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1 [The R.M.C. 803 session was called to order at 0903, 31 May
2 2016.]

3 MJ [COL POHL]: Commission is called to order.

4 Trial Counsel, any change in the attorneys today from
5 when we recessed yesterday?

6 MTC [MR. TRIVETT]: Good morning, Your Honor. No changes.

7 MJ [COL POHL]: Any defense counsel changes?

8 Apparently not.

9 I notice Mr. Bin'Attash and al Hawsawi are not here
10 today. Mr. Mohammad and Mr. Binalshibh and Mr. Ali are here
11 today.

12 Mr. Swann.

13 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
14 was sworn, and testified as follows:

15 **DIRECT EXAMINATION**

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

17 Q. Now, Major, you are the same major who has testified
18 on previous occasions early in the morning regarding the
19 accuseds' absence; is that correct?

20 A. That is correct.

21 Q. All right. This morning two of the accused are
22 absent, Mr. Bin'Attash. You have in front of you what's been
23 marked as Appellate Exhibit 429. Is that the advice form

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1 given to the accused this morning?

2 A. That is correct.

3 Q. Okay. What time did you do that?

4 A. With Mr. Bin'Attash, I began reading the English
5 version at 0610 hours.

6 Q. Okay. When you completed the English version, did
7 you then have the translator translate the Arabic version?

8 A. That is correct. The translator then read the Arabic
9 version to Mr. Bin'Attash.

10 Q. Did you deviate from the form in any way?

11 A. I did not.

12 Q. All right. Did Mr. Bin'Attash indicate that he
13 understood his rights?

14 A. He did.

15 Q. And did he waive his right to attend this morning?

16 A. He did.

17 Q. All right. Does the signature appear on 429?

18 A. Yes. He signed the Arabic form, and then I went
19 ahead and signed underneath him at 0615 hours.

20 Q. All right. Both of these forms consist of three
21 pages; is that correct?

22 A. That is correct.

23 Q. All right. Let's turn now to 429A. This is the

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1 advice form for Mr. Hawsawi?

2 A. That is correct.

3 Q. Okay. What time did you read that form to him?

4 A. I began reading the English version at 0603 hours.

5 Q. All right. Did you read it to him in English?

6 A. I read the entire English version to him. He
7 followed along with the Arabic form, and then the translator
8 read the entire Arabic form to Mr. Hawsawi.

9 Q. Did he sign the document?

10 A. He did sign the document and then I signed underneath
11 him at 0609 hours.

12 Q. All right. Did either of them indicate that they did
13 not understand their rights?

14 A. They did not.

15 Q. And did they waive those rights?

16 A. They did waive their rights.

17 Q. Thank you.

18 TC [MR. SWANN]: I have nothing further, Your Honor ----

19 MJ [COL POHL]: Ms. Bormann or Mr. Ruiz, any questions?

20 LDC [MS. BORMANN]: Nothing for us, Judge.

21 LDC [MR. RUIZ]: No questions.

22 MJ [COL POHL]: Thank you. Thank you, Major.

23 WIT: Thanks, Judge.

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1 [The witness was excused.]

2 MJ [COL POHL]: At the conclusion of yesterday's hearing,
3 we conducted an 802 session, and during the 802 Ms. Bormann
4 made a comment that I would ask her now to put on the record.

5 LDC [MS. BORMANN]: Mr. Bin'Attash had asked me to confer
6 with him and then represent his position to the court. His
7 position was that although he had made previous statements
8 that he did not want me to represent him, he had not made that
9 statement on yesterday's date because he had met with the
10 Chief Defense Counsel, General Baker, prior to the hearing
11 yesterday and after that conversation had been assured by
12 General Baker that we could solve the issues.

13 MJ [COL POHL]: Okay. So that's kind of where we're at?

14 LDC [MS. BORMANN]: That's where we're at.

15 MJ [COL POHL]: Okay. Thank you, Ms. Bormann.

16 So that brings us to the first issue on today's
17 business, which is AE 422.

18 Trial Counsel, it's your motion.

19 LDC [MR. CONNELL]: Excuse me, sir, before we go to 422.
20 In the previous 802 you said we would do 018W and we sort of
21 skipped over 018W yesterday and went straight to 018Y.

22 MJ [COL POHL]: Yeah, Mr. Connell, that is correct. And
23 the reason why I did that, although I'll certainly give you an

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1 option to do it, is that I think the 018 issue, for what it's
2 worth, is encapsulated in the 018Y. Is there something you
3 wish to add on 018W that would impact --

4 Mr. Ryan, let me hear from Mr. Connell.

5 TC [MR. RYAN]: I'm sorry, sir.

6 MJ [COL POHL]: Okay. No problem. And it just seems to
7 me is that the long pole in the tent was 018Y, but -- and
8 that's why I kind of assumed 018W would be subsumed in it.
9 But if there's anything you wanted to add ----

10 LDC [MR. CONNELL]: Yes, sir. There are a few minor parts
11 of 018W that are not encapsulated within 018Y.

12 MJ [COL POHL]: Okay. Do you want to come -- do you want
13 to talk about them now?

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

15 MJ [COL POHL]: We certainly can. Okay. Go ahead with
16 them.

17 LDC [MR. CONNELL]: It's Mr. Hawsawi's motion. I'd like
18 to give them an opportunity to go first if they want, but I do
19 have a few comments.

20 MJ [COL POHL]: Okay. Okay.

21 DC [LtCol GLEASON]: Good morning, Your Honor.

22 Your Honor, in November of 2013, this commission
23 issued a written communications order in 018U at the request

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1 of the prosecution, and the reason that the commission issued
2 this order and the prosecution requested this order be issued
3 is to govern attorney-client communications, written
4 communications that were going into the detention camps.

5 The harm that the prosecution said they wanted to
6 avoid was the introduction of contraband into the camps, so
7 they asked that you set up a Privilege Review Team to review
8 attorney-client materials before they go into the camps. And
9 that's what you did. You set up a Privilege Review Team to
10 review attorney-client communications. This review that they
11 were to conduct was to be for contraband only, not for a
12 content review.

13 Immediately after this order was issued, the defense
14 began to -- ran into several problems. I'm sorry.

15 MJ [COL POHL]: Slow down, please.

16 DC [LtCol GLEASON]: I will.

17 MJ [COL POHL]: Go ahead.

18 DC [LtCol GLEASON]: After 018U was issued, the defense
19 encountered a number of problems with materials being
20 submitted through the Privilege Review Team. And we put those
21 problems together and we filed a motion, 018W, asking for six
22 clarifications or amendments to 018U. The first amendment
23 dealt with bound books. The Privilege Team in connection with

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1 JTF-GTMO Staff Judge Advocate's office determined that the
2 defense could not bring in bound books to attorney-client
3 meetings unless the defense marked every single page of the
4 bound book at the top and bottom with the banner markings
5 which state "unclassified military commissions, other related
6 material for release to detainees." The defense was also
7 required to put the detainee's name on the top of every page,
8 the defense counsel's name at the top of every page, and
9 initial each page.

10 The Privilege Team would then have to go through
11 these bound books and stamp every single page. As you can
12 imagine, this is really an unworkable requirement. We
13 requested that it would be clarified that bound books can go
14 in with just a marking on the first page. The prosecution did
15 not oppose that. They agreed that that was a -- that makes
16 sense.

17 The second area that we've requested be changed was
18 the requirement that court filings be marked as "releasable
19 to" -- by the prosecution before they could be shared with
20 Mr. Hawsawi. That became problematic for a couple of reasons.
21 The first is some motions that are filed by the defense are ex
22 parte, so the prosecution never receives a copy of it,
23 therefore, the prosecution is unable to remark it releasable

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1 to for it to go to Mr. Hawsawi.

2 The other problem is there is no timeline as far as
3 how long it takes the prosecution to mark motions as
4 "releasable to." As a result, sometimes the prosecution will
5 get a "releasable to" marking in a few days, sometimes they're
6 slow and it will take sometimes a few weeks. For example, the
7 current docketing order has never been marked "releasable to,"
8 and for this military commission session we are unable to
9 provide a copy of the docketing order to Mr. Hawsawi.

10 So on 018W we added the "releasable to" marking
11 requirement for court filings be eliminated, the prosecution
12 has agreed to that, so we ask that you eliminate that
13 provision, Your Honor.

14 MJ [COL POHL]: Okay.

15 DC [LtCol GLEASON]: The third area that we asked for
16 clarification regarding electronic media. When the Privilege
17 Team first started enacting the written communications order,
18 they interpreted it to only apply to written media and they
19 were initially rejecting any DVDs or CDs that we were trying
20 to bring into attorney-client meetings.

21 Now, that issue over the last almost three years now,
22 I think we have worked through that with the Privilege Team
23 where they're now reviewing electronic media, but we ask that

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1 you clarify in the order -- in the amended order, just to make
2 it clear for any future Privilege Team member, that it is a
3 responsibility that -- to review electronic media. The
4 defense has the right to submit that for review. That is
5 another area that the prosecution did not oppose, Your Honor.

6 MJ [COL POHL]: Okay.

7 DDC [LtCol GLEASON]: The next three areas are areas where
8 we diverged with the prosecution. They did not agree.

9 MJ [COL POHL]: Let me back up. In the pleading ----

10 DC [LtCol GLEASON]: Yes, sir.

11 MJ [COL POHL]: ---- you skipped over recommended change
12 C. Or were you going to come back to that?

13 DC [LtCol GLEASON]: I separated them into the first three
14 where the prosecution did not oppose, and I could address the
15 three that they have opposed.

16 Is this with the walled-off Privilege Team, sir?

17 MJ [COL POHL]: Yeah. Okay. Go ahead.

18 DC [LtCol GLEASON]: So one area that we propose to change
19 that the prosecution did oppose with regards to the Privilege
20 Team is the fact that whether they're going to be walled off.
21 I believe it was the intent of the commission for the
22 Privilege Team to be a walled off Privilege Review Team. It
23 says in the order that they're not to communicate with

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1 intelligence personnel, they're not to communicate with
2 security folks; however, the Privilege Team has interpreted
3 that to be that they can consult with the Staff Judge
4 Advocate's office at JTF-GTMO. And they have been consulting
5 with the Staff Judge Advocate's office for guidance on
6 interpreting this commission's written communications order.

7 The defense believes that that communication is
8 improper and we have requested that, in addition to a
9 provision saying they cannot consult with security or
10 intelligence personnel, that an additional provision be added
11 that they cannot consult with JTF-GTMO.

12 We believe if the Privilege Team has an issue that
13 arises with the interpretation of your order, sir, that's
14 something they should address with the commission. They
15 should not be seeking legal -- outside legal guidance from
16 JTF-GTMO.

17 MJ [COL POHL]: Okay.

18 DC [LtCol GLEASON]: The next provision, sir, is the
19 resealing of legal envelopes. The process that was set up to
20 stamp this mail and put it in envelopes that are sealed was to
21 ensure that, when we brought mail into meetings, the guards
22 could quickly identify whether this mail has been inspected by
23 the Privilege Review Team for contraband. So when we take

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1 mail in to the Privilege Review Team, they inspect every
2 single page, they stamp the back of every single page showing
3 that they've inspected it, and then they seal it in an
4 envelope.

5 When we check in for the attorney-client meetings, we
6 go through a screening process where there's an SJA standing
7 there. He checks envelopes to make sure they're sealed and he
8 allows us to take them into meetings. The problem we are
9 encountering is when we take an envelope out of the meetings,
10 we can't bring it back in again unless we take it back to the
11 Privilege Team and have them reseal the envelope. Sometimes
12 it's not a problem, sir, but it does become a problem for us
13 on the weekends when the Privilege Team is not working. So
14 we'd ask that you make a modification to the order that
15 eliminates that requirement for the envelopes to be resealed.

16 MJ [COL POHL]: How would JTF-GTMO know that the unsealed
17 information had gone through a Privilege Review Team review?

18 DC [LtCol GLEASON]: Because the pages are stamped, sir,
19 with the Privilege Team's information.

20 MJ [COL POHL]: Okay. But who would review that before
21 you took it back in?

22 DC [LtCol GLEASON]: The Staff Judge Advocate that's
23 standing there when we check in.

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1 MJ [COL POHL]: So you're saying that you don't have a
2 problem with additional confirmation that the Privilege Team
3 had seen this information before they bring it back?

4 DC [LtCol GLEASON]: Say that one more time, sir.

5 MJ [COL POHL]: What I'm saying, the Privilege Review Team
6 looks at the stuff, stamps it, gives the sealed envelope, you
7 walk in the meeting and walk out with the envelope. Okay.
8 Currently to walk back in with the envelope, you have to take
9 it back to the Privilege Review Team, correct?

10 DC [LtCol GLEASON]: Correct, sir.

11 MJ [COL POHL]: What you propose to change instead of
12 doing that would simply have the SJA representative there
13 before you go back into the meeting confirm that each page has
14 been stamped properly by the Privilege Review Team ----

15 DC [LtCol GLEASON]: Yes, sir.

16 MJ [COL POHL]: ---- rather than going through the
17 whole ----

18 DC [LtCol GLEASON]: Yes, sir.

19 MJ [COL POHL]: I got it.

20 DC [LtCol GLEASON]: It's really going to be the exception
21 to the rule, sir. It really only comes up when the Privilege
22 Review Team is not working. And we encounter that on the
23 weekends primarily.

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1 And the last provision that we'd ask be eliminated is
2 the requirement under paragraph 8.a for us to mark
3 Mr. al Hawsawi's notes following each meeting. We don't
4 believe -- we believe that the order was set up to prevent
5 contraband from going into the camps and it's logically --
6 doesn't make any sense that information that he takes notes on
7 inside the camps is already in the camps, so it can't be
8 contraband that we're bringing in to him. So we see no
9 purpose for us to take his notes out of a meeting, go through
10 the many steps in the process that are required under the
11 order to bring those notes back to him.

12 MJ [COL POHL]: Okay. So currently Mr. Hawsawi's notes
13 would go -- after the meeting, go back to the Privilege Review
14 Team, they'd take a look at them, and they'd stamp them and
15 give them back to Mr. Hawsawi?

16 DC [LtCol GLEASON]: So this is how it would work under
17 the order, sir.

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

19 DC [LtCol GLEASON]: We take the notes back to the
20 meeting, we take them to the ELC here and scan them on the
21 point-to-point classification system because we don't know
22 what the classification level is. We then have the notes
23 translated to English. We have the DS, the Defense Security

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1 Officer review the notes to make a classification
2 determination. We then mark the notes with the classification
3 determination and the banner markings, then we take the notes
4 back to the Privilege Review Team for them to review and stamp
5 them and then only at that point could we then bring them back
6 to Mr. Hawsawi.

7 MJ [COL POHL]: And your proposed change would do what?

8 DC [LtCol GLEASON]: To eliminate that provision, sir.

9 MJ [COL POHL]: And Mr. Hawsawi would take notes and then
10 simply take his notes back to his cell?

11 DC [LtCol GLEASON]: Yes, sir. And the way it works now
12 is the guard force provides Mr. Hawsawi legal notepads to take
13 his notes on.

14 MJ [COL POHL]: Okay.

15 DC [LtCol GLEASON]: Those notepads are all marked with
16 his ISN number before they're provided to him, those notepads.
17 And it would be an easy step for when they -- for the guard
18 force when they stamp his ISN number on them, on those
19 notepads, they could also just stamp attorney-client
20 privileged material; therefore, it's clear for them to
21 distinguish what are legal notes and what are not legal notes.
22 And that would allow them then ----

23 MJ [COL POHL]: How would they know? How would the guards

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1 know it was all legal material?

2 DC [LtCol GLEASON]: Because each -- the notepad would be
3 stamped with legal material on each page, sir. Right now,
4 they stamp his ISN number 1011 on each page.

5 MJ [COL POHL]: Okay.

6 DC [LtCol GLEASON]: At the end of the additional stamp,
7 they could just stamp attorney-client privilege notes or legal
8 notes. They would allow them ----

9 MJ [COL POHL]: With the assumption that anything he took
10 down during an attorney-client meeting was attorney notes?

11 DC [LtCol GLEASON]: Yes, sir.

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

13 DC [LtCol GLEASON]: And under the current order, it's
14 really not workable. I explained all the steps we have to go
15 through and it's just not feasible to accomplish all of those
16 steps in one to two days. What ends up happening if we have
17 to take his notes out of the meeting, he doesn't get those
18 notes back during that week when we are meeting with him and
19 we have to get them back to him at a later meeting. That
20 prevents us, if I talk with him about something on Friday, and
21 I can't have his notes handy when we talk about the similar
22 topic on the next day, on Saturday.

23 MJ [COL POHL]: Okay.

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1 DC [LtCol GLEASON]: And really if the harm is trying to
2 have a way for the guards to distinguish that easily, it can
3 be rectified by just stamping the legal notepad with the
4 attorney-client notes. That would allow the guards to
5 distinguish what are legal notes and what are not.

6 MJ [COL POHL]: Okay.

7 DC [LtCol GLEASON]: May I have one moment, Your Honor?

8 MJ [COL POHL]: Okay.

9 [Pause.]

10 DC [LtCol GLEASON]: Your Honor, I just wanted to clarify
11 a couple of points.

12 MJ [COL POHL]: Sure.

13 DC [LtCol GLEASON]: With the provision that we propose
14 for resealing the envelopes or not resealing envelopes when we
15 go into meetings, one of the alternatives that we proposed was
16 to have a member of the Privilege Review Team at the meeting
17 location every day when we check in. That way, if we have an
18 open envelope, he can then reseal it on-spot, on site.

19 MJ [COL POHL]: So you want me to tell the JTF to have a
20 Privilege Review Team member there 24/7 whenever you have a
21 meeting?

22 DC [LtCol GLEASON]: Just to be there present when we
23 check in, sir. Currently when we check in, they have a member

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1 of the Staff Judge Advocate's office that's present. It
2 wouldn't be a stretch to have a member of the Privilege Review
3 Team there during check-in time. That way, if we do have
4 envelopes that need to be resealed, he could quickly do it on
5 site. That was one of the alternatives that we proposed, sir.

6 MJ [COL POHL]: You're really getting into the weeds here.
7 You want somebody to sit there on site when you get done with
8 your meeting to reseal the envelope?

9 DC [LtCol GLEASON]: When we check in in the morning, sir.
10 It could be at the end of the day when we are done with the
11 meeting or it could be when we check in in the morning.

12 MJ [COL POHL]: Okay. You've confused me. You check in
13 in the morning with a sealed envelope.

14 DC [LtCol GLEASON]: Yes, sir.

15 MJ [COL POHL]: You go visit your client.

16 DC [LtCol GLEASON]: Yes, sir.

17 MJ [COL POHL]: You walk out of the meeting, the envelope
18 is now unsealed. If you -- your first proposal is to take it
19 back, you don't want to have go through the Privilege Review
20 Team?

21 DC [LtCol GLEASON]: Yes, sir.

22 MJ [COL POHL]: Okay. This is a different thing?

23 DC [LtCol GLEASON]: Yeah. The first proposal is we go

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1 back, the SJA just looks at the back of the sheet to make sure
2 it has a stamp, and we go in with the document.

3 MJ [COL POHL]: Got it.

4 DC [LtCol GLEASON]: The other proposal is if for whatever
5 reason there is concern about the envelopes not being sealed
6 to have a member of the Privilege Review Team on site when we
7 check in for the morning meetings to reseal envelopes.

8 MJ [COL POHL]: Where would the unsealed envelope be in
9 between?

10 DC [LtCol GLEASON]: It would be with defense counsel,
11 sir.

12 MJ [COL POHL]: So the bottom line is you want a member of
13 the Privilege Review Team there every morning, seven days a
14 week?

15 DC [LtCol GLEASON]: If -- or we prefer to have a
16 provision where we don't have to reseal the envelope, sir.
17 And if that's not possible for whatever reason, then we would
18 like to have a member of the Privilege Review Team on site
19 when we check in.

20 MJ [COL POHL]: Let's say that you come in on Friday, with
21 a sealed envelope. It goes to the Privilege Review Team.
22 They stamp, stamp, stamp, and it goes in to the client. You
23 take it out unsealed.

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1 DC [LtCol GLEASON]: Yes, sir.

2 MJ [COL POHL]: Okay. Currently if you wanted to bring it
3 in on Saturday, you'd have to take it back to the Privilege
4 Review Team.

5 DC [LtCol GLEASON]: Yes, sir.

6 MJ [COL POHL]: Your proposal is if you want to bring it
7 back Saturday, the SJA rep sits there and looks to see, hey,
8 this was all stamped by the Privilege Review Team and you take
9 it back in?

10 DC [LtCol GLEASON]: Yes, sir.

11 MJ [COL POHL]: Okay. And now what's this -- I don't
12 understand the other -- the new proposal.

13 DC [LtCol GLEASON]: The one proposal is just to have the
14 Privilege Review Team present so that they can reseal that
15 envelope.

16 MJ [COL POHL]: If I don't agree with ----

17 DC [LtCol GLEASON]: If you don't agree with the first
18 proposal, sir.

19 MJ [COL POHL]: Number two is the same procedure that you
20 got now, it's just make the Privilege Review Team work every
21 day ----

22 DC [LtCol GLEASON]: Yes, sir.

23 MJ [COL POHL]: ---- is what this comes down to? And what

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1 you're telling me is they don't work every day currently?

2 DC [LtCol GLEASON]: They don't.

3 MJ [COL POHL]: Okay.

4 DC [LtCol GLEASON]: And we've encountered that before
5 where we show up on Saturday. For example, we showed up on
6 Saturday and the Privilege Review Team was not working
7 Saturday and Sunday because they took the weekend off. When I
8 met with Mr. Hawsawi on Sunday, I was not able to bring any
9 documents in with me. So this proposal will -- seeks to solve
10 that problem, sir ----

11 MJ [COL POHL]: Okay.

12 DC [LtCol GLEASON]: ---- of the Privilege Review Team not
13 being available.

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

15 DC [LtCol GLEASON]: Thank you. And one other point I
16 just wanted to clarify, sir. You -- you seemed like you had a
17 question about if Mr. Hawsawi took nonattorney-client notes
18 during a meeting. I think that could easily be solved if
19 JTF-GTMO would provide him two separate notepads, one that's
20 marked -- stamped attorney-client meeting notes and one that's
21 stamped with his ISN number. That way he could distinguish
22 what notes are legal, which notes are not legal, and the guard
23 force could quickly distinguish when they did cell searches

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1 what are legal notes.

2 MJ [COL POHL]: Yeah, but the bottom line is they're
3 relying on Mr. Hawsawi to say that these notes written in
4 Arabic are legal, right?

5 DC [LtCol GLEASON]: Yes, sir.

6 MJ [COL POHL]: I'm not sure what that solves. I mean,
7 currently there's some type of review before they go back to
8 him, right? What you want to do is eliminate the review.
9 Basically the bottom line is any notes he takes during an
10 attorney-client meeting are going to be presumed
11 attorney-client notes ----

12 DC [LtCol GLEASON]: Yes, sir.

13 MJ [COL POHL]: ---- no matter what they say.

14 DC [LtCol GLEASON]: Yes, sir.

15 MJ [COL POHL]: And there's no way to get around that.
16 If -- but you just want him to be able to take them back with
17 nobody reviewing them?

18 DC [LtCol GLEASON]: Yes, sir. And if we look at the harm
19 that the government really originally brought up was they
20 don't want contraband being introduced into the camps.

21 MJ [COL POHL]: Okay.

22 DC [LtCol GLEASON]: Mr. Hawsawi is not leaving their
23 controlled environment. He's ----

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1 MJ [COL POHL]: I don't need -- I think you're correct on
2 that.

3 DC [LtCol GLEASON]: So if he's taking notes during an
4 attorney-client meeting, it's not like he's introducing
5 contraband somehow into the camps.

6 MJ [COL POHL]: Got it.

7 DC [LtCol GLEASON]: Okay, sir.

8 MJ [COL POHL]: Okay.

9 DC [LtCol GLEASON]: That's all I had, Your Honor.

10 MJ [COL POHL]: Thank you. Thank you.

11 Mr. Connell, you wanted to add something?

12 LDC [MR. CONNELL]: Yes. So it's not always easy to tell,
13 especially in advance, how a written policy is going to
14 translate into ground truth. And as the military commissions
15 knows, I fought pretty hard about 018, and lost most of my --
16 the things that I wanted, but won some. And 018U has turned
17 out to be a workable solution that allows written
18 communication to travel in and out of the camp in a controlled
19 manner. It just has -- there are just a few minor ways that
20 the expectation has not matched up with the actual -- what
21 actually happens.

22 Two of those, Mr. Hawsawi's proposals A and B, I
23 won't mention. They've already been discussed by the --

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1 agreed to by the prosecution.

2 C, I think was just a wording problem. I think that
3 the military commission -- I think that all of the parties
4 contemplated the Privilege Team to be a walled-off -- to work
5 for the commission, and to be a walled-off, ex parte
6 institution that -- and I know, because I've had many
7 conversations with the Office of the Chief Prosecutor where
8 they have told me, we don't talk to the Privilege Team. If
9 you have this issue with the Privilege Team, you have to work
10 it out with them. I think the prosecution has done -- gone
11 out of their way to respect the wall between themselves and
12 the -- and the Privilege Team. And I think it was just a
13 wording question that JTF was left out -- was left inside on
14 the Privilege Team side of the wall instead of outside the
15 walled-off privilege review. I think that can be easily
16 solved with a minor change.

17 Proposed change (d), I do -- has been agreed to in
18 part by the prosecution, but I do want to add a little bit
19 more about it. That's the paragraph 7.c and that's about how
20 is electronic media handled. This is about to become much
21 more important because the prosecution has proposed a
22 work-around involving an external hard drive. As you know,
23 the military commission has ordered the laptops to be returned

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1 to their 2010 functionality, which include CD -- controlled by
2 the guards, CD- and DVD-burning capability.

3 JTF has declined to allow that. We briefed this
4 recently. We gave an update to the military commission that
5 JTF is not in compliance with the military commission's order.
6 The prosecution has proposed a sort of alternate solution that
7 involves external hard drives, that instead of having --
8 bringing information in on CD for transfer, that it would
9 happen via external hard drive.

10 That makes the proposed change to 7.c extremely
11 important. Because the question that the Privilege Team
12 doesn't know and we have all been forced to sort of work
13 around is what are they reviewing electronic media for? What
14 are they -- are they conducting a contraband review like they
15 are with physical paper, or are they conducting a content
16 review? At present, they conduct a content review, but we
17 don't believe that was the -- or at least I don't believe that
18 was the intent of the written communications order; that when
19 we're dealing with physical paper, the -- the military
20 commission was very clear that a -- we're -- that only
21 physical contraband is being searched for. There is not a
22 content review which is being conducted.

23 Instead, the -- and so the question is, when we're

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1 dealing with electronic media, is the question that the
2 Privilege Team checks the markings and checks to make sure
3 that, you know, this is the external hard drive which has been
4 authorized, or the CD which has been authorized and it checks
5 the external markings for physical contraband, or is it
6 conducting a content review?

7 The Privilege Team at present has determined that
8 that is a content review. I don't think that that is
9 consistent with the other provisions of the order, and I think
10 that the military commission should make clear that the review
11 is for markings and physical contraband and not for content.

12 The proposal E ----

13 MJ [COL POHL]: Let me go back.

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

15 MJ [COL POHL]: I was just told that on -- we're talking
16 about recommended change D, right?

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

18 MJ [COL POHL]: That the recommended change language is
19 not objected to by the -- by the government. Do you believe
20 that the proposed language satisfies Mr. al Baluchi's
21 position?

22 LDC [MR. CONNELL]: One -- court's indulgence.

23 MJ [COL POHL]: I hear agreement and then I don't know

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1 whether -- I understand your point. I got your point. I'm
2 just simply saying is, do you take issue with the proposed
3 language that apparently others have already agreed to?

4 LDC [MR. CONNELL]: The proposed language out of 018Y?

5 MJ [COL POHL]: 018W.

6 LDC [MR. CONNELL]: Mr. Hawsawi's proposed language.

7 MJ [COL POHL]: I'm operating off of that one. I don't
8 have 018Y yet.

9 LDC [MR. CONNELL]: Can I have the court's indulgence for
10 a minute? I want to make sure we are all talking about the
11 same language.

12 MJ [COL POHL]: Yes.

13 MTC [MR. TRIVETT]: Sir, to clarify, are you referencing
14 the prosecution's proposed amended order for Mr. Ruiz?

15 MJ [COL POHL]: No. I'm looking at 018W, since that was
16 the source document that I was told that everybody agreed to.

17 LDC [MR. NEVIN]: Your Honor, I think their proposed
18 change is in 018Y, government proposed second supplement.

19 MJ [COL POHL]: Yeah. That's true.

20 LDC [MR. NEVIN]: Right.

21 LDC [MR. CONNELL]: Okay. Your Honor, peace has broken
22 out again.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: The government included in its 018Y
2 second supplement ----

3 MJ [COL POHL]: Right.

4 LDC [MR. CONNELL]: ---- the first sentence that
5 Mr. Hawsawi had proposed. And just so the record is clear,
6 I'm going to read that sentence: "The Privilege Team is
7 responsible for inspecting tapes and other forms of electronic
8 media for physical contraband and to verify that the tapes and
9 other forms of electronic media are appropriately marked
10 pursuant to this order."

11 Mr. Hawsawi had proposed a second sentence which
12 is, "This inspection shall not include a review of the
13 substantive contest of this incoming electronic material, as
14 such material is privileged under M.C.R.E. 502."

15 The prosecution did not originally include that
16 second sentence, but the -- I've -- thank you very much. But
17 the government has just informed me that it considers the
18 second sentence simply to be further clarifying and it does
19 not object to the inclusion of the second sentence.

20 MJ [COL POHL]: Okay. So we're all in agreement on that
21 one?

22 LDC [MR. CONNELL]: I believe so, sir. The government can
23 speak for itself.

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

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: With respect to -- and thank you to
4 the -- thank you. With respect to proposed change E, which is
5 the sealing -- the unsealing and re-sealing, Mr. al Baluchi
6 does not support that solution. We find that the sealed
7 envelopes make it very easy for the guards to just pick up
8 the -- you know, there's a big crowd there at 9:00 in the
9 morning anyway. There's no staggering, right, and everybody's
10 there at the same time. We find that it's easy and
11 straightforward to have a sealed packet. We find that the --
12 on many occasions if we plan ahead, the Privilege Review Team
13 is willing to accommodate us and we do not support the
14 alternative that was proposed there.

15 But when it comes to change F, which is the idea of
16 inspection of written notes taking place after a meeting,
17 the -- I will be completely honest with you. When I was
18 preparing for this motion, I went back and reread that
19 provision and was surprised to see it in 018U because I had
20 forgotten about it. There is no outgoing review from the --
21 by the Privilege Team of material from Echo II, as it -- the
22 ground truth is now. Notes do not come out of Echo II and get
23 reviewed by the Privilege Team. The Privilege Team only

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1 reviews things which come into the -- into the camp. They
2 don't review things that come out of the camp for like written
3 notes.

4 This idea of having client notes translated and
5 remarked, I will tell you that in my experience it has never
6 happened. I don't know what the Privilege Team would do if I
7 asked them to show up and handle his written notes ----

8 MJ [COL POHL]: When you're done with your meeting with
9 Mr. al Baluchi, does he just take his notes back to his cell?

10 LDC [MR. CONNELL]: Yes, sir. JTF provides -- at various
11 times it's been different things. This is Mr. al Baluchi's
12 notebook right now that was provided by JTF. It has a GUAN
13 number on it, it has his ISN number on it. He takes his notes
14 in this little book, he writes down whatever he wants to write
15 down during the meeting, and then he takes his little book
16 back with him in his legal bin back from Echo II back to the
17 camp. I don't like there's no -- I don't rip out pages or
18 there's nothing like that that occurs. There's no outgoing
19 processing by the Privilege Team. He takes his material back
20 in a form that has been previously approved by JTF and keeps
21 his notes that way.

22 So the -- I think what happens with paragraph 8.a(2),
23 it was an idea that was contemplated when we were working, you

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1 know, ex-ante to try to figure out how the thing was going to
2 work, but it is not something that has translated into ground
3 truth because that -- as the military commission just
4 observed, it's not like the Privilege Team is hanging out at
5 Echo II waiting for us to walk out so they can out-process
6 information.

7 So I think that the appropriate thing to do is simply
8 to strike paragraph 8.a(2) as something that has proven not to
9 be necessary or workable in the overall scheme established by
10 018U.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: I have one more comment to say about
13 that. It is that changing that would not affect in any way
14 the other protective structures that are set up around client
15 information that comes out of the camp. The -- if information
16 is classified when it comes out of the camp, we double wrap it
17 and two-person integrity courier it. You know, all of the
18 protections around classified information would remain in
19 place. All of the protections that we have around privileged
20 information would remain in place. It is simply that we would
21 take a sort of anomalous provision out of the protective
22 order. I hate to have those anomalous provisions hanging
23 around because someone later may decide, contrary to four

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1 years of practice, now we're going to start enforcing this,
2 you know, provision that has never been in effect or really
3 worked.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: All right. Thank you.

6 MJ [COL POHL]: Thank you. Mr. Nevin, Ms. Bormann, or
7 Mr. Harrington, do you wish to add anything? I just prefer
8 the lead counsel. It doesn't necessarily mean they're the
9 only ones that get to talk.

10 Mr. Schwartz.

11 DDC [MR. SCHWARTZ]: Good morning, Your Honor.

12 MJ [COL POHL]: Good morning.

13 DDC [MR. SCHWARTZ]: I don't have anything to add on W,
14 018W specifically. I just want to bring to your attention, if
15 you'd like to do HH and MM, it makes sense, just based on the
16 arguments that were raised this morning. I hesitate to do
17 anything or to take up any more time before the opportunity to
18 discuss 426. Obviously that's my position.

19 MJ [COL POHL]: Yeah.

20 DDC [MR. SCHWARTZ]: But for efficiency's sake, if you
21 want to discuss, HH was the one that was missing from the
22 docket last session and discusses our ability to process
23 classified information that's not in the handwriting of the

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1 client through the PRT, if you recall that. And then MM is
2 PRT weekend hours, which continues to be an issue.

3 MJ [COL POHL]: Okay. I think we had already put MM on
4 yesterday.

5 DDC [MR. SCHWARTZ]: They're both on. Yes. I'm sorry,
6 yes.

7 MJ [COL POHL]: We were going to discuss that. HH is new.

8 DDC [MR. SCHWARTZ]: Yes.

9 MJ [COL POHL]: Okay. Okay.

10 DDC [MR. SCHWARTZ]: So ----

11 MJ [COL POHL]: Back to what we're talking about. Do you
12 have anything to add on 018?

13 DDC [MR. SCHWARTZ]: That's all on this. Nothing to add
14 to W.

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

16 Mr. Harrington.

17 LDC [MR. HARRINGTON]: Judge, there's a conflation of a
18 lot of things that we talk about all the time here, but 018W
19 was filed back in December of 2013, and obviously we have had
20 a long time to work with it since that time. But just as an
21 example to you of how difficult this is, when we talk about
22 books, on my team we have four paralegals. Two of them have
23 not had their SAP reading for over a year. And when we have

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1 to photocopy books, it could be a book of 500 pages,
2 individual pages, and then have them scanned and marked, it
3 takes just an enormous, enormous amount of time, which could
4 be obviously spent on much more substantive tasks.

5 And the PRT will not accept books marked as we
6 proposed and they say to us submit them nonlegal. We have
7 done that on occasion. The nonlegal books are not approved
8 and we don't get reasons and we don't get the -- we don't even
9 get the books back on many occasions.

10 So this -- these practical problems are
11 extraordinarily frustrating in our relationship with our
12 client, who has many times specifically asked for books which
13 are, in our opinion, case related and important to preparing a
14 defense. And we are unable to deliver those to him except for
15 an extraordinary use of valuable ----

16 MJ [COL POHL]: Hasn't the government proposed a change to
17 address that, though?

18 LDC [MR. HARRINGTON]: It does. But I just want to
19 emphasize that all of these things that we talk about
20 dramatically affect our relationships with our clients.
21 That's all. Thank you.

22 MJ [COL POHL]: Okay. You're welcome.

23 Trial Counsel. Good morning, Mr. Trivett.

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1 MTC [MR. TRIVETT]: Good morning, Your Honor.

2 No disagreement from the prosecution on the first
3 three issues that Colonel Gleason brought up, specifically to
4 the bound books and the court filings, and now the electronic
5 media. So we are in agreement with that. We're trying to be
6 as reasonable as possible in order to facilitate the defense
7 counsel function and also protecting contraband, be it
8 physical or -- be it physical contraband going into the camp.
9 The prosecution did propose its changes. And to the extent
10 that there's any differences, we would ask you to adopt ours
11 as opposed to theirs with the exception of what I just
12 approved.

13 But I did want to discuss a couple of issues that we
14 are opposed to, and that's specifically this concept that the
15 Privilege Review Team, if they coordinate at all with the
16 SJA's office, is somehow violating the privilege. We have had
17 no allegations of any privilege being violated per your order.
18 But there is a reasonable and practical reason for, at times,
19 the Privilege Team coordinating with JTF-GTMO, who is
20 ultimately going to be the individuals who are searching the
21 cells, understanding how the stamps work, those types of
22 things. So we do oppose the additional language that
23 Mr. Hawsawi's defense team requested in that regard and we'd

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1 just point out that ----

2 MJ [COL POHL]: What type of coordination ----

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

4 MJ [COL POHL]: ---- and I think there's -- obviously
5 there needs to be a common understanding of markings and
6 things like that between the Privilege Review Team and the
7 JTF-GTMO.

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

9 MJ [COL POHL]: Okay. Is that what we're talking about?

10 MTC [MR. TRIVETT]: My concern is that if -- by
11 specifically identifying the SJA's office as not someone that
12 the Privilege Team should be communicating with, that the
13 communications that are occurring that are not in violation of
14 your order and which help facilitate this entire process, will
15 be chilled, and that's the concern.

16 MJ [COL POHL]: Well, let me ask you this: Are we doing
17 content coordination or simply logistic coordination?

18 MTC [MR. TRIVETT]: It's usually logistic coordination.

19 MJ [COL POHL]: Oh, you used the word usually.

20 MTC [MR. TRIVETT]: I did use the wrong word.

21 MJ [COL POHL]: I mean, do you have no -- what you're
22 saying is they may have to consult with JTF-GTMO, the SJA
23 office, as to how to mark something.

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1 MTC [MR. TRIVETT]: Correct.

2 MJ [COL POHL]: Okay. But not content review.

3 MTC [MR. TRIVETT]: Correct.

4 MJ [COL POHL]: Okay. So you say they can coordinate for
5 logistical administrative consistency between the review team
6 and the JTF ----

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

8 MJ [COL POHL]: ---- but they are not coordinating the
9 content itself?

10 MTC [MR. TRIVETT]: That's correct.

11 MJ [COL POHL]: We're simply talking about administrative
12 coordination here only.

13 MTC [MR. TRIVETT]: Correct. So to the extent that the
14 order needs to clarify that it's proper to have logistical
15 conversations and just simply to clarify that at no time
16 should any of the substantive information that the Privilege
17 Review Team may learn be communicated to JTF, we're okay.

18 MJ [COL POHL]: The way the motion is worded, though, it
19 appears that they ask the JTF SJA for guidance. Now, is that
20 guidance on what 018U means or -- administratively or is it
21 guidance on what it means substantively or do you know?

22 MTC [MR. TRIVETT]: I certainly don't know what recent
23 communications, if any, they've had. At the beginning, I'm

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1 sure they communicated when there was a disagreement amongst
2 the defense counsel and the Privilege Review Team on how the
3 order was to be interpreted, but that was probably early on in
4 the process.

5 MJ [COL POHL]: Let's say you had that again. Let's say
6 the Privilege Review Team doesn't talk to anybody, looks at
7 something and I interpret 018U to require A, B and C, okay?
8 It appears that the concern is their next step may be to go to
9 the SJA for legal advice. And what I'm looking -- what
10 appears to be the proposal here is if you have a concern about
11 how it's being interpreted, you would go to the defense
12 counsel to resolve it. And if they couldn't resolve it, they
13 would come to the commission for guidance on what 018U means
14 legally as opposed to the going to the SJA office.

15 MTC [MR. TRIVETT]: If it's solely a specific of
16 interpret -- a specific issue of interpreting the order, the
17 prosecution isn't opposed to that. The prosecution doesn't
18 believe that the SJA's office has to be involved when the
19 Privilege Team has a question on interpretation of the order.
20 More of their communications, I am told, are logistical in
21 nature.

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

23 MTC [MR. TRIVETT]: But we did want to preserve that right

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1 to have those conversations that are logistical in nature so
2 that the process can continue to move smoothly.

3 And in regard to the receipt ----

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

5 MTC [MR. TRIVETT]: Oh, yes, sir.

6 [Pause.]

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

8 MTC [MR. TRIVETT]: In regard to the resealing of the
9 legal envelopes, it's interesting, because on one hand they're
10 concerned about the SJA being involved at all in the process,
11 yet if it's more expedient for them, they're fine with the SJA
12 actually looking and checking the stamps, which would be far
13 closer to any privileged information that they would have
14 gotten in these logistical communications, but we do oppose --
15 we continue to oppose that.

16 We believe that it appears to be working, at least
17 according to one of the defense counsel. It allows for a
18 quicker and more efficient means by which these meetings can
19 begin, and it ensures that the guards have less involvement in
20 the process, which I believe everyone wanted.

21 Turning now to the notes out of the meeting and the
22 concern -- Mr. Connell seems to have worked out a situation
23 with GTMO where his client's notes are in some bound notebook

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1 that already has a GUAN number and that's already approved.
2 And if the camp's fine with that, that's great. The concern
3 isn't that situation. I think the concern is the looseleaf
4 paper concern and whether or not it's got proper markings on
5 it when it goes back to the camp. And the main concern with
6 that is the idea was that everything would have a stamp of
7 some type so it could be identified under its proper category
8 when it went back out -- back out to the camp.
9 Ultimately ----

10 MJ [COL POHL]: Yeah. I think Colonel Gleason was talking
11 about that, he was -- I think he was talking about a stamped
12 notebook with the ISN number and the GUAN number on it
13 and ----

14 MTC [MR. TRIVETT]: If that's the case and if they're
15 working it in a way that the camp has no concerns about, then
16 why disrupt the apple cart on this and why not keep the
17 current situation in place?

18 MJ [COL POHL]: Okay.

19 MTC [MR. TRIVETT]: I think that's the government's
20 position. If it works for the camp, it works for the
21 government on this issue. But I don't want to bring any
22 additional confusion into the process, because the more
23 confusion, the more litigation we have when guards are seizing

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1 information that they're not sure whether or not the accused
2 are entitled to have.

3 MJ [COL POHL]: Okay.

4 MTC [MR. TRIVETT]: So that's our position on that.

5 And subject to your questions, sir.

6 MJ [COL POHL]: So just on that, if you look at
7 paragraph 8.a ----

8 MTC [MR. TRIVETT]: Yes, sir. Material retained by the
9 accused.

10 MJ [COL POHL]: "The accused shall be allowed to retain
11 any written notes made during the meetings, any written
12 materials produced during the meeting and any material above
13 brought into the meeting."

14 MTC [MR. TRIVETT]: Yes, sir. We would prefer to keep
15 Section 2 in because it apparently works with the notebook and
16 we wouldn't want to change any of the provisions for that.

17 MJ [COL POHL]: Okay. I need to ask Mr. Connell something
18 before I get back to this. Okay. Thank you.

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

20 LDC [MR. CONNELL]: Sir?

21 MJ [COL POHL]: Yeah. You say get rid of
22 paragraph 8.a(2).

23 LDC [MR. CONNELL]: I have another alternative.

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1 MJ [COL POHL]: But do you see -- we're talking about two
2 separate notes here and I'm not sure how you differentiate
3 them.

4 LDC [MR. CONNELL]: Right.

5 MJ [COL POHL]: I'm saying, 8.a(1) talks about notes that
6 they're bringing into the meeting they already have.

7 LDC [MR. CONNELL]: Or made during the meeting.

8 MJ [COL POHL]: Or made during the meeting and ----

9 LDC [MR. CONNELL]: It's somewhat contradictory with
10 paragraph 2.

11 MJ [COL POHL]: That's, yeah.

12 LDC [MR. CONNELL]: Yeah. So I think that a reasonable --
13 and what my problem with 8.a(2) is that technically I'm in
14 violation because it says defense counsel shall, a mandatory,
15 mark them pursuant to the procedures above and shall be
16 inspected by the Privilege Team, which I have never done.
17 The -- I think that we could solve the problem by -- and if
18 prosecution has a reason they want to keep 8.a(2), so be it.
19 But if it we change the shalls to may, then it would provide
20 flexibility for the current system to continue. But if there
21 were something that specifically needed to be -- if there were
22 concerns about something that needed to be marked, we could
23 take it out and have it marked by the Privilege Team and bring

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1 it back in.

2 MJ [COL POHL]: Mr. Connell, once I change shalls to may
3 then we have interpretation issues. What I'm saying is right
4 now the way I read this, it says that if it's premarked and
5 everything and brought into the meeting, okay, he can take it
6 back. Right?

7 LDC [MR. CONNELL]: That's certainly true.

8 MJ [COL POHL]: Okay. If it's developed during the
9 meeting, that's where the rub comes, because ----

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

11 MJ [COL POHL]: ---- because the paragraphs don't appear
12 to be read, because it's in the conjunctive "and brought into
13 the meeting," but it says, "retain notes made during the
14 meeting." If you take paragraph 1 and simply say that as long
15 as all notes are kept and marked -- for the stuff brought into
16 the meeting is already marked, right?

17 LDC [MR. CONNELL]: Yes, of course.

18 MJ [COL POHL]: Okay. And then the notes during the
19 meeting, if it's done in a little notebook, will be marked
20 going out of the meeting.

21 LDC [MR. CONNELL]: No, sir.

22 MJ [COL POHL]: No, no, no, no. I'm saying marked in the
23 sense that it's in a marked notebook.

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1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: The third option of notes on a piece of
3 paper would not have any markings on them.

4 LDC [MR. CONNELL]: Correct.

5 MJ [COL POHL]: Those would have to go through some type
6 of marking process, for want of a better term. If you're
7 client ----

8 LDC [MR. CONNELL]: You mean our marking?

9 MJ [COL POHL]: No. If your client chose to make notes on
10 an unmarked -- okay, your little book, you know -- your little
11 book with the numbers already on it ----

12 LDC [MR. CONNELL]: Right.

13 MJ [COL POHL]: ---- fine, take it back to the cell.

14 LDC [MR. CONNELL]: So let me make my point. Over the
15 years it has not always been a little book. Sometimes it has
16 been like a little half legal pad stamped with the ISN number.
17 It's been different things over time.

18 MJ [COL POHL]: So as long as he takes notes on something
19 that's previously been stamped, then taking it back to the
20 cell presents no problems. But if he takes notes on something
21 that's not been stamped, then it needs to be stamped before it
22 goes back to the cell ----

23 LDC [MR. CONNELL]: So that ----

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1 MJ [COL POHL]: ---- so we don't run into a problem in the
2 cell later on, right?

3 LDC [MR. CONNELL]: Right. Right.

4 So I want to break that into two pieces. The first
5 one is, under the language as it's written right now,
6 Mr. al Baluchi's notes in his little book or on a pre-stamped
7 legal pad are in violation because the Privilege Team never
8 sees those, right? It's the Privilege Team that's really the
9 problem here because there's no loop to get the Privilege Team
10 back into it. The privilege team's not there. It just
11 doesn't actually work this way.

12 So that's the problem with the way that it's written
13 right now, is that there's a current practice that works that
14 protects all of the interests that is okay with JTF that's
15 okay with us, and this -- but it's in technical violation of
16 this 8.2.a [sic].

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

18 LDC [MR. CONNELL]: The second -- now let's talk about the
19 second part because the second part is actually a problem that
20 has, you know, dogged us forever and none -- none of us in
21 this room have ever come up with a good solution for the
22 mystery of the unmarked documents, because there are legacy
23 documents that came in before the current system. Now, there

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1 are printed documents because there's a printer that's set up
2 at Echo II, which we greatly appreciate. JTF, if you are
3 listening, thank you. And there's a printer that's set up
4 that gets printed on, you know, the paper that we put the ISN
5 number on.

6 From time to time, JTF or someone else will send a
7 letter to the defendants and those aren't marked. You know,
8 those don't go through this Privilege Team. There are a lot
9 of ways that only defense information goes through the
10 Privilege Team. If it comes from JTF, if it's self-generated,
11 if it comes from some other legitimate government source, then
12 it's not marked. They just hand them stuff.

13 So there is the -- there is a quantity of unmarked
14 information still in the camp. And we've seen the problem
15 before of, you know, not understanding what the previous stamp
16 looked like. And, you know, I'm not sure that we're going to
17 solve that problem, you know, in this 8.2.a.

18 MJ [COL POHL]: Let me ask you this: We're talking
19 about -- you say your material is all marked?

20 LDC [MR. CONNELL]: Yes, sir. Your meaning defense
21 counsel.

22 MJ [COL POHL]: Defense counsel case-related material that
23 you've controlled in and out.

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

2 MJ [COL POHL]: So this is noncase-related material.

3 LDC [MR. CONNELL]: Sir?

4 MJ [COL POHL]: What is this unmarked stuff?

5 LDC [MR. CONNELL]: Well, I'll give you an example.

6 Well, one example -- you mean the other unmarked
7 stuff that I'm just telling you about?

8 MJ [COL POHL]: Yeah.

9 LDC [MR. CONNELL]: Yeah. So we generate a document
10 during the meeting and it's on -- we print it out. It's now
11 never been through the Privilege Team, right? It was just
12 generated during the meeting.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: Or, for example, the prosecution or
15 somebody from the government sends a new policy memo, right?
16 There's going to be a change in the rules. The camp rules
17 were this and now -- let's say when -- do you remember the
18 controversy over daylight savings time and when the prayer
19 time was going to be? Right? They get a note about here's
20 going to be the new prayer time. That has never been through
21 the Privilege Team. It doesn't have markings on it.

22 MJ [COL POHL]: I know this concerns you, but that doesn't
23 concern me. What I'm saying is the stuff that doesn't --

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1 that's not case related, the new daylight savings time memos
2 from the SJA, new policies, things like that, unless it
3 somehow impacts on the commission, that's -- that's not what
4 I'm worried about.

5 LDC [MR. CONNELL]: Great. I'm not saying that it has to
6 be marked, I'm just trying to say that the -- you know, the
7 client-generated material during the meeting which doesn't
8 have markings on it is only, you know, a tiny fraction of the
9 unmarked material.

10 MJ [COL POHL]: Yeah. Okay. What I'm saying is if you
11 generate material that's not marked, don't you have a
12 procedure to mark it if he's going to keep it in his cell?

13 LDC [MR. CONNELL]: No, sir.

14 MJ [COL POHL]: So he's got ----

15 LDC [MR. CONNELL]: I don't get to apply markings. Banner
16 markings I apply but not Privilege Team markings.

17 MJ [COL POHL]: Okay. But -- so is he taking material
18 back to his cell that's attorney material, client-related
19 material, that's unmarked?

20 LDC [MR. CONNELL]: Like in his book, just like I showed
21 you.

22 MJ [COL POHL]: Yeah. But again, the book has got some
23 markings on it?

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1 LDC [MR. CONNELL]: Yes, it has some -- it doesn't have
2 Privilege Team markings on it.

3 MJ [COL POHL]: Okay. Yeah. Is this a problem I need to
4 worry about now?

5 LDC [MR. CONNELL]: No, sir. In fact ----

6 MJ [COL POHL]: Go ahead.

7 LDC [MR. CONNELL]: In fact, my point is that's a giant
8 rabbit hole that we're not going to solve in 8.2.a.

9 MJ [COL POHL]: Okay. Well, let's -- good. You got a
10 problem with no solution that you don't want me to solve, that
11 I can do.

12 LDC [MR. CONNELL]: Great.

13 So the thing that I do -- the problem that I do want
14 you to solve is our technical violation of 8.2.a by modifying
15 8.2 -- or either change it to may or take it out altogether
16 and lets ----

17 MJ [COL POHL]: Got it.

18 LDC [MR. CONNELL]: ---- let a system that works, even if
19 it's not exactly what was anticipated when 8.2.a -- 8.a(2) was
20 written.

21 MJ [COL POHL]: Got it. Thank you.

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

23 MTC [MR. TRIVETT]: Sir, could I have one minute to confer

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1 with Mr. Connell before we close business on this issue?

2 MJ [COL POHL]: Sure.

3 [Pause.]

4 DC [LtCol GLEASON]: Your Honor, I just want to hit a
5 point that Mr. Trivett raised.

6 MJ [COL POHL]: Sure.

7 DC [LtCol GLEASON]: He had mentioned that coordination
8 between the Privilege Team and JTF-GTMO was purely
9 administrative and it deals with just reviewing markings. We
10 filed evidence that that is not the case in 018W, Attachment
11 B, and 018W second supplement, which was ex parte. We have
12 indications where the Privilege Team was consulting with the
13 Staff Judge Advocate's office JTF-GTMO to receive legal
14 guidance on what is and what is not contraband. So we think
15 that those types of conversations should cease and we request
16 that the change we proposed to paragraph 4.c be made.

17 MJ [COL POHL]: You would agree that there has to be some
18 kind of cooperation between marking documents and processing
19 documents.

20 DC [LtCol GLEASON]: Yes, sir. You look at our proposed
21 changes to paragraph 4.c and it reads "that may not consult
22 with intelligence or security experts or JTF-GTMO regarding
23 potential contraband." It doesn't say anything about

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1 coordinating for administrative purposes. The problem we run
2 into is when they consult with JTF-GTMO for guidance on what
3 is and what is not contraband, then we have items that get
4 rejected that are not contraband under your order, but they're
5 receiving contrary advice from the Staff Judge Advocate's
6 office.

7 MJ [COL POHL]: Okay.

8 DC [LtCol GLEASON]: That's what we'd like to put a halt
9 to, sir.

10 MJ [COL POHL]: Okay, got it.

11 DC [LtCol GLEASON]: Thank you, sir.

12 MJ [COL POHL]: Mr. Nevin, I will give you your comfort
13 break now. Commission is in recess for 15 minutes.

14 [The R.M.C. 803 session recessed at 1005, 31 May 2016.]

15 [END OF PAGE]

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