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1 [The R.M.C. 803 session was called to order at 1100,
2 24 August 2017.]

3 MJ [COL POHL]: Commission is called to order. Any
4 changes in the parties except we now have the presence of
5 Mr. Hawsawi?

6 CP [BG MARTINS]: Not for the United States, Your Honor.

7 LDC [MR. NEVIN]: No, Your Honor.

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

9 LDC [MR. HARRINGTON]: No, Judge.

10 LDC [MR. CONNELL]: No change, sir.

11 MJ [COL POHL]: Mr. Ruiz. Okay.

12 Mr. Ruiz, do you want to say anything before I say
13 something?

14 LDC [MR. RUIZ]: Judge, perhaps a couple of points I want
15 to clarify. It was brought to my attention that maybe I
16 wasn't as clear as I intended to be. Number one, we had no
17 contact with Mr. al Hawsawi since the Monday hearing.

18 I had -- we did have previously scheduled hearings --
19 I mean, excuse me, meetings with him; and typically, we would
20 have exercised the ability to meet with him, for instance,
21 yesterday, when we did not have hearings.

22 Those meetings were cancelled by Mr. al Hawsawi and
23 they were indeed cancelled in relation to the issue that I

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1 raised before the commission today.

2 That's all I have to say, Judge.

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

4 What I'm about to say is directed to Mr. Hawsawi, but
5 it also applies to all other detainees.

6 If you look around this room, you see how many people
7 are implicated in just getting these hearings conducted. At
8 the request of the defense, I permitted you -- I'm speaking to
9 the accused here -- the option to waive your presence after
10 being advised of your rights. We have done this for years
11 now. Okay.

12 This issue has come up before about whether the
13 waiver is voluntary or not. I'm not faulting Mr. Ruiz about
14 when he got notice of the issue, and that's why I'm talking
15 specifically to the detainees here, and most importantly to
16 you, Mr. Hawsawi.

17 In the future, if I get anything but an unconditional
18 waiver of your presence, we will, A, order you to be present;
19 and in the future, you will not be given the opportunity to be
20 present -- to be absent. I want to make it very clear.

21 We're not going to stop for two hours like we did
22 today and we have in the past, assuming it's within the
23 detainee's control. I know with the ICRC issue one time, and

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1 I do not hold that against the accused. But this issue has
2 come up, and I look to all five accused when I say this: If
3 you wish to be here, you have a right to be here. If you wish
4 not to be here, you can choose not to be here, but it's going
5 to be voluntary and knowing.

6 If you -- if this scenario comes up again where a
7 detainee signs a waiver form, and then in court finds out it
8 really isn't a voluntary waiver because of some other
9 information, whether written or otherwise, that requires me to
10 bring the detainee in here. Absent extraordinary
11 circumstances, that individual detainee will no longer be
12 given the option not to attend and will attend every time, no
13 matter what he wants. I hope that is clear.

14 That being said ----

15 LDC [MR. RUIZ]: Judge?

16 MJ [COL POHL]: Yes, Mr. Ruiz.

17 LDC [MR. RUIZ]: Judge, I perfectly understand and share
18 in your concerns in terms of efficiency. I certainly came
19 here this morning at a mindset to argue a very important
20 motion and spent a great deal of time and energy preparing for
21 that, not expecting to go through this process.

22 However, I will say, Judge, in what you just said, I
23 take it that if it's not within the detainee's control, that

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1 you will take that into account. I will simply say that this
2 is a circumstance in regards to the manner in which
3 Mr. al Hawsawi has been transported, the van itself and the
4 speed, which is not within his control.

5 It is a matter of how JTF and the individual drivers
6 choose to effect that transportation from point A to point B.
7 And I will tell you, because I want you to understand there's
8 been good faith in trying to handle this problem so it doesn't
9 become an issue for the commission. That's why I've said to
10 you, I have been trying to handle this issue and speak to
11 people in authority outside of the court about this issue.
12 I've had face-to-face conversations with them where they've
13 assured me they're going to look into the issue. There are
14 only specific instances where this happens and it seems to be
15 based on specific drivers, but this is just that kind of issue
16 that's outside of Mr. al Hawsawi's control.

17 One of the things I want to make clear, and I think
18 the record reflects this, is that Mr. al Hawsawi has never
19 been one to raise these issues all the time except when
20 they're legitimate issues. This is one such legitimate issue.
21 I'm going to continue to speak with the JTF and the
22 transportation force to try to see if there's a solution to
23 this issue.

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1 But it's not Mr. al Hawsawi creating this problem,
2 Judge, and it's not without us trying to resolve this problem
3 outside of the court's time and outside of the court's
4 attention.

5 MJ [COL POHL]: Okay, but Mr. Ruiz, just make sure you
6 understand what I'm saying.

7 There is a myriad of possible reasons that an accused
8 may not wish to show up that they could blame on a third
9 party, okay? That's not what I'm talking about. When I said
10 about reasons beyond his control, I was talking about the time
11 that the Government, big G, scheduled the ICRC meetings at the
12 same time the hearing was going on. That's what I'm talking
13 about.

14 If there's an issue about the JTF system or something
15 else, then he needs to come and tell me about it. I can't use
16 this standard, well, it's the JTF's problem, therefore I can
17 waive it and then not waive it. You know, don't sign the
18 waiver, then. I'm asking ----

19 LDC [MR. RUIZ]: I understand.

20 MJ [COL POHL]: ---- the attorneys to explain this to
21 their clients.

22 LDC [MR. RUIZ]: Right.

23 MJ [COL POHL]: What I'm talking about here, you signed

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1 the waiver. Remember the one time we had waivers and people
2 would write on them and different things. I said don't do
3 that anymore.

4 LDC [MR. RUIZ]: I understand.

5 MJ [COL POHL]: That's all I'm saying. When I say outside
6 the control, that's not for the detainee to determine, today
7 it's outside of my control because of some third party, the
8 JTF, whatever, is doing this. If there is an issue with the
9 third party interference, then it's to be brought to me in a
10 timely fashion. And I understand, Mr. Ruiz, I'm not faulting
11 you on the notice of this thing. Okay.

12 That wasn't my frustration. My frustration was -- is
13 we had a system in place that not to write on other pieces
14 of -- on that piece of paper so we were on notice and now,
15 apparently, we can end-run around that and again -- I'm not
16 blaming you, it came from your client -- by filing a
17 privileged piece of information to the attorney, and now we
18 sit around and don't do anything for two hours.

19 LDC [MR. RUIZ]: For what it's worth, Judge, it wasn't
20 meant to be an end-around. Mr. al Hawsawi actually intended
21 by not signing or putting anything else on the waiver, he
22 thought we could, in fact, go forward. I have explained to
23 him that it has the same effect.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. RUIZ]: But his intent was actually to do that so
3 as to avoid us having to go through this process.

4 MJ [COL POHL]: I -- I'm sure, and I understand this. If
5 his complaint was he didn't want to be in the transport van
6 today, and then the end result of what happened is he's in the
7 transport van today twice, I take it your representation is
8 that this is not the result he wanted.

9 LDC [MR. RUIZ]: Absolutely.

10 MJ [COL POHL]: But just explain to him, and this goes to
11 all, if this comes up again, that the procedure is pretty
12 clear in my mind, or was, you either choose not to come or you
13 come. But this is the last time we're going to go through
14 this drill. So I mean ----

15 LDC [MR. RUIZ]: This is an issue, unfortunately, I want
16 it to be, again, part of the reason it wasn't brought to you
17 earlier is the attempt to not make it a litigation issue and
18 litigate it further.

19 MJ [COL POHL]: And ----

20 LDC [MR. RUIZ]: But we have to do it.

21 MJ [COL POHL]: I appreciate and encourage that, but I
22 don't appreciate and encourage that if that doesn't work out,
23 I only get involved when we have this type of situation. With

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1 me there, Mr. Ruiz?

2 LDC [MR. RUIZ]: I understand, and we will get to work on
3 the issue to the commission's attention.

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

5 LDC [MR. RUIZ]: Oh, one more thing, Judge.

6 Mr. al Hawsawi has indicated that he would like to be able to
7 return to the camp. Obviously, his intent was never to be
8 here today in the first place.

9 MJ [COL POHL]: Really.

10 LDC [MR. RUIZ]: So he would like the opportunity to
11 return.

12 MJ [COL POHL]: Isn't the issue the transportation issue?
13 I mean, that's what you told me.

14 LDC [MR. RUIZ]: He's got to go back either way.

15 MJ [COL POHL]: He's got to go back one way or the other.
16 He will stay for all today and he will make one trip back when
17 we're done today.

18 Okay. Just on a scheduling matter is that I was
19 deferring ruling on the 425 505 matters because of the volume
20 of them. After reviewing them most of yesterday, I've gotten
21 through all of them and, therefore, I'm going to put 425 back
22 on the docket. I want to do the open session on 425 today.

23 Mr. Nevin, you look -- well, it was on the docket.

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1 We just took it off the docket. So I'm not saying we're going
2 to do it right now. But my indication was do the open session
3 today.

4 LDC [MR. NEVIN]: And you're going to do ----

5 MJ [COL POHL]: And closed session tomorrow. Probably. I
6 mean, depending what we get done. I was hoping to do both
7 today, but we can't. I'm going to tell you what was in the
8 505 ruling, Mr. Connell, in a second.

9 LDC [MR. NEVIN]: So what we would do in the open session
10 on the 425, we would argue the motion to you?

11 MJ [COL POHL]: Yes. The 425, there's an open portion and
12 then a closed portion.

13 LDC [MR. NEVIN]: Okay. Well, I will say on my part, I
14 forwent the last whatever it is, 24 hours or so, 48 ----

15 MJ [COL POHL]: Okay. You will get time.

16 LDC [MR. NEVIN]: ---- preparing. In terms of preparing,
17 because there remains the issue of conducting a voir dire of
18 the military judge ----

19 MJ [COL POHL]: Okay.

20 LDC [MR. NEVIN]: ---- and then arguing these ----

21 MJ [COL POHL]: That's what I recall.

22 LDC [MR. NEVIN]: ---- arguing these issues, so ----

23 MJ [COL POHL]: We'll do it after lunch.

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1 LDC [MR. NEVIN]: Okay.

2 MJ [COL POHL]: Okay. Mr. Connell, as far as your 505
3 notice, which you will get in writing, just to tell you what
4 it will say so you're not -- you know what you can argue in
5 the closed session. 425HH, everything except attachments G, H
6 and L; 425II, with the understanding that you withdrew 3M and
7 you did not intend to disclose any classified evidence in
8 paragraphs 3D, E, K, and L. The rest of it is relevant for a
9 fair determination.

10 All of 425JJ is denied, and I'll tell you why, is
11 425JJ encompassed over 800 pages. Each of those were
12 multiple -- a lot of them were multiple pages of the same
13 thing. I have no idea exactly what is the relevant
14 information that you wanted to argue. The notice has to be a
15 summary, but with some particularity. I look at a 30-page
16 document or an X-amount of pages of a transcript, and I have
17 to -- and I spent a lot of time looking at it, and I said,
18 "Why am I trying to figure out what's relevant to the issue
19 before me?" So given the lack of particularized notice, all
20 of the requested 425JJ has been denied.

21 425K was granted, and that can be argued -- KK. I'm
22 sorry. That being said ----

23 LDC [MR. CONNELL]: May I be heard briefly, Your Honor?

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1 MJ [COL POHL]: Sure.

2 LDC [MR. CONNELL]: Your Honor, I would request permission
3 to provide the particularity that the military commission
4 wants out of JJ. Much of that discovery was produced to us on
5 26 July. The -- we're in a hurry-up posture. I was trying to
6 get it to you as fast as I could. The -- I would ask -- I
7 understand your issue. I get it. It's a lot of pages, and
8 sometimes it's one sentence out of a document. I get it.

9 So what I would ask is for leave of court to file a
10 supplemental document which provides the particularity that
11 the military commission needs.

12 MJ [COL POHL]: And when would you file said document?
13 And I'm not -- I even -- I have seen the volume of the pages.
14 I have read them all.

15 LDC [MR. CONNELL]: What I would have, Your Honor, I have
16 highlighted versions, right. My own version has what's
17 highlighted, what I need. You know, I'll produce it whenever
18 you say.

19 MJ [COL POHL]: But I was attempting to resolve 425 this
20 session. That does not seem to be consistent with your
21 ability to provide me that information. And more importantly
22 is -- it's not just me -- is you will have to do another
23 505(g) notice, another 505(h) hearing.

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1 LDC [MR. CONNELL]: I understand, sir.

2 You told me your ruling. I understand it. I'm not
3 arguing with it. What I am instead saying is it prejudices us
4 on our argument to not be able to argue the classified
5 information that is relevant.

6 I understand that you need more particularized notice
7 and the government needs more particularized notice, perhaps.
8 I get that. I'm just asking for -- and if you say, you know,
9 have it done, have it here by tonight, then I'll have it here
10 by tonight. But I don't want important evidence to not -- to
11 go unargued because of a procedural issue.

12 MJ [COL POHL]: You're prepared to argue the open portion
13 of 425?

14 LDC [MR. CONNELL]: Yes, sir. I had to send for my notes,
15 but yes.

16 MJ [COL POHL]: Okay. Trial Counsel, if he gives you a
17 particularized notice by today and we can do a 505(h) tomorrow
18 and resolve 425 tomorrow, is that acceptable to the
19 government?

20 TC [MR. SWANN]: Your Honor, my position on this all
21 along, having read the 857 pages that he provided, pages I
22 note that we gave them as part of the 308 process, none of
23 those pages are relevant. Nothing would change. My argument

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1 would be the same. There's no relevance contained in those
2 pages.

3 MJ [COL POHL]: Okay. But, Mr. Swann, that's not what I
4 asked you. I asked you if he provided you a more detailed,
5 more particularized notice, if you can do that with the 857
6 pages ----

7 TC [MR. SWANN]: Sir, if you want to entertain that, I'll
8 entertain anything you want to hear.

9 MJ [COL POHL]: Well, if we can accomplish that, you can
10 provide that more particularized notice, then enable us to do
11 a 505(h) hearing tomorrow, and then we'll do the 806 after
12 that, then that will work.

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

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: Your Honor, may I have just a moment?
16 Maybe I can get it -- have someone start on it while we're
17 arguing.

18 MJ [COL POHL]: Sure. But okay, that operates under the
19 assumption that your particularized notice is enough ----

20 LDC [MR. CONNELL]: I understand.

21 MJ [COL POHL]: ---- to enable me to make a decision.

22 LDC [MR. CONNELL]: I understand.

23 MJ [COL POHL]: Mr. Nevin.

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1 LDC [MR. NEVIN]: So could you clarify where -- how we're
2 going to do this?

3 MJ [COL POHL]: What we're going to do, we're going to do
4 the 425 open today.

5 LDC [MR. NEVIN]: Okay.

6 MJ [COL POHL]: I mean, I'm not quite sure why we delayed
7 it to begin with, quite frankly, because they are not -- it's
8 an open -- one part's open, one part's closed, so what it
9 is -- but we did -- so that's last thing we're going to do
10 today. If you want to ask me some questions, I'll give you
11 that opportunity.

12 LDC [MR. NEVIN]: Okay. Got it.

13 MJ [COL POHL]: We will do that and then we'll hopefully
14 get the rest of the 425 tomorrow. We'll do the 505(h) hearing
15 on the 425JJ, and then we'll do the other -- and you will --
16 you should have already gotten the ruling on the other 505
17 matters ----

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

19 MJ [COL POHL]: ---- for tomorrow. Just while we're on
20 that topic, you got a copy of that?

21 LDC [MR. CONNELL]: What's that, sir?

22 MJ [COL POHL]: Of the -- we did an omnibus order. We
23 issued an omnibus order.

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1 LDC [MR. CONNELL]: Yes, sir, I did.

2 MJ [COL POHL]: I see those are ready, I think, one of the
3 questions, was 350 ready for tomorrow?

4 LDC [MR. CONNELL]: 350 is not ready for tomorrow, but it
5 doesn't have anything to do with the 505. There's guidance
6 that's in the pipeline.

7 MJ [COL POHL]: Okay. We'll get started on it and we'll
8 go from there. Thank you, Mr. Connell.

9 LDC [MR. CONNELL]: May I have the court's indulgence for
10 just a moment?

11 [Pause.]

12 MJ [COL POHL]: While he's doing that, just to give you a
13 heads up on the order of march, we'll do 511 -- then I'll
14 repeat it for Mr. Connell later on -- 133, 444, 517. Although
15 I said it was going to be last, I want to do the 478 last.
16 We'll do 425 and then 478, with the understanding that -- I
17 don't think we'll get there -- but 425 will not be done before
18 lunch, which will be approximately 1300 hours.

19 And then what I have for the closed session, just to
20 let you know, is 133, 350, 444, 517, and 425.

21 Okay. Do I need to repeat that for you, Mr. Connell?

22 LDC [MR. CONNELL]: I'm sorry, sir?

23 MJ [COL POHL]: Do I need to repeat that for you?

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1 LDC [MR. CONNELL]: No.

2 MJ [COL POHL]: Got it.

3 LDC [MR. CONNELL]: Thank you.

4 MJ [COL POHL]: Okay. That brings us to Mr. Ruiz's
5 argument on 511.

6 [Pause.]

7 LDC [MS. BORMANN]: Judge, I have a request.

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

9 LDC [MS. BORMANN]: Can Captain Brian Brady be excused now
10 that 425 is back on the call?

11 MJ [COL POHL]: Sure.

12 LDC [MS. BORMANN]: After you told us on Tuesday it was
13 going to be heard in October ----

14 MJ [COL POHL]: I know.

15 LDC [MS. BORMANN]: ---- I need some preparation done.

16 MJ [COL POHL]: Yes, he can be.

17 LDC [MS. BORMANN]: Thank you.

18 LDC [MR. RUIZ]: Judge, I'll start with a brief
19 housekeeping matter.

20 There were two exhibits that I submitted to the
21 commission during our previous session, and they were marked
22 and provided to the parties, and they were also admitted in
23 the record.

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1 I understand there is a correction on the designation
2 of those exhibits.

3 MJ [COL POHL]: Okay.

4 LDC [MR. RUIZ]: So I want to put that on the record.

5 MJ [COL POHL]: What were they, and what are they now?

6 LDC [MR. RUIZ]: Judge, the first exhibit was a 42 U.S.C.
7 Section 10/607, Services to victims. The correct designation
8 I'm informed should be 511(MAH)E [sic].

9 MJ [COL POHL]: Okay.

10 LDC [MR. RUIZ]: The second document was the Department of
11 Defense instruction that relates to VWAP, the victim witnesses
12 procedures. The correct designation should be 511F.

13 MJ [COL POHL]: This has been coordinated with the court
14 reporters?

15 LDC [MR. RUIZ]: Yes. They alerted me that there is a
16 designation change.

17 MJ [COL POHL]: They're usually pretty good at that stuff.
18 So thank you.

19 LDC [MR. RUIZ]: Your Honor, I want to begin by addressing
20 some of the points that Mr. Ryan made during his argument.

21 First, a question that was asked by the military
22 judge was whether you would be in a position to use a
23 statement submitted by other co-accused in this case against

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1 Mr. al Hawsawi. Mr. Ryan indicated no, and then made
2 references to Judge Henley's handling of that submission. The
3 response Mr. Ryan gave is you found on page 16,181 of the
4 transcript, lines 20 through 22.

5 Mr. Ryan says, "he," referring to Judge Henley, "made
6 no delineation as to one accused as to another. He accepted
7 it as to all five. That is the way it reads."

8 Again, in page 16,184 of the transcript, lines 1
9 through 3, Mr. Ryan says, "Judge Henley could have looked at
10 it and said I accept it as to three or -- but not two. And he
11 could have said, I couldn't accept it as filed."

12 The representation that that document was accepted as
13 to all five and that there was no delineation made is
14 incorrect.

15 Judge, specifically in 511(MAH) Exhibit E, page 3,
16 footnote 6, paragraph 5 ----

17 MJ [COL POHL]: Hold on a second, please, Mr. Ruiz.

18 LDC [MR. RUIZ]: Sure.

19 MJ [COL POHL]: Do you have it? 511E?

20 LDC [MR. RUIZ]: 511(MAH), E.

21 MJ [COL POHL]: It's the Services to victims?

22 LDC [MR. RUIZ]: No, sir. This is Exhibit E [sic], and it
23 is D -- it is an order from the military judge. It's D-101.

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1 So this is our initial filing on the pleading, 511(MAH).

2 MJ [COL POHL]: What was the date of the filing?

3 LDC [MR. RUIZ]: 8 June 2017.

4 MJ [COL POHL]: And again, the attachment number?

5 LDC [MR. RUIZ]: E. E, Judge.

6 MJ [COL POHL]: Got it. Okay. Go ahead.

7 LDC [MR. RUIZ]: If I can refer your attention to the very
8 last sentence of page 2, it begins "Once a document is," and
9 follows onto the next page, Judge.

10 MJ [COL POHL]: Okay. Just a second. Which page?

11 LDC [MR. RUIZ]: Page ----

12 MJ [COL POHL]: Start on the bottom of page 2.

13 LDC [MR. RUIZ]: Page 2. If you begin with the very last
14 sentence, it begins with "Once a document is" ----

15 MJ [COL POHL]: Got it. Go ahead.

16 LDC [MR. RUIZ]: Sure. Judge, it goes on to read, "Once a
17 document is submitted to the Commission for consideration,"
18 and this is important, "by counsel representing an accused or
19 an unrepresented accused proceeding pro se, the public should
20 generally be able to determine for itself the correctness of a
21 judicial decision..."

22 The importance of that language is the judge clearly
23 makes a delineation that the document is submitted either by

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1 counsel representing an accused or an unrepresented accused
2 proceeding pro se. We know that at this time Mr. al Hawsawi
3 was still represented. Mr. Ryan has affirmed that, in fact,
4 does not contest the fact that Mr. al Hawsawi was represented
5 throughout the timeline that governs this issue.

6 If you go down to the bottom of page 3, Judge, and
7 look at footnote number 6, footnote number 6 of Judge Henley's
8 order of 18 March 2009 says as follows: "That said, the
9 record will reflect that counsel for Mr. Al Hawsawi and
10 Mr. Bin al Shibh did not join in the filing."

11 And then, of course, Judge, referring back to the
12 paragraph I just read, the judge has already articulated that
13 only counsel representing an accused or unrepresented accused
14 can submit such documents. It is clear he makes a distinction
15 here. It is clear on the face of this order that he does not
16 accept it as a joinder by Mr. al Hawsawi's counsel or Mr
17 Binalshibh's.

18 MJ [COL POHL]: Well, isn't it clear from footnote 7 that
19 he's not addressing the admissibility of the document?

20 LDC [MR. RUIZ]: That was going to be my next point.

21 MJ [COL POHL]: Okay.

22 LDC [MR. RUIZ]: But I think I wanted to bring to your
23 attention that there was a clear statement by the judge ----

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1 MJ [COL POHL]: Uh-huh.

2 LDC [MR. RUIZ]: ---- in regards to who was joining this
3 pleading, who was not joining this pleading. And you took my
4 next point from me, which is footnote number 7, where he said
5 he's not making any determination as to this admissibility at
6 this time.

7 [Pause.]

8 LDC [MR. RUIZ]: Judge, you asked a question regarding the
9 status of the case at the time, and you asked Mr. Ryan what
10 was the status of the case. Mr. Ryan's response was the case
11 was still in existence.

12 Just one moment, Judge. I need to locate a document.

13 [Pause.]

14 LDC [MR. RUIZ]: Judge, I've provided to the commission a
15 number of documents that I would like to enter into evidence
16 for the purposes of this hearing. They have been marked as
17 511(MAH)G, 511(MAH)H, and 511(MAH)I [sic].

18 I've provided that to -- copy to the prosecution and
19 copy to counsel for the co-accused.

20 MJ [COL POHL]: Were these referenced in your motion?

21 LDC [MR. RUIZ]: These were issues that were raised by
22 Mr. Ryan's argument in relation to the status of the case.
23 They were not -- they were not referenced in our motion.

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1 These are in reply and response to Mr. Ryan's statements
2 concerning, number one, the status of the case, and number
3 two, concerning his answer to you regarding the --
4 Mr. al Hawsawi's competency and the question of competency
5 during the pendency of this submission.

6 The first one, Judge, is a transcript from 21 January
7 2009 when the commission first addresses the request for a
8 four-month continuance.

9 MJ [COL POHL]: But is there -- I mean, I'm wondering, is
10 there any issue here? I mean, Mr. Ryan had said that at the
11 time the case was continued pursuant to the request of the
12 government.

13 LDC [MR. RUIZ]: I'm not ----

14 MJ [COL POHL]: All these documents say it was continued
15 at the request of the government.

16 LDC [MR. RUIZ]: Yes, but ----

17 MJ [COL POHL]: The question was whether it was dismissed
18 or not ----

19 LDC [MR. RUIZ]: Sure.

20 MJ [COL POHL]: ---- at the time of the submission, and it
21 appears to be uncontroverted that it was not. So why am I --
22 why are you -- it's not like you're agreeing with Mr. Ryan.

23 LDC [MR. RUIZ]: No, I am agreeing.

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1 MJ [COL POHL]: You want to show how much evidence there
2 is to support his position.

3 LDC [MR. RUIZ]: I'm agreeing that the case was in
4 existence but I want to tell you the parameters of the
5 existence of the case. Saying the case is in existence makes
6 it sound like it's business as usual. These documents give
7 you greater insight into what exactly that meant.

8 So for instance, Judge, if you look at the bottom
9 of -- and actually, are you accepting these, or ----

10 MJ [COL POHL]: Yeah. I'll accept them, but I got it.
11 The case was continued, there was no hearings but the case was
12 continued at the request of the government, but it had not
13 been dismissed. I got it. I don't, quite frankly, need
14 anything else.

15 LDC [MR. RUIZ]: I understand.

16 The government's understanding, however, is important
17 when we get to the submission of this document. So I'm going
18 to make some quick points. I'm not going to expend a lot of
19 time and energy on these.

20 But in the bottom of 511(MAH)G, Mr. Trivett is asked
21 to what extent they're asking this continuance, does it apply
22 to all matters before the commission?

23 Mr. Trivett's answer in line 22 -- excuse me, line

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1 23, is it would be as to all matters.

2 Now, on the second page, lines 22 through 24,
3 Ms. Lachelier, at the time representing Mr. Binalshibh, says,
4 "We do believe that any continuance that is granted can be
5 used to resolve issues regarding discovery and proceedings
6 relating to the pending competency..."

7 So it wasn't just a matter, Judge, that there weren't
8 any hearings being held; it was a matter that there wasn't any
9 other business going on. There were no motions being filed.
10 There were no submissions being made. It was clear to Judge
11 Henley before he issued the next exhibit, 511(MAH)H, on the
12 21st day of January of 2009, that the only business the
13 commission would be handling, if all, would be issues related
14 to discovery and issues relating to the pending competency of
15 Mr. al Hawsawi and Mr. Binalshibh. And the government itself
16 agreed that the continuance applied and halted matters as to
17 all matters, not just the commission sessions. But I think
18 that's an important distinction because we're talking about
19 filing of a document.

20 And finally, Judge, in the last exhibit, 511(MAH)I,
21 the importance of this exhibit is to rebut Mr. Ryan's
22 argument, and I quote his response when the issue of 706 was
23 raised. He said, "It really wasn't -- nobody ever seriously

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1 took at issue." I think that's -- oh, there was never any
2 real significant concerns about competency, Judge, is what
3 Mr. Ryan said to you in court on Monday. That's incorrect.

4 511(MAH)I, Judge, indicates that there was, in fact,
5 a pending R.M.C. 909(e) hearing, and that it was pending for
6 September of the same year, set to proceed on 25 [sic]
7 through 25 September 2009.

8 So I bring that to the court's attention simply
9 because I want you to have accurate information as to that
10 representation. I am also very mindful that when the 706
11 issue was raised in court, your response was that issue is not
12 before you; and I agree, Mr. al Hawsawi's issue of
13 Mr. al Hawsawi's competency is not before you in the sense
14 that you have to order any kind of inquiry or determine
15 anything along those lines.

16 But the fact that at the time that this submission
17 was provided to the court, there was a pending competency
18 determination that was unresolved absolutely refutes
19 Mr. Ryan's assertion and his attempts to wing this to the side
20 that there was no real significant concern about competency.
21 We know for a fact that Judge Henley was concerned about
22 competency. We know that he scheduled an R.M.C. 909(e)
23 hearing and he did so in P-010, which is 511(MAH)I.

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1 So to say there was no real significant concern in
2 the face of an order that directs otherwise, I think,
3 sufficiently rebuts that assertion, Judge. And I think that
4 is important. The government recognizes that it is important
5 because all along they have said this is an admission.
6 Admission brings into analysis issues of voluntariness and, of
7 course, we know, Judge, from Judge Henley on December 8, 2008,
8 which is the date that Mr. al Hawsawi -- excuse me, Mr. Ryan
9 called a very important date for him, or for them.

10 Judge, you may recall December 8, 2008, was the day
11 where Mr. Ryan indicated D-089 was addressed. And, in fact,
12 Mr. Ryan quoted a portion of that transcript, but he didn't
13 quote the entire transcript, obviously, and he didn't quote
14 the entire context of the exchange between Mr. al Hawsawi and
15 Judge Henley.

16 And what Mr. Ryan left out was this, Judge. After
17 Mr. al Hawsawi makes his statements, Judge Henley responds as
18 follows. This is December 8, 2008, pages 757 to '58 of the
19 transcript, and this is also referenced in our motion on page
20 5, AE 511C(MAH) in our reply.

21 Judge Henley responds and says, "...testing must be
22 completed. That won't happen today or in the near future."

23 So the point being, Judge, on December 8, 2008, Judge

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1 Henley clearly articulates on the record that there is testing
2 pending and it won't be completed anytime in the future.

3 Now you have the order which is the bookend to that
4 time process, which sets that timeline for September of 2009.

5 So Mr. Ryan may characterize that as no serious
6 concerns about competency, but the record clearly indicates
7 otherwise. I'm giving you concrete proof that rebuts that
8 assertion, Judge.

9 Mr. Ryan also made the assertion, Judge, that reports
10 had been issued. He argued on Monday that reports had been
11 issued in reference to 706. That's incorrect, and that's why
12 I think it's important to give you the timeline, that on
13 December 8, Judge Henley says there's still testing pending.
14 We have an order that sets that for September of '09.
15 Mr. Ryan says that reports have already been issued in an
16 attempt to make the argument that that is no longer an issue
17 before the court. That's not accurate.

18 MJ [COL POHL]: Does it make any difference?

19 LDC [MR. RUIZ]: It might.

20 And the reason it might is because all along the
21 prosecution has been arguing admissions, confessions, issues
22 that relate to what inquiry a court or may or may not have had
23 to engage in, which is voluntarily. Judge Henley indicated

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1 that he could not engage in a legally significant inquiry
2 about Mr. al Hawsawi on specific issues because there was a
3 706 pending.

4 MJ [COL POHL]: Yeah, but as I read the record, Judge
5 Henley wasn't making any determinations sua sponte. He simply
6 said that the defense, the counsel there thought the client
7 needed a 706 examination. Quite frankly, that's all it takes
8 to get one, and there's no determination there. And I don't
9 see anywhere in your pleadings that you're arguing that the --
10 that at the time Mr. Hawsawi was incompetent or somehow
11 mentally ----

12 LDC [MR. RUIZ]: Incapable.

13 MJ [COL POHL]: ---- incapable of entering this. You have
14 argued, A, they can't show a foundation and B, they -- you
15 know, they can't show a foundation. It's a pleading from a
16 representative of the accused and, therefore, shouldn't be
17 considered.

18 LDC [MR. RUIZ]: That's a correct statement. However, if
19 you look at our reply, the prosecution's response brings the
20 issue full front and center in terms of the voluntariness and
21 Mr. al Hawsawi's voluntariness and ability to do that.

22 MJ [COL POHL]: What evidence in your pleadings or their
23 pleadings or any pleadings on this issue would show -- I mean,

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1 I'm not making any assumptions here that it came from him
2 because that's an issue. Foundation is an issue, I got that.

3 LDC [MR. RUIZ]: Yes.

4 MJ [COL POHL]: And I'm not making any assumptions on
5 whether he's represented or not represented. That appears he
6 was represented. What I'm simply saying is, was there any
7 issue of voluntariness of this statement?

8 LDC [MR. RUIZ]: Well, the issue is ----

9 MJ [COL POHL]: If there is, point me to the evidence of
10 it in your pleading or somewhere else.

11 LDC [MR. RUIZ]: No, I understand that. We have not made
12 the -- we have not made the argument itself that voluntariness
13 was at issue in that regard, but I will bring your attention
14 to footnote -- found it here. Give me one second, Judge.

15 I'm going to try to say this as nonconfusing as I
16 can.

17 So the issue, I think, that is important for the
18 commission is not that there's any evidence that
19 Mr. al Hawsawi was incompetent, but the issue goes directly to
20 the judge's ability at that time to make certain that
21 Mr. al Hawsawi -- if, as they say, he submitted this document,
22 adopted it, made the confession, did so knowingly,
23 intelligently and voluntarily.

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1 MJ [COL POHL]: Okay. I'm back to -- back to my question.

2 LDC [MR. RUIZ]: Sure.

3 MJ [COL POHL]: First of all, that's not an argument you
4 made in -- in your -- in your motion. Your motion was, as I
5 read it -- and point me where I'm wrong -- it was they can't
6 lay a foundation and he was represented at the time. Okay.

7 LDC [MR. RUIZ]: We also raised the Bruton issue. We also
8 did the due process.

9 MJ [COL POHL]: But I'm saying, is there anywhere embedded
10 in your argument that somehow there's an issue about this
11 being an involuntary or the statement lacked voluntariness?
12 I'm not talking about what Colonel Henley did. I'm not
13 talking about the 706 issue. I'm simply saying you were the
14 one who filed the motion and the rules require the grounds,
15 and I don't see voluntariness in there.

16 LDC [MR. RUIZ]: Not -- not -- not overtly as such. But
17 voluntariness is an issue. You can't get away from that
18 because it's an issue in the submission of that document. And
19 before the court could receive it, the court had to ascertain
20 for itself that it was knowing, intelligently and voluntarily
21 received. We think it's embedded within that analysis.

22 MJ [COL POHL]: Okay. Okay. But I'm saying is other than
23 that, I agree that when you look at the admissibility of the

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1 statement, voluntariness is a concept. I got it. Okay.

2 Is there any evidence in your pleading that you
3 referred to of involuntariness?

4 LDC [MR. RUIZ]: So if you're asking me if my argument
5 is ----

6 MJ [COL POHL]: I am not saying the burden is on you, and
7 I understand the burden is not. You're kind of drifting into
8 other grounds and I just want to see ----

9 LDC [MR. RUIZ]: This is a complex issue and I'm trying to
10 unpack it as well as I can. If you're asking me if I'm saying
11 that Mr. al Hawsawi, assuming he made the statement,
12 obviously, we think we need to get to whether ----

13 MJ [COL POHL]: Yeah, no.

14 LDC [MR. RUIZ]: ---- there's even ----

15 MJ [COL POHL]: I got it.

16 LDC [MR. RUIZ]: But just for sake of argument, that the
17 statement was made, right, that there was -- he was coerced in
18 some jail cell here in Guantanamo, and then because of that,
19 he made the statement, that's not exactly the statement.

20 But we do -- in footnote 27 of page 13 of our reply,
21 we do lay out why we can't completely and fully make that
22 argument in terms of the voluntariness. And because the
23 prosecution brought it back to the center, Judge, and put

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1 voluntariness in that sense squarely at issue, we submitted an
2 actual exhibit within our reply that actually documents all of
3 Mr. al Hawsawi's torture and all of his injuries that he
4 received during that time.

5 So the argument I think you're asking us about in
6 terms of developing whether this statement was a product of
7 years of isolation, torture, coercion, a concentrated effort
8 to not Mirandize him, all of those things, it's contained
9 mostly in our reply, because in response to the prosecution's
10 argument. But you are correct that in our initial filing we
11 didn't lead with that voluntariness argument. And the reason
12 we didn't, Judge, is because we looked at what we had and we
13 said, these are strong facts, and these are the facts that
14 we're leading with, but it is an issue.

15 MJ [COL POHL]: Mr. Ruiz, you knew at the time you filed
16 this that discovery hadn't been complete.

17 LDC [MR. RUIZ]: Yes.

18 MJ [COL POHL]: You knew at the time you filed this that
19 voluntariness is always an issue with every statement from an
20 accused, okay.

21 Nonetheless, over the objection, I believe of
22 Mr. Connell and others, you wanted to pursue 511.

23 LDC [MR. RUIZ]: I don't ----

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1 MJ [COL POHL]: I'm sorry, 502.

2 LDC [MR. RUIZ]: Yeah, I don't think it's over the
3 objections.

4 MJ [COL POHL]: 502. Okay. Okay.

5 And now what you're telling me, and looking at that
6 footnote, is you're not ready to even litigate 511 until you
7 get more discovery?

8 LDC [MR. RUIZ]: No.

9 MJ [COL POHL]: I don't do piece -- otherwise, you want me
10 to do the piecemeal litigation.

11 LDC [MR. RUIZ]: Well, that's not what I'm saying. I'm
12 ready to litigate it with the facts that we have.

13 MJ [COL POHL]: And you're bound by the ruling and if
14 voluntariness isn't raised, why would I address it?

15 LDC [MR. RUIZ]: I think voluntariness is raised, and I
16 beg to differ on that point. I think it's raised in our
17 initial pleading.

18 MJ [COL POHL]: Okay. I understand what you're saying and
19 I understand what the rule requires.

20 LDC [MR. RUIZ]: Yes.

21 MJ [COL POHL]: Every statement must be voluntary.

22 LDC [MR. RUIZ]: Absolutely.

23 MJ [COL POHL]: But the part that causes me pause that I

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1 find disquieting is that the footnote seems to say, "I may
2 raise voluntariness explicitly down the road."

3 LDC [MR. RUIZ]: Well, I think what I'm saying is if two
4 years down the road I get additional discovery that I had no
5 idea existed, then, yes, I would move -- I will come before
6 this commission and I will say, "Judge, we have been -- look,
7 we have been seeking discovery since day one of this
8 proceeding in 2012. Here in 2025, I finally got some
9 documents; I'm going to bring it to your attention."

10 MJ [COL POHL]: Just so I'm clear. So you're prepared to
11 go forward on 511 and 502 on the evidence that you have now,
12 if -- and of course, these -- these are the type of rulings
13 that if you had newly discovered evidence and
14 reconsideration ----

15 LDC [MR. RUIZ]: Right.

16 MJ [COL POHL]: ---- you could re-look at it. Okay. But
17 that's what you're saying.

18 LDC [MR. RUIZ]: That's fair, yes.

19 MJ [COL POHL]: You're not saying wait on this.

20 LDC [MR. RUIZ]: Judge, I have made a concerted effort to
21 litigate the issues that are before us with the evidence that
22 we have.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. RUIZ]: We have made earnest efforts to obtain
2 all of the information. But there comes a point, if you look
3 at this from Mr. al Hawsawi's perspective where he's been
4 isolated in prison since 2003, we're in 2016, there's still
5 been no resolution and no day in court for him, in essence,
6 where we can put forth an argument on the case.

7 MJ [COL POHL]: I understand. I just wanted to make sure
8 that you wanted me to resolve the issue on the record as it is
9 now and you weren't asking for more time on completion of
10 discovery.

11 LDC [MR. RUIZ]: No. What I want to make clear to the
12 commission is these are the facts that we have. This is the
13 information that we have obtained through discovery and other
14 sources. Actually, more information outside of the discovery
15 process, through the SSCI disclosure and the CIA
16 classification.

17 MJ [COL POHL]: Okay.

18 LDC [MR. RUIZ]: We're willing outside of the discovery.
19 We are willing to go forward with that. We can no longer
20 wait, continue to allow the government to exploit a piece of
21 evidence without the pendency of the proceedings without
22 bringing it to the attention of the court. The reason I'm
23 before you now with what I have is because we have made the

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1 determination that's just no longer something that we can
2 accept.

3 MJ [COL POHL]: Okay. So let's focus on the -- I got the
4 background here. I know where we're at. Let's focus on your
5 two grounds. One is the foundational grounds, and I don't
6 think that -- I mean, you can talk about it, but it strikes to
7 me that's ----

8 LDC [MR. RUIZ]: Sure.

9 MJ [COL POHL]: ---- that's not a very complicated legal
10 concept because the government can't introduce a piece of
11 evidence without adequate foundation. If you want to
12 articulate -- let's break this -- where is the foundation
13 inadequate?

14 LDC [MR. RUIZ]: May I have a moment? I want to grab some
15 water.

16 MJ [COL POHL]: Sure.

17 [Pause.]

18 LDC [MR. RUIZ]: So in terms of the D-101 statement
19 itself, Judge, the evidence that has been provided to you and
20 the argument that is made is essentially this: D-037 -- D-037
21 was a motion for joinder and group meetings that was filed on
22 29 August of 2008. Judge Henley accepted pro se
23 representation of three accused on 28 August of 2008.

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1 The prosecution then references D-089 as the next
2 significant event which was filed and received on 4 November
3 2008. Now, Judge, one thing that is real important, because
4 this is where I'm going to show the insufficiency in
5 foundation and reliability, is that D-089 is not the motion
6 which is subject of our request for suppression at this time.

7 D-089 is the vehicle that the prosecution is using to
8 try to bootstrap the inadmissibility -- or the admissibility
9 of D-101. And the more -- most information they've provided
10 you in terms of dates, times, and statements in terms of who
11 made them has been with respect to D-089.

12 On 8 December Judge Henley addressed D-089, and then,
13 of course, in March D-101 was filed.

14 But, Judge, if you turn your attention to D-089,
15 which is on 511B, government motion, that's 511B on page 8 --
16 actually, and also page 9, Judge.

17 MJ [COL POHL]: Go ahead.

18 LDC [MR. RUIZ]: Do you have it, Judge?

19 MJ [COL POHL]: Yeah, I got it. Go ahead.

20 LDC [MR. RUIZ]: So in order to illustrate what's lacking
21 in D-101, I think it's helpful to actually look at what's in
22 D-089, which is what the prosecution has indicated.

23 When you look at D-089 -- and also let me say this,

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1 Judge. On D-089, it is not our intention to waive the
2 admissibility of this document. We are not challenging for
3 purposes of this hearing, but D-089 is a subject for a
4 different time. My only purpose here is to compare and
5 contrast the two motions.

6 Judge, in D-089 --

7 [Pause.]

8 LDC [MR. RUIZ]: If you look at the first paragraph,
9 Judge, of that writing, it references a specific date where
10 the accused met. It references a specific session, which they
11 say was a joint strategy session; and it also sets the date
12 forth in both the issuing calendar as well as the more
13 conventional Tuesday -- 6 -- Tuesday, November 4 of 2008.
14 When you look at -- when you look at D-101, there is no
15 specificity as to when, if anything -- when they met, who was
16 present at the meeting. There is no evidence that the
17 prosecution has provided that Mr. al Hawsawi was even at this
18 meeting. The only thing that they've provided in both their
19 pleadings and in their argument is speculation as to who was
20 present or who may have been present.

21 So the D-101 is devoid of any type of statements such
22 as D-089 that articulates specific dates and times for
23 meetings and that the document came from a joint meeting from

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1 those accused.

2 In fact, D-089 is in accordance with what was agreed
3 upon in the joint meeting convened on such-and-such date.
4 That has got handwritten signatures on it which appear to be
5 the same handwriting, and I'm not sure what to say about that
6 one way or another. But one of the things that the
7 prosecution says about D-101 is that it was signed in a
8 similar manner. Just the language, signed in a similar manner
9 as D-089, and it's not. D-101 is not signed at all. D-101
10 actually just has -- is a printed document with printed names
11 at the bottom.

12 The argument then goes to a different point. The
13 prosecution then also says in their -- in their pleading, but
14 you wouldn't have expected that they would hand-sign the
15 document. It wouldn't have made any sense that they would
16 have signed the document, referring to D-101. But at the same
17 time they're also saying it was signed in a similar manner as
18 D-089. D-089 was a handwritten document; D-101 was a printed
19 document, so their explanations make no sense on that.

20 The prosecution says all five chose to attend this
21 meeting where they decided the wording of D-101. Again, no
22 evidence of what this meeting is, when it took place, or who
23 was there. I have not seen a scintilla of evidence from the

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1 prosecution.

2 They also -- the government also indicates no
3 government agents were present at these meetings. The
4 reasonable inference from that, Judge, is that the prosecution
5 has no idea who was there.

6 Footnote 5 on page 28, the prosecution says they
7 would have inevitably discussed the language, and then they go
8 on to say it doesn't make any sense they would have
9 hand-signed the document. Again, it's all just speculation.

10 Here is the evidence that the prosecution has -- has
11 submitted. Actually, it was provided to us, Judge, in
12 discovery.

13 If you look at Attachment E of 511B, the government's
14 submission, there are a number of handwritten requests that
15 were submitted to the commission. They were submitted not by
16 Mr. al Hawsawi but by another co-accused. One is dated 10
17 March, one is dated 11 March of 2009. That's Attachment E to
18 the government's response, Judge.

19 If you look at the 10 March document that was
20 submitted, and this is an original document, it says, for
21 filing purposes from, and I quote, "the Pro Se." That's what
22 it says. That's the one concrete piece of evidence that's an
23 original, not a copied document, not translated, that exists

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1 that says that this document, referring -- on 10 March, this
2 document was filing from, quote, "the Pro Se."

3 The 11 March document says it's a request to print,
4 presumably, the document, again signed "Pro se."

5 In those documents there are no other names or
6 handwriting or signatures, Judge. Certainly not
7 Mr. al Hawsawi's signature.

8 There is also -- there are also two pages of a
9 letter, of the D-101 letter, handwritten pages that were the
10 original writing that was provided to the prosecution, again,
11 contained with Attachment E, and in those two original pages,
12 there is no signature by anyone, really, but by
13 Mr. al Hawsawi, either.

14 So the original concrete documents that are before
15 the commission that have been provided in discovery to us
16 clearly indicate that the document was meant to be filed by
17 the pro se, and clearly indicate that Mr. al Hawsawi's name is
18 nowhere to be found.

19 The printed signature that they characterize as a
20 signature comes much later. I'm not really certain where that
21 document came from, but we certainly know that
22 Mr. al Hawsawi's name did not appear anywhere on the original
23 documents that were submitted. And which I would also add,

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1 Judge, the prosecution recognized -- at the time they created
2 a chain of custody for this document, believing it to be a
3 piece of evidence, and I think that's important, and I'll
4 explain why later.

5 But certainly, when you are looking at the
6 foundation, reliability of any statement, as you say, now in
7 the context of a capital case where you have heightened
8 standards of reliability and due process that apply, you have
9 before you a document, and we have before you evidence not
10 only that indicates that there isn't sufficient reliability or
11 foundation to establish that Mr. al Hawsawi adopted, wrote, or
12 in any way affirmed this document, certainly he never spoke in
13 open court to do so, that was D-089. And I don't want the
14 commission to get concerned. The statements that were quoted
15 to the commission were in reference to a D-089 pleading,
16 three, four months prior to that.

17 Certainly with what we recognize is a process that is
18 meant to ultimately result in the taking of the life of the
19 person before the state, you do have to apply heightened
20 standards of reliability and heightened standards of due
21 process. We ask you to consider not only the evidence that
22 does exist, but the evidence that doesn't exist, Judge, in
23 terms of that document.

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1 MJ [COL POHL]: Okay. The other part of your argument
2 dealing with -- now, I read your pleadings, Mr. Ruiz. You
3 have a tendency to repeat them, but I do read them.

4 LDC [MR. RUIZ]: I understand, Judge. It's my own
5 insecurity to make sure that I highlighted all of the relevant
6 points.

7 MJ [COL POHL]: You guys spend a lot of time writing stuff
8 and I spend a lot of time reading it.

9 And let's go to the second part of the argument, the
10 represented accused. For the sake of the second part of the
11 argument that he was represented and that appears not to be an
12 issue that somehow that therefore precludes the consideration
13 of the statement, let me ask you, you cite some case primarily
14 dealing with the hybrid counsel.

15 What -- and you cite the Fifth, Sixth and Eighth
16 Amendments, here, too. What specific constitutional or
17 regulatory or statutory provision supports your proposition
18 that a represented accused cannot make a -- and I've made no
19 determination -- have voluntary submission outside -- without
20 his attorney's permission?

21 LDC [MR. RUIZ]: I don't think there's a per se bar to
22 that. Let me first say that. Okay. I think that it's
23 important to articulate that. There is no per se bar to that,

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1 although I understand why you can read our argument to be that
2 as a de facto as that, I think when you look at the case law,
3 there are circumstances where a represented accused can make a
4 voluntary statement and can, in fact, do so knowingly,
5 intelligently and voluntarily; and I think there are cases
6 that support that. The reference to the hybrid representation
7 was really geared towards the adoption and the reception of
8 that document by the commission. Also, meant to support our
9 argument that a document submitted by a represented accused at
10 the time had no legal effect because the commission should
11 have declined it. When you look ----

12 MJ [COL POHL]: That goes with like accepting as a
13 pleading or nonpleading, whatever label you put on it.

14 Let's go down to just what you're -- because I'm just
15 trying to drill down as to what is your source of authority.
16 A represented accused submits this type of document, okay ----

17 LDC [MR. RUIZ]: Right.

18 MJ [COL POHL]: ---- to third parties. Don't even talk
19 about a judge, because ----

20 LDC [MR. RUIZ]: Well, it's to the court.

21 MJ [COL POHL]: Okay. Okay. What's the court -- okay.
22 If a third party becomes aware of it, you say the court should
23 reject it without giving it to anybody else?

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1 LDC [MR. RUIZ]: No. And I ----

2 MJ [COL POHL]: Well, let's not go there because we're not
3 there. Let's just say where we're at. Where we're at right
4 now ----

5 LDC [MR. RUIZ]: Sure.

6 MJ [COL POHL]: ---- is we have a submission that was
7 given to a third party; and I'm not getting to the
8 voluntariness, that part of it or the foundation issue. I'm
9 simply going to the issue of what's the authority that that
10 submission cannot be considered as a normal statement against
11 interest, for want of a better term. I mean, what you have
12 here.

13 LDC [MR. RUIZ]: I don't mean to throw another wrench into
14 it, which is the interest.

15 MJ [COL POHL]: Let's slow down. Statement by the
16 accused. Inculpatory, exculpatory, who cares.

17 LDC [MR. RUIZ]: Okay.

18 MJ [COL POHL]: A statement by a party. Generally that's
19 going to be admissible, correct? Are my hearsay rules ----

20 LDC [MR. RUIZ]: Say that one more time. Sorry.

21 MJ [COL POHL]: Statement by a party opponent is generally
22 exception to the hearsay rules. It's not hearsay. One of the
23 two depending.

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1 LDC [MR. RUIZ]: Yes.

2 MJ [COL POHL]: You're saying yes, it meets that but
3 because of this represented party issue, that it should be
4 excluded?

5 LDC [MR. RUIZ]: Right.

6 MJ [COL POHL]: So I'm trying to drill down into your
7 authority for that proposition that this is somehow an
8 exception to the normal party admission rules. Or statement
9 by opposing party, whichever term you want to use.

10 LDC [MR. RUIZ]: I understand.

11 MJ [COL POHL]: Is it a Sixth Amendment issue? Is it an
12 Eighth Amendment issue? Is it a Fifth Amendment issue?

13 LDC [MR. RUIZ]: I think it's a due process issue on the
14 Fifth Amendment for sure.

15 MJ [COL POHL]: Okay. What's the due process violation?

16 LDC [MR. RUIZ]: Well, the due process violation like in
17 this instance, and I will use this example. Right.

18 So in this case the statement was submitted to a
19 third party; the third party in my view is the court. Do you
20 agree with that? It was ----

21 MJ [COL POHL]: I will say I will agree it was submitted
22 to the court. I don't frankly know who all saw it.

23 LDC [MR. RUIZ]: Just when you say third parties, I think

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1 it makes a difference who it was given to.

2 MJ [COL POHL]: Okay.

3 LDC [MR. RUIZ]: If the third party is the court, it makes
4 a difference in the analysis ----

5 MJ [COL POHL]: But there was a reference that the
6 statement was provided to other people during Mr. Ryan's
7 argument, not by your client, but by -- I believe one of the
8 other accused to his mother or something like that. I
9 remember that reference.

10 LDC [MR. RUIZ]: I understand.

11 MJ [COL POHL]: Okay. But go with me here. Just facts,
12 forget that part.

13 Mr. -- one accused gives it to the judge.

14 LDC [MR. RUIZ]: Yes. All right.

15 MJ [COL POHL]: And I'm asking for the authority -- you
16 say it's a due process Fifth Amendment violation, is that what
17 you're telling me?

18 LDC [MR. RUIZ]: Are you ----

19 MJ [COL POHL]: I'm asking you -- I'm not telling you
20 anything. I'm asking you -- I hear your analogizing it to
21 hybrid counsel, some other examples which are not totally on
22 point, but I understand that.

23 LDC [MR. RUIZ]: That's correct.

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1 MJ [COL POHL]: I just want to drill down to exactly what
2 constitutional or statutory provision are you hooking your
3 argument on that compels your result.

4 LDC [MR. RUIZ]: I understand.

5 My -- I'm not trying to -- I'm not trying to be
6 evasive. You keep throwing elements into the scenario that
7 shift the analysis.

8 So when you talk about one of the co-accused as a
9 party against a penal interest, that's a different analysis
10 than if you were just referring to Mr. al Hawsawi as
11 representing.

12 MJ [COL POHL]: Just Mr. Hawsawi, just in your argument.

13 LDC [MR. RUIZ]: I'll start there, but I also want to
14 address the statement of penal interest by a co-accused,
15 because that's important as well.

16 With respect to Mr. al Hawsawi's case, and I'm going
17 to cite -- I'm going to give you some cases, some cases that
18 are contained within our pleadings that I think address this
19 issue and I think flesh it out. It's not as direct as you'd
20 like it. I'm not going to be able to say to you this is the
21 exact rule. I have to show you through the case the analysis
22 that the court's engaged in to illustrate my point.

23 MJ [COL POHL]: Go ahead.

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1 LDC [MR. RUIZ]: So there are three cases or four cases in
2 the pleadings that illustrate exactly where the voluntariness,
3 reliability, that knowing intelligence determinations come in
4 and why I'm telling you even a represented accused has to do
5 that.

6 So United States ----

7 MJ [COL POHL]: No. And I -- I'm not apologizing for
8 interrupting, but that's not my focus.

9 LDC [MR. RUIZ]: Okay.

10 MJ [COL POHL]: My focus is you've made two arguments.
11 Let's try again. The first one we talked about the
12 foundation. The second one is that because he was represented
13 is it is, therefore, it can't be considered. Okay.

14 That's not -- and then you just talked about
15 voluntariness, reliability. That's not -- I want to drill you
16 down or hopefully -- which hope springs eternal here -- but to
17 tell me what the authority for your proposition that a
18 represented accused under these circumstances cannot submit
19 this statement. Or the statement cannot be used against him.

20 LDC [MR. RUIZ]: Yes.

21 I think there's a Sixth Amendment issue ----

22 MJ [COL POHL]: How?

23 LDC [MR. RUIZ]: ---- in regards to -- well, he's

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1 represented, for one. He's a represented accused.

2 But I think the state of the case law is that even
3 represented accused can submit certain admissions. I'll give
4 you that much, Judge.

5 But then that's why I want to go next is what must
6 happen before that happens.

7 Okay?

8 Second, I do think there's a Fifth Amendment due
9 process violation when you have a represented accused who
10 allegedly makes an admission to, in this case a court, and
11 that admission is accepted without certain due process
12 safeguards.

13 MJ [COL POHL]: What were the safeguards that Colonel
14 Henley should have done?

15 LDC [MR. RUIZ]: Great. I'm glad you finally asked me
16 that question because that's where I want to get to.

17 MJ [COL POHL]: Okay.

18 LDC [MR. RUIZ]: That's what the cases illustrate and I
19 want to cite them for you. United States v. Bertelson at
20 3 M.J. 314 (C.M.A. 1977). It's in the filings.

21 MJ [COL POHL]: Okay.

22 LDC [MR. RUIZ]: You may be familiar with that case.

23 MJ [COL POHL]: I'm familiar with the case. That's a

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1 stipulation case.

2 LDC [MR. RUIZ]: I figured you were.

3 United States v. Dixon, 45 M.J. 104. You've got

4 United States v. Davis at 617 F.2d 668, which is a

5 D.C. Circuit case; and United States v. Milton at 110 F.2d

6 159, which is also a D.C. circuit case.

7 I want to point you back to Mr. Ryan's argument about
8 what this D-101 is. He uses D-089, they indicated an
9 expressed intent to plead guilty. We believe D-101 is a
10 result of that and is, in essence, a confessional stipulation.
11 He didn't say that, but that's really what the argument is.
12 It's an admission, it's a confession, and it's a confessional
13 stipulation of guilt that was borne out of a desire to plead,
14 brought to a submission, brought to a judicial officer, right,
15 by still a represented accused.

16 So Bertelson inquiry, I think you know what happens
17 in a Bertelson inquiry, right? You have a confessional
18 stipulation where the judge has to determine, and you may take
19 that admission if it's knowing, intelligently and voluntarily
20 made.

21 So if you're asking me what Judge Henley should have
22 made in the face of what amounts to a confessional stipulation
23 by a represented accused, he should have engaged in a knowing,

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1 intelligently and voluntarily inquiry. He couldn't, and
2 that's why it was important to articulate it to indicate to
3 the court the procedural posture of the 706.

4 So while -- I'm not saying -- I can't say to you that
5 at the time Mr. al Hawsawi made the statement he was
6 incompetent. What I am saying to you is that at the time
7 Judge Henley was addressing this issue, there was a procedural
8 impediment for him to engage in this procedure.

9 And as you know from Bertelson and Dixon and the
10 progeny of cases, even in those cases where the accused has
11 had the opportunity to consult with counsel and then wants to
12 make an inculpatory statement, there are still procedural
13 safeguards that go to voluntariness, that go to the
14 reliability, go to the knowing and intelligent nature of
15 making that determination.

16 In fact, I will quote some language here, Judge, from
17 Bertelson, where it says this: "From all circumstances it
18 appears that the accused eagerly desired and sought his
19 admission. But the issue is not so much whether he desired
20 his admission to the stipulation as it is whether he knew it
21 was inadmissible as evidence unless he preferred to have it
22 admitted."

23 MJ [COL POHL]: And you really think that's the same thing

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1 we have here?

2 LDC [MR. RUIZ]: Yes.

3 MJ [COL POHL]: You really think the Bertelson -- I mean,
4 if you do, that's fine. Bertelson is a stipulation -- a
5 confessional stipulation of fact to have a de facto guilty
6 plea when the accused is saying -- okay. The language you're
7 quoting would apply to every statement of any accused that's
8 inculpatory and, therefore, he has to agree that it puts in?
9 Bertelson is a completely different scenario.

10 LDC [MR. RUIZ]: That's why I thought it was important to
11 say it was submitted to the judge. This is a statement that
12 was ultimately submitted and accepted by a sitting judge. In
13 response, as Mr. Ryan says, to a statement previously
14 allegedly to the intent to plead. Judge, and maybe you
15 wouldn't have engaged in the Bertelson inquiry, either, had
16 this come before you, I don't know.

17 MJ [COL POHL]: Do judges engage in the Bertelson inquiry
18 when there's an issue about admissibility of a confession?

19 LDC [MR. RUIZ]: This is a unique set of facts, Judge.

20 MJ [COL POHL]: You say because it was styled as a
21 pleading, it's a Bertelson inquiry?

22 LDC [MR. RUIZ]: No.

23 MJ [COL POHL]: But Bertelson says -- I don't want to beat

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1 this to death because, quite frankly, I don't think it carries
2 much weight, so I'm not going to go down this road. Bertelson
3 requires the accused in court voluntarily and knowingly agrees
4 to the statement and if he doesn't, it doesn't come in under
5 the Bertelson process. Okay.

6 LDC [MR. RUIZ]: Right. Why does he do that?

7 MJ [COL POHL]: To support a --

8 LDC [MR. RUIZ]: That it's knowing, intelligent and
9 voluntary.

10 MJ [COL POHL]: Right. Right. But it's in the context of
11 really, quite frankly, the military's version of an Alford
12 plea, because the accused can then preserve an issue that he
13 may want to that's normally waived by a guilty plea. It's all
14 in the context of a courtroom process. It is not in the
15 context of -- this is simply a suppression motion on a
16 statement, out-of-court statement by your client. You think
17 the Bertelson procedures would apply to every out-of-court
18 statement simply because it was given to the judge as opposed
19 to handed to the prison guard?

20 LDC [MR. RUIZ]: In this instance, it was the court who
21 ultimately adopted this document and put it forth for everyone
22 else to see.

23 So no, I don't think in every instance, Judge, that's

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1 why I said that I think it is significant that the submission
2 of this document, the third party was the court. That's why I
3 think it's important.

4 In these cases I think there is a parallel to be
5 drawn. I understand that you don't normally see a Bertelson
6 inquiry in this context, but these are a unique set of facts.

7 MJ [COL POHL]: I got it.

8 LDC [MR. RUIZ]: I certainly haven't seen a lot of facts
9 like these. But I do think that that line of cases that I
10 have just cited for you ----

11 MJ [COL POHL]: Okay.

12 LDC [MR. RUIZ]: ---- does stand for the proposition that
13 when there is an alleged confession or admission submitted to
14 a tribunal, to a sitting judge, purported to be essentially a
15 confessional stipulation, which is what the prosecution has
16 argued throughout their brief. That was the lead argument in
17 the brief; it's a confession, it was an admission, it was
18 provided to the court.

19 When that happened, there needed to be certain
20 procedural safeguards, particularly in a capital case where
21 you have heightened due process and reliability standards.
22 For the judge to engage in an inquiry, not only to advise
23 Mr. al Hawsawi, anybody else, of those rights so they would

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1 understand what meaning waiving those rights would be, and
2 that means knowingly, intelligently and voluntarily admitting
3 to that confessional stipulation.

4 MJ [COL POHL]: Let me ask you this, Mr. Ruiz. And I
5 don't want to beat this to death, but you're inviting me to,
6 so I'm going to.

7 So you are saying that given where we are now, that I
8 should conduct a Bertelson inquiry with Mr. Hawsawi to see if
9 he voluntarily agrees to put this statement in?

10 LDC [MR. RUIZ]: No. No.

11 MJ [COL POHL]: Why am I at a different posture than
12 Colonel Henley was?

13 LDC [MR. RUIZ]: Judge, first of all, as we indicated, the
14 first question you need to answer is whether there is
15 reliability in the statement.

16 MJ [COL POHL]: Yeah.

17 LDC [MR. RUIZ]: Proper foundation. Our obvious, and I
18 think strongest argument is clearly there is no indication
19 that Mr. al Hawsawi made or adopts this statement.

20 MJ [COL POHL]: Got it. Let's not -- let's move on from
21 Bertelson because I don't think we're ever going to agree. Do
22 you have anything further on the issue of the represented
23 accused?

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1 LDC [MR. RUIZ]: I don't have anything further on this
2 specific issue, Judge.

3 MJ [COL POHL]: Okay.

4 LDC [MR. RUIZ]: So I will, however, then move on to the
5 prosecution's -- prosecution makes the argument that this is
6 an admission against party opponent -- or excuse me, party --
7 statement against penal interest, not party opponent.

8 The argument in essence, Judge, is that because this
9 is a statement against interests made by a co-accused that
10 it's not subject to cross-examination and, therefore, is not
11 subject to a confrontation clause problem.

12 The interesting thing I saw about just the manner in
13 which the prosecutor argued it, is that he led with this
14 argument during his argument to the court on Monday. In their
15 brief, the prosecution's first 31 pages are devoted to arguing
16 why this is an admission or a confession.

17 But the important distinction here, Judge, in terms
18 of this argument, is that the statement was, in fact, made to
19 or alleged to have been made to the commission and submitted
20 to the commission.

21 The prosecutor says that it should be a statement
22 that is submitted, even if Mr. al Hawsawi could not have made
23 it because it was made by three pro se accused who certainly

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1 made a statement against interests.

2 The key distinction here is the testimonial nature of
3 the statement, Judge. The statement was made to a tribunal.
4 It was clear that this was the type of statement that may
5 later be used in a tribunal or in a trial process as opposed
6 to a statement made to a casual acquaintance, and that's the
7 distinction that is, in fact, drawn in Crawford as well as
8 Davis v. Washington and the cases that have been cited, Judge,
9 within the submission to the commission.

10 I think the statement Mr. Ryan said, Judge, was it
11 doesn't matter if they gave it to a carrier pigeon or if it
12 was hand-delivered to the court. It does matter, Judge. For
13 that statement to come in, it would have to be subject to
14 cross-examination. There is a confrontation problem because
15 it was a statement made to the commission by the declarant or
16 at least three other declarants who were proceeding pro se and
17 is reasonable to infer that that would then be used in the
18 trial proceeding. In fact, the prosecution's first act was to
19 do a chain of custody for that document and then move into a
20 trial procedure.

21 So we think that the testimonial nature of the
22 statement dispenses with that argument.

23 MJ [COL POHL]: But just so I'm clear, that would be it

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1 was offered as the statement of one of the other co-accused.

2 LDC [MR. RUIZ]: Correct.

3 MJ [COL POHL]: Okay. But looking at my hearsay rules
4 here, if it's offered as a statement of a -- an admission by a
5 party opponent, that's the analysis we talked about earlier
6 about the represented accused.

7 LDC [MR. RUIZ]: Yes.

8 MJ [COL POHL]: Okay. Got it. Thank you.

9 LDC [MR. RUIZ]: Judge, in terms of the Bruton problem, we
10 do think this raises squarely a Bruton issue. We did raise
11 that in our initial brief. It's certainly something that the
12 prosecution has responded. Their position is that because
13 this is a joint confession, it doesn't raise the Bruton -- the
14 Bruton issue.

15 First, I would say that by making that argument, they
16 are, in fact, admitting that the character of the statement is
17 such that it is a confession, incriminating on its face, and
18 therefore, raises the Bruton issue if you, in fact, have a
19 nontestifying co-accused and a statement that would come in
20 against them, as we think it might, as opposed to
21 Mr. al Hawsawi.

22 They attempt to dispense with that by citing
23 Richardson v. Marsh and arguing that a curative instruction

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1 could, in fact, be used to resolve that.

2 I want to highlight that in Richardson v. Marsh, not
3 only was there a curative instruction but also a redaction, an
4 entire redaction of the existence of the defendant. So when
5 you look at the confession in Richardson, it wasn't just a
6 curative instruction, it was, in fact, a wholesale redaction
7 of the existence of the defendant.

8 But we think even that remedy in this instance,
9 Judge, would not be enough.

10 In this instance, Judge, because of the inflammatory
11 nature of the statement, the prejudicial nature of the
12 statements made within that statement, the nature of the trial
13 itself, which would be joint, we think that a more severe
14 remedy would be necessary and that a redaction alone of
15 Mr. al Hawsawi's name or a curative instruction would not be
16 enough to cure the prejudice against Mr. al Hawsawi.

17 Judge, in terms of the public dissemination of
18 this -- this piece of evidence, I don't think it's beyond
19 argument -- beyond contestation that this is, in fact, a piece
20 of evidence that is characterized as such, and that they may
21 have probative value, certainly prejudicial effect. The
22 prosecution has not addressed it as anything other than
23 evidence.

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1 One of the remedies we have asked you, Judge, is to
2 issue a protective order pursuant to -- pursuant to
3 R.M.C. 806(d).

4 MJ [COL POHL]: Hasn't it already gone out?

5 LDC [MR. RUIZ]: It has gone out, Judge.

6 MJ [COL POHL]: What am I doing, telling people to -- what
7 am I protecting, then?

8 LDC [MR. RUIZ]: Well, I think one of the things you're
9 protecting is, number one, directing the prosecution not to
10 continue to exploit this information, not to continue to
11 disseminate it and to distribute it, not to continue to make
12 statements about the culpability or the innocence or the
13 character of that information.

14 And I understand that a lot of damage has already
15 been done. But at least from our perspective, there's never a
16 bad time to do the right thing, Judge, and you can take
17 whatever appropriate steps you can. You may not be able to
18 completely ameliorate the effects that have already been
19 created, but I think you can -- you can within the authority
20 you have provide appropriate safeguards moving forward, Judge.
21 And on that, we have quoted Sheppard v. Maxwell, which
22 indicates that neither the press nor the public has an
23 unqualified right to be informed by -- about evidence by the

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1 prosecuting authorities, the evidence being accumulated
2 against the defendant.

3 You do have that authority not only under Maxwell,
4 but also under the rules that I have cited, and that applies
5 to any statements made to the defense officials, any belief of
6 guilt or innocence, or like statement concerning the merits of
7 the case, all of which are squarely implicated by the
8 dissemination of this document.

9 Judge, in fact, you have already set a precedent in
10 these proceedings for ameliorating prejudicial effect of
11 evidence when it comes to the accused, and you did so in
12 regards to the deposition that was requested by the
13 prosecution; the procedures that were employed in that
14 particular deposition, your ruling in AE 422E, Judge, where
15 you refused to make that proceeding a public proceeding and in
16 ruling so indicated that the -- having that proceeding open to
17 the public did not sufficiently ameliorate the prejudicial
18 effect to the accused.

19 So there was an additional request -- you even went
20 as far as denying the prosecution's additional request for
21 other family members to be present in the courtroom as well as
22 for the witness' spouse. You denied that request, and you did
23 so in order to protect the accused's rights to a fair trial.

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1 Certainly this piece of potential evidence is in that
2 category. And while you may not be able to completely correct
3 the effects that have already been created, you certainly can
4 establish additional safeguards now that prohibit the
5 prosecution from further exploitation of this information; and
6 that's the second piece of what we're asking you to do, Judge.

7 We have submitted to you both instructions that the
8 prosecution cites. They cite to you DoD Instruction 1030.2
9 and 42 U.S.C. 10607 and for the proposition that they have
10 some kind of legal authority or duty under those -- under
11 those documents to provide evidence incriminating or
12 prejudicial, highly inflammatory evidence to members of the
13 public, who, as the prosecution is well aware, also engage in
14 a press conference at the end of every session where comments
15 are made to public officials, made to press and
16 representatives of the press, to be disseminated beyond the
17 military commissions.

18 In those documents that I've provided to you for your
19 review, there's absolutely no indication that there is any
20 such authority or requirement or even a duty to do so. And so
21 I think the instructions speak for themselves in the absence
22 of any such requirement. It doesn't establish any such duty,
23 legal or ethical or otherwise, to continue to exploit this

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1 information against people who are pending trial in a capital
2 case where ultimately the State wants to deprive them of their
3 life.

4 May I have a moment, Judge?

5 MJ [COL POHL]: Sure.

6 [Pause.]

7 LDC [MR. RUIZ]: Judge, that's all I have. Thank you.

8 MJ [COL POHL]: Trial Counsel, any rebuttal?

9 TC [MR. RYAN]: Good morning, sir.

10 MJ [COL POHL]: Good afternoon.

11 TC [MR. RYAN]: Good afternoon, sir.

12 Your Honor, in their -- in the defense's pleadings in
13 511, they state, I counted at least six times, that D-101 was
14 not filed and/or was not accepted as to Mr. al Hawsawi; and it
15 is a constant theme of their argument to you in regard to this
16 issue of represented parties or not-represented parties.

17 If they say it 100 times more, it still doesn't make
18 true that which is so demonstrably false; and for this, I will
19 rely upon their exhibit, which is 511, Attachment E, Judge
20 Henley's second order in regard to D-101. Your Honor will
21 recall that the other day in my argument I read from Judge
22 Henley's first order accepting the filing.

23 In this second order, he says as follows: "...the

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1 Military Commission received an unsolicited filing titled 'The
2 Islamic Response to the Government's Nine Accusations'
3 submitted by the above named Accused," and the above named
4 accused are all five, "three of whom represent themselves
5 pro se."

6 So what he has done there right off the bat, Judge,
7 is affirm quite clearly that it has been received as to all
8 five. But we go on from there.

9 He then says, on March 10 -- "On 10 March 2009,
10 detailed military counsel for Mr. bin al Shibh," who was
11 Ms. Lachelier at the time, "and Mr. al Hawsawi," who was Major
12 Jackson at the time, "submitted a special request for relief
13 objecting to release of the filing and asks the order be
14 rescinded, submitting they had not seen the document and that
15 it is highly irregular for the military judge to accept
16 pleadings from represented accused that are not filed with the
17 Commission by the counsel themselves."

18 So, in essence, they are making this same objection
19 back then days after this was filed that counsel is now making
20 to Your Honor, essentially asking you to nunc pro tunc back
21 and wipe all of this away.

22 What Judge Henley's order at the conclusion of the
23 three-page order states is as follows. I just gave you the

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1 grounds of the objection. There were others as well, but his
2 order is as follows: Number 6, "The defense special request
3 for relief submitted by counsel for Mr. Al Hawsawi and Mr. bin
4 al Shibh is here DENIED."

5 So he took that argument. He rejected that argument,
6 and ultimately accepted it for filing as to all five.

7 Now, the other day, Judge, I gave you a bunch of
8 reasons as to why Judge Henley was within his rights and
9 within reason to accept the document for filing. I'll just
10 give you one more now at this point.

11 Judge Henley noted that it wasn't even a legal
12 pleading. They weren't seeking any relief. He did, in fact,
13 see it as, from all reason would dictate, what this was, was
14 not a pleading seeking relief but, in fact, was a confession
15 of the accused and, in essence, a shouting from a mountaintop
16 as to their guilt.

17 And as Your Honor pointed out, and I cannot emphasize
18 more strongly, nowhere in the law is a judge required to stop
19 an accused from confessing to a crime of his own volition.

20 Now, as I said before, Your Honor, the other day, it
21 doesn't matter in the end whether it was filed, whether it was
22 on the right kind of paper, whether it's an attachment or a
23 certificate of service or anything else. The document speaks

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1 for itself with all of the other evidence we've put in as to
2 authentication and foundation. It is clearly admissible.

3 But I did -- because this is the horse they choose to
4 ride in on, and because I don't know what Your Honor is
5 considering, I do have to address it one last time. And that
6 is my argument as to that.

7 Their big statement to Your Honor this morning is,
8 forget the rest of the order, just look at footnote number 6.
9 I do not dispute, Your Honor, that in footnote number 6, Judge
10 Henley took the opportunity, I would submit, to very
11 graciously point out that the two lawyers in this case had not
12 joined in the filing. Everything else indicates he takes it
13 in as to all five, but he does, in fact, take that opportunity
14 to let Major Jackson and Ms. Lachelier off the hook and
15 absolve them of responsibility for this pleading when they
16 found themselves in the rather awkward position ----

17 MJ [COL POHL]: Does it have any legal significance?

18 TC [MR. RYAN]: To what, sir?

19 MJ [COL POHL]: And I forget, I believe it was -- who was
20 representing Mr. Hawsawi, Major Jackson?

21 TC [MR. RYAN]: Mr. Hawsawi was being represented at that
22 time by Major Jackson.

23 MJ [COL POHL]: Okay. Major Jackson says I didn't join in

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1 this pleading or didn't have any part in this pleading, does
2 it have any legal significance?

3 TC [MR. RYAN]: It doesn't the way Judge Henley chose to
4 address it. I would believe this, Judge. I -- and you've --
5 we've been down this road in this case a few times.

6 A judge in the course of litigation at times will
7 refuse to accept anything from an accused when he's got
8 counsel, sometimes allow him to become a full partner, or
9 sometimes pick and choose his battles along the way. And it
10 was often a matter of the court's discretion at that time.

11 Whether Judge Henley could have done something
12 differently doesn't matter as much as the fact that his order,
13 when you read it, is quite clear; he gets their objection,
14 same one you heard today, and rejects it. But does, as I
15 said, throw the bone to the attorneys of saying, I get that
16 you aren't part of this -- this mess, where these people
17 confessed to one of the worst crimes in history, and there was
18 nothing you could do about it. That's what footnote 6 amounts
19 to.

20 Counsel has brought up the issue of mental competency
21 and RDI both in his oral argument today and in his response to
22 pleading in the response to the government's motion. This is
23 their motion. This is what they chose to bring it at the time

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1 that they brought it. They chose to bring it in the way that
2 they brought it. They have requested no witnesses. They have
3 proffered no evidence of a mental defect on the part of
4 Mr. Hawsawi. They have proffered no evidence of any
5 connection between D-101 and any claim of a mental defect.

6 They have proffered no evidence that the RDI program
7 that lasted a course of weeks back in 2003 had any causal
8 effect or connection on the accused that led to the decision
9 to file D-101 six years later in 2009.

10 In fact, there is evidence to the contrary as to this
11 voluntariness issue that is brought up, that being the
12 accused's statement on 8 December 2008 stating -- this is
13 Mr. Hawsawi -- "with all my complete mental capacity and
14 voluntarily on my part to withdraw," I do not argue the fact
15 that this is in regard to D-089.

16 All I'm doing is raising this to show that there is
17 evidence in the record to indicate he was acting voluntarily,
18 and with full mental capacity, whereas I point out the accused
19 can point to nothing to show the contrary.

20 As far as the argument as to RDI/mental competency, I
21 also point out, Judge, that the -- at least two other teams in
22 this case specifically opted out of this motion on the grounds
23 that it did not include an argument as to RDI matters. So all

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1 of those things that the defense team could have waited for
2 and could have decided to litigate at another time, I submit
3 to you now, sir, are waived.

4 Bruton, they bring up Bruton. The Bruton case, of
5 course, Judge, refers to situations where a co-defendant, most
6 usually, makes a confession to law enforcement. In the course
7 of making such a confession to law enforcement, talks about
8 another person who was involved in the crime with him.
9 Sometimes, and just by the nature of things, an accused who's
10 making such a confession will have the tendency to shift blame
11 or to minimize his own conduct.

12 MJ [COL POHL]: Mr. Ryan, I know Mr. Ruiz mentioned Bruton
13 but is the Bruton issue really before me right now?

14 TC [MR. RYAN]: It isn't, Judge.

15 MJ [COL POHL]: It seems to me the issue before me is
16 whether this is a statement by Mr. Hawsawi and, if so, can it
17 be used against Mr. Hawsawi. If for some reason the ruling is
18 no, it can't, then the Bruton issue is for another day, as far
19 as I'm concerned.

20 TC [MR. RYAN]: That's fine, Judge, and I'll move on from
21 there.

22 MJ [COL POHL]: I'll listen to the argument, but it
23 strikes to me that the rule on this, if I say it can't be used

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1 by the government against Mr. Hawsawi as Mr. Hawsawi's
2 statement ----

3 TC [MR. RYAN]: That's right, sir.

4 MJ [COL POHL]: ---- then it strikes to the commission,
5 that the Bruton issue is now somewhat joined, is can the
6 statement of the others be used against Mr. Hawsawi. But that
7 seems to be it's not really on the front burner of the current
8 issue.

9 TC [MR. RYAN]: It is clear, Judge, that Bruton only
10 matters if it's a statement by one of the other accused
11 implicating him. It is our clear position, without a doubt,
12 no doubt about it, that this is a joint statement of all five,
13 and everything about it indicates this.

14 MJ [COL POHL]: Not to bind the government but as I
15 recall, there was a representation by the government you did
16 not intend to use any statement by one accused against another
17 accused.

18 TC [MR. RYAN]: Based on ----

19 MJ [COL POHL]: I mean, this is -- this is their
20 statement, that's a different issue. But I'm saying, as I
21 recall earlier, I'm not sure if it was Mr. Trivett, but one of
22 the government said we're not going to use a statement -- any
23 statement of one will only be used against that individual,

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1 not against any of the other four.

2 TC [MR. RYAN]: We were talking about certain narrow
3 circumstances, Judge. In any event, there are matters that I
4 am aware of that will possibly bring in concerns of Bruton.

5 MJ [COL POHL]: Okay.

6 TC [MR. RYAN]: They will be well identified. Everyone
7 will have a chance to raise them.

8 MJ [COL POHL]: Let's cross the Bruton bridge when we get
9 there.

10 TC [MR. RYAN]: With that, Judge, I will leave off of the
11 Bruton matter.

12 Finally, the question of turning this document over
13 to certain persons that we feel obligated to do so.

14 Mr. Ruiz cites various statements of the law in
15 regard to our obligations in regard to the victim family
16 member community. I will not recite them, Judge. I will
17 simply say that we believe we act in a consistent manner with
18 them at all times. The initial decision to turn this thing
19 over to the general public was not, in fact, ours; it was
20 Judge Henley's. But really, I will say long before it was
21 Judge Henley's decision, it was the decision of the five
22 accused by their own desires to illustrate their work in this
23 particular case and their determinations to continue their

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1 acts against the United States in the future.

2 At the time that it was turned over to the general
3 public, or at least ordered to be done so by Judge Henley,
4 Major Jackson and Ms. Lachelier objected and said specifically
5 at that time it is evidence and shouldn't be released. Judge
6 Henley overruled it. Again, that's order Attachment E in 511.

7 We believe it is our duty to inform the victim family
8 member community as to this, the most basic point. As I said
9 the other day: In short, we believe we owe this information
10 to them. To hide it, to not represent that it even exists, we
11 feel, would be a far greater harm to our obligations to them.
12 We believe we're operating consistent with the law.

13 Judge, with that, I have nothing further.

14 MJ [COL POHL]: Thank you.

15 Mr. Ruiz, anything further?

16 LDC [MR. RUIZ]: Number one, Judge, I categorically
17 disagree with Mr. Ryan's characterization that we have not
18 briefed and we have not brought authority to the court in
19 regards to the RDI issue as it relates to voluntariness. I'm
20 not going to go through our argument again. I think you've
21 kind of sent me the message you don't want me to repeat my
22 arguments from the pleadings, but I will just reference ----

23 MJ [COL POHL]: You said you were going to go through it

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1 again?

2 LDC [MR. RUIZ]: No, no. I'm just going to reference for
3 you the section in our reply that addresses it, also for
4 purposes of the appellate record.

5 In our argument Section 2.E., Judge, references and
6 chronicles the history of torture for Mr. al Hawsawi, the
7 isolation, and in fact, one of the exhibits to our reply is a
8 stand-alone exhibit of all of the known information regarding
9 Mr. al Hawsawi's maltreatment; and it is very clearly
10 articulated in our brief that in that context with the
11 information that we have, neither Judge Henley could have made
12 a voluntariness determination and we have made our argument as
13 to why we think there should have been one. I'm not going to
14 go there again.

15 But to say that is nonexistent and hasn't been
16 raised, we disagree and re-reference Section 2.E. of our
17 pleading. While other colleagues may think that was not
18 raised, it has been. That's their reading; we have ours.

19 Judge, in relation to Mr. Ryan's argument with
20 respect to Judge Henley's ruling.

21 MJ [COL POHL]: Go ahead. I'm listening.

22 LDC [MR. RUIZ]: He's misreading the order, Judge.

23 I know he thinks I'm misreading the order, so

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1 obviously, you will make your determination. But this is not
2 some bone that Judge Henley threw to Ms. Lachelier and to the
3 Major at the time.

4 MJ [COL POHL]: Major Jackson?

5 LDC [MR. RUIZ]: Major Jackson, thank you.

6 That's why I pointed you to the language, Judge, at
7 the top of page 3 where Judge Henley says, Once a document is
8 submitted to the Commission by counsel representing the
9 accused or an unrepresented accused, so two ways it would be
10 submitted, by counsel representing the accused or an
11 unrepresented accused, the public should be generally able to
12 see that document.

13 Really, what Judge Henley's saying here, Judge, is
14 that Ms. Lachelier and Major Jackson didn't have standing to
15 object to other counsel submitting this document. Much as,
16 you know, if one of co-counsel wants us to stand up and submit
17 some document, what he's really saying is, okay, I get your
18 objection as to the person you're representing. They're not
19 joined. But there really is no standing for them to argue
20 that a pro se accused submitting a document, it can't be
21 received by the court. That's what Judge Henley's saying in
22 his order. He's not saying, "I'm accepting it as to all
23 five."

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1 MJ [COL POHL]: Did Major Jackson object to the document
2 as you are today, or just object to the publication of said
3 document?

4 LDC [MR. RUIZ]: Clearly, he didn't brief it as I did.

5 MJ [COL POHL]: I know.

6 LDC [MR. RUIZ]: But from my recollection, there is an
7 exhibit in the motion that actually was an objection by
8 e-mail, which I thought was kind of -- it was ----

9 MJ [COL POHL]: Are we talking about D-101 or D-089 here?

10 LDC [MR. RUIZ]: D-101.

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

12 LDC [MR. RUIZ]: The objection was to the publication of
13 it.

14 MJ [COL POHL]: Right. There was no hearings.

15 LDC [MR. RUIZ]: And the objection ----

16 MJ [COL POHL]: The objection was the publication.

17 LDC [MR. RUIZ]: You're right. You're right.

18 MJ [COL POHL]: There was an objection -- I'm not saying
19 it's required, to the document itself, similar to what you are
20 making now.

21 LDC [MR. RUIZ]: Yes, absolutely. That's contained in the
22 pleadings as an exhibit that has the e-mail objection and then
23 the judge's subsequent ruling on that. That's the objection.

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1 MJ [COL POHL]: I got it.

2 LDC [MR. RUIZ]: But that doesn't mean that's what Judge
3 Henley did in this case.

4 MJ [COL POHL]: That brings us to 133.

5 DDC [Maj WAREHAM]: Good afternoon, Your Honor. Major
6 Wareham for Mr. al Baluchi.

7 MJ [COL POHL]: Good afternoon.

8 DDC [Maj WAREHAM]: I'm coming before you with a motion to
9 permanently and verifiably disable any audio monitoring that
10 may exist in attorney-client meeting spaces. This is an
11 extension of your original order found in 133QQ where you held
12 that the attorney-client confidentiality is sacrosanct.

13 Now, while making this acknowledgement and adding
14 some prophylactic measures, you made certain findings. One,
15 that there was not any indication at the time ----

16 MJ [COL POHL]: Please slow down a little bit.

17 DDC [Maj WAREHAM]: Yes, Your Honor.

18 MJ [COL POHL]: For the interpreter. Thank you.

19 DDC [Maj WAREHAM]: You ready for me to proceed, Your
20 Honor?

21 MJ [COL POHL]: Yeah. Just to be clear, that binder you
22 got on you, is that a SECRET cover?

23 DDC [Maj WAREHAM]: Only because it contains notes that

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1 has Secret material in it.

2 MJ [COL POHL]: You're certainly not going to read the
3 SECRET material.

4 DDC [Maj WAREHAM]: Certainly not, Your Honor.

5 MJ [COL POHL]: I have a CISO sitting over here and when
6 the CISO sees documents and you're referring to them and I
7 just want to make sure ----

8 DDC [Maj WAREHAM]: I can fully understand the concern.

9 MJ [COL POHL]: Okay.

10 DDC [Maj WAREHAM]: But everything I intend to say at this
11 stage of the game is unclassified.

12 MJ [COL POHL]: Everything you will say is unclassified.

13 DDC [Maj WAREHAM]: Indeed.

14 MJ [COL POHL]: Go ahead.

15 DDC [Maj WAREHAM]: In your order at that time involving
16 microphones placed in Echo II that were perceived originally
17 by or at least acknowledged to represent or resemble smoke
18 detectors, you found that there was no intentional misleading
19 by the government or actual audio monitoring that has
20 occurred. In fact, in making these findings, you relied on
21 the averments of Brigadier General Martins as an officer of
22 the court that no entity of the United States was monitoring
23 the five defendants and their counsel. However, in an

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1 abundance of caution, entered some prophylactic measures, that
2 is an order made by Colonel Bogdan, be integrated into the
3 SOPs for JTF-GTMO and JDG. In integrating that order, you
4 stated on page 11 of your order that all audio capability
5 would be disconnected, and that if there was a case where
6 audio recording was going to be taking place, that attorneys
7 be made aware of this before it occurred.

8 Unfortunately, there has been another instance of
9 audio recording where the -- in this -- while outside of these
10 specific five accused, the government has been found to
11 inadvertently having recorded the attorney-client meetings
12 of ----

13 MJ [COL POHL]: Were these in the same attorney-client
14 rooms that you ----

15 DDC [Maj WAREHAM]: No, Your Honor. It was a different
16 space in Camp Echo.

17 MJ [COL POHL]: Do your clients use this space?

18 DDC [Maj WAREHAM]: No, Your Honor.

19 MJ [COL POHL]: Why do you care what's done in other
20 spaces?

21 DDC [Maj WAREHAM]: We care primarily because, first off,
22 your order that Colonel Bogdan's specific requirements be
23 entered into the SOP obviously was not followed; or, in

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1 integrating that your -- the requirements of Colonel Bogdan's
2 order into the SOP.

3 MJ [COL POHL]: Without going into anything classified
4 here, we have attorney-client -- I don't think it's
5 classified, the number, but let's say there's a number of
6 meeting rooms available, correct?

7 DDC [Maj WAREHAM]: Yes, Your Honor.

8 MJ [COL POHL]: Does who gets to use those meetings depend
9 on the status of the detainee to be interviewed?

10 DDC [Maj WAREHAM]: By the representations of the
11 government, yes, Your Honor.

12 MJ [COL POHL]: No, I'm asking you. You guys have the
13 experience. I mean, you just told me where the -- where the
14 recording took place that is causing the issue is not one -- a
15 room you guys use.

16 DDC [Maj WAREHAM]: Correct, Your Honor.

17 MJ [COL POHL]: My question is, is -- there's other
18 recording in other places ----

19 DDC [Maj WAREHAM]: Yes, there are.

20 MJ [COL POHL]: ---- and you want me to order that to be
21 disabled.

22 DDC [Maj WAREHAM]: Well, what we're looking for is that a
23 more specific order be placed in our case, in allowing us to

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1 verifiably -- or verify that audio recording has been disabled
2 in our spaces.

3 MJ [COL POHL]: And how would you do that?

4 DDC [Maj WAREHAM]: How would I do that in order, Your
5 Honor?

6 MJ [COL POHL]: No, I'm just saying just tell me how -- I
7 read your pleadings. When you say "verifiable," I mean, I
8 know you've -- this issue predates your participation.

9 DDC [Maj WAREHAM]: Yes, Your Honor.

10 MJ [COL POHL]: Well, it's -- just by the number, you can
11 tell it was a while ago. Okay. The government says we don't
12 record attorney-client meetings. The recording devices are
13 there for another type of meetings.

14 DDC [Maj WAREHAM]: Uh-huh.

15 MJ [COL POHL]: And then I think Colonel Bogdan, as I
16 recall, said we don't record attorney-client meetings and
17 something came up that while this issue -- well, maybe it was
18 over here. So I go back to, okay, you say you want a
19 verifiable thing. What do you -- what do you mean saying that
20 take out all ----

21 DDC [Maj WAREHAM]: Firstly, Your Honor ----

22 MJ [COL POHL]: ---- all recording devices?

23 DDC [Maj WAREHAM]: Firstly, Your Honor, an order that

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1 more specifically and declaratively states that all audio
2 monitoring capability be disconnected in the Echo II meeting
3 rooms or the attorney-client meeting rooms, wherever those end
4 up being should they shift in the camps in the future.

5 MJ [COL POHL]: Okay.

6 DDC [Maj WAREHAM]: Second to that is that members of the
7 defense team be allowed to observe the removal and observe --
8 and inspect the rooms, as have been done in collateral cases,
9 and ensure that no audio monitoring capability exists.

10 The need for this arises because supposedly any sort
11 of recording in any case was supposed to be disclosed to
12 attorneys. This was part of what you ordered be entered into
13 the generalized SOP.

14 Now, we have been given indications now that this
15 SOP, even if it was including these details, has not been
16 followed.

17 Now, as I understand it ----

18 MJ [COL POHL]: But not in this case?

19 DDC [Maj WAREHAM]: Not yet in this case but it's given
20 rise, it's given suspicion.

21 MJ [COL POHL]: But what I'm saying is what we got right
22 now is basically you have this issue that came up in other
23 cases.

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1 DDC [Maj WAREHAM]: Right, Your Honor.

2 MJ [COL POHL]: My order, of course, can only apply to the
3 case that I have before me, which is this case.

4 DDC [Maj WAREHAM]: Yes, Your Honor.

5 MJ [COL POHL]: So we have no evidence that it's been
6 violated in this case, but the procedures that I have proposed
7 in this case are apparently not being followed in other cases,
8 and therefore, you want this prophylactic remedy so it doesn't
9 happen as you said, yet, so it doesn't happen in this case.

10 DDC [Maj WAREHAM]: Perfectly stated, Your Honor. Exactly
11 right.

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

13 DDC [Maj WAREHAM]: In fact, given your perfect statement
14 of that condition, that's all I have at the moment.

15 MJ [COL POHL]: Thank you.

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

17 MJ [COL POHL]: Any other defense counsel want to be heard
18 on this?

19 Mr. Nevin?

20 LDC [MR. RUIZ]: Judge, may I interrupt for a second? I
21 apologize.

22 Come back to my table, and I have an issue with
23 Mr. al Hawsawi. He has been standing for some time. He was

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1 standing for some time during my argument. He is in pain, and
2 has been in pain for some time.

3 MJ [COL POHL]: Mr. Ruiz, I don't want to sound
4 insensitive here, but what do you want me to do?

5 LDC [MR. RUIZ]: Judge, I think that Mr. al Hawsawi needs
6 to have the opportunity to --

7 ACC [MR. AL HAWSAWI]: [Speaking Arabic].

8 MJ [COL POHL]: Mr. Hawsawi, I want you to -- okay.

9 ACC [MR. AL HAWSAWI]: If the judge would allow me to
10 please ----

11 MJ [COL POHL]: This is exactly the issue that you just
12 talked about.

13 LDC [MR. RUIZ]: I do need the translation, Judge.

14 MJ [COL POHL]: But this is just the issue that you talked
15 about. We now have a represented accused talking to me, and
16 what am I supposed to do?

17 LDC [MR. RUIZ]: Well, I'm talking with you right now, and
18 I ----

19 MJ [COL POHL]: I know you are, but I'm just saying is, am
20 I supposed to listen to your client? I mean, you -- I just
21 see it as a similar kind of issue we just talked about. I
22 don't want to ----

23 LDC [MR. RUIZ]: Well, if the question -- the question is,

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1 I guess, you should advise him of his rights, and tell him
2 that he has to knowingly and intelligently and voluntarily
3 make a statement if you are going to allow him to speak.

4 MJ [COL POHL]: Okay. What we're going to do is take a
5 recess, because we're almost to lunch anyway.

6 But I'm going to tell you this, Mr. Ruiz. If your
7 client stands up and wants to talk, I'm not asking him any
8 questions. Okay. There are scenarios that I will -- I have
9 got it. We have done it earlier in other scenarios but that
10 isn't one. If he chooses to talk, that's his decision. I'm
11 not advising him of his rights. I'm not questioning him of
12 anything. I see no requirement of that. If you think there
13 is, you show me some authority of that position.

14 But if an accused stands up in court and starts
15 talking on his own, without any government or court
16 involvement, I'm curious about any of the authority that I
17 have to either advise him of his rights or stop him.

18 LDC [MR. RUIZ]: Well, Judge, I will tell you what a
19 federal judge would do. He would say, "You have counsel,
20 please confer with him. You have a right against
21 self-incrimination."

22 MJ [COL POHL]: I'm going to tell you what I'm going to
23 do. I'm going to give you a break; you can talk to your

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1 client, and we can go from there. But again, you can't have
2 it both ways.

3 LDC [MR. RUIZ]: Judge, I'm trying to raise an issue to
4 you regarding Mr. al Hawsawi's ----

5 MJ [COL POHL]: I got that. Your issue is not ----

6 LDC [MR. RUIZ]: ---- medical condition.

7 MJ [COL POHL]: Don't talk over me. It's not your issue
8 that's the concern. It's the issue of your client talking to
9 me directly in court, and somehow, you have some type of
10 belief that I have some role to prevent him from doing that.
11 And I'm not quite sure where that comes from.

12 LDC [MR. RUIZ]: Well, it comes from your current
13 practice, Judge, where you've said as much and you have
14 advised the accused -- I'm not asking you -- I'm not asking
15 you that. You're the one that asked me, "What do you want me
16 to do?"

17 MJ [COL POHL]: Yeah, well, I ----

18 LDC [MR. RUIZ]: I'm just trying to get to the root of the
19 issue, which is a medical issue.

20 MJ [COL POHL]: Let me make it very clear to you. If a
21 client chooses to stand up in court and talk, there's two
22 issues as far as I'm concerned. One is, it's disruptive to
23 the proceedings. As I said earlier, I'm not going to permit

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1 that because that upsets the decorum of the court, number one.

2 The other issue about what he says is all on him,
3 okay? It's not -- I'm not going to say -- advise him of his
4 rights. I will tell him to talk to you, as I've told -- when
5 this came up before when a client wanted to speak in court, I
6 said, "No, you have an attorney. Talk through the attorney."

7 But I saw you talking, your client talking, and then
8 I -- I'm hearing both of you, and I don't see you moving over
9 there to tell him not to talk.

10 We're taking a recess. See how he's doing.

11 We'll reconvene at 1415. The commission is in
12 recess.

13 [The R.M.C. 803 session recessed at 1257, 24 August 2017.]

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