

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The Military Commission was called to order at 1045,
2 22 October 2013.]

3 MJ [COL POHL]: Commission is called to order. All
4 defense counsel are again present that were present when the
5 commission recessed. The accused are still here.

6 Trial Counsel, your full team is still here?

7 CP [BG MARTINS]: Yes, Your Honor.

8 MJ [COL POHL]: Oh, wait a minute. I'm sorry. I spoke
9 too fast. We're waiting for Ms. Bormann. While we're waiting
10 for her, Trial Counsel, do you have the stipulation of the
11 expected testimony?

12 ATC [LT KORCZYNSKI]: Yes, we do, Your Honor.

13 MJ [COL POHL]: Can I see a copy of it, please?

14 ATC [LT KORCZYNSKI]: May I approach, Your Honor?

15 MJ [COL POHL]: Yes. Lieutenant, what -- do you have a
16 number on it?

17 ATC [LT KORCZYNSKI]: I do.

18 MJ [COL POHL]: What's it relate to?

19 ATC [LT KORCZYNSKI]: This is going to be related
20 to 008.

21 MJ [COL POHL]: The next one is 008.

22 LDC [CDR RUIZ]: Judge, are you doing the stipulation
23 now?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: I thought I would.

2 LDC [CDR RUIZ]: Okay. I was just making sure. My
3 translator is on his way.

4 MJ [COL POHL]: And the record should reflect that
5 Ms. Bormann has joined us.

6 ATC [LT KORCZYNSKI]: Your Honor, I'm not certain if it
7 will make a difference for the court reporters but it is
8 related to 008, 018, 031 and 032. I know at one point we were
9 having different conventions for several motions.

10 MJ [COL POHL]: 008, 018, 031 and 032.

11 ATC [LT KORCZYNSKI]: Yes, sir.

12 MJ [COL POHL]: We'll treat it as an 8 series for now
13 and if we need to renumber for the other ones, we will.

14 LDC [MR. CONNELL]: Your Honor, while we're cleaning up
15 the record on this stipulation, I can say that this
16 stipulation resolves the issues in AE 008H, AE 018F, and
17 AE 032C. Those were the motions seeking to compel the
18 appearance of Commander Strazza.

19 MJ [COL POHL]: Okay. Commander, is the translator
20 here?

21 LDC [CDR RUIZ]: Yes, Judge, thank you.

22 MJ [COL POHL]: Okay. Since this is the first
23 stipulation of expected testimony that we have done in this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 case, I just want to make sure that we all agree on the
2 convention to be used.

3 I notice that it is only signed by three of the
4 defense counsel. Would that indicate that Mr. Nevin and
5 Mr. Harrington, you do not join in the stipulation?

6 LDC [MR. NEVIN]: That's correct, Your Honor.

7 LDC [MR. HARRINGTON]: Yes, Judge, the stipulation is
8 not relevant to us, and we would not need Commander Strazza.

9 MJ [COL POHL]: And normally we have the -- actually the
10 accused themselves actually sign the stipulation, but since
11 we're going to go over it verbally with them on the record, we
12 can go from that, from that point forward.

13 Mr. Bin'Attash, Mr. Ali and Mr. Hawsawi, I have
14 before me what's called a stipulation of expected testimony
15 that has been signed by your defense counsel. Before I can
16 consider this, I have to explain what a stipulation of
17 expected testimony is, and to get your verbal agreement that
18 you will let me consider it.

19 Now, a stipulation of expected testimony does not
20 admit the truth of the facts in the stipulation. It simply
21 says that if Commander Strazza were testifying under oath she
22 would testify as set forth in the stipulation. The facts
23 contained in the stipulation can be contradicted, challenged

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 in any other way, just like the testimony of any witness, if
2 they were to appear in court. But instead of appearing before
3 you in person, they are presenting their testimony through the
4 stipulation of expected testimony.

5 Now, no one can be forced to enter into such a
6 stipulation, and it will be only entered into if you agree
7 that I can consider the stipulation of expected testimony of
8 Commander Strazza for the reasons that I just explained to
9 you.

10 That being said, Mr. Bin'Attash, do you agree for
11 me to consider the stipulation of expected testimony on this
12 issue?

13 DDC [Capt SCHWARTZ]: Your Honor, can you clarify that
14 the stipulation is relevant only as to Commander Strazza?

15 MJ [COL POHL]: Okay. The stipulation only discusses
16 what Commander Strazza would testify to, not anybody else.

17 I'm sorry.

18 ACC [MR. BIN'ATTASH]: Yes.

19 MJ [COL POHL]: Mr. Ali, do you understand and agree to
20 the use of the stipulation of expected testimony of Commander
21 Strazza?

22 ACC [MR. AZIZ ALI]: Yes.

23 MJ [COL POHL]: Mr. Hawsawi, do you understand and agree

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to the use of the expected testimony of Commander Strazza?

2 ACC [MR. AL-HAWSAWI]: Yes.

3 MJ [COL POHL]: Therefore, a stipulation will be
4 considered as evidence on 008, 018, 031 and 032. Okay.

5 Back to 200.

6 LDC [MR. CONNELL]: Your Honor, I thought I understood
7 your ruling on the 505 issue, but obviously I didn't. I
8 expected us to return to a -- to a 505 hearing, and someone
9 explained to me, no, you meant take a break later in the day.

10 MJ [COL POHL]: Yes, I did.

11 LDC [MR. CONNELL]: Okay. I need to be clear that there
12 are arguments that I would have made a few minutes ago in my
13 presentation if we had had ----

14 MJ [COL POHL]: Understand this, Mr. Connell, is that --
15 it is that you have a 505(h) specific issue ----

16 LDC [MR. CONNELL]: Yes.

17 MJ [COL POHL]: ---- to you ----

18 LDC [MR. CONNELL]: Correct.

19 MJ [COL POHL]: ---- on 200.

20 LDC [MR. CONNELL]: Yes.

21 MJ [COL POHL]: We are going to have that hearing at the
22 end of today.

23 LDC [MR. CONNELL]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: And if we need to revisit based on that,
2 you can.

3 LDC [MR. CONNELL]: Okay.

4 MJ [COL POHL]: So I'm not neglecting that, but as I
5 said, that's just to you and I'd like to get -- quite frankly,
6 you can just go last. Oh, depending on how long everybody
7 argues ----

8 LDC [MR. CONNELL]: Sure. I'll go last.

9 MJ [COL POHL]: ---- if necessary, or you can reserve
10 and we can do the 505(h) hearings and you can argue your
11 position tomorrow.

12 LDC [MR. CONNELL]: Okay.

13 MJ [COL POHL]: Okay. So I understand.

14 LDC [MR. CONNELL]: And just so I understand, when -- I
15 understand the military commission to be drawing a distinction
16 between the legal issue of the enforceability of rights, or
17 the jurisdiction as the prosecution calls it, of the norm
18 against torture on one hand. That's the legal issue that the
19 commission keeps referring to.

20 There are the factual issues of what implication
21 that has for our investigation and for our rights to seek
22 rehabilitation, et cetera. Those are what I think of as the
23 factual issues. Are you dividing the argument on this? Do

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 you want to hear about the sort of strictly legal part of it
2 now and then we'll visit the factual part of it as necessary?

3 MJ [COL POHL]: Well, your second thing you're calling
4 factual issues I think is embedded in your legal argument.
5 But it strikes to me that that would be -- that second part
6 that you talked about?

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: The factual issues?

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: That this device will permit us to do
11 certain investigations?

12 LDC [MR. CONNELL]: Right.

13 MJ [COL POHL]: Or to coordinate, I think there was some
14 reference in the motions, coordinate with other countries,
15 perhaps influenced this way or that, okay, but as I understand
16 your motion, your door to get to those avenues goes through
17 the legal issue.

18 LDC [MR. CONNELL]: They're intimately intertwined. I
19 don't disagree, if that's what the commission is saying. I'm
20 not trying to pre-argue. I just want to make sure, are you
21 saying please reserve and don't argue my -- the sort of
22 impact, the factual part of mine that you really want to hear
23 about what enforceable rights do we have?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: As related to the argument, the legal
2 issue of the argument, if -- the facts I was concerned about
3 are the underlying facts and the treatment of the accused.

4 LDC [MR. CONNELL]: Right. And that's really not what's
5 at issue here.

6 MJ [COL POHL]: Again, that's kind of what I'm putting
7 aside.

8 Now, as far as other implications, I mean are
9 those -- let's just see how the argument evolves.

10 LDC [MR. CONNELL]: Okay.

11 MJ [COL POHL]: What I'm saying is if you want to argue
12 that this will permit us to investigate in such and such a
13 way, I mean, that's -- that's -- that doesn't strike to me as
14 particularly -- that would be certainly -- I hate to say
15 whether it's -- what impact it would have, but I can
16 understand why that's part of your argument.

17 LDC [MR. CONNELL]: Right.

18 MJ [COL POHL]: But those aren't the facts that I was
19 talking about.

20 LDC [MR. CONNELL]: I know that. The reason I bring it
21 up is those are the facts that the 505 process goes to.

22 MJ [COL POHL]: I got it. Okay.

23 Go ahead.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [CDR RUIZ]: Thanks, Judge.

2 The motion that we have been referring to as AE
3 200 of course, is a motion that has been brought before this
4 commission and it's under the Convention Against Torture. At
5 its most basic essence of the Convention Against Torture, it
6 essentially is a treaty, and we have in fact entered into an
7 agreement where we believe that torture is bad. And we're not
8 to torture or tolerate those who do, and that convention
9 creates a number of certain rights.

10 The issue as it's maybe evolved or devolved has
11 almost been framed as this commission's jurisdiction to bring
12 a claim pursuant to the Convention Against Torture, and I
13 don't think that's necessarily correct.

14 Mr. Hawsawi is not seeking to have this court take
15 action on such a claim. We're not looking for that at this
16 point in any domestic court or avenue, and, of course, the
17 prosecution's position is essentially that rights under the
18 Convention Against Torture do not exist, and they certainly do
19 not exist in this commission, and they do not exist in our
20 domestic courts because they have not been provided such
21 jurisdiction by Congress, except with the exception of one
22 limited circumstance which they cite in their brief which is
23 for asylum cases, where a person may be deported or facing

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 deportation, then they can properly bring an issue under the
2 Convention Against Torture pursuant to the place that they
3 would be deported, that they may be tortured. Of course,
4 that's not -- those aren't the facts here. That situation
5 would be somewhat ironic, I think, considering the way some of
6 these facts will eventually play out.

7 But what's essentially at the heart of our issue
8 here is the intersection and the clash between a capital
9 prosecution, where the government of the United States has
10 made a decision and a determination that these men will go
11 through a process, and, at the end of that process, their life
12 will be in jeopardy, by a judicial sanction, by a process
13 where we will have fact-finding, presumably, and where a
14 number of fact-finders, jurors, members, will then have the
15 opportunity, if we get to that stage of the sentencing stage,
16 presumably, if we get past the guilt-or-innocence stage, they
17 will have the opportunity to sit in judgment of these men,
18 Mr. Hawsawi, and determine whether he lives or dies.

19 The intersection of -- where this comes to a head
20 is our capital litigation jurisprudence, death penalty law and
21 the requirements that our Supreme Court has instituted for
22 defense counsel in these cases and the restrictions that are
23 currently in place in this process, that, in our estimation,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 create a very, very significant hurdle, obstacle and
2 impediment to carrying out what we -- and I say we as myself
3 and the other learned counsel on this case, who by virtue of
4 our qualifications and experience are deemed to be experts in
5 the defense of capital litigation. We couldn't be here
6 without that designation and without you having made a finding
7 that our qualifications are such.

8 Having made a personal judgment based on the facts
9 of this case, and it is very important that we focus on the
10 facts of this case, there are going to be some comparisons
11 made by the prosecution to other cases, where protective
12 orders had issued in other cases, and these -- these
13 comparisons are made kind of with a broad-brush stroke of
14 these are same types of protective orders that we routinely
15 issue in other cases.

16 But the fundamental defect with that argument is
17 that we're not talking about the same facts, and that's where
18 facts get in the way, so to speak, of just the clean legal
19 argument that we may want to apply to it, because the facts
20 matter when it comes to the determination that an individual
21 defense counsel defending a capital case makes, as to what is
22 a reasonable investigation and a reasonable development of
23 information and evidence that we then will be necessarily

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 providing to a fact-finder.

2 And it's not just -- I would say the word
3 investigation, because that word has been thrown around quite
4 a bit. It is part investigation. That is part of the
5 analysis, but it is also development of information that we
6 already know exists. We don't have to discover it. We know
7 it. We simply cannot share it.

8 We cannot develop a piece of information in the
9 way that that piece of information ought to be developed, is
10 required to be developed, and is mandated to be developed by
11 our Supreme Court, by counsel in our position, in order to
12 present the best evidence, the best case, to a jury in a case
13 where a man is facing a death sentence. That's ultimately the
14 vision that we have when comes down to any -- any process
15 where life or death is at issue at the end of that process.

16 Of course, one of the things that would be a
17 reasonable question for the commission to ask is, do I have
18 the power to declassify information. The answer to that, as
19 we have seen, is no. You're not in an original classification
20 authority. When the government of the United States has made
21 a determination that evidence is classified, you do not have
22 the power to declassify that, and so we continue to labor
23 under those restrictions.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 What you do have the power to do, completely have
2 the power to do, is assess our ability under all of the rights
3 that are granted and all of the responsibilities that exist
4 based on our law to defend this case to the fullest extent of
5 the law, and whether that ability is enough, whether we can
6 effectively carry out our mission. And if we cannot, then you
7 have the power to dismiss these charges; or in the
8 alternative, you have the power to dismiss the death penalty
9 as a proper sentence in this case because of the legal
10 impediments, because of the obstacles that we face in
11 developing that information.

12 So while you may not be in a position to have the
13 authority to -- I'm being told to slow down a little bit --
14 where you may not have the authority to declassify a given set
15 of information, you absolutely have the authority to dismiss
16 the death penalty or dismiss these charges. And that is
17 essentially what remedy we have requested.

18 Where the protective order comes into play in this
19 case, the MOU, the memorandum of understanding, and on this
20 point I want to be very clear, I part ways very considerably
21 with the argument that Mr. Connell made differently, that the
22 MOU really does not add that much to the protective order.
23 The reason unequivocally I have not signed that in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. al Hawsawi's case is that this court needs to make a
2 determination.

3 And one of the definitions in the MOU defines
4 information that Mr. Hawsawi possesses as classified
5 information. That's information based on his personal
6 observations, based on his personal experiences. And it
7 prevents him, individually, from sharing that information. It
8 also gives us or binds us to prevent him or anybody else --
9 it's not just the accused, but prevent them from sharing
10 classified information.

11 Of course, that is an obligation that exists,
12 independent of the MOU. But where it takes it to a
13 different -- to a different level and stretches it to a
14 different extent, is where it takes it and applies it to
15 Mr. al Hawsawi and what Mr. al Hawsawi can or cannot share.

16 And what is indisputable as I stand here right
17 now, is that there has never been a classification guide
18 provided to the defense -- that is the subject of another
19 motion -- there has been never been a classification guidance
20 provided by the original classification authority in this case
21 that clearly spells out that Mr. Hawsawi's or any of these
22 other men's experiences are in fact classified.

23 The only guidance that we have with that respect

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 has been some statements that have been made on the record by
2 the prosecution. And of course, when you go back to the
3 original classification guidance, which is the executive
4 order, there are some very clear and deliberate steps that
5 must be made in order to classify information.

6 And in this case, Judge, you have not seen that --
7 or maybe you have, I don't know -- because you do get ex parte
8 filings.

9 I see you. I got you.

10 We certainly have not received, Judge, such
11 guidance in this case. So that's why one of our colleagues'
12 pleadings says if, in fact -- if, in fact, these statements
13 are classified, and references your framework or your
14 analysis, and of course where you see that the real essence of
15 what we're asking the court and the real issue that we're
16 bringing before the court, Judge, in Mr. al Hawsawi's case, we
17 have submitted to you an ex parte submission that I think
18 pretty clearly delineates for you and spells out to the best
19 of our ability, of course, without having taken actual steps
20 to develop much of this information, the practical limitations
21 and the impediments that we face in developing additional
22 areas of mitigation that are Constitutionally required in this
23 kind of case with the kind of directive and the kind of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 mission that we have been asked to do.

2 Now, the prosecution's response is essentially the
3 four corners of the commission, and says, outside of the
4 commission sandbox Mr. Hawsawi and these men do not have any
5 advocacy rights. That's part of their response. They say
6 there are no advocacy rights outside of the four corners of
7 this box. And within these four corners, they have the
8 ability to talk to experts, they have the ability to avail
9 themselves of forensic specialists, they have the ability to
10 see the information that we will presumably at some point
11 provide, but have not yet provided to you, and you will be
12 able to use that evidence and present it to a fact-finder.

13 And I will tell you this, Judge: There is merit.
14 There is some merit in that argument, because we will have the
15 opportunity to see some of this information. We will have the
16 opportunity, hopefully, to utilize experts that are properly
17 cleared at some point, when that happens. It hasn't happened
18 completely yet. And we will have the ability, I think, to
19 develop some of that information and present it in the closed
20 proceeding to a fact-finder.

21 But that's not where the analysis ends, and it
22 can't be where the analysis ends for us. There are
23 significant avenues that we are all very well aware of. The

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 court received a filing from one -- from an intervenor that I
2 think also highlights some of the issues and the type of
3 information that could be developed.

4 And that is what's foreclosed. That is what we
5 cannot do right now, a defense. That's what Mr. al Hawsawi
6 cannot do. The effect is that he has an individual right, as
7 do many of these men have an individual right, by law, to
8 affirm rights under the Convention Against Torture.

9 There may not be the avenues in domestic courts in
10 the United States to do that, but that's not what they're
11 necessarily seeking to do at this point. Mr. al Hawsawi is a
12 citizen of Saudi Arabia. Saudi Arabia is a signatory to the
13 Convention Against Torture and, presumably, in locations where
14 Mr. al Hawsawi has been held, there are also signatories to
15 the Convention Against Torture and there are obligations that
16 go along with signing on to the convention.

17 Mr. al Hawsawi, or any of these men, should be
18 able to exercise an independent right in any of those forums
19 to do that.

20 MJ [COL POHL]: What do you -- let's -- what do you want
21 me -- it's unclear to me exactly as what you want me to do --
22 well, I know what you want me -- I got what your remedies are,
23 but let me talk about it pragmatically speaking.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [CDR RUIZ]: Okay.

2 MJ [COL POHL]: That they want to assert their rights
3 that you say they have under the Convention Against Torture in
4 some other fora or places, governments, correct?

5 LDC [CDR RUIZ]: Yes.

6 MJ [COL POHL]: And you say the protective order
7 prevents them from doing that?

8 LDC [CDR RUIZ]: The particular paragraph that
9 extends -- basically gives them the obligation of not
10 disclosing classified information, essentially prevents them
11 from doing it and prevents us from assisting them in doing so.

12 MJ [COL POHL]: Okay. But at the end of the day is it
13 the protective order that prevents this information -- I mean,
14 you know, you have taken issue about how classified
15 information was defined in the protective order, I have got
16 that. But at the end of the day do you want -- do you believe
17 the Convention Against Torture permits the disclosure of
18 classified information to noncleared people?

19 LDC [CDR RUIZ]: The Convention Against Torture
20 explicitly says that matters of national security should not
21 be used as subterfuge to hide evidence of war crimes or
22 embarrassment.

23 MJ [COL POHL]: I got that.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [CDR RUIZ]: It's very clear.

2 MJ [COL POHL]: That's not what I'm saying, though. You
3 mentioned an intervenor, and that's not ripe, obviously,
4 because it was just filed, but the intervenor, the proposed
5 intervenor is a British NGO, as I understand it.

6 And under your reading of the Convention Against
7 Torture, the way it's drafted, as you just said, is that would
8 permit classified information being given to a British NGO?

9 LDC [CDR RUIZ]: What I would say, it prohibits any
10 government from claiming a national security privilege for the
11 explicit purpose of hiding war crimes or embarrassment. And
12 it puts a great emphasis on the judicial process, to take a
13 very close look at why that information is classified, and at
14 the classification authorities.

15 And I will tell you, Judge, in this case, in
16 Mr. al Hawsawi's case, we have made a request, an official
17 request to the CIA to declassify materials and they have come
18 back and they have essentially punted and say, we're not going
19 to do that.

20 MJ [COL POHL]: Okay.

21 LDC [CDR RUIZ]: We're going to seek additional recourse
22 for that. The classification issue is one that's separate and
23 distinct. The Convention Against Torture does not give

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 anybody the ability to disclose properly classified
2 information but it also prohibits any government from
3 classifying information for the explicit purpose of hiding
4 evidence of crimes. So it is a very complicated issue.

5 What I would like you to do, to answer your
6 question, is first, the language in the definition in the
7 protective order with respect to what information is
8 classified as it relates to Mr. al Hawsawi and as it relates
9 to any of these men should be changed, and should be changed
10 not to include them in that particular responsibility. And
11 that language has been suggested to you in the pleading.

12 So that's number one. So yes, you're correct, it
13 is the protective order and the language in the way it is
14 defined.

15 The memorandum of understanding, what it does is
16 it puts counsel in a position to make an affirmative -- an
17 affirmative agreement to essentially become complicit in
18 silencing our clients. And that's where the memorandum of
19 understanding is problematic for us, where it requires us then
20 to take an affirmative step to say somebody we represent,
21 we're going to prevent them from exercising an independent
22 right that we believe exists under domestic law.

23 MJ [COL POHL]: Okay. When you say that, are you saying

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 if the -- let's assume there was no protective order
2 whatsoever, as there wasn't, you know, prior to referral of
3 this case. I mean, you were restrained or had to comply with
4 your security agreements. But at that point in time, that's
5 what you had. At that point in time, presumptively, the
6 factual predicate of any type of complaints for violation
7 against this convention would have already been conveyed to
8 you by your client. I'm not going to get into whether it was
9 or not, because that's obviously privileged information.

10 So putting a protective order aside, wouldn't
11 that -- if you -- under your -- under your hypothetical you
12 just told me, then you could go talk to whomever and convey
13 the classified information to them?

14 LDC [CDR RUIZ]: I could not. I still have the same
15 obligations and the same gag order restrictions ----

16 MJ [COL POHL]: So ----

17 LDC [CDR RUIZ]: ---- on the information.

18 MJ [COL POHL]: So it's they can't do it.

19 LDC [CDR RUIZ]: He can. He could.

20 MJ [COL POHL]: He.

21 LDC [CDR RUIZ]: He could. But how's he going to do
22 that? He's living in a box in Guantanamo Bay, Cuba. He can't
23 call his family.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: I got that. Commander, I got that.
2 That's why I'm coming back to the point, is that he is not in
3 a position to convey this to anybody, except his attorneys,
4 quite frankly.

5 LDC [CDR RUIZ]: And that's exactly the issue.

6 MJ [COL POHL]: And then, so to give the relief that you
7 request -- well, part of the relief requested, because there's
8 different reliefs requested, would be to permit you to
9 convey it from him to a third party; is that what you're
10 asking me to do?

11 LDC [CDR RUIZ]: No. I think you have read my
12 pleadings. I have not asked you to do that.

13 MJ [COL POHL]: What are you ----

14 LDC [CDR RUIZ]: We were very specific.

15 MJ [COL POHL]: What are you asking me to do?

16 LDC [CDR RUIZ]: We're pursuing -- first of all, let me
17 tell you the two tracks we're pursuing. Number one, we think
18 this information is improperly classified, so we're pursuing
19 the track of trying to declassify the information from the
20 CIA. Of course they're not going to do this. Now we're
21 pursuing the track to have -- through the proper channels to
22 have the information declassified because the court has no
23 such authority to do that. That's the relief we seek in that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 forum.

2 MJ [COL POHL]: And from nowhere else?

3 LDC [CDR RUIZ]: Exactly. The executive order itself is
4 very clear. It's crystal clear, the information is not to be
5 classified or obscure or hide evidence of war crimes. Torture
6 is absolutely undeniably a war crime regardless of who you do
7 it to or with or for whatever reason. Right.

8 MJ [COL POHL]: You keep saying that's not a
9 classification issue before us.

10 LDC [CDR RUIZ]: Put that one aside.

11 MJ [COL POHL]: What's before me?

12 LDC [CDR RUIZ]: I think with those restrictions in
13 place, I cannot do what you are saying for me to do. I cannot
14 go and articulate and be an advocate, so I can't do that. But
15 at the very best -- at the very least, what I'm asking you to
16 do is unshackle the restrictions on Mr. al Hawsawi, who has no
17 duty or responsibility, has never had a secure access program
18 information briefing. The reason he has the information is
19 because he was subjected in flesh and blood ----

20 MJ [COL POHL]: No ----

21 LDC [CDR RUIZ]: ---- to come in contact with the
22 protected treatments -- or the treatment issues.

23 MJ [COL POHL]: But you just told me earlier that the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 issue deals with the attorney-client relationship between you
2 and your client, and it -- and then implicitly somehow you're
3 going to assist him in filing some type of a complaint.

4 LDC [CDR RUIZ]: That's why I'm asking you to dismiss
5 and asking you to take the death penalty off the table and
6 dismiss the charges. Because under the current situation that
7 you hit it very aptly, we didn't do it. We can't do it.
8 That's the remedy I'm asking for this issue.

9 MJ [COL POHL]: Okay. Got it. We are going back and we
10 have got it, jumped to remedies, and perhaps let's go back to
11 the ----

12 LDC [CDR RUIZ]: You asked me what we wanted you to do.

13 MJ [COL POHL]: I know why I did that. I got that. I'm
14 not blaming you, Commander. But it goes back to then ----

15 LDC [CDR RUIZ]: Okay.

16 MJ [COL POHL]: ---- if the Convention Against Torture
17 actually applies. True.

18 LDC [CDR RUIZ]: Absolutely. It absolutely applies.

19 MJ [COL POHL]: Okay. And then that's the -- and now,
20 government talks about this jurisdictional bar, the box you
21 talk about, okay?

22 LDC [CDR RUIZ]: To -- I think what they're saying is to
23 in essence prosecute a Convention Against Torture claim within

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this commission, or within a domestic court. That's not what
2 we're asking you to do. We're not asking you to waive that,
3 to waive those facts or to provide a remedy other than the
4 remedy you can provide to remove impediments to our
5 representation to the extent that you can with the
6 restrictions on classification.

7 We're not asking this commission to take up the
8 Convention Against Torture issue as a cause of action. That's
9 not -- we have never asked you to do that. We have
10 highlighted aspects of the order in place in the memorandum of
11 understanding that we believe place unnecessary and improper
12 restrictions on the exercise of a legal right ----

13 MJ [COL POHL]: But if ----

14 LDC [CDR RUIZ]: ---- under our laws.

15 MJ [COL POHL]: But if the commission is restricted, as
16 every court is, by its jurisdictional basis and statute in
17 this case, okay, so anything I rule on is within the limits of
18 the jurisdiction conveyed by the act, correct? As you stated
19 before.

20 LDC [CDR RUIZ]: Yes.

21 MJ [COL POHL]: Okay. So therefore, if I were to grant
22 you your request about lift the order against the accused ----

23 LDC [CDR RUIZ]: Well, change the language.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: ---- change the language to the accused.
2 How does that impact anything beyond the commission?

3 LDC [CDR RUIZ]: Well, there's two ways it impacts.

4 MJ [COL POHL]: How does that get him to somewhere else?

5 LDC [CDR RUIZ]: It puts Mr. Hawsawi in a position where
6 he can communicate and he can he communicate with people who
7 vindicate or pursue these claims.

8 MJ [COL POHL]: How's he going to do that?

9 LDC [CDR RUIZ]: Well, as you have seen, one of the
10 intervenors has filed a motion with this court to, asking the
11 commission to allow him to execute a power of attorney. And
12 that's how he would presumably do it. It would be by you
13 removing restrictions to access to Mr. Hawsawi to allow him to
14 pursue legal rights. And you can do that; you can absolutely
15 do that, Judge.

16 MJ [COL POHL]: No, I -- but is that the protective
17 order issue, or is that just a general access to the accused
18 issue?

19 LDC [CDR RUIZ]: Well, it's ----

20 MJ [COL POHL]: You see what I'm saying? What you're
21 saying is it's the protective order from the four of you. I'm
22 assuming this is the major objection to it, is 200 things
23 various -- but my point is, is that if I say, okay, we're

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 going to apply it to the accused, but the accused have no way
2 to convey this to somebody else, you know, and I mean, I
3 got -- again, the intervenor ----

4 LDC [CDR RUIZ]: That's the first step.

5 MJ [COL POHL]: The intervenor is not before me yet, but
6 they're going to say, now you tell -- because basically what
7 you are saying is remove the commission restrictions on the
8 accused?

9 LDC [CDR RUIZ]: Yes.

10 MJ [COL POHL]: Let's assume that's done. Does it
11 impact any other restrictions on them?

12 LDC [CDR RUIZ]: You mean in terms of access to him via
13 mail or otherwise?

14 MJ [COL POHL]: Various.

15 LDC [CDR RUIZ]: That's the second step that -- that's
16 the second step that I think you can, you can affect because,
17 as you've always said, Judge, you don't care -- I won't say
18 you don't care, you want to draw a line between what happens
19 at a detention facility and what happens within your
20 courtroom, unless it impacts the rights within the courtroom
21 and the ability to move.

22 MJ [COL POHL]: Right.

23 LDC [CDR RUIZ]: I think in this case it does. The lack

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of access to advocates impacts, as you can see, his ability to
2 develop all mitigating evidence where his life is in jeopardy.
3 So I believe you're perfectly within your rights and your
4 jurisdiction to provide and to direct that there be a mailbox
5 where these advocacy groups can contact these men and ask if
6 they want them to execute a power of attorney to develop these
7 lines ----

8 MJ [COL POHL]: What is it about -- okay.

9 LDC [CDR RUIZ]: So the first step ----

10 MJ [COL POHL]: But isn't that ----

11 LDC [CDR RUIZ]: But the first step is you have to
12 remove that restriction, and then we can worry about how the
13 world can have access to him in a manner that's consistent
14 with security and the practices that we're concerned about.

15 MJ [COL POHL]: But your concern about removing the
16 restriction is really a nonissue if they don't have the
17 ability to communicate with other people.

18 LDC [CDR RUIZ]: Right. Absolutely. I think --

19 MJ [COL POHL]: So let's even assume -- assume the
20 restriction is removed. So what? Nothing changes. They
21 still don't have their mailbox.

22 LDC [CDR RUIZ]: So then you -- you ----

23 MJ [COL POHL]: That's not a mailbox.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [CDR RUIZ]: You listen to the intervenor motion
2 that is before the court that says they want a power of
3 attorney to act on his behalf, and you grant that, and now
4 they have access, and they can vindicate their rights, and
5 they can develop information, and we can sit on the sideline,
6 and we can listen, and we can watch, and we can take notes and
7 see what they do; and if they come up with something that is
8 helpful to us and they develop that in whatever forum,
9 whatever court in whatever jurisdiction, we'll sit as a
10 silent, passive observer with our hands over our mouths and
11 our ears, and then we'll use whatever information we can use,
12 and that's best we can do; and if you can't do that, you must
13 dismiss the charges and dismiss the death penalty, either one
14 of those.

15 MJ [COL POHL]: Actually, if you get to your step
16 two ----

17 LDC [CDR RUIZ]: Actually, it's your step two, which is
18 a good step.

19 MJ [COL POHL]: Well, whatever, step two. We won't
20 assign ownership to it.

21 LDC [CDR RUIZ]: Okay.

22 MJ [COL POHL]: That, A, step one being the accused are
23 released from the protective order, which only applies to the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 commission, that we're -- you're going to assume that it
2 applies to everything else, too. That -- right? If it's a
3 commission protective order that is binding on parties to the
4 commission.

5 LDC [CDR RUIZ]: Right.

6 MJ [COL POHL]: Okay. Why would it be binding on
7 parties not to the commission? Or what I'm saying is why
8 would it impact these third parties at all, and unless they
9 have some type of access?

10 LDC [CDR RUIZ]: I don't think it does. I think what
11 impacts them is their inability to communicate with somebody
12 who can speak to them.

13 MJ [COL POHL]: Okay. Now, do I have jurisdiction over
14 that?

15 LDC [CDR RUIZ]: I think you have ----

16 MJ [COL POHL]: Because remember what you said, though,
17 what you said, though, Commander, was that if these third
18 parties get involved, you guys can sit on the sidelines.

19 LDC [CDR RUIZ]: Sure.

20 MJ [COL POHL]: And then they do their thing and that's
21 helpful, you get something out of it.

22 LDC [CDR RUIZ]: Yes.

23 MJ [COL POHL]: But that sounds like something else

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 altogether. You started this debate, this discussion about
2 what you needed to do to investigate the case, what you need
3 to do to mitigate a possible death sentence.

4 LDC [CDR RUIZ]: I understand what are you saying. I
5 understand what you are saying. Right.

6 MJ [COL POHL]: So what third parties do is ----

7 LDC [CDR RUIZ]: No, no. I understand what you are
8 saying.

9 MJ [COL POHL]: ---- is irrelevant to the discussion.

10 LDC [CDR RUIZ]: I understand what you're saying. We
11 need to do this, we absolutely need to do this. But the next
12 worst option is that we sit on the sideline and watch while
13 somebody else does it. And in the absence of our own ability
14 to do this we must at least have those restrictions removed so
15 we can utilize the best worst option and one that's completely
16 inconsistent with capital and death defense litigation.

17 So if you're asking me, do we need to do this, we
18 absolutely need to do this. We should do this. We're
19 required to do this by law, but we can't. And in the absence
20 of that, what we're trying to find is the best solution, and
21 one within your authority to affect, because we recognize that
22 you can't affect the classification issue. And that at least
23 is step one. We will continue to challenge the classification

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 decisions in this case.

2 But yes, we absolutely must be able to do this in
3 order to properly present a defense in this case.

4 If I may have a moment. Do you have any other
5 questions, Judge?

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

7 Commander, since you have paused I -- I do have
8 another question. Looking at your motion, you talk about the
9 Convention Against Torture, but it appears a lot of the -- a
10 lot of it is just that the MOU, in your own -- AE 013 as
11 currently drafted with the MOU puts the -- putting the
12 Convention Against Torture aside, still infringes your ability
13 to do a mitigation case.

14 LDC [CDR RUIZ]: Do you want me to litigate those issues
15 as well?

16 MJ [COL POHL]: No, no, but I'm saying your -- I'm just
17 saying your motion talks about it sometimes on the Convention
18 Against Torture, and then it talks about the effective
19 assistance of counsel.

20 Now, is the issue before me simply -- and I
21 know -- I have heard about 13. But the issue before me is
22 really -- strictly the Convention Against Torture, true?

23 LDC [CDR RUIZ]: That's the issue, at least on

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Hawsawi's behalf. I have tried to focus the issue for the
2 court. But of course when we use one legal issue to focus
3 attention of the court on a significant impediment, I think
4 it's inevitable that it highlights other obstacles that are
5 very similar in nature. And I think Mr. Connell filed a
6 motion on denial of access to Congress because the prosecution
7 opposes that, and cites language in the protective order --
8 and I know he has briefed that or is briefing it fully -- but
9 that's another symptom of the ailment.

10 The one that's most pressing for us is this one
11 and the one that is before this court. And I think at the
12 very end you raise some very good questions about the
13 practicalities of what to do to try to put us in a position to
14 do what we need to do.

15 And what I will tell you is we gave it a great
16 deal of thought as to how to frame this issue for this
17 commission in a way that you would still be within your
18 authority to provide some relief. And we understand,
19 unfortunately, you can't engage in the classification review
20 process. It's just not something that you can do.

21 But you can weigh the equities between a death
22 penalty prosecution and between the information and the
23 ability defense counsel have to do what we're asked to do,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 period. Mandated to do. So you can do that. Those were
2 those two remedies that I framed.

3 And the other one is to amend the language of the
4 protective order to the extent that it frees up Mr. al Hawsawi
5 from those restrictions, and frees us up from having to police
6 him or police our other clients.

7 MJ [COL POHL]: But if I do that, okay -- and do I
8 really want to -- well, "want" is the wrong word.

9 And then now I'm -- you're -- our step two is now
10 I'm going to start litigating third-party access to the
11 accused? Isn't that what the intervenor's basically asking me
12 to do, a nonparty, to say we want to talk to the accused? We
13 want to send them e-mail, give them an option?

14 LDC [CDR RUIZ]: The reason you can't do that is by
15 simply sending it to me, quite frankly, I was not sure if I
16 can provide him with a power of attorney for another
17 organization that could act on his behalf. I don't have
18 classification guidance that's that specific.

19 So in the natural course of litigation if somebody
20 wanted to do that, no, we wouldn't have to litigate it. We
21 didn't have to ask the court and we didn't have to file a
22 motion to intervene and convene, we would simply ask the
23 capital litigation lawyer, hey, if you want to act on his

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 behalf and you want us to to act on his behalf, can you give
2 him a power of attorney and sign it, and we could. There
3 wouldn't be this plethora of litigation that we have here.

4 The reason we have this litigation here is because
5 there isn't reasonable access to Mr. al Hawsawi and for him to
6 have the ability to have reasonable access to other advocates
7 in collateral litigation that are perfectly permissible and
8 mandated in capital litigation.

9 And I think it is, Judge, perfectly within the
10 scope of your authority. You don't necessarily have to be.
11 The reason that you are litigating this is because of the lack
12 of access, the lack of access issue.

13 And it is perfectly reasonable for you, when you
14 look the a -- not the lack of access, but the -- his ability
15 to exercise legal rights in the defense of his case, to say it
16 is reasonable for a defendant facing the death penalty here to
17 have at least perhaps an adequate mail address where advocates
18 can send him information, that we can go through the Privilege
19 Review Team to review contraband, those kinds of things
20 setting that aside ----

21 MJ [COL POHL]: Oh, it's treated as privileged to begin
22 with?

23 LDC [CDR RUIZ]: I'm sorry?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You say go through the Privilege Review
2 Team. That may have been a wrong choice.

3 LDC [CDR RUIZ]: All I'm saying is if there are security
4 considerations, we can address those later. But all I'm
5 saying is perfectly within your ability to say there needs to
6 be an avenue of communication -- avenue of communication, a
7 reasonable avenue of communication so that he can try to
8 exercise his legal rights. If that's the case, if somebody
9 can send him a power of attorney which he wants to execute and
10 he can do that, we wouldn't have to litigate it and we
11 wouldn't have to spend all of this time litigating it.

12 The reason you cannot do it and the reason we're
13 not litigating it -- it's not your fault. It's the way the
14 process has been constructed. I will tell you, Judge, I
15 actually asked the Staff Judge Advocate in Guantanamo Bay, the
16 high-value detainee Staff Judge Advocate, is there a mailbox
17 address that somebody from the outside could send a request
18 for communications. There isn't. There isn't anything that
19 actually works.

20 Just as there aren't telephone calls and there
21 isn't the ability to do that. No, you don't have to get into
22 litigating third-party interventions if there's simply a
23 reasonable means to access the criminal defendant, where they

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 could try to get a power of attorney and act on his behalf.

2 MJ [COL POHL]: And eventually that would engage in
3 communications. I mean, aren't ----

4 LDC [CDR RUIZ]: And what's wrong with that?

5 MJ [COL POHL]: Well, I'm not saying it's right or
6 wrong. What I'm simply saying is that if you give him their
7 post office box and they're communicate with somebody else,
8 then there's going to be communications between them and third
9 parties.

10 LDC [CDR RUIZ]: Well, I mean, if you wanted to, you
11 could ----

12 MJ [COL POHL]: No, but ----

13 LDC [CDR RUIZ]: I mean, we ----

14 MJ [COL POHL]: Okay. I got you. I understand what you
15 are saying, but you make it seem like they just put a post
16 office outside their cell and their box and they drop their
17 mail in and pick their mail up.

18 LDC [CDR RUIZ]: Judge, I'm not asking you to. This is
19 not rocket science. Our federal prisons have a workable mail
20 system where prisoners can get information from the outside
21 world and it goes -- it's properly vetted. It balances the
22 security and the equities. I like to believe that with as
23 many obstacles that we have in Guantanamo Bay, Cuba, if we get

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 all of the high thinking, high decision-makers of JTF-GTMO,
2 they can come up with a cardboard box on top of the
3 refrigerator, which we currently have in the camp, where
4 somebody can actually drop a line to our client and say, hey,
5 we're a human rights advocacy organization, and our mandate is
6 to prevent torture, and we are interested in vindicating human
7 rights. We are interested in your case. If you are
8 interested in having us litigate the issue, we have a power of
9 attorney, we'd like you to execute it. I think -- I'd like to
10 believe that we can do that. I think we can. I think you can
11 absolutely make that happen.

12 MJ [COL POHL]: Let's go back to the defense against
13 torture, self-executed.

14 LDC [CDR RUIZ]: No.

15 MJ [COL POHL]: Would it require a statute?

16 LDC [CDR RUIZ]: Yes.

17 MJ [COL POHL]: Do you have a statute to point to that
18 executes it?

19 LDC [CDR RUIZ]: Well, prosecution talks about to the
20 extent that we have one, it relates to the rights of somebody
21 who is going to be deported. And they have the right to bring
22 up an asylum. It has never been executed in the sense of
23 rights that we're talking about here. And it is your -- you

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 are correct the United States does not recognize the
2 competence of the committee against torture. What that means
3 is Mr. Hawsawi could not bring an individual claim against the
4 United States before the committee against torture because our
5 government doesn't recognize it.

6 But what he could do if he were not prevented from
7 doing that, is he could do so in any of the countries that are
8 signatories to the Convention Against Torture who properly
9 recognize his authority and who -- I think, in some
10 respects -- respects would be in a position where Mr. Hawsawi
11 could properly exercise that independent right in that
12 country. And I can't get into the feasibility of that here in
13 an open setting, but I think we have laid out for you in our
14 ex parte filing the very specifics of where he could properly
15 do that.

16 So while the United States would not recognize his
17 individual right, we're not asserting that, and I started off
18 saying that. We're not asserting his individual right. We're
19 simply asking the United States Government and this commission
20 to get out of the way and not impede his ability to exercise
21 an independent right in another country that are signatories
22 to the Convention Against Torture and who may take this
23 seriously.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The government of Saudi Arabia wants to talk to
2 Mr. al Hawsawi -- he is their citizen -- and our government
3 will not allow that to happen. That is the subject of the
4 discovery request that is also part of 200, that the
5 prosecution continues to oppose.

6 It is an answer that our government would never
7 accept. Somebody in prison, isolated, in a judicial process,
8 cannot have access to representatives from their government.
9 It's unacceptable, and it impedes and it impacts directly on
10 the Convention Against Torture and the rights that we're
11 asking him to be able to exercise.

12 MJ [COL POHL]: Okay. Thank you. Any other defense
13 counsel wish to be heard at this time?

14 LDC [MR. CONNELL]: I do, Your Honor, but after the 505.

15 MJ [COL POHL]: Okay. Mr. Harrington? Ms. Bormann?
16 Mr. Nevin?

17 LDC [MR. NEVIN]: It would be Major Wright for us, Your
18 Honor.

19 MJ [COL POHL]: Okay. Go ahead, Major Wright.

20 DDC [MAJ WRIGHT]: Good morning, Your Honor.

21 MJ [COL POHL]: Good morning.

22 DDC [MAJ WRIGHT]: I'd like to pick up on your last
23 question concerning the Convention Against Torture and whether

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 or not it applies absent implementing statute, and I just want
2 to add and join in Mr. Connell's remarks earlier on the
3 criticality of having Dr. Nowak on that particular issue. I
4 believe he would testify that the standard inherent in
5 Article 13 of the Convention Against Torture is a customary
6 international law rule that applies irrespective of any
7 implementing statute.

8 I'd also add I believe on brief we cited Hamdan v.
9 Rumsfeld for their citation of Article 75 of Additional
10 Protocol 1 to the Geneva conventions. And what Article 75
11 does is it sets forth the fair trial guarantees for a law or
12 war prisoner before any competent tribunal. And the Supreme
13 Court was careful to note that -- in their majority opinion
14 that the U.S. is not -- has not ratified Additional
15 Protocol 1, as it's known within Article 75, and they do rely
16 on the fact that it has risen to the level of customary
17 international law.

18 So I just want to alert the commission to this
19 fact, that the Supreme Court in ruling on military commission
20 issues has upheld customary international law standards where
21 a treaty has not formally been signed by the Senate.

22 Now here, the Convention Against Torture actually
23 has been ratified, as Your Honor knows, and there were certain

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 declarations and reservations along with the signing document
2 that went forth in 1984. But there is a long history of U.S.
3 consistent treatment with respect to the Convention Against
4 Torture, and that the U.S. acknowledges that it does apply. I
5 came into the judge advocate general's corps in 2005 and we
6 were instructed about the Convention Against Torture. There
7 are operational law handbooks that talk about the Convention
8 Against Torture, and indeed this very Military Commissions Act
9 of 2009 has substantive law that is based upon the Convention
10 Against Torture.

11 That would be that no evidence obtained through
12 torture should be admitted generally before this commission,
13 and there's actually a substantive crime for torture before
14 this commission. So I just want to raise that issue, and I
15 believe Dr. Nowak would be able to provide further information
16 for the commission on that point.

17 Finally, Your Honor, before I leave this point
18 about customary international law, which requires the intent
19 of a state to be bound by international law rule, and the
20 state practice consistent with that intent, you will note on
21 brief to Mr. Mohammad's joinder that we also submitted the
22 most recent U.S. periodic report, the committee against
23 torture about the U.S.'s intent to follow the Convention

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Against Torture. And they answered several responsive
2 questions concerning Guantanamo. They do talk about the right
3 to complain and they even state, Your Honor, that were
4 credible allegations of torture presented before a military
5 commission, it's the DoD's authority and obligation to
6 investigate that. So I think these issues are very much on
7 the mind of the United States as a sovereign in terms of
8 following its obligations under the Convention Against
9 Torture.

10 The fundamental issue, though, that is raised here
11 is that we argue on behalf of Mr. Mohammad that the commission
12 should not enter a protective order that violates his rights
13 under the Convention Against Torture.

14 That's essentially what's presented here, and we
15 have articulated, Mr. Mohammad ----

16 MJ [COL POHL]: Commander Ruiz's objection on the
17 protective order more than anything else is that it applies to
18 the accused. Do you agree?

19 DDC [MAJ WRIGHT]: Not entirely, Your Honor. I agree
20 with that in part, but as the commission is aware, and we
21 cited it in brief -- and I want to stay on the declassified
22 line and not go into the classified line, but the
23 U.S. Government has acknowledged that they mistreated

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Mohammad, and, in fact, they tortured Mr. Mohammad. And
2 the former convening authority, Admiral MacDonald, testified
3 in January that waterboarding is torture and Mr. Mohammad was
4 subjected to 183 sessions of waterboarding.

5 MJ [COL POHL]: Again, Major Wright, stick to the legal
6 issues. I got that. I'm assuming for the sake of this
7 discussion, and there's going to be other times -- and just
8 understand there's going to be places where the actual
9 treatment is going to be very relevant.

10 DDC [MAJ WRIGHT]: Thank you.

11 MJ [COL POHL]: Just on a strictly legal issue, is that
12 this is a nonself-executing treaty that the -- signed by the
13 United States. And your belief is that even though there's
14 been implementing statute that it applies anyway, and that
15 therefore this convention is the law of the land and it
16 requires the accused to have access to third parties to pursue
17 claims for violation of the convention.

18 DDC [MAJ WRIGHT]: Correct, Your Honor. Just like the
19 Supreme Court in Hamdan said Article 75 of Additional
20 Protocol 1 applies to Mr. Mohammad. And even because that
21 treaty was not signed -- that treaty was not signed, and still
22 the Supreme Court said that that treaty applies to this very
23 commission proceeding right here. The fair trial guarantees.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So do the -- so does the right to complain under Article 13 to
2 the Convention Against Torture.

3 So Mr. Mohammad has a right to complain to the
4 United States. And we believe that some of the factual
5 witnesses we've requested, medical doctors, would actually say
6 that he attempted to invoke his right to complain about
7 torture. He has a right to complain to the United States. He
8 has a right to complain to Pakistan, his country of
9 citizenship, and he has a right to complain to any potentially
10 complicit state that is a party to the Convention Against
11 Torture.

12 Those sovereigns, he has an absolute right to
13 complain to. He has the right to complain to any human rights
14 body that has jurisdiction and any other U.N. organization
15 that has jurisdiction to hear this.

16 MJ [COL POHL]: Okay.

17 DDC [MAJ WRIGHT]: Not only does Mr. Mohammad have it
18 right but, as counsel, we have an absolute obligation under
19 the Eighth Amendment to pursue this evidence on his behalf
20 because it may produce reasonable mitigation leads for us in
21 this capital execution and to pursue other collateral
22 challenges to this very process today. So Mr. Mohammad has
23 this right and counsel has this right.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So you believe the Convention Against
2 Torture gives you the right to disclose classified information
3 to the people who are not cleared?

4 DDC [MAJ WRIGHT]: I believe the military commission
5 should not enter an order that violates the Convention Against
6 Torture.

7 MJ [COL POHL]: Well, that's an answer to the question
8 that I didn't ask. What you just said more expansively than
9 Commander Ruiz said is that this -- is this order violates
10 your ability to defend your client because it restricts your
11 ability to go to outside fora for various relief. And at the
12 end of the day, there's nothing in the world that prevents you
13 from going to outside fora for appropriate relief as long as
14 you don't discuss classified information, true, as we sit here
15 right now? You can go wherever you want ----

16 DDC [MAJ WRIGHT]: That's correct.

17 MJ [COL POHL]: ---- to talk to whoever you want. So
18 the only thing that you're restricted on is disclosing
19 classified information. And now are you saying that that
20 restriction violates the Convention Against Torture and
21 therefore, you have the right, as the defense counsel in a
22 capital case, to disclose classified information to uncleared
23 people?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DDC [MAJ WRIGHT]: That's not how I would frame the
2 issue, Your Honor.

3 MJ [COL POHL]: I know you wouldn't frame it that way,
4 but is that what you are telling me?

5 DDC [MAJ WRIGHT]: I think the commission is asking me
6 to somehow certify that what the CIA did to Mr. Mohammad
7 should be properly classified.

8 MJ [COL POHL]: No, I'm not.

9 DDC [MAJ WRIGHT]: And in the Convention Against
10 Torture, the Convention Against Torture specifically says you
11 cannot use state secrets to classify the observations and
12 experiences of someone who was subjected to torture and that's
13 what Dr. Nowak, who is the world expert on this, would
14 testify.

15 MJ [COL POHL]: That's not what I'm saying. What I am
16 simply saying is this -- to get back to the classification
17 issue. Do you believe the Convention Against Torture permits
18 you to disclose classified information to third parties in
19 defense of your client?

20 DDC [MAJ WRIGHT]: On that general question of whether
21 or not I'm permitted to disclose classified information,
22 assuming without arguing that the classified information is
23 not to hide war crimes, and ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: It is classified. It is properly
2 classified.

3 DDC [MAJ WRIGHT]: I understand that I have an
4 obligation, that I have signed the nondisclosure statements.
5 I have gotten my top secret security clearance, and I have
6 agreed not to disclose classified information to third
7 parties.

8 MJ [COL POHL]: If I change the protective order, what
9 does it permit you to do that you can't do now? Not talking
10 about your client, you, as his attorney.

11 DDC [MAJ WRIGHT]: It allows me to fully develop the
12 evidence that I need to to properly defend Mr. Mohammad.

13 MJ [COL POHL]: Does it allow you to disclose classified
14 information?

15 DDC [MAJ WRIGHT]: The protective order ----

16 MJ [COL POHL]: No, if there's no protective order at
17 all, okay, are you -- what are you allowed to disclose now?
18 What are you prohibited from disclosing now with the
19 protective order that you would be permitted to disclose
20 without it?

21 DDC [MAJ WRIGHT]: Your Honor, there's a universe of
22 things that we would be permitted to disclose.

23 MJ [COL POHL]: Oh, really? In that universe is there

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 anything that's unclassified?

2 DDC [MAJ WRIGHT]: Once again, we're getting back to the
3 definitional problem.

4 MJ [COL POHL]: That's a separate issue.

5 DDC [MAJ WRIGHT]: Well, the protective order is a
6 creation of the CIA. It is their classification regime.

7 MJ [COL POHL]: Oh, really?

8 DDC [MAJ WRIGHT]: They are the original classification
9 authority, and they are organization that's trying to silence
10 Mr. Mohammad.

11 MJ [COL POHL]: You keep coming back to that, but you're
12 not answering my question because you don't want to. I
13 understand that. I wouldn't want to either.

14 My simple question is this, is that there is a
15 universe of information that's -- that you are prohibited from
16 disclosing because it's currently classified, true?

17 DDC [MAJ WRIGHT]: Correct.

18 MJ [COL POHL]: Okay. With or without the protective
19 order, wouldn't that prohibition still apply to you?

20 DDC [MAJ WRIGHT]: The prohibition would still apply,
21 correct.

22 MJ [COL POHL]: Okay. Now, do you believe that the
23 Convention Against Torture would trump that obligation?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Assuming all that stuff is still classified.

2 DDC [MAJ WRIGHT]: Yes, I do. I believe the Convention
3 Against Torture establishes that no country should classify
4 evidence of war crimes.

5 MJ [COL POHL]: Therefore, do you believe the Convention
6 Against Torture permits you to disclose classified information
7 if that information meets your exceptions under the Convention
8 Against Torture as you determine them to be?

9 DDC [MAJ WRIGHT]: Well, again, that's not our concern.
10 Our concern is that this commission should not enter a
11 protective order that violates the Convention Against Torture.
12 Once you enter such a finding, which we believe you should,
13 it's up to the original classification authority and the
14 prosecution to decide how to proceed.

15 But I'm not going to stand here today and advance
16 to you what the original classification authority should do.
17 They're the ones who have created this regime to silence
18 Mr. Mohammad and his defense counsel in pursuing reasonable
19 investigative leads.

20 MJ [COL POHL]: But back to my point. I grant your --
21 well, I sign a piece of paper saying that the protective order
22 is hereby rescinded. Okay. What does that give you -- permit
23 you to do that you are prohibited currently with the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 protective order? That's what I keep coming back to, and the
2 answer I keep hearing is: Nothing.

3 DDC [MAJ WRIGHT]: The point is we only have a very
4 limited amount of disclosure carefully crafted narratives
5 through a FOIA investigation of what happened to Mr. Mohammad.
6 There is an entire universe of material out there that we have
7 not been privy to, and Mr. Mohammad has the independent right
8 as well, as Commander Ruiz said.

9 MJ [COL POHL]: I keep coming back to this, is that the
10 protective order -- we may quibble on words, I've got that,
11 but at the end of the day -- at the end of the day you have an
12 obligation not to disclose classified information. My
13 question I keep coming back to, which I keep not getting an
14 answer to, is that without the protective order you still
15 would be ----

16 DDC [MAJ WRIGHT]: I will tell you what I cannot do here
17 today. I cannot go to any one of countries that may have been
18 a signatory to the Convention Against Torture ----

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

20 DDC [MAJ WRIGHT]: ---- and vindicate his rights.
21 That's what I cannot do.

22 MJ [COL POHL]: Can you go to -- I get rid of the
23 protective order. You can get an a plane tomorrow and fly to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 one of these countries and disclose classified information to
2 them?

3 DDC [MAJ WRIGHT]: I cannot under the current protective
4 order.

5 MJ [COL POHL]: You don't answer my questions but I'm
6 still going to keep asking them until you do.

7 DDC [MAJ WRIGHT]: Okay.

8 MJ [COL POHL]: No protective order. You fly tomorrow
9 to that country, can you disclose classified information to
10 them?

11 DDC [MAJ WRIGHT]: I could, but I would be prosecuted.

12 MJ [COL POHL]: Okay.

13 LDC [CDR RUIZ]: Judge, I'll answer your question if you
14 want an answer to that.

15 MJ [COL POHL]: No, one attorney at a time.

16 LDC [CDR RUIZ]: I have an answer for that.

17 MJ [COL POHL]: Okay. I'm sure you do.

18 DDC [MAJ WRIGHT]: I would be happy to reserve my time,
19 Your Honor, to Commander Ruiz.

20 MJ [COL POHL]: No, go ahead. Go ahead, keep going. I
21 think we have exhausted that.

22 DDC [MAJ WRIGHT]: I think, Your Honor, your questions
23 touch on an important tension here, the one between the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 U.S. Government's obligation to protect or otherwise cover up
2 what happened to Mr. Mohammad and his brothers and our
3 obligation to zealously represent the interests of
4 Mr. Mohammad.

5 We said it on brief, that -- the relevant Eighth
6 Amendment case law on the issue, and it bears repeating, as
7 Commander Ruiz did, that this is a capital case.

8 MJ [COL POHL]: But that's going back to the order
9 itself. That's 13.

10 DDC [MAJ WRIGHT]: I don't understand.

11 MJ [COL POHL]: You say the Eighth Amendment talks
12 about -- and I understand that. Are we relitigating 13 now,
13 or are we relitigating the Convention Against Torture?

14 DDC [MAJ WRIGHT]: Well, they're interrelated, Your
15 Honor. Our context is that the amended protective order
16 violates plainly the Convention Against Torture and
17 Mr. Mohammad's right to complain, and they are interrelated,
18 and this is a capital execution.

19 MJ [COL POHL]: Do you agree with Commander Ruiz that if
20 the order was -- the first step is to take the -- remove the
21 restrictions of the order on the accused, and the second step
22 is to permit somebody else to talk to him?

23 DDC [MAJ WRIGHT]: We're asking you right now to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 consider the first step. The first step would be do not enter
2 an order that violates the Convention Against Torture. That's
3 what we're asking you. We'll approach step two when we get
4 there, ultimately.

5 MJ [COL POHL]: And I don't know why I'm doing this,
6 because I think we just talked about it, but I'm going to do
7 it anyway. You believe the protective order violates the
8 Convention Against Torture, whereas the general security
9 requirements that you've already signed do not violate the
10 Convention Against Torture; there's got to be some room
11 between the two ----

12 DDC [MAJ WRIGHT]: No, I believe what I signed also
13 violates the Convention Against Torture. But bear in mind, I
14 had to sign a piece of paper in order to meet with
15 Mr. Mohammad, and this piece of paper at the time says I will
16 not disclose classified information, and then I received a
17 brief that said that anything ----

18 MJ [COL POHL]: I understand.

19 DDC [MAJ WRIGHT]: No, sir, you asked the question, so I
20 have to provide some sort of factual basis for my answer.

21 I signed this piece of paper, and at that time I
22 was given a brief, and the brief said anything that
23 Mr. Mohammad said was presumptively classified. If

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Mohammad were to say hello, that would be presumptively
2 classified. I tendered this brief, and I thought to myself
3 this seems ludicrous. I knew I would have an opportunity one
4 day standing before a military commission to challenge this,
5 and we have. We challenged presumptive classification, and
6 the government backed down.

7 And that's what we're doing here now with this
8 amended protective order. We are challenging paragraphs
9 2(g)(3) through 2(g)(5), which likewise pose a similar problem
10 to the presumptive classification regime, and we have already
11 established that these challenges do help Mr. Mohammad.

12 Now, the presumptive classification regime has
13 been lifted, and now we can do a little bit more in terms of
14 our obligation to defend him. We can go talk to witnesses now
15 and represent Mr. Mohammad in that regard, and we don't have
16 to treat his every word as presumptively classified. We're
17 asking you to continue that paradigm, continue that paradigm
18 of invalidating those provisions that are otherwise violative
19 of some standard of the Convention Against Torture.

20 So I did sign an SF form -- I don't know the
21 number, but I signed a form saying that, yes, I will not
22 disclose classified information. I was given the requisite
23 security clearance of top secret, and I was finally able to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 meet with Mr. Mohammad. So yes, I did sign something, but
2 with the full knowledge and understanding that one day as
3 counsel, I would be able to vindicate his rights and challenge
4 what I believe to be an unlawful regime committed by
5 U.S. Government.

6 MJ [COL POHL]: Your second point, the protective order
7 you believe violates the Convention Against Torture, your
8 security agreement whatever the term of art is -- similarly
9 violates it, so consequently, if I -- if we get rid of the
10 protective order, the next step is to litigate the basic
11 regime you had to sign to begin with, because otherwise you're
12 in the same spot.

13 DDC [MAJ WRIGHT]: Well ----

14 MJ [COL POHL]: That's always been my point for the last
15 15 minutes.

16 DDC [MAJ WRIGHT]: That may be, but there are other
17 stakeholders beyond the four corners of this courtroom. The
18 prosecution is a stakeholder, all of the original
19 classification authorities are stakeholders, and there's
20 countless other stakeholders out there who can resolve this
21 issue.

22 So filing a motion before this court in reference
23 to step two is not just the end of the matter. You have

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 already heard that Mr. Connell wants to talk to Congress. I
2 think they will be interested in hearing this issue as well --
3 they're also stakeholders in this issue -- about how they're
4 not able to hear what these men want to tell them.

5 So this is broader than just what we're arguing
6 right here today, and I acknowledge that as well. But what
7 we're asking you to do, sir, is just not enter an order that
8 violates the Convention Against Torture.

9 MJ [COL POHL]: Okay.

10 DDC [MAJ WRIGHT]: But I do want to pick up, Your Honor,
11 on what we would like to do. And you will note on brief, in
12 our reply that was filed on Friday, we do cite the ABA
13 guidelines that do state that we have an obligation to pursue
14 all investigative leads necessary to pursue collateral
15 attacks. The previous alleged 9/11 co-conspirator had charges
16 dismissed by a former convening authority. That proved some
17 of the value of pursuing collateral attacks. It was not
18 dismissed; I inartfully said that. It was not referred
19 capitally.

20 We cite a case from the Inter-American Commission
21 on Human Rights. The U.S. is actually a party to the
22 Inter-American Commission on Human Rights through the American
23 Declaration on Rights of Man, and in this particular case,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 against Argentina, a man by the name of Yardez Gómez was
2 detained by police officers in Mendoza County on allegations
3 of rape and other crimes, and he was subjected to torture for
4 ten days that included mock execution, a waterboard, beating
5 and the like. He was denied the opportunity to see medical
6 doctors during this time. He was charged by the state and
7 during this period, he lodged a complaint consistent with the
8 Convention Against Torture, against the government of
9 Argentina, and against those police officers in Mendoza, and
10 about eight years later, the commission heard his complaint.

11 He was able to enter into an agreement with the
12 government of Argentina, and the province of Mendoza where
13 under the American convention, they were able to negotiate a
14 friendly settlement. That's an example of how circumstances
15 for Article 13 resulted in a collateral benefit to an accused.

16 I mention as well -- we mention as well in brief
17 that Pakistan has a demonstrable interest in this case. Were
18 we able to fully present the evidence as to what happened to
19 Mr. Mohammad. Pakistan may seek to intervene in their own
20 right under the Vienna Conventions Article 36 counselor access
21 rights. That's a potential viable means of collateral attack.
22 And also would benefit Mr. Mohammad.

23 So Your Honor, I just want to note those -- those

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 additional issues. With that, I would yield my time to
2 Commander Ruiz.

3 MJ [COL POHL]: Well, he will get a second bite
4 eventually.

5 DDC [MAJ WRIGHT]: Thank you, sir.

6 LDC [CDR RUIZ]: It's going to be a big one, Judge.

7 MJ [COL POHL]: Ms. Bormann?

8 LDC [MS. BORMANN]: First of all, I'd like to adopt the
9 arguments of Commander Ruiz and Major Wright, so I won't
10 duplicate what they have argued, but I do want to address your
11 issue at least in part.

12 So leaving aside the part that your protective
13 order orders Mr. Bin'Attash to forego a right -- and that is
14 part of the complaint, so you don't want to hear about that,
15 right? Am I ----

16 MJ [COL POHL]: No, I'll listen to any argument you
17 have.

18 LDC [MS. BORMANN]: That particular provision of the
19 protective order is, I think, violative of everything that the
20 Convention Against Torture stands for. If you enter an order
21 that prohibits Mr. Bin'Attash from exercising a right, and
22 that would be to complain of his torture, you are ordering him
23 to forego a right which he absolutely has under a treaty

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 signed by the United States. It might not be an enabling
2 statute ----

3 MJ [COL POHL]: Okay.

4 LDC [MS. BORMANN]: ---- but that enabling statute would
5 only pertain to relief sought in a United States court.

6 The Convention Against Torture is signed by a
7 variety of other nations and states, many of whom were
8 complicit in the capture and torture of my client. So without
9 going into any further information regarding that, because
10 it's classified, I can tell you that were Mr. Bin'Attash
11 provided the right to pursue those remedies, he definitely
12 would.

13 MJ [COL POHL]: Ms. Bormann, just as a follow-up, I
14 think I asked this of Commander Ruiz, if that part of the
15 protective order was inval- -- I took that out. Okay. So it
16 doesn't cover them. At this point, that doesn't give them
17 anything.

18 LDC [MS. BORMANN]: Of course.

19 MJ [COL POHL]: Okay. So I mean, it's simply --
20 simply -- so is there a next step on that?

21 LDC [MS. BORMANN]: Well, but there's the irony, really,
22 of all of this, isn't it? That the classification of the
23 material related and surrounding this case is an ever-evolving

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 process. We received a notification from the government that
2 they're still in the process of going through classification
3 review of FBI memoranda which have been reviewed for the
4 Moussaoui hearing and tendered to those counsel previously and
5 were tendered to these counsel previously in the previous
6 iteration of these cases. So obviously, classification isn't
7 a stagnant situation. And this kind of ties into the second
8 part of my argument. So we're going to talk about that, and
9 I'll wrap up this entire subject.

10 But in your protective order, you define what's
11 classified. I think it's 13(g)(4). And for, (a), (b), (c),
12 (d), (e), and then (g)(5). There is a possibility that the
13 President of the United States could make an authorized
14 disclosure of any of the material that you claim is classified
15 in your protective order, and your protective order would
16 therefore restrict us from talking about things that everybody
17 else in the world could, including the prosecution.

18 So in that instance ----

19 MJ [COL POHL]: Does that amount to a declassification?

20 LDC [MS. BORMANN]: Well, an authorized disclosure by
21 the President of the United States under an executive order is
22 declassification -- I mean, it absolutely is -- but your
23 protective order would still bind us. The MOU you want me to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sign would still bind me and prevent me from the very thing
2 that General Martins could get up in front of a press
3 conference and say ----

4 MJ [COL POHL]: And that the protective order could
5 never be amended, then?

6 LDC [MS. BORMANN]: Well, it could be, but it couldn't
7 be amended very quickly, as we have learned. It requires a
8 motion and then an answer and then a variety of other things.

9 The -- you know, there have been books published
10 that have gone through CIA review that contain material that
11 we have been told is classified, despite the fact that it's
12 unclassified in -- for purposes of the publication of that
13 book. And your protective order actually covers some of that
14 information. So your protective order is more restrictive on
15 us than the CIA is on José Rodriguez, for instance.

16 And they vetted that book. I mean, there's
17 absolutely no doubt they vetted that book. So they have --
18 they are the OCA with respect to that program, and they have
19 declassified it. Your protective order bars us from talking
20 about the same thing that are former CIA agent can.

21 That is why this restricts us in large part in
22 pursuing rights even now, even tomorrow. If the President of
23 the United States stood up tomorrow and made an authorized

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 disclosure, if that happened, General Martins could talk about
2 it and I couldn't, because General Martins isn't bound by
3 this.

4 Now, you asked whether or not we would ever pursue
5 a right and talk about classified information. Of course not.
6 That's -- you know, we are bound by the same law that binds
7 the prosecutor and binds you, and binds José Rodriguez in not
8 disclosing classified information. But as I indicate, that's
9 an evolving principle, and what's classified today may not be
10 classified tomorrow. So with respect to (g)(4), we believe
11 that should -- that those definitions ought to be removed.

12 Now, let's talk about a right. The Convention
13 Against Torture provides that no information can be classified
14 to prevent disclosure in the pursuit of a complaint of
15 torture. And it's the position of the defense in this case
16 that, in fact, much of the classification scheme is designed
17 to do just that. But there are remedies to that, and
18 Commander Ruiz talked about some of those, and that is seeking
19 declassification from the OCA and then going above them,
20 pursuant to the executive order. That is a process that many
21 of the defense counsel are engaged with now, in a lawful
22 seeking of declassification of material we don't think ought
23 to be classified.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 This protective order would bind us in ways
2 that -- that would be contrary to rulings that we got on
3 declassification later on down the line. So we believe that
4 it is -- now we're talking about 13 instead of the Convention
5 Against Torture, and I suppose we sort of ----

6 MJ [COL POHL]: Well, it's hard ----

7 LDC [MS. BORMANN]: ---- we couldn't dovetail the two.

8 MJ [COL POHL]: Let me get to your point, here, though,
9 is -- because I think it's been mentioned before, is there's a
10 Convention Against Torture talking about you can't classify
11 something simply to hide up a war crime or embarrassment.

12 So let's say theoretically a piece of information
13 is classified for that exact reason. The likelihood of
14 getting that clarity on something like that is probably not
15 high, but let's just ----

16 LDC [MS. BORMANN]: Okay.

17 MJ [COL POHL]: Okay. But that declassification -- or
18 that challenge to the classification process is outside the
19 purview of the commission. Would you agree with that?

20 LDC [MS. BORMANN]: Right.

21 MJ [COL POHL]: Okay. Okay. So we're stuck with what
22 we're stuck with.

23 Now, you say if you go through this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 declassification process and something is declassified, you're
2 still -- it still can be ----

3 LDC [MS. BORMANN]: Well, your protective order says if
4 I -- if I am able to declassify the location of Mr. Bin'Attash
5 in the year 2003, after his capture date, and I receive
6 information that that's declassified, that that's going
7 through the declassification process, your protective order
8 bars me from talking about it.

9 MJ [COL POHL]: Okay. But is that ----

10 LDC [MS. BORMANN]: Now, if your protective order said,
11 "Dear Defense Counsel, please don't violate classification
12 law," I would have far less problem with it than what we have
13 right now.

14 MJ [COL POHL]: Okay. It's the particularity of the way
15 it's worded.

16 LDC [MS. BORMANN]: Well, yes, and it leads to all
17 sorts -- it leads to all sorts of bizarre situations.

18 MJ [COL POHL]: Do you believe that the protective order
19 treats something as classified that's not classified?

20 LDC [MS. BORMANN]: I think it can. I think it
21 certainly did in its first iteration; and I think, quite
22 honestly, the one issued in al Nashiri did, yes, absolutely.

23 Presumptive classification is a prime example, and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that was included in the original iteration of the protective
2 order. And I don't know if it's been revised in Nashiri or
3 not, I haven't followed it, but it was ordered in a previous
4 commission. So yes, it kind of turns itself on its head, and
5 as I said, it's an ever-evolving process, which is why we have
6 argued from the very beginning that 13 and the -- if you're
7 going to issue a protective order, it ought to be consistent
8 with and track what classification is.

9 And that's really why we're with here, right,
10 protecting national security secrets? That's what
11 classification is supposed to be about.

12 MJ [COL POHL]: Why -- of course, I don't know what --
13 why would we even need a protective order, then?

14 LDC [MS. BORMANN]: Well, that's been my position the
15 entire time. I am a law-abiding citizen who has a top secret
16 security clearance. I haven't violated it yet. I don't
17 intend to violate it in the future. We have been asking for
18 guidance to help us determine, you know, what is classified
19 and what is not. We have been stymied pretty much everywhere
20 we have gone, and so we have tried to work around that. But
21 at any rate, we have what we have.

22 So with respect to those provisions under 4,
23 that's what I'm asking, for you to strike that, and just tell

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 us not to talk about classified information.

2 With respect to 5, it says, in addition, the term
3 "information" shall include, without limitations, observations
4 and experiences of an accused with respect to the matters set
5 forth in other paragraphs.

6 That seems to bind the defendants. I have a
7 serious problem with binding my client's silence. I'm not
8 going to violate classification rules, but if somehow or
9 another he is given an opportunity to complain in a court or a
10 remedy of some sort or another, I don't know how that would
11 happen. I can't foresee it, but -- I can't tell the future,
12 so I don't know. But binding him by a signature that I placed
13 to a piece of paper is offensive, especially in light of the
14 fact that it violates the Convention Against Torture.

15 So you're asking me to sign an agreement to gag my
16 client, and in violation of the treaty the United States
17 Government is a signatory to, in violation of what I believe
18 are my ethical duties. So I am offended by that.

19 That pretty much sums up, with what my colleagues
20 have argued, our position on the Convention Against Torture.
21 And I would simply say, in closing, that if the United States
22 Government wants to prohibit these men from talking about the
23 horrific things that happened to them, then they can't have it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 both ways.

2 You can't gag somebody and then want to kill them.
3 You can't gag somebody about talking about torture and then --
4 and then say, well, you can't talk about what happened to you.
5 You can't make a complaint about what happened to you. You
6 can't make a complaint and seek investigation in those places
7 where it happened because we have a protective order that says
8 we can't. And oh, by the way, tough luck, we want to kill
9 you, and you're not going to be able to find out this
10 information.

11 As a death-penalty lawyer, and under the Eighth
12 Amendment, I'm required to investigate every aspect of
13 mitigation. This one -- you know, is like -- falls out of the
14 sky and lands on me like the anvil does, you know, in a Bugs
15 Bunny cartoon, right? Bam! Your client was tortured. Well,
16 yeah.

17 Everywhere I turn in investigating this issue, we
18 hit a brick wall. And we hit a brick wall in large part
19 because of the classification regime that we operate under,
20 and -- because of the regime that we operate under and because
21 of the protective order. So I think the remedy is
22 appropriate. You want to prosecute these guys, you want to
23 gag them. Well, you -- then you can't execute them. You

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 can't have it both ways. You have to provide fairness in the
2 system.

3 MJ [COL POHL]: I understand that that's your
4 requirement, but in essence, if the -- if the classification
5 regime, slash, protective order violates the Convention
6 Against Torture, they shouldn't be tried at all, then?

7 LDC [MS. BORMANN]: Well, yes. And that would be --
8 you're probably right.

9 MJ [COL POHL]: Your remedy is we don't execute them, so
10 that leaves them in -- I mean, the alternative is if they're
11 convicted, they could still spend the rest of their lives in
12 jail.

13 LDC [MS. BORMANN]: In fact, that's exactly what the
14 former convening authority, Ms. Crawford, did on the other
15 case -- and the name now escapes me -- but she said he was
16 tortured and I'm not going to allow this to go forward. So we
17 don't have a convening authority in this case that did that,
18 but now we have a commission and now we have you. And so now
19 you get to determine how much outrageous construct this court
20 is going to -- conduct this court is going to allow the United
21 States Government to do without taking death off the table.
22 And that's really where we are.

23 So you know, the United States Government, if you

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 really want to have a fair trial, then you have to ungag them.
2 If you really want to have a fair trial and execute them, then
3 you have to ungag them and let them defend themselves the way
4 they need to.

5 MJ [COL POHL]: When you use the term "ungagged" in this
6 context, that would -- would it be fair to say, when you say,
7 ungagged, that would mean to permit -- basically, lift any
8 restriction of disclosure of classified information?

9 LDC [MS. BORMANN]: No. What I'm talking about is
10 allowing them to pursue remedies. You're talking about in the
11 aspect of -- I'm talking about now in the Convention Against
12 Torture issue.

13 MJ [COL POHL]: Okay. So in that context, though, would
14 that -- would the ungagging to pursue remedies under the
15 Convention Against Torture entail disclosure of classified
16 information from the accused?

17 LDC [MS. BORMANN]: Well, the United States Government
18 is the one that's determining what's classified and what's
19 not, so all the commission can do is either abate or not. So
20 you don't have any power over classified information, and
21 nobody standing here today is saying I'm going to talk about
22 classified information.

23 MJ [COL POHL]: Well, no, that wasn't my question. My

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 question is it's a variation of the theme of what the
2 ruling ----

3 LDC [MS. BORMANN]: Well, yes, if the United States
4 Government said, you're right, we want to make this a fair
5 fight, we want to have a fair, transparent, and just system,
6 and we're going to ungag the clients by allowing them fair
7 access to the evidence and allow them to tell their stories,
8 that would, of course, result in the OCA or the President of
9 the United States declassifying the information that's
10 currently classified.

11 MJ [COL POHL]: Okay.

12 LDC [MS. BORMANN]: So that's where you -- that's where
13 you come in. You can say either, you know, this is unfair,
14 because these guys can't use the tools they need to defend
15 their clients, or, on the other hand, you can't ask for death.
16 You can't have it both ways.

17 MJ [COL POHL]: No, but back to my other -- and this is
18 a variation of the remedy theme.

19 LDC [MS. BORMANN]: If I'm not -- you can tell that we
20 death-penalty counsel are particularly worked up about this
21 issue, so ----

22 MJ [COL POHL]: Okay. Yeah. That's fine. It's good to
23 zealously represent your client.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: Yes, it is.

2 MJ [COL POHL]: The issue, though, is that if your
3 client is determined -- the term used was ungagged, and
4 assuming that gives him access to somebody other than ----

5 LDC [MS. BORMANN]: Can I back up for just a moment?
6 When I say -- so I can define that term as I used it ----

7 MJ [COL POHL]: Yes.

8 LDC [MS. BORMANN]: ---- when I say ungagged, I mean,
9 United States Government declassifies what happened to him
10 between 2003 and 2006. That's what I'm talking about. So
11 in ----

12 MJ [COL POHL]: So basically what you are -- so the
13 issue is not necessarily -- the issue comes down to one of
14 classification more than anything else.

15 LDC [MS. BORMANN]: Well, it comes down to ----

16 MJ [COL POHL]: Even if you get rid of the Convention
17 Against Torture, even if I get rid of the -- as I said
18 earlier, get rid of the protective order altogether, you're
19 still stuck with your classification regime.

20 LDC [MS. BORMANN]: Of course. You know, I have a TS,
21 and I am a good citizen, and I don't break the law, so --
22 except I might speed a little, 26 miles an hour here. But at
23 any rate, the ultimate issue for you is, you can only do so

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 much, right?

2 So you have only a few remedies at your
3 fingertips. So you can say you're right, you know, this is an
4 unfair fight. The protective order violates the Convention
5 Against Torture, and I can only do my limited part. I can
6 only grant this small remedy. I -- that's all you can do.
7 But in this situation, all -- if that's all you can do, that's
8 all you can do.

9 Sometimes it takes one domino to tip, and then
10 there are a lot of things that can spring from decisions.
11 It's amazing to me when I see judges, in the last 25 years
12 I've practiced, make rulings against the government that
13 result in the government changing its position on things. So
14 what I would suggest to you is, don't look at this as an
15 outcome determinant issue. Look at this as whether or not you
16 can be part of an order which violates the Convention Against
17 Torture.

18 I would propose to you that you shouldn't.

19 MJ [COL POHL]: Okay. But assuming I agree with you and
20 I just get rid of the order altogether, okay, are you in any
21 different position than you are today, basically?

22 LDC [MS. BORMANN]: Yeah. Well, the order orders -- if
23 you're asking about tomorrow, when I wake up in the morning,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 probably not. If you're asking about six months from now,
2 maybe so.

3 And so ----

4 MJ [COL POHL]: This is back to the President
5 declassifying things.

6 LDC [MS. BORMANN]: Right, and other nuances. There are
7 nuanced changes in classification as this case goes on. I
8 mean, at one point, I thought that saying the number of the
9 camp where my client is held was somehow classified, and
10 somebody on the prosecution said it, and then you repeated it,
11 and you know -- so things change, and so I would say to you
12 that I anticipate they will continue to change. It has been
13 the lesson I have learned. So for that reason, that we would
14 be in a better position.

15 For the reason that you cannot bind Mr. Bin'Attash
16 by an order that I am forced to sign, we would be in a better
17 position. And the protective order doesn't do anything that
18 creates a safer, more secure world. It doesn't protect
19 national security any more because I'm already required to do
20 that.

21 So yes, we would be in a better position with
22 respect to the Convention Against Torture going ahead. And
23 when, on balance, you weigh it with the fact that I'm already

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 required to do certain things anyway, just like the government
2 is, you know, you're not ordering them to provide Brady
3 information because you say they have a duty to do it anyway.

4 MJ [COL POHL]: Don't they?

5 LDC [MS. BORMANN]: They do. But why not order them to
6 do it? Because it would be needless and senseless and a waste
7 of time. Ordering us to do what we're already required to do
8 is needless, senseless, and a waste of time.

9 Do you have anything else?

10 MJ [COL POHL]: Thank you.

11 Mr. Harrington.

12 LDC [MR. HARRINGTON]: Judge, the last issue which
13 Ms. Bormann talked about was what I was going to talk about,
14 and I just want to reiterate one thing about it. You asked
15 the question, are you in any different position -- would you
16 be in any different position than -- if I took this away than
17 you are now. And I think that -- and it goes to the practical
18 questions you were asking, for example, is the Convention
19 Against Torture, a self-executing right. And I mean, if you
20 look at most rights that people have in our country, none of
21 them are self-executing. If you're locked up in jail
22 wrongfully, you sit in jail until you do something about it.
23 You file a habeas corpus proceeding. Or if you're prosecuted

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 after the statute of limitations has run, if you don't raise
2 that as an issue, you get convicted and you go off to jail
3 even though your rights have been violated. If somebody
4 violates your civil rights, if you don't sue them, nobody does
5 anything about it. I mean, that's -- it's analogous to what
6 we have here.

7 And then your practical questions go: What do you
8 do after this when we take this away? That's not the issue.
9 These commissions are looked upon with suspicion, mildly,
10 around world, and they're under attack every day you come in
11 here. We raise issue after issue after issue, and you know
12 those issues are going to wean their way up to the higher
13 courts, and the other cases that have come through here before
14 are already at the higher courts and have been argued. You
15 know that's going to happen. The earlier commissions have
16 been attacked, and this commission will be attacked because
17 it's a new animal. It's not something like our established
18 federal courts.

19 But the issue here is, is what you're doing right,
20 regardless of whether Mr. Mohammad or Mr. Binalshibh or
21 anybody else ends up exerting a claim under the Convention
22 Against Torture. That's not the issue of whether they can get
23 around classification or get around some other thing. The

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 issue in front of you is, is this order right, is it correct,
2 and does it violate the letter and the spirit of the
3 Convention Against Torture? I think that's really the --
4 really the way the question has to be framed.

5 Thank you.

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

7 Mr. Connell wants to reserve, correct?

8 LDC [MR. CONNELL]: I'm fine with that phraseology, Your
9 Honor. It's that there are, you know, several procedural
10 steps that we have to get through. One of them is the 505
11 procedure. So I would call it not yet ripe. You can call it
12 reserved, but whatever. But we can't ----

13 MJ [COL POHL]: Don't want talk right now about it.

14 LDC [MR. CONNELL]: There are other things that have to
15 happen first.

16 MJ [COL POHL]: Okay. Fine. What we'll do is rather
17 than get started with the government, go ahead and recess for
18 lunch a little bit earlier.

19 We'll reconvene at 1345. The commission is in
20 recess.

21 [The Military Commission recessed at 1223, 22 October 2013.]

22 [END OF PAGE]

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT