain our
19 objection to the markings on these documents for later
20 discussion, if need be, because obviously if these are records
21 we want to use in court later, we're going to have to go to
22 closed session improperly.

23 So I wanted to preserve that issue, and recognize

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1 that marking them FOR DISPLAY ONLY for today's purposes and
2 our purposes now is sufficient.

3 MJ [COL POHL]: Okay. So you're, as far as the 336 --
4 assuming it all works as the government propagates, you are
5 satisfied with that procedure going forward on that specific,
6 narrow issue, reserving the right to raise other related
7 issues with these documents.

8 ADC [MS. LACHELIER]: That's correct, sir. I may ask that
9 you leave it on the docket for status maybe for the next
10 hearing because we haven't yet received -- sorry. Wrong
11 marking. We haven't received the display-only DIMS and I want
12 to make sure we receive these before this is completely
13 removed from the docket.

14 MJ [COL POHL]: We'll keep it on the docket and then
15 address it at the next session.

16 ADC [MS. LACHELIER]: Okay. Thanks, Judge.

17 LDC [MS. BORMANN]: Judge, can I be heard for just a
18 moment?

19 MJ [COL POHL]: Sure.

20 LDC [MS. BORMANN]: As you might imagine, probably all of
21 the defense teams have some sort of records issue. And so
22 when Ms. Lachelier indicates that the government's going to
23 provide Mr. Hawsawi's counsel record that are displayable to

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1 Mr. Hawsawi, I'm wondering whether or not they intend to do so
2 for all of the men who are interested here and their counsel.

3 MJ [COL POHL]: We're talking -- to make sure I know what
4 we're talking about, we're talking about the DIMS records?

5 LDC [MS. BORMANN]: Yes. Because we don't have anything
6 like that.

7 MJ [COL POHL]: I got it.

8 LDC [MS. BORMANN]: So this is a new development, for one,
9 and it would save us some litigation going forward, if that
10 were the case for us, too.

11 MJ [COL POHL]: Okay. In essence, you want to know if the
12 other accused will be treated -- that their DIMS records will
13 be treated as similar to the type that -- to the procedure
14 that Ms. Lachelier outlined.

15 LDC [MS. BORMANN]: Yes.

16 MJ [COL POHL]: Trial Counsel, are you prepared to respond
17 to that right now?

18 Mr. Swann.

19 TC [MR. SWANN]: Your Honor, let me talk a little bit
20 about how we got here. The 21st of April, I told you we
21 obtained approval from the defense teams to be able to speak
22 with their clients about specific dates and times and specific
23 guards for incidents identified in the DIMS report.

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1 Now, the defense counsel were given the authority to
2 reference dates and guard numbers of instances of interest,
3 even if the information was redacted in the version releasable
4 to the accused. The defense was prohibited from hand-carrying
5 the reports into the room because the version provided to
6 defense counsel contained other sensitive and protected
7 information unrelated to the dates and guard numbers.

8 Now, I informed you that the motion was moot and you
9 disagreed, ordering the prosecution to show cause why it would
10 not provide the defense with DIMS containing dates and guard
11 numbers with additional sensitive force protection information
12 redacted so that they could be shown to the accused.

13 Now, in light of your order and not to prolong this
14 litigation forever, the prosecution will now provide a copy of
15 the DIMS marked DISPLAY ONLY containing the pseudonyms and
16 dates and times. The defense will be able to use that version
17 to show it to the clients at meetings but will not be
18 permitted to leave it with the accused.

19 Now, I say again, this portion of the motion is now
20 moot. Now, on 19 May, though, you -- we also argued this at
21 15999 to 16012 of the record. And you asked that I take
22 another look at Mr. Connell's pleading of 28 January 2015. I
23 did. In doing so I went back and read all of our several

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1 responses. All total, there have been 24 pleadings in this
2 one series. Although I have not filed another pleading, and
3 I'm going to this week, I'm quite certain that we have
4 provided all that he asked for.

5 Part of what he wanted in 2015 were records from his
6 client's time before GTMO. All of these have been provided in
7 our filings in the AE 308 series and pursuant to your order of
8 the ten-paragraph construct in AE 397.

9 All of these have been provided by our filings.

10 MJ [COL POHL]: Mr. Swann.

11 TC [MR. SWANN]: I also paid particular ----

12 MJ [COL POHL]: I know we're going to slide into a
13 separate issue, but since you mentioned 308, and I just got a
14 308 one actually last Friday.

15 TC [MR. SWANN]: Yeah. PPP, if I recall.

16 MJ [COL POHL]: Was that the last of the 308?

17 TC [MR. SWANN]: I don't believe so. I think General
18 Martins has said we're going to be done by what, the end of
19 September, and we will meet that deadline.

20 MJ [COL POHL]: When you say the end of September, that
21 means -- is there more for me to review?

22 TC [MR. SWANN]: There will be a little more for you to
23 review, that is correct.

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1 MJ [COL POHL]: Let me ask you another question. When I
2 get done with my review and authorize the substitutions, do
3 you then give them to the defense, or are you waiting to give
4 them all to them at one time?

5 TC [MR. SWANN]: No, they're gone. The better -- I
6 think ----

7 MJ [COL POHL]: Other than the one I reviewed on Friday,
8 which was 308.

9 TC [MR. RYAN]: Your Honor, could we have a moment,
10 please?

11 MJ [COL POHL]: Sure.

12 [Pause.]

13 TC [MR. SWANN]: General Martins would like to say a
14 couple of things about 308.

15 MJ [COL POHL]: Okay.

16 CP [BG MARTINS]: Your Honor, since I litigated 308, if
17 you don't have an objection.

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

19 CP [BG MARTINS]: As of 17 July, is the day I marked down
20 in my calendar, you had reviewed everything that we gave you
21 by 30 September of last year, and had worked through it and we
22 had gotten up to something like 31 different protective orders
23 dealing with all of that. There were times when you sent

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1 things back, said provide more, et cetera.

2 MJ [COL POHL]: Yes.

3 CP [BG MARTINS]: In that process, there were also a
4 couple of additional items that we went back and looked and
5 found. This is what Mr. Swann was just referring to. There
6 are a couple of additional statements, and then there are --
7 there are a few items that relate to this back-and-forth we
8 had. And those -- you have those now, but you have not -- you
9 have not -- and I can get the 308 designator for that, but you
10 do have some final pieces that arise from the interchange.

11 MJ [COL POHL]: Okay. The last one I saw was 308PPP which
12 I saw on Friday.

13 CP [BG MARTINS]: Four Papas.

14 MJ [COL POHL]: Four Papas, that's the one. That's the
15 one. Okay. I'm done with that one.

16 CP [BG MARTINS]: Oh, you are done with it. Have we ----

17 MJ [COL POHL]: You may not have gotten it back.

18 CP [BG MARTINS]: We've not seen it.

19 MJ [COL POHL]: But I'm saying you're going to get an
20 order from me on that soon. After that, is there more coming?
21 I hear the 30 September date.

22 CP [BG MARTINS]: There is an interchange -- the 30
23 September Mr. Swann was referring to is something different

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1 and not relating to RDI. The 30 September I've said was the
2 30 September of last year to give you ----

3 MJ [COL POHL]: Okay.

4 CP [BG MARTINS]: ---- after we had reviewed the 3 million
5 documents.

6 The -- to the extent there's additional litigation,
7 to the extent things come up in the litigation that refines
8 our understanding of what we might need to hunt for, there may
9 be more in the RDI realm.

10 MJ [COL POHL]: But as you stand there in front of me
11 saying as of Friday, since that's when I saw it, that
12 completes the substantive RDI discovery?

13 CP [BG MARTINS]: Yeah, with the continuing discovery
14 obligation requirement.

15 MJ [COL POHL]: Okay.

16 CP [BG MARTINS]: And we -- you know, we're listening
17 throughout all of this to refine our understanding of where
18 counsel are going, not only looking at their formal requests
19 that come from their review, but listening as well, because
20 there's just obviously a lot of material. But that's a fair
21 understanding of it.

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

23 CP [BG MARTINS]: And I want to thank Mr. Swann for

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1 yielding the floor on that.

2 MJ [COL POHL]: Okay.

3 TC [MR. SWANN]: So back to 336.

4 MJ [COL POHL]: Just to be clear, I switched the motion
5 issue. That's why I'm letting two counsel on it, before I
6 hear ----

7 TC [MR. SWANN]: Sir, I want to close the loop on this 336
8 issue and your direction to me to respond to the 28 January
9 2015.

10 All right. In reading Mr. Connell's argument, I paid
11 particular attention to some of his comments about what the
12 Chairman of the Joint Chiefs of Staff had said about these men
13 were so dangerous that they could chew through a hydraulic
14 cable on a C-17. I looked for anything that could be a
15 predictor of future behavior, as Mr. Connell wanted.

16 So they have the DIMS. As Mr. Connell said, it
17 amounts to practically an hour-for-an-hour accounting for
18 everything these men do on a daily basis. When they visit
19 their lawyers; when they refuse. It accounts for when they go
20 to recreation; to watch television or videos; or when they
21 check out their computers.

22 It accounts for when they go to the doctor.

23 ADC [MS. LACHELIER]: Judge, I'm going to object on the

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1 basis of the motion at this point and the narrow four corners
2 that we are discussing on the record and we don't need to go
3 into this.

4 MJ [COL POHL]: Yeah. The objection is sustained. I know
5 when they say, Mr. Swann.

6 TC [MR. SWANN]: Specifically, they also asked for this --
7 he wanted weight registers. That's satisfied. It's in the
8 DIMS.

9 He wanted to know about disciplinary records, when
10 someone is disciplined; it's in the DIMS. And it's also
11 identified at the detailed reports at the end of the DIMS. If
12 it doesn't exist, if it's not in the DIMS, it doesn't exist.
13 I've gone back to the camp on a number of times. I'm going to
14 do it one more time this week to cover my bases.

15 In the motion they also ask for SOPs. The defense
16 teams each have at least 20 or so unclassified SOPs, they have
17 classified SOPs; all total, they have more than 300 pages at
18 the present time. We sent them a letter asking them and
19 giving them a list of all of the SOPs, asking them, "Which of
20 these do you want?" Of course, I got the answer back, "I want
21 all of them." And we are now in the process of dealing with
22 that to include all of the historical SOPs that go along with
23 that.

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1 So in response to Mr. Connell's and your direction to
2 me, there's nothing more. I have nothing else.

3 MJ [COL POHL]: Thank you, Mr. Swann.

4 Okay. On the docket, we also have 152LL ----

5 LDC [MS. BORMANN]: Judge, I'm sorry.

6 MJ [COL POHL]: Yes.

7 LDC [MS. BORMANN]: I must have missed Mr. Swann's
8 response to my question, which is ----

9 MJ [COL POHL]: That was a while ago. I believe he said
10 everybody's going to be treated the same as far as the DIMS
11 DISPLAY ONLY. Is that accurate?

12 TC [MR. SWANN]: They will get their individual what, 4500
13 pages or so ----

14 MJ [COL POHL]: Got it.

15 TC [MR. SWANN]: ---- marked specifically for each of
16 their clients.

17 LDC [MS. BORMANN]: Thank you.

18 MJ [COL POHL]: Mr. Harrington, I have 152HL also on.

19 LDC [MR. HARRINGTON]: That was the one, Judge, we
20 indicated we were still waiting for other discovery.

21 MJ [COL POHL]: Okay.

22 Just -- I have 350C and 0. Are those ripe for
23 argument yet?

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1 LDC [MR. CONNELL]: Sir, we can take that up in the 505.

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: Sir, the two from your list from the
4 802 that I still have live are 478 and 511. Everything else I
5 believe is in the 505.

6 MJ [COL POHL]: What about 133RR?

7 LDC [MR. CONNELL]: Yes. That has 505 notice.

8 MJ [COL POHL]: Okay. I'm sorry, which were the two?

9 LDC [MR. CONNELL]: 478 -- you said in the 802 that you
10 just wanted -- you didn't want to argue it, we weren't going
11 to resolve it. You wanted comments.

12 MJ [COL POHL]: We're not going to touch 478. Let's touch
13 it later in the week.

14 LDC [MR. CONNELL]: Okay. The last thing we have is
15 Mr. al Hawsawi's motion 511.

16 MJ [COL POHL]: You believe all of the other ones we have
17 to do the 502 first?

18 LDC [MR. CONNELL]: The 505(h), yes, sir.

19 MJ [COL POHL]: I'm sorry. The 505.

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

21 MJ [COL POHL]: Okay. Let's turn to 511, then.

22 Trial Counsel, that's Mr. Connell's suggested order
23 of march. If you think we can do something else, obviously

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1 I'll listen to you in, too, before we -- what I'm hearing him
2 saying is we can do 511, and what we've got left is the 505(h)
3 tomorrow and we pick up with the open session on Wednesday.

4 TC [MR. RYAN]: Yes, sir. We're agreeing with him as to
5 478 as well.

6 MJ [COL POHL]: Okay. So we'll complete 511, and that
7 will be the last motion we address today.

8 Mr. Ruiz.

9 LDC [MR. RUIZ]: Judge, may I, before I begin, have a
10 couple of documents marked and a couple of exhibits I'd like
11 to submit?

12 MJ [COL POHL]: Okay.

13 LDC [MR. RUIZ]: May I approach?

14 MJ [COL POHL]: Sure. Go ahead and approach. Do you wish
15 to display these?

16 LDC [MR. RUIZ]: I'm sorry, Judge?

17 MJ [COL POHL]: Did you give them to ----

18 LDC [MR. RUIZ]: No, I'm not going to display them.

19 [Counsel away from podium; no audio.]

20 MJ [COL POHL]: You can refer to them, but if you are
21 going to display them, you have to submit them to the court
22 information security officer.

23 [Pause.]

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1 LDC [MR. RUIZ]: Thank you, Judge. For purposes of the
2 record, I've provided to the commission two documents. Copies
3 of them provided to opposing counsel as well as to the
4 co-accused counsel in this case. They have been marked as
5 Appellate Exhibit 511D (MAH), it's a two-page exhibit and 511F
6 (MAH), which is a 23-page exhibit. Those two exhibits are
7 authorities that were cited by the prosecution in their brief
8 but not provided to the commission along with the pleading
9 that relate to duties and responsibilities in regards to the
10 victim family members, and I will be touching upon those
11 briefly. I do not intend to display any of that material.

12 Judge, 511 is a motion that has been filed on behalf
13 of Mr. al Hawsawi, and I make that perfectly clear. I know
14 the prosecution, in their response, has indicated a number of
15 times that we intended to suppress this motion as it relates
16 to the other four accused in this case.

17 I'm always very judicious about this, but in this
18 particular case, I am going to be extremely clear that this is
19 a motion to suppress D-101, which is the filing designation
20 that was provided during the 2008 session of the commissions,
21 to suppress that document as it pertains to use against
22 Mr. al Hawsawi at any proceeding.

23 The remedy we're asking is suppression of that

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1 document. In addition to that, we're asking the court to
2 issue a protective order in relation to the handling and the
3 use of that document. As the commission is aware, that
4 document was publicly posted on the commission's website in
5 2009 when it was first submitted to the commission, and, to
6 the best of my understanding, has remained there.

7 As we also indicate in our pleading, it has come to
8 our attention and has been told by [sic] us by a number of
9 people that the prosecution actively distributes this piece of
10 evidence to members of the public and makes comments during
11 that distribution along the lines that Mr. al Hawsawi has
12 intended to plead guilty, in fact was pleading guilty in 2008,
13 and that there is no indication or understanding of why now in
14 2017 we continue to litigate these matters.

15 The prosecution's pleading is crystal clear on their
16 understanding of what they believe this document to be. They
17 believe it to be an incriminating confession. They believe it
18 to be a highly prejudicial piece of evidence that they intend
19 to use at every stage of the proceedings.

20 Having admitted that much, the prosecution also
21 submits that they are distributing and submitting this
22 document publicly and indicate that they will continue to do
23 so as well. So we are asking the court to use its power and

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1 authority to issue a protective order to keep the prosecution
2 from engaging in the practice that essentially takes what they
3 consider a highly incriminating piece of evidence very
4 prejudicial to the accused and continue to distribute that and
5 continue to make incriminating statements, inflammatory
6 statements prior to the adjudication of these issues at a
7 trial before a jury where a jury can, if the court ultimately
8 deems that this piece of evidence is admissible, determines
9 what it means to them.

10 Judge, we would move to suppress D-101 and certain
11 facts are indisputable.

12 MJ [COL POHL]: Mr. Ruiz, just so I'm clear, this is a
13 suppression motion, okay? Who's got the burden?

14 LDC [MR. RUIZ]: The prosecution, Judge.

15 MJ [COL POHL]: So don't we start out with an evidentiary
16 hearing and then we go to the argument? So let's -- I mean,
17 that's the way I have always done these things.

18 LDC [MR. RUIZ]: Okay.

19 MJ [COL POHL]: You've got facts. They've got facts. But
20 to me, they're just what they say they are until they are
21 entered into evidence. So you've made your motion, the
22 government knows what statement they're talking about. It's
23 their burden; they go first.

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1 LDC [MR. RUIZ]: That's fine.

2 MJ [COL POHL]: Okay.

3 Trial Counsel. I just want to make -- apparently
4 this has come up in other contexts where people get confused,
5 okay, and I'm willing to listen to another argument. We have
6 before me is a motion to suppress the statement. That
7 requires an evidentiary hearing and then a -- then I'll listen
8 to argument and then a ruling. An evidentiary hearing
9 requires evidence. Proffers are not evidence unless they're
10 agreed to by both sides. Okay.

11 Now, does anybody disagree with that procedure?

12 LDC [MR. RUIZ]: I do not, Judge. The only comment I
13 would add to that is that we have submitted to the commission
14 in our pleading certain documents that we believe to be
15 evidence; for instance, transcripts, reference to transcripts
16 that we believe we can argue in terms of the facts that I have
17 been relating to.

18 MJ [COL POHL]: Evidence can take all sorts of different
19 forms.

20 LDC [MR. RUIZ]: Sure.

21 MJ [COL POHL]: But let me come back. A lot of times we
22 get these affidavits flown in here -- flown in -- attached to
23 things, and unless both sides agree to them, that's like a

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1 proffer as far as I'm concerned. An ex parte affidavit
2 prepared by one side, if there's -- so I just want to make --
3 so there's no later on people are saying, well, the judge
4 didn't give me a chance, the judge didn't do this, that's the
5 way I've always done suppression motions: Evidence, and then
6 argument, and ruling.

7 LDC [MR. RUIZ]: Sure.

8 So the documents we have attached to our pleadings,
9 do you consider those evidence?

10 MJ [COL POHL]: When we get to them, I'll deal with them
11 one at a time. Because there's different -- I mean, you can
12 take judicial notice of things. There's all sorts of ways you
13 can take evidence. But I'm not going to give you a blanket
14 thing that just because it is attached to your pleading, it
15 changes from a proffer to a piece of evidence just -- just so
16 it's clear, when we get done with this hearing, everybody
17 knows what the evidence is that I'm considering.

18 LDC [MR. RUIZ]: Understand. I think we've done it
19 differently before, which is why we've been comfortable
20 attaching documents to our pleadings and -----

21 MJ [COL POHL]: It varies on the type of motion it is.

22 LDC [MR. RUIZ]: Okay.

23 MJ [COL POHL]: A motion to suppress is -- because I have

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1 run into this many times -- is counsel get confused; not
2 necessarily you guys, but other counsel before me, with
3 proffers being the same as evidence. I'm just stating it is
4 not. Understand?

5 LDC [MR. RUIZ]: I understand.

6 MJ [COL POHL]: Go ahead.

7 Mr. Ryan.

8 TC [MR. RYAN]: Sir.

9 Good morning, Your Honor.

10 MJ [COL POHL]: Good morning.

11 TC [MR. RYAN]: Edward Ryan on behalf of the United
12 States.

13 Your Honor, your comments just now I think were well
14 taken, and it highlighted to me the rather strange nature of
15 this -- what is styled as a motion to suppress statement.
16 Excuse me. The defense has asked for no witnesses as to this
17 motion.

18 Now, we, the prosecution, are prepared to argue it.
19 And the evidence that we will be relying upon has been cited
20 in our pleading and concerns almost entirely items that are
21 part of the record of the commission in the case against these
22 men either this go-around or the first go-around, but all of
23 which appear within the record.

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1 MJ [COL POHL]: When you say "appear within the record,"
2 Mr. Ryan, what do you mean?

3 TC [MR. RYAN]: I'm talking about for the most part
4 transcripts, Your Honor, and documents that were filed as
5 pleadings and were received by either the commission. That
6 would be either you or your predecessors.

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

8 TC [MR. RYAN]: Your Honor, the defendant, Mr. Hawsawi,
9 styled this as a motion to suppress the joint statement that
10 we intend to introduce at trial of all five of the accused in
11 this case, and it is referred to as D-101. That is, in fact,
12 its filing designation from back in 1 March or so of 2009.

13 Now, motion to suppress to me, and I'm sure to Your
14 Honor, means simply that the defense is going to cite usually
15 constitutional privileges or constitutional principles as a
16 reason that some piece of evidence should not be allowed
17 because it violated some right of the accused.

18 Mr. Hawsawi in this motion cites the Fifth Amendment,
19 the Sixth Amendment and the Eighth Amendments of the United
20 States Constitution and also Military Commission Rule of
21 Evidence 304, which governs confessions, statements and
22 admissions.

23 But within the pleading itself, at least the initial

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1 pleading of the defense, they do almost no analysis whatsoever
2 as to how this particular statement falls within those
3 principles, well recognized and well understood principles of
4 law.

5 Now, skipping over the constitutional principles, the
6 more direct and germane piece of the law for our purposes
7 would be 304(a)(2), which reads in relevant part, "A statement
8 of the accused may be admitted in a military commission only
9 if the judge finds that the totality of the circumstances
10 renders the statement reliable and possessing sufficient
11 probative value, and" -- and this is the part that concerns
12 us -- "the statement was voluntarily given."

13 Further down in 304 there is an area regarding
14 determination of voluntariness which I just referred to.

15 "In determining for purposes whether a statement was
16 voluntarily given, the military judge shall consider the
17 totality of the circumstances including, as appropriate, the
18 following: A, the details of the taking of the statement,
19 accounting for the circumstances of the conduct of military
20 and intelligence operation during hostilities; B,
21 characteristics of the accused, such as military training,
22 age, et cetera; C, the lapse of time, change of place, or
23 change in identity of the questioners between the statements

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1 sought to be admitted and any prior questioning of the
2 accused."

3 LDC [MR. RUIZ]: Objection, Your Honor. Based on what I
4 just understood you to say, we were not going to proceed into
5 argument. There's going to be some type of presentation of
6 evidence. I'm just trying to clarify exactly where we're
7 going now.

8 MJ [COL POHL]: Mr. Ryan, response?

9 TC [MR. RYAN]: I think he just objected to me reading
10 Military Commission Rules of Evidence.

11 MJ [COL POHL]: He did. He did. But his point is that
12 you said you wanted me to consider the evidence in the record
13 that you referred to in your brief; is that the evidence you
14 wish me to consider?

15 TC [MR. RYAN]: The evidence that is in our brief. The
16 only other things I will be asking Your Honor to consider is
17 certain portions of the same record -- and I'm talking
18 specifically now about certain transcripts, which we've
19 already referred to, just maybe different statements within
20 that same transcript.

21 MJ [COL POHL]: Okay. So let's ----

22 LDC [MR. RUIZ]: Judge, may I confer with Mr. Ryan for a
23 minute?

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1 MJ [COL POHL]: Sure.

2 [Pause.]

3 LDC [MR. RUIZ]: Judge, what we were discussing is my -- I
4 proposed to Mr. Ryan that if what he intended to argue is the
5 substance of what is contained within the 511 pleadings,
6 references to transcripts, there are some handwritten notes
7 that have been provided in the discovery to the defense that
8 have been submitted along with the 511 series, that we would
9 be willing to stipulate to the court using that and the
10 prosecution arguing that as the basis for their motion
11 opposing our motion.

12 I think Mr. Ryan's understanding, and what he wants
13 to do, is expand it beyond the 511 pleadings and the
14 references in the exhibits that have been submitted there and
15 essentially argue that everything else is fair.

16 MJ [COL POHL]: Okay. Let's get -- okay. Let's -- both
17 sides cite in their pleadings transcript references and also
18 things like executive orders that would appear to be not
19 particularly controversial. What I got in your pleadings,
20 what I'm hearing you say, is both sides are agreeing I can
21 consider that as the evidentiary -- as part of the factual
22 predicate for the motion. Is that what I'm hearing from you,
23 Mr. Ruiz?

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1 LDC [MR. RUIZ]: That's what you're hearing from me. In
2 fact, our motion is basically a motion about absence of
3 evidence and highlights the absence of evidence against
4 Mr. al Hawsawi.

5 MJ [COL POHL]: We'll get back and come back. But is that
6 your position also, Mr. Ryan?

7 TC [MR. RYAN]: It's my position, Judge, and it's hard to
8 speak when I'm not clear as to what the commission is
9 thinking.

10 MJ [COL POHL]: Okay.

11 TC [MR. RYAN]: But what we have been he relying upon is
12 matters that we have either put in our brief, that we have
13 attached to our brief, or that we are citing to anyway. For
14 example, let me be real clear about this. Transcripts of
15 events that happened in this courtroom involving these five
16 accused which was taken down and made part of the record
17 and/or pleadings that were accepted by a commission and are
18 part of the public record.

19 MJ [COL POHL]: Okay. Okay.

20 Now, I think we may actually be getting somewhere.
21 You both have references, specific references to transcript
22 and I'm talking about what you've already filed, okay.

23 LDC [MR. RUIZ]: Yes.

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1 MJ [COL POHL]: Do you want me to consider those as part
2 of the evidence in this thing, right?

3 LDC [MR. RUIZ]: Right.

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

5 MJ [COL POHL]: All right. Now, if there's anything in
6 addition to that, which I think I'm hearing, no -- I think
7 Mr. Ryan is saying that I need specific cites to anything
8 outside what you've already -- I can consider what you already
9 gave me. I got it. I can look that up, I got it.

10 But if you're going to supplement your argument at
11 this point with transcript references or a reference to
12 something else, then I need to have that in writing.

13 Now, my question -- let me go to Mr. Ryan first
14 because he's -- do you understand what I'm saying, Mr. Ryan?

15 TC [MR. RYAN]: I believe I do, Judge.

16 MJ [COL POHL]: What you're telling me what you've given
17 me, I'll consider now. But you think you're telling me you're
18 going to give me more.

19 TC [MR. RYAN]: The only thing I'm talking about when I
20 say possibly more is, for example, we cite to specific
21 hearings that occurred that went on a certain day, call it day
22 one, and in our brief, we took a quote from day one, and put
23 it there.

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1 Now, I have a few more quotes from day one, same
2 transcript, that I made reference to in my argument ----

3 MJ [COL POHL]: Okay.

4 TC [MR. RYAN]: ---- but all part of the same record. All
5 part of the same case.

6 MJ [COL POHL]: Mr. Ruiz.

7 LDC [MR. RUIZ]: Judge, I think if they're not already
8 contained within the four corners of the 511 pleading, they
9 need to be submitted to the commission as evidence.

10 MJ [COL POHL]: I think if they're -- if either side
11 refers to a transcript page and reads more out of the page
12 than necessarily is in the pleading as long as it's referenced
13 right into the page, do you have any objection to that?

14 LDC [MR. RUIZ]: No.

15 MJ [COL POHL]: But if you're going to pull something out
16 of the transcript that is not encompassed in what you've
17 already given me, you have to give me a transcript cite and
18 we'll go from there. Because I understand what you are
19 saying, Mr. Ruiz, if it's in the transcript, it's in the
20 transcript. I'm not going to hunt for it, that's kind of what
21 I'm saying.

22 LDC [MR. RUIZ]: No, I agree. I am not going to hunt what
23 Mr. Ryan is talking about if it's not already contained in the

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1 pleadings.

2 MJ [COL POHL]: What we'll do -- yeah.

3 LDC [MR. RUIZ]: So perhaps it may be worthwhile for
4 Mr. Ryan and I to spend some time conferring so that we make
5 sure that everything is sufficiently provided. I understand
6 the court wants it all in one place and makes sure that this
7 evidentiary foundation is all in place.

8 MJ [COL POHL]: Given the -- what we have so far, I -- I
9 certainly don't -- I think we got plenty of time this week to
10 resolve that, if that would be easier.

11 LDC [MR. RUIZ]: So my suggestion would be, it would be
12 helpful to us, it would be helpful for us to have a
13 conversation, if we could do it on Wednesday after we've had
14 an opportunity to confer and make sure ----

15 TC [MR. RYAN]: If counsel will yield the podium, sir.

16 LDC [MR. RUIZ]: I will yield very little, but the podium,
17 I will at this moment.

18 MJ [COL POHL]: Does that make sense, Mr. Ryan?

19 TC [MR. RYAN]: No, sir.

20 MJ [COL POHL]: No?

21 TC [MR. RYAN]: It does not, sir. This is an argument
22 that's grounded in the record that is available to everyone.
23 It's part of this case.

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1 MJ [COL POHL]: Here's what we'll do, then. Here's what
2 we'll do. We'll do the argument, just continue how we have
3 been going with specific references. If we need additional
4 time to verify or to go back in there, you'll get it. Okay.
5 Let's see. I have a feeling that it may not be that big of an
6 issue. It may be.

7 But what I'm talking about now is we're going to
8 consider the transcript. Is there any other evidence -- is
9 there any other evidence other than what's in the transcript
10 that you want me to consider for the government's position on
11 this motion?

12 TC [MR. RYAN]: Within the pages that I may refer to from
13 the same transcripts ----

14 MJ [COL POHL]: Okay.

15 TC [MR. RYAN]: ---- that's the only additions I can think
16 of, as well as whatever we attached, the attachments to our
17 pleading. That's everything I'm going to be talking about,
18 Judge.

19 And when I refer to the transcript, there were
20 hearings that took place in this very courtroom in which the
21 accused were making statements to then Judge Henley or then
22 Judge Kohlmann about their desires, all of which support our
23 argument of this statement and its validity under the rules of

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1 evidence.

2 MJ [COL POHL]: Okay.

3 TC [MR. RYAN]: But that's what I'm relying on, sir.

4 MJ [COL POHL]: I got it. Just a second.

5 [Pause.]

6 MJ [COL POHL]: Now, both sides have attachments to their
7 pleadings. One of the attachments is a proposed order, so put
8 that to the side. Do both sides want me to consider the
9 attachments as part of the evidence in this case?

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

11 LDC [MR. RUIZ]: Yes.

12 MJ [COL POHL]: Okay. So we're all clear, but ----

13 LDC [MR. RUIZ]: Yes.

14 MJ [COL POHL]: We'll get to the argument of what they're
15 worth. That's a different issue. But ----

16 LDC [MR. RUIZ]: May I have a moment to confer with my
17 table?

18 MJ [COL POHL]: Sure.

19 [Pause.]

20 LDC [MR. RUIZ]: Judge, with respect to the exhibits
21 contained in our initial pleading and in our reply, yes, we
22 would ask you to consider those as our basis for argument.
23 Because for us, it's more about lack of evidence than

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1 evidence, so we would ask for that.

2 The fundamental objection I have to the proposal
3 Mr. Ryan is putting forth before the court is this: Both
4 parties had ample opportunity to respond during the course of
5 this pleading and to submit any documents, to quote any
6 references that we wanted to in that pleading. What that
7 allows each party to do is obviously to review that,
8 internalize it, digest it, be able to make a counter-argument
9 to the commission in an intelligent and thoughtful way.

10 What I hear Mr. Ryan saying is, "Not only do we want
11 to use the things which we have cited in our pleading," which
12 we are fine with it, we had an opportunity to review it and
13 analyze and respond to it, but he wants to pull from the
14 universe of what's available. Granted it's publicly available
15 and it's part of the transcript but that denies us the
16 opportunity to review it, internalize it and respond. It will
17 also force us, as he's going along and making arguments from
18 the transcript, to compare and contrast whether the reference
19 he's talking about is one that's contained within the pleading
20 or one that's not contained within the pleading.

21 What we would like to happen, Judge, is Mr. Ryan has
22 other references from the transcript, that's fine. We would
23 simply like to have him submit that to us and to the

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1 commission ahead of argument so that we have an opportunity to
2 review them, to make any objections and to respond. Likely we
3 won't have any objections because it's information we've
4 responded to, but we simply don't want to be in a motion where
5 he's bringing in arguments -- information for argument that
6 hasn't been provided either through a pleading or through an
7 evidentiary process that we're asked to respond to. We don't
8 think that's the way to go here, Judge.

9 MJ [COL POHL]: Okay, but fundamentally it's both sides
10 want me to consider the attachments as part of the evidence,
11 true?

12 LDC [MR. RUIZ]: We do.

13 MJ [COL POHL]: Mr. Ryan? Okay.

14 This is what we'll do because now -- and Mr. Ryan,
15 you have no other evidence other than what we just talked
16 about.

17 TC [MR. RYAN]: Everything I have stated.

18 MJ [COL POHL]: And Mr. Ruiz, you have no other evidence
19 other than what we just talked about.

20 Okay. Here's what we're going to do. We're going to
21 proceed to argument. If Mr. Ryan drifts into argument, he
22 will have specific references on them. If you need more time
23 you want to respond, you won't necessarily have to respond

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1 today. You can write them down and -- but we get to the same
2 place anyway. So you have an opportunity to do that. Okay,
3 that being said -- Mr. Harrington.

4 LDC [MR. HARRINGTON]: Judge, what I'm going to say has
5 nothing to do with the argument that just went on or the
6 confusion it may have caused me but because of the -- the
7 circumstances, which I can go into if the court wants, we want
8 to unjoin this motion. The other three counsel have unjoined
9 it, and we wish to unjoin it.

10 MJ [COL POHL]: Yeah. No. I see this only as a motion
11 that only, quite frankly, the only whole basis is only one
12 accused.

13 LDC [MR. HARRINGTON]: Thank you. We are not part of
14 this.

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

16 TC [MR. RYAN]: One moment, sir.

17 DDC [Maj WAREHAM]: Your Honor, Mr. al Baluchi seeks also
18 not to join, for the court's permission.

19 MJ [COL POHL]: Sure. Go ahead. I mean ----

20 LDC [MS. BORMANN]: And unjoin.

21 MJ [COL POHL]: I understand the need to unjoin. I got
22 it. Given the nature of the motion, it's almost inherently
23 unjoined. It's almost specific of the statement why is being

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1 attributable to one accused. So he's not speaking for anybody
2 else, Mr. Ruiz and Mr. Hawsawi. If you all feel you need to
3 unjoin on that basis, I got it.

4 DDC [Maj WAREHAM]: Thank you, Your Honor.

5 LDC [MS. BORMANN]: Judge?

6 MJ [COL POHL]: Ma'am.

7 LDC [MS. BORMANN]: We filed an actual motion to decline
8 joinder. I don't know if the court issues motions on that,
9 the filing was accepted, but so -- just to dot my Is.

10 MJ [COL POHL]: I try to avoid issuing orders if I don't
11 have to. If you declined joinder, I'll consider it.

12 LDC [MS. BORMANN]: Done.

13 MJ [COL POHL]: Thank you. I'll only issue an order if I
14 won't let you do it. Quite frankly, we haven't gotten to
15 that.

16 LDC [MS. BORMANN]: Got it. Thank you.

17 MJ [COL POHL]: Okay. Mr. Ryan.

18 TC [MR. RYAN]: Your Honor, I just finished reading the
19 relevant portions of M.C.R.E. 304.

20 Now, the rule is written, I submit to you, plainly
21 for purposes of instructing the military commission how it is
22 to evaluate statements given in evidence by the government
23 taken from the accused. But in all of it, there was clearly

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1 the understanding that the statements that's being referred to
2 and the guidelines that are setting out and the rules to live
3 by concern statements taken by law enforcement, by government
4 personnel, by intel, by military.

5 In this particular motion, the accused makes no claim
6 of unlawful interrogation or improper actions in any way. In
7 fact, there's no interrogation at all. There's not a cop in
8 sight. This is a statement that is given by the accused that
9 came out of their own thinking, their own actions, their own
10 decisions, and even I think counsel would have to concede
11 didn't involve any sort of government personnel.

12 It's hard to see how the Fifth, Sixth, and Eighth
13 Amendments or 304 is applicable to this particular statement,
14 and I don't think the defense offers very much in that. They
15 also, Your Honor, at times in their motion dance around a
16 claim that Mr. Hawsawi never might have -- maybe didn't even
17 make this statement, or that the government hasn't proven that
18 he has made the statement, and they kind of bounce back and
19 forth within their pleading as to which particular authority
20 they're claiming at a given time.

21 At times, as I read it, it seemed to me that it was
22 more along the lines of argument of authentication under 901,
23 and if so it would seem somewhat out of the norm that the

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1 commission is being asked to take up an authentication
2 question as to a piece of evidence to be introduced at trial
3 at this point. But nonetheless, they have chosen to style it
4 how they have chosen to style it, and we are prepared to make
5 our response right now.

6 The prosecution's position is quite clear. D-101 is
7 a joint statement, admissible against all five accused made by
8 all five accused against their interest, and inculpatory in
9 the sense that they acknowledge and claim and celebrate the
10 guilt for the attacks on September the 11th.

11 The path that led to the filing of D-101 began way
12 back at the time of arraignment in this case, 5 June of 2008.
13 At that time all five of the accused declined to accept the
14 counsel that was being provided to them. Their remarks at the
15 time, Judge, were along the lines of, we aren't going to
16 participate in U.S. justice. They saw all Americans as being
17 their enemies, whether they were lawyers for the defense or
18 lawyers for the prosecution, and they didn't intend to
19 cooperate in any way, shape or form.

20 Based on what was being said ----

21 LDC [MR. RUIZ]: Judge, I object to that argument without
22 any reference to ----

23 MJ [COL POHL]: Transcript cite?

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1 LDC [MR. RUIZ]: ---- more specifically that is referenced
2 or what evidence he's referring to that establishes that.

3 TC [MR. RYAN]: The entire transcript of the June 5, 2008
4 hearing in front of Judge Kohlmann, sir.

5 MJ [COL POHL]: Thank you. Go ahead. Objection
6 overruled.

7 TC [MR. RYAN]: Based on what he was hearing, then Judge
8 Kohlmann conducted, properly, a colloquy for purposes of
9 analysis under the Faretta decision of the Supreme Court
10 giving defendants a right to represent themselves as long as
11 they understood the ramifications.

12 At that time the accused Ali, the accused bin'Attash,
13 and the accused Shaikh Mohammad gave answers to Judge Kohlmann
14 which were shown to be -- shown to represent a knowing and
15 voluntary waiver of the right to counsel. Now, counsel for
16 Mr. Binalshibh at that time and counsel for Mr. al Hawsawi at
17 that time raised claims or concerns or questions about their
18 particular competency to be making these kinds of decisions.
19 Judge Kohlmann, not really having heard any of this before,
20 deferred the Faretta inquiry as to those accused at this time.

21 The next session of the commission, Your Honor,
22 occurs on 9 July of 2008, and at that time the first statement
23 of one of the accused that would later become a strong theme

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1 in D-101 was stated, and this is referred to on our -- in our
2 pleading 511b at page 4, when the accused bin'Attash said,
3 among other things, "and any attack that I undertook against,
4 I am happy of -- against America, I am happy of, or
5 anticipated or helped in, I am proud of it and I am happy
6 about it." This pride and joy he shows --

7 LDC [MR. RUIZ]: Objection to the relevance of
8 Mr. bin'Attash's statements.

9 TC [MR. RYAN]: Your Honor, this is a joint trial.

10 MJ [COL POHL]: Overruled.

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

12 This pride and joy that Mr. bin'Attash shows about
13 the attacks will be something that comes back amplified ten
14 times in filing of D-101 itself.

15 At that same session of July 2008, the accused
16 Mr. al Hawsawi said the following: "When we asked to confer
17 with each other," talking to the judge, "you refused, or you
18 did not comply with our request. There was an opportunity to
19 confer with each other so we could reach some common ground."
20 This was on page 11 of that transcript.

21 So at this point, Judge, early on back in July, the
22 accused al Hawsawi already is demonstrating his desire to work
23 with his co-accused and come to some, quote, "common ground."

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1 This is eight months before D-101 is actually filed.

2 I also note, Your Honor, that in that same hearing,
3 July, on page 14 -- and this is important to Mr. Ruiz, I
4 believe -- he does state, "I didn't decide -- I haven't
5 decided so far whether I'm going to be represented or to
6 represent myself. Thus far, I have made -- I haven't made a
7 decision."

8 So I want to be clear about this. Although at the
9 initial arraignment date there was this -- there was I believe
10 a consistent statement by all five that they didn't want
11 lawyers, there was a time, at least in these early stages,
12 some vacillating on the part of Mr. al Hawsawi as to whether
13 he wanted to be represented or not. There were times, and you
14 can see it in the transcript, where he talks about there's a
15 lawyer out there that he knows who's of the same faith as him
16 and he maybe wants to have him as his lawyer, and Judge
17 Kohlmann does some analysis about that.

18 But I put it out there because I want to be clear as
19 to -- that I'm not running away from it, and I'll come back to
20 this issue of his representation in a moment.

21 Somewhere around 28 August of 2009, a pleading was
22 filed in which all five of the accused request and then later
23 got the ability to meet together, I think for the most part in

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1 this courtroom, so that they could confer. There was no
2 distinction at the time between those going pro se -- that
3 being accused Mohammad, accused Ali, and accused bin'Attash --
4 and those who were still represented, that being accused
5 al Hawsawi and Binalshibh.

6 MJ [COL POHL]: So those dates were April of '09.

7 TC [MR. RYAN]: That was August of '09.

8 MJ [COL POHL]: So as of August of '09, Mr. Hawsawi was
9 represented by counsel.

10 TC [MR. RYAN]: For purposes of al Hawsawi and
11 Binalshibh ----

12 MJ [COL POHL]: Right.

13 TC [MR. RYAN]: ---- starting at arraignment, they were
14 represented going forward because of this issue that was
15 raised as to competency.

16 LDC [MR. RUIZ]: Judge, I hate to interrupt, but I think
17 he may be thinking of '08.

18 TC [MR. RYAN]: I'm sorry.

19 MJ [COL POHL]: I got it. August of '08.

20 TC [MR. RYAN]: The years spin by, Judge.

21 MJ [COL POHL]: If it was August of '08, Mr. Hawsawi is
22 represented by counsel.

23 TC [MR. RYAN]: Correct. No question about that. In

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1 fact ----

2 MJ [COL POHL]: Go ahead.

3 TC [MR. RYAN]: In fact, going forward right up until
4 D-101. I want to be clear about that.

5 MJ [COL POHL]: Okay.

6 TC [MR. RYAN]: Now, based on statements of counsel during
7 the session of 24 September of 2008, all five intended -- this
8 is in a transcript -- all five made in -- intended to meet
9 together approximately every two weeks in this courtroom for
10 the purposes of discussing things among themselves.

11 The next big event that happens, Judge, that leads
12 ultimately to D-101 is 4 November 2008, and that is the filing
13 of D-089. It is a handwritten pleading that was received, and
14 its title is "Our Joint Request for Immediate Plea Session."

15 The second page, and I won't read the whole thing,
16 but the second page of it in relevant part -- and by the way,
17 Judge, this is 511B. It appears at pages 8 through 9 and it
18 is also Attachment B to our pleading.

19 But on the second page it reads as follows: "The
20 undermentioned brothers have agreed," and then it lists the
21 names, 1, Khalid Shaikh Mohammad; 2, Mustafa Admed Adam
22 al Hawsawi; 3, Walid bin'Attash; 4, Ramzi Binalshibh; 5, Ali
23 Abdul Aziz Ali, "on the following. First, we all five agree

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1 to stop filing any motion on our behalf or presented by our
2 name via the office of defense counsel without our personal
3 approval.

4 "Second, we, all five, have reached to an agreement
5 to request from the commission an immediate hearing in order
6 to announce our confessions, plea in full, and with complete
7 satisfaction and with our earnest desire in this regard and
8 without being under any kind of pressure, threat, intimidation
9 or any promise from any party."

10 At the bottom, it reads, "Signed by," although it's
11 in handwriting, hand printed, rather, signed by Khalid Shaikh
12 Mohammad, with an S at the end, Mustafa Admed Adam al Hawsawi
13 with an S, Walid bin'Attash with an S, Ali Abdul Aziz Ali with
14 an S, and Ramzi Binalshibh with an S.

15 I draw attention to this, Your Honor, for the
16 following reasons. First, in the course of two pages, it
17 lists all five names three different times. It uses the words
18 "we" and "our," which show that they were acting in concert
19 and together. There is no point at which any one of them
20 appears to be speaking alone or has a divergent interest.

21 And I do concede at this point as counsel for the
22 defense strongly point out in the pleading that this is not
23 hand-signed in each person's own handwriting. I agree with

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1 that. It is hand printed in each occasion.

2 But I point this out as well, Your Honor. Upon being
3 received by the commission at the next session, D-089 was
4 brought up and referred to and examined by Judge Henley.

5 MJ [COL POHL]: What was the date of that session?

6 TC [MR. RYAN]: That is 8 December, Your Honor, 2008.

7 At that session, the military judge, and I believe it
8 was Judge Henley at that point, asked the three who were pro
9 se at that point -- Shaikh Mohammad, bin'Attash and Ali -- if
10 they, using his words, signed D-089. All three said yes, and
11 indicated they wanted to move on to a guilty plea.

12 So although I don't dispute what counsel says, that
13 nobody signed it, it is clear from the transcript and from the
14 answers that however you want to describe it, Judge Henley and
15 the three accused he was talking to all saw this as them
16 signing on to it, certainly accepting it as their words, their
17 actions and so on.

18 And I also want to point out to you that the other
19 two names, so those who were represented at this point and who
20 Judge Henley did not colloquy, their names appear in the exact
21 same place in the exact same manner.

22 So because of the competency issue that was still
23 pending and, therefore, because they were still represented,

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1 no colloquy was given to them at that point; however, sir,
2 Judge Henley did let them speak. Mr. Binalshibh said the
3 following, and this is on page 41 of the 8 December
4 transcript: "And we, the brothers, all of us, we would like
5 to submit our confession." This is three months before D-101.
6 It's by Ramzi Binalshibh, who was represented at the time. It
7 shows the cohesiveness, and I emphasize that he was not just
8 speaking aloud; Judge Henley allowed him to speak at that
9 time.

10 Mr. al Hawsawi said the following: "I had -- I had
11 expected that in the beginning of October that you would
12 receive my request to represent myself. And accordingly, we
13 undertook the plea, 89, with all my complete mental capacity
14 and voluntarily on my part to withdraw all the motions and to
15 request, and we requested for a special session to plea our
16 guilt."

17 So a couple points, Judge. First, as I said before,
18 back in July, he was still equivocating as to the issue of
19 representing himself or having counsel. At this point, it
20 was -- it seems clear that he has moved beyond that and he
21 wants to represent himself. He says it specifically.

22 MJ [COL POHL]: Did the judge --

23 TC [MR. RYAN]: Say again, sir?

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1 MJ [COL POHL]: Did Judge Henley take any action on that,
2 oppose the request?

3 TC [MR. RYAN]: No, Judge, because the competency matter
4 was still outstanding. Reports had been issued, some of which
5 had been filed, and if we need to supplement, we will seek
6 leave to do that at some point. I will say this, Judge. As
7 far as the competency issue is concerned, there has never been
8 any significant concern about his competency.

9 MJ [COL POHL]: No. I was just wondering whether he
10 addressed the pro se request after it came up in December, but
11 by then it was wrapped up in the competency issue.

12 TC [MR. RYAN]: At this point -- now, remember, this is
13 December of 2008. Things changed, and I'll sort of highlight
14 this for you now, Judge.

15 Things were to change in the next 45 days or so when
16 the change of administration resulted in changes to the ----

17 MJ [COL POHL]: Hold that thought.

18 TC [MR. RYAN]: ---- course.

19 LDC [MR. RUIZ]: Judge, I object to the argument that
20 there was no significant concern about Mr. al Hawsawi's
21 competency without any evidentiary basis for making that
22 argument.

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

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1 LDC [MR. RUIZ]: Is that contained -- there's nothing
2 contained in the pleadings, either the government's or the
3 defense that would ----

4 MJ [COL POHL]: Well, it doesn't ----

5 LDC [MR. RUIZ]: ---- purport that.

6 MJ [COL POHL]: It doesn't appear to be an issue before
7 me, so I'm not going to give it weight one way or the other.
8 Go ahead.

9 TC [MR. RYAN]: So that was the first point, Judge, where
10 before he was equivocating to his attorney, by this session he
11 was clear on the matter.

12 I also want to state that if you notice in the course
13 of the pleadings by the defense, they go through several
14 arguments about voluntariness and it's the prosecution's
15 burden to prove, which I don't contest under 304, but here he
16 shows you -- or was showing Judge Henley, and now through the
17 transcript, I suggest he's showing you, with his words, "with
18 my complete mental capacity and voluntarily on my part," his
19 clear intent to voluntarily participate in the actions along
20 with his co-accused. He's going out of his way to say it.

21 This is -- this session in December of 2008 is very
22 important for the government's position because the statements
23 I've already made reference to, combined with the colloquies

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1 of the others, prove much of our point. The five of them are
2 acting together; doesn't matter if they're represented or not,
3 they're still in it together. They're begging, essentially,
4 to confess and to plead.

5 And as further evidence of that, Judge, I ask you to
6 consider this. Same transcript, the three pro se accused --
7 Mohammad, bin'Attash, and Ali -- went through colloquies or
8 discussions with the judge about their intention to enter
9 guilty pleas. The only reason they didn't enter finally
10 guilty pleas at that time as is shown in the record, as in the
11 transcript, is that they could not stay together as five. The
12 words of Mr. Mohammad: "I think" -- upon learning the other
13 two couldn't go with him, "I think I would like to withhold or
14 postpone our pleas until the other -- and after the decision
15 is made about our brothers, our Brothers bin'Attash and
16 Hawsawi, if their decision will be clear, then we want to
17 plead together."

18 Mr. bin'Attash: "Me, too. I would like to object to
19 also delay my decision. I would like to postpone a decision
20 until a decision is made for my Brothers Hawsawi and
21 Binalshibh."

22 Mr. Ali: "I would rather reserve and hold my plea
23 until the decision about Brother Ramzi and Brother al Hawsawi

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1 is finalized. The reason -- the reason is our plea request
2 was based on a joint strategy."

3 I submit, Your Honor, the joint strategy is
4 ultimately what produced D-101 a few months later.

5 Next relevant event in the course of events is D-101.
6 It is filed with the commission on 1 March. Its title is "The
7 Islamic Response to the Government's Nine Accusations." I
8 won't read it in its entirety, Judge, because it is long, but
9 I will note the following.

10 MJ [COL POHL]: Mr. Ryan?

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

12 MJ [COL POHL]: Just because I have this motion pending
13 before me about sealing it, it seems to me as I can read it.
14 I know what it says.

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

16 MJ [COL POHL]: So if you wish to refer to any part that
17 indicates Mr. Hawsawi's assent to it, that's fine, but I don't
18 need to have any of the other part of it read. I have it in
19 front of me.

20 TC [MR. RYAN]: I understand.

21 MJ [COL POHL]: I haven't decided what I'm going to do in
22 the motion, but it doesn't do much good if you read the whole
23 inculpatory part of it. Any part that wants to reference that

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1 indicates his joining it, I'll give you that leeway, but as
2 far as other stuff talking about incriminatory activity that's
3 unrelated to that, don't read it. I can read it myself.

4 TC [MR. RYAN]: I understand your position, Judge. I will
5 not do so.

6 I would like to make reference to the certain
7 following points, though, however. There is no indication nor
8 is there any allegation, nor is there any existence of law
9 enforcement involvement or anybody by the United States
10 Government, no urging, no requesting, no interrogation,
11 et cetera. This comes directly from them.

12 MJ [COL POHL]: What was the date of the statement?

13 TC [MR. RYAN]: 1 March 2009, Your Honor.

14 MJ [COL POHL]: And what was the status of the case at the
15 time?

16 TC [MR. RYAN]: At that time, the case was still in
17 existence, but the United States had filed a motion for
18 continuance of the case allowing for time for it to be
19 considered ----

20 MJ [COL POHL]: But it hadn't been dismissed or anything.

21 TC [MR. RYAN]: It had not been dismissed. No, sir.

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

23 TC [MR. RYAN]: The next point I want to make about it is,

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1 if you read it, Judge, it is exactly what they were saying
2 they wanted to do. It is this proclamation or this statement
3 of their own guilt that was made reference to in D-089 and
4 also in the hearings of 8 December. Like D-089, it speaks in
5 the collective, even more so. Over the course of six pages,
6 the words "we," "our," and "us" appear a total of 69 times.

7 Like D-089, there is no indication anywhere in that
8 document that any one of the five diverge off into their own.
9 There is no statement of somebody taking a lesser role or
10 someone saying, well, it was the other guy. It's always in
11 terms of "we," "us," and "our."

12 Also like D-089, it bears all five names again, and
13 this time, at the end, it says -- and, Judge, it's the final
14 page now that I'm talking about. It's just where their names
15 appear, like D-089, it says, quote, signed, colon and then in
16 this particular case, it says the 9/11 Shura Council and then
17 again in the handwriting -- the typewritten, it lists all five
18 of their names. It is in graphic and incendiary terms but it
19 is without a doubt an inculpatory statement.

20 At the same time that this was happening, the accused
21 Mr. Ali, who was apparently acting as the administrative
22 officer for the group, made sure that it was well spread and
23 received by sending versions of it to the clerk, to the

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1 prosecution, and to his mother. Those items are contained
2 within the government's brief at 511B at Attachment E.

3 On the 9th of March, Judge Henley enters an order,
4 and that is the D-101 order. In it he states the following,
5 lists the case, and then at the end of one paragraph states he
6 received this document filed -- his words, sir -- "filed pro
7 se by the above named accused." Now, only in the document
8 above that is the name of the accused is in the title, and
9 it's all five of them listed together.

10 So I point that out, Judge, to say that he's not
11 saying filed by the accused going pro se. What he says is
12 it's filed pro se, meaning without counsel because certainly
13 no counsel would have been -- would have been enjoying the
14 thought of filing this -- "filed pro se by the above named
15 accused," which makes reference to all five of them. "The
16 commission further directs the pleading be provided to the
17 clerk of court for immediate public release. It is so ordered
18 on the 9th day of March 2009."

19 So within that eight-day or so period, Judge. That
20 is Attachment D to our pleading 511B.

21 Now, since that time, Your Honor, there have been
22 thousands of documents filed with the military commission.
23 There have been hundreds of hours spent in court. Never

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1 before 511 that is before Your Honor now has there been any
2 objection to this document, disavowing of this document,
3 recanting of this document, or clarifying of this document.
4 Even in 511, although they bounce back and forth between
5 different theories as to why they seek suppression,
6 Mr. al Hawsawi does not through declaration or affidavit at
7 any point, or any of the other accused either, take a factual
8 position that is -- that this is not his words, not his
9 thoughts, not his desires, not his actions.

10 At the time that it was filed back in March of 2009,
11 although he was represented by counsel, at no point do either
12 his lawyer or the lawyer for Binalshibh contest that it was
13 him. They object, certainly, but do not refute it on a
14 factual basis.

15 The defendant's -- the accused's primary legal
16 argument is that it should be suppressed because the military
17 judge should never have accepted it or maybe never did accept
18 it as a filing. I would submit, Your Honor, the judge's order
19 of course, will speak for itself, but it was quite reasonable
20 for Judge Henley to accept it as a pleading on all five for
21 the following reasons: Three of the five had already gone
22 pro se. Binalshibh and al Hawsawi clearly wanted to go
23 pro se, and the judge probably knew that was coming soon.

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1 D-101 was consistent with everything the military judge had
2 been hearing all along from all of them, and both Judge
3 Kohlmann and then Judge Henley had a practice of allowing the
4 accused who were going pro se to allow lawyers to speak for
5 them and at the same time allow those who were represented to
6 speak for themselves on occasion.

7 But, Your Honor, I submit that regardless of the
8 administrative niceties of whether this was filed or not filed
9 or should have been filed, it is a statement of the accused.
10 It is valid evidence under M.C.R.E. 901 and 304(b).

11 The last point, Your Honor, concerns that which was
12 raised initially by counsel. In short, they don't want --
13 they don't like the fact that we have been providing this
14 document to the victim family members, who travel with us down
15 here to Guantanamo and who, in fact, have traveled with us
16 this week as well and are seated in the back of the room.

17 As I stated, Judge Henley ordered this publicly
18 released. He put it in very plain writing, and he did this
19 sua sponte. There was no pleading from any other party about
20 this. As you can imagine, sir, it was -- it made a bit of a
21 splash. In fact, as of two days ago, when I typed in the
22 words "Islamic response to the government's nine accusations"
23 in Google, I got a return of 549,000 hits. Those hits include

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1 major media outlets like Reuters, the *Miami Herald*, *The New*
2 *York Times*, but it also includes the Congressional Record and
3 mc.mil. It is most certainly a publicly available document
4 for the past seven, eight years now.

5 We have a legal responsibility, a moral
6 responsibility, and a personal responsibility to the VFMs that
7 the defense simply does not have. We believe that providing
8 D-101 satisfies the most basic obligation we have to them,
9 which is to prove -- to give them concrete evidence, proof, as
10 to who it was that changed their lives so dramatically on that
11 day in September many years ago.

12 Judge, that's all I have unless the court has
13 questions.

14 MJ [COL POHL]: Mr. Ryan, the defense pleading indicates
15 that since -- since Mr. Hawsawi was a represented accused, he
16 wasn't authorized to file pleading and, therefore, this was an
17 improperly filed plead and it should be disregarded. How do
18 you respond to that?

19 TC [MR. RYAN]: Sir, first of all, Judge Henley did
20 receive it, and as I read to you from his order, he made no
21 delineation as to one accused as to another. He accepted it
22 as to all five. That is the way it reads.

23 MJ [COL POHL]: Okay. But let's move on from Judge

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1 Henley.

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

3 MJ [COL POHL]: What I'm saying is let's just say
4 conceptually. Let's not just talk about this particular one.
5 Can a represented accused file pro se pleadings that a court
6 should consider?

7 TC [MR. RYAN]: I would submit, Judge, that's going to
8 depend on the circumstances. I think you have firsthand
9 knowledge of this. In a particular case where circumstances
10 are not the norm, a judge does what he sees as the right thing
11 under certain circumstances.

12 MJ [COL POHL]: But some of those things, and I mean, in
13 this particular case, most of those issues have come up in the
14 course of representation to determine who's representing them.

15 TC [MR. RYAN]: Right.

16 MJ [COL POHL]: Which I think is a separate issue. But as
17 we came up in those discussions, what I heard the counsel tell
18 me, the defense counsel tell me, is that the decisions to file
19 motions are the decision of the lawyers, not the accused.

20 TC [MR. RYAN]: In normal situations, yes, sir.

21 MJ [COL POHL]: Okay.

22 TC [MR. RYAN]: In this particular case, what we have is
23 three pro se, so there's no question they can file it.

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1 MJ [COL POHL]: No, but then would I be using a statement
2 of one of the other three against Mr. Hawsawi?

3 TC [MR. RYAN]: No, sir, because it's a joint statement.
4 It is all of them.

5 As to how it gets to the commission is one issue; but
6 when it is written, it is their joint statement.

7 Now, if it came to the United States prosecution
8 team ----

9 MJ [COL POHL]: So let me -- I think I understand what you
10 are saying.

11 So if Mr. Hawsawi and at the time Mr. Binalshibh,
12 assuming they are represented by counsel at the time ----

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

14 MJ [COL POHL]: ---- they couldn't submit the pleading to
15 me, but the other three could have; and therefore, since under
16 your view of Mr. Hawsawi has adopted it, the fact that he
17 couldn't have given it to me directly is overcome by the fact
18 that others could have given it to me directly and he just --
19 therefore, it's properly before the commission.

20 TC [MR. RYAN]: The second part of your point I certainly
21 agree with. The first part where it concerns if they were by
22 themselves, that being the represented parties, I would say it
23 completely depends on the judge and what he does at the time.

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1 Judge Henley could have looked at it and said I accept it as
2 to three or but not to two. And he could have said, I
3 couldn't accept it as filed.

4 MJ [COL POHL]: Am I bound by Judge Henley's decision on
5 that?

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

7 MJ [COL POHL]: Oh, I am?

8 TC [MR. RYAN]: I believe you are, sir.

9 MJ [COL POHL]: Okay.

10 TC [MR. RYAN]: Last part of this and mostly of all, it
11 doesn't matter. Administrative niceties as how it gets there
12 don't matter as much here. We can prove as well as other
13 things that which we'll put on during the trial, that this was
14 their valid statement, that this was their voluntary
15 statement. Whether it was a carrier pigeon or the court
16 system, it is with us now and we intend to introduce it as
17 evidence.

18 MJ [COL POHL]: Thank you.

19 Mr. Ruiz, do you wish to respond today, or do you
20 wish to think about it and respond on Wednesday?

21 LDC [MR. RUIZ]: Judge, I would appreciate the opportunity
22 to respond on Wednesday.

23 MJ [COL POHL]: Okay. That's what we'll do, then.

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1 Just so the way ahead. It seems to me that's the
2 last open thing we have scheduled for today. What I have
3 listed on the 505 list is 425, 375N, 444. I think 445 is --
4 as I think is -- I have a note here, which of course, I can't
5 read my own writing. We have already ordered the 806, there's
6 awaiting discovery.

7 LDC [MS. BORMANN]: That's correct. That's not ripe.

8 MJ [COL POHL]: That's what I thought. 498, 133RR, 517,
9 399. Are the 350 ready for the 505(h)?

10 LDC [MR. CONNELL]: We can at least talk about it, sir.

11 MJ [COL POHL]: Okay. So I've got 350C and O, both from
12 Mr. Connell. Any other ones I'm missing?

13 LDC [MS. BORMANN]: Judge, did you have 399 for 505? I
14 misunderstood.

15 MJ [COL POHL]: Yes.

16 LDC [MS. BORMANN]: 399 is we're waiting for the
17 classification of something that was submitted in December.
18 So we don't have it yet.

19 MJ [COL POHL]: So that's not ready for the ----

20 LDC [MS. BORMANN]: It's not ready yet.

21 MJ [COL POHL]: Okay. Got it.

22 LDC [MS. BORMANN]: And on 498, we're in the same boat.

23 Oh, I'm sorry, we're waiting for discovery on 498. My

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1 mistake.

2 LDC [MR. RUIZ]: Judge, we do have a notice on 350, which
3 is 350W.

4 MJ [COL POHL]: Okay. So, Ms. Bormann, 498, you're still
5 waiting for something before we do the 505(h) hearing?

6 LDC [MS. BORMANN]: Correct. The government says that the
7 discovery is forthcoming.

8 MJ [COL POHL]: Okay. Okay.

9 Then to recap, 425, 375N, 444, 133RR, 517, 350C, 0,
10 and W. That's what's on my list. And that's what we'll do.
11 We'll reconvene tomorrow at 0900 in a private session. The
12 detainees can remain here until 1500 hours and then return to
13 the camp.

14 LDC [MR. NEVIN]: Would 1600 be possible, Your Honor?

15 MJ [COL POHL]: 1500.

16 LDC [MR. NEVIN]: All right. Thank you.

17 MJ [COL POHL]: Commission is in recess.

18 [The R.M.C. 803 session recessed at 1227, 21 August 2017.]

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