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1 [The Military Commission was called to order at 1051,
2 23 October 2013.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present that were present when the
5 commission recessed.

6 Mr. Connell.

7 LDC [MR. CONNELL]: Thank you. Your Honor, when we
8 stopped, I wanted to address the intersection of these two
9 different areas of law that we've talked about, the questions
10 of customary international law and their domestic effect and
11 also the classification law.

12 So to do that, I want to look a little bit at
13 Department of Defense against ACLU which the government cites
14 in its brief and is the origin of all of this observations and
15 experiences phrase, as far as I can tell.

16 The -- it makes sense to talk about that in
17 drawing the two things together to take one quick look at
18 Executive Order 13526, which defines what classified
19 information is. Of course, our argument is that that's
20 imported into the military commissions, even though it has its
21 own diminutive effect through 10 USC 948a, which is the
22 definition of classified information in the Military
23 Commissions Act. The Military Commissions Act explicitly

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1 refers back to the executive order at -- for its source of
2 classification authority. This is the argument that -- I'll
3 come back. Let's talk about 13526 at this time.

4 If I may have permission to publish the document
5 camera to the gallery, please. This is just the executive
6 order. This specifically addresses the question that the
7 military commission asked about, isn't this an OCA call,
8 because there are parts of the classification question that
9 are an OCA exclusive call and parts that are subject to
10 review, really, on different grounds.

11 What part -- Section 1.1(a) of the executive order
12 on classified national security information. Executive Order
13 13526 sets forth four requirements for the classification of
14 information. The first of those requirements is that an
15 original classification authority is classifying the
16 information. Whether someone is an OCA is a procedural
17 question of delegation from the authority of the president or
18 vice president, and that's obviously an OCA call.

19 The second and most critical element, however, for
20 our purposes here, is category two, which is that the
21 information is owned by, produced by or for or is under the
22 control of the United States Government. That is not a
23 question that -- that's a legal question. Right. That's not

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1 a question that the OCA has particular agency expertise on
2 that it gets to decide.

3 There are others that the -- is closer to the
4 agency expertise of the OCA, like the third category as to
5 whether it's one of the categories of information listed
6 elsewhere in the order; and number four, which is usually the
7 question that is addressed by the Freedom of Information Act
8 cases, which is the expected damage to national security.
9 That's an OCA call as well.

10 But the question is whether the information is
11 observed by, produced by, or under the control of the United
12 States Government is itself a legal question. And that's the
13 legal question that was critical to the decision in ACLU
14 versus Department of Defense. And in ACLU versus Department
15 of Defense -- this is the Freedom of Information Act case,
16 which is different -- different context of course, but shares
17 some similar principles.

18 And the ACLU was looking for government records
19 regarding the observations and experiences of the defendants.
20 Government records of the observations and experiences; not
21 the observations and experiences of the defendants themselves,
22 but government records of that.

23 It's the distinction here between Mr. al Baluchi's

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1 life experience, that he talks about, that we talked about
2 earlier, and government records of that life experience.

3 And what the ACLU argued was that the government
4 lacked the authority to classified information derived from
5 the detainee's personal observations and experiences. It's --
6 that decision is where the observations and experiences
7 language comes from to begin with.

8 But what the D.C. Circuit held on the question was
9 that the ACLU's argument was irrelevant to the reality that
10 the information that the CIA wishes to withhold it within the
11 government's control because any documents generated in the
12 process of interrogation are in the hands of the government
13 and will remain subject to the government's authority whether
14 the detainees are retained, released or transferred.

15 They drew a sharp distinction there between the
16 actual observations and experiences of the defendant as
17 related by themselves, not obtained through the military
18 commission process, or any other thing which could arguably
19 create a relationship, but, instead, are the documents
20 themselves.

21 There's a terrible irony in all of this
22 classification discussion, which is that I don't actually have
23 access to any government information which could confirm or

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1 deny the accuracy of any observation, experience of the
2 defendant because the government has turned over any of that
3 information. But I have high hopes, and I hope that in the
4 future that will come into play.

5 So this is the reason the executive order here --
6 well, sorry. Let me say one other thing about this, which is
7 that one of the arguments that we made in 013G, that the
8 government has never responded to and that the military
9 commission did not deal with in its ruling -- I'm done with
10 the document camera, if you want to take it down -- is about
11 the construction of 10 USC 948a(2) which is the definition of
12 classified information in the military commissions, and the
13 international law comes together with the construction of
14 948a(2) through the Charming Betsy Doctrine.

15 And the Charming Betsy Doctrine says that where
16 there is ambiguity, one of the principles of statutory
17 construction is that statutes should be construed to be
18 consistent with customary international law, so even if the
19 military commission concludes that the self-executing --
20 nonself-executing nature of the Convention Against Torture
21 dispenses with a specific obligatory and universally accepted
22 norm against torture, the Charming Betsy Doctrine still says
23 it should interpret the definition of classified information

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1 as defined in 948a(2) consistent with the customary
2 international law.

3 That is why -- and that all brings us to the
4 second part of the relief that I asked for. Which is that if
5 I am wrong about the nature of classification, if the military
6 commissions decides that the OCA has actually classified the
7 actual internal thoughts, the observations and experiences,
8 that is why the military commission has to go to the
9 alternative -- to the relief of dismissing the case, because
10 that would itself be a violation of the Convention Against
11 Torture. You cannot use a system -- that's where I'm saying
12 that the government would have created a problem that the
13 military commission cannot solve.

14 If the -- if I am wrong about the classification,
15 then the whole system operates to suppress, to violate the
16 right to complain, and to violate the international norm
17 against torture.

18 MJ [COL POHL]: Is that based on that provision
19 referenced earlier that classification procedures cannot be
20 used to hide evidence of torture or embarrassing things?

21 LDC [MR. CONNELL]: In part, but because that's evidence
22 of a principle, right, and that's a Convention Against Torture
23 evidence principle, and as I hope is clear, I'm not relying

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1 exclusively on the Convention Against Torture but rather the
2 international jus cogens norm against torture.

3 But what is clear is that there must be -- that
4 there is a right to complain. Our argument for dismissal
5 under that situation is the violation of the right to
6 complain.

7 MJ [COL POHL]: Okay. So if it's classified -- and your
8 position is it doesn't really make any difference why it's
9 classified, because it abdicates the right to complain.

10 LDC [MR. CONNELL]: In that situation the government has
11 created a problem the military commission can't resolve. I
12 fully acknowledge you cannot declassify things.

13 MJ [COL POHL]: You understand what I'm saying, there
14 appears to be a distinction in the convention that talks about
15 why it's classified. It's classified to hide evidence or to
16 prevent embarrassment, that that's not permitted.

17 LDC [MR. CONNELL]: With all due respect to my
18 colleagues, I think that that distinction arises from
19 Executive Order 13526 and not from the Convention Against
20 Torture itself.

21 MJ [COL POHL]: Either way, I mean -- that's an improper
22 motive for classification, or reason for classification.

23 Motive, I won't put it in. But what I'm saying is you could

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1 have multiple reasons for various things. It may be
2 embarrassing but also may disclose sources and methods. It
3 may also do this. But you're not relying on that subcategory
4 of the improper classification ----

5 LDC [MR. CONNELL]: No.

6 MJ [COL POHL]: ---- argument ----

7 LDC [MR. CONNELL]: No, I'm not.

8 MJ [COL POHL]: ---- of the Convention Against Torture
9 or the executive order.

10 LDC [MR. CONNELL]: No.

11 MJ [COL POHL]: It's classified, there's nothing that
12 you can do about it, and it violates -- if it is classified,
13 it prevents the accused from exercising their rights under the
14 convention and as such ----

15 LDC [MR. CONNELL]: Not the convention but the
16 international jus cogens, and that goes back ----

17 MJ [COL POHL]: But that's not the order problem, that
18 would be the classified. The initial problem of it being --
19 if the order reflects the facts as you understand it, that
20 that paragraph (g)(5) is a correct statement of classified
21 information, then you're now back to the violation of ----

22 LDC [MR. CONNELL]: Correct.

23 MJ [COL POHL]: ---- the inherent violation of the

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1 U.S. Government classified information that prevents them from
2 exercising their rights to ----

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

4 MJ [COL POHL]: Right.

5 LDC [MR. CONNELL]: I acknowledge there are two
6 different scenarios of classification, one of which I'm right
7 about classification and one of which I'm wrong.

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

9 LDC [MR. CONNELL]: So let's talk not about the abstract
10 right to complain but let's talk for a little while about
11 why -- how this interferes with the right to complain from the
12 defendant.

13 So let's start with the government slide, if I
14 could have the -- I'm doing this old school, so if I could
15 have the document camera. Let's start with the government's
16 slide, which is regarding the third, fourth and fifth --
17 excuse me. -- third, fourth and fifth submission of the
18 United States to the committee against torture.

19 So this is the part of the government's argument
20 where they talk about we don't -- it's okay that we restrict
21 all of these other avenues of complaint because we --
22 essentially, it's a substitution argument because we have
23 substituted a separate robust complaint mechanism.

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1 One of those that I would like to talk about is if
2 a credible allegation of torture were raised by a defendant in
3 a military commission proceeding, DoD -- not CIA, but DoD
4 would conduct an investigation in accordance with relevant DoD
5 policy. So this brings us to -- and I -- in accordance with
6 our discussion yesterday, I'm not putting this on the screen,
7 but the documents which the unclassified FOUO documents which
8 are contained within AE 200Q, and just so the record is clear,
9 that is a properly marked version of AE 200C.

10 The fourth document in AE 200Q is dated
11 September 17 of 2006, and it is a report form. It describes
12 an occurrence which occurred three to four years ago, and it
13 is a report of suspected detainee mail treatment.
14 Describes -- it either has redacted or does not include the
15 description of what happened, but it describes that the
16 incident was discovered in an 8 September 2006 interview with
17 the psychiatrist, the unknown individuals were involved with
18 the detainee, and that the adverse effects and medical
19 interventions required were that Mr. al Baluchi reported, as a
20 result of the injury, a -- auditory and visual hallucinations
21 for one to two weeks, with slow resolution; headaches; pain,
22 and intermediate memory problems.

23 There's a -- this -- I want to point out, was a

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1 report made to Dr. 1, which is the reason that we requested --
2 one of the reasons that we requested Dr. 1's presence here,
3 because the complaint that was made to him, under this
4 allegedly robust policy, is reflected in page 4 of AE 200Q.

5 Page 6 of AE 200Q likewise reflects a complaint.
6 It's dated 12 October 2006 with an unknown date of occurrence
7 and it also reports alleged detainee maltreatment. It reports
8 that it's part of a follow-up interview on October 12th of
9 2006 by HM #6. Hospitalman #6, which is why we requested the
10 presence of Hospitalman #6, and discussion as a result of the
11 injury that there was memory loss and delusions as a result of
12 the head injury.

13 This is the robust complaint policy that the
14 prosecution refers to. On 8 September 2006, and again on
15 12 October 2006 Mr. al Baluchi reported maltreatment, and
16 nothing happened. It was written down. It was recorded in
17 medical records. There was no investigation in accordance
18 with relevant DoD policy. There was no robust investigation
19 of what happened. Instead, nothing happened. They just --
20 these records just molded away with no follow-up discussed in
21 the records.

22 MJ [COL POHL]: Just to be clear, and, again, it may be
23 a distinction without a difference, but you're referring to

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1 paragraph 155, refers back to the DoD policy contained in
2 paragraph 95, that refers to a policy in effect at 2012.

3 LDC [MR. CONNELL]: Fair enough.

4 MJ [COL POHL]: So again, I'm not saying there was a
5 robust one there or not, but in the context of the answer, the
6 answer is referring to a policy that's six years after the
7 alleged incidents.

8 LDC [MR. CONNELL]: Sure. I haven't done the research
9 and I haven't been provided with what the policy was in 2006.
10 I don't know if it was the same or different. I do know that
11 the -- because this is the third, fourth and fifth reports of
12 the United States to the Committee Against Torture, that this
13 report -- this response of the United States does cover the
14 period in 2006. The United States is supposed to make an
15 initial report and then report every five years. They held
16 off for a while ----

17 MJ [COL POHL]: Yeah.

18 LDC [MR. CONNELL]: ---- without making any reports.
19 And this does cover the period 2006, this report. Now,
20 whether this specific policy was covered in 2006, I can't say.

21 MJ [COL POHL]: I got it. So again we're talking
22 about -- what you're talking about is mistreatment in a
23 confinement facility.

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1 LDC [MR. CONNELL]: I'm sorry, Your Honor. I couldn't
2 hear.

3 MJ [COL POHL]: You're talking about his alleged
4 mistreatment in a confinement facility, those two incidents
5 that you are talking about.

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: Alleged mistreatment by guards. The
8 gravamen of the motion ----

9 LDC [MR. CONNELL]: I'm not saying it was by guards.

10 MJ [COL POHL]: What?

11 LDC [MR. CONNELL]: I'm not saying it was by guards.

12 MJ [COL POHL]: By somebody at the confinement facility.
13 Whomever. If it was somebody else, that's fine. That's not
14 my point. My point is this. The gravamen of your complaint
15 is not that. It's treatment prior to '06.

16 LDC [MR. CONNELL]: These were reports of treatments
17 prior to '06, Your Honor.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: The fourth page of AE 200Q, if I can
20 point your attention to it, is the report of something that
21 occurred several years earlier.

22 MJ [COL POHL]: And that's included, and so your
23 position, then, is that all of that should be reportable to a

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1 third entity?

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: I'm saying that the substitute
5 process -- I'm saying, actually, a couple of things.

6 MJ [COL POHL]: If there was a substitute process, would
7 that satisfy it.

8 LDC [MR. CONNELL]: No.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: But I'm really just pointing out the
11 substitute process is no substitute at all. Nothing happens
12 other than the documentation of the -- and really how could
13 it? It's difficult for the DoD to investigate what happened
14 in -- with the CIA. I mean, one of the reasons why I think
15 that the United States carefully worded its response to the
16 committee against torture, that the DoD would conduct an
17 investigation is that the DoD has -- prior to September of
18 2006, the DoD has no ability to investigate.

19 MJ [COL POHL]: And I don't want to go too far down this
20 road because I don't really think it addresses any particular
21 issue, but your basic position is no matter what the
22 U.S. Government did to investigate allegations of
23 mistreatment, and God knows that -- well, they're in the

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1 pleadings. There was all sorts of investigations of various
2 kinds into the treatment of the accused, okay. No matter what
3 they did, no matter what they did, that doesn't satisfy their
4 right under the Convention Against Torture to complain outside
5 the U.S. Government.

6 LDC [MR. CONNELL]: Absolutely. And that very much
7 comes back to the question of, you know, the fox guarding the
8 henhouse. I mean, can the body about which you are
9 complaining be trusted to conduct the investigation, and
10 that's -- and it's a basic principle of international law that
11 they can't. I mean, there has to be the ability to go to a
12 third party, whether that's, you know, somebody at the U.N. or
13 whether it's a federal judge or ----

14 MJ [COL POHL]: And the fact that -- let's say that
15 you -- if they go to a non-U.S. third party with limited
16 remedies is somewhat irrelevant. By that I'm saying, if you
17 go to -- I mean, it's -- the discussion earlier, there's no
18 authority for -- you know, I'll rephrase that. There's
19 limited -- I would say probably no, but I could be wrong --
20 authority for a third international body to compel the United
21 States to pay reparations in this case, if we chose -- if the
22 United States chose not to.

23 LDC [MR. CONNELL]: Which is why I mentioned there are a

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1 variety of remedies recognized by international law. Let me
2 give you one example that's raised in AE 232, which we'll get
3 to later. For example, one of the third parties that we're
4 prohibited from going to is Congress. The circuits have
5 pointed out that Congress has been far from silent on the
6 questions of -- silent on the questions of detainee handling,
7 and I -- not that I always agree with all of their decisions,
8 but if you look at the Detainee Treatment Act of 2005, for
9 example, one of its provisions was to make clear the
10 provisions of the Constitution and that there are protections
11 for detainees. So Congress has intervened.

12 There were changes made, some of them significant,
13 some not, in between the Military Commissions Act of 2009 and
14 the Military Commissions Act of 2006. The -- and one
15 important question which is pending in front of Congress right
16 now is the -- is the release of the SSCI torture report. I
17 mean, there are -- even within -- noninternational. Even
18 within our own government there are mechanisms for advocacy
19 that we could pursue if -- were it not for the protective
20 orders that are a part of the right to complain.

21 What the prosecution's position is, is that we get
22 one avenue to complain and that's the military commissions.
23 And there's a world of difference between the various

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1 political actors, both domestically and internationally, and
2 the -- and just the military commissions.

3 I mean, we -- the military commissions does not
4 exist in a vacuum, although sometimes it feels like it down
5 here. We are not in a vacuum. We operate in a political
6 environment and Mr. al Baluchi should be able to have his
7 voice heard within that political environment.

8 MJ [COL POHL]: And, again, the Congress is an issue for
9 another day.

10 LDC [MR. CONNELL]: No. The -- in order for ----

11 MJ [COL POHL]: I said that. I got how it implicates
12 here, your separate motion on that.

13 LDC [MR. CONNELL]: Right. But there's a distinction
14 between what we're talking about here and what 232 is about
15 for Congress.

16 In 232 we're simply asking permission to provide
17 classified information to properly cleared members of
18 Congress. There's the separate question of could
19 Mr. al Baluchi write to a member of Congress, a letter
20 complaining about his treatment, or requesting -- you know,
21 bringing information to their attention. That's -- that's a
22 separate question, right.

23 The -- the first question of classified

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1 information to cleared individuals is not a question of
2 2(g)(5). It's a question of later in the protective order.
3 It's the paragraph 5(f) that you mentioned yesterday.

4 The question of whether Mr. al Baluchi could write
5 to Congress and provide them with information for them to do
6 whatever they -- they believe, disbelieve or anything else,
7 ask to interview him or anything else, that is a question of
8 2(g)(5).

9 MJ [COL POHL]: Sure. Let's come back to 200.

10 LDC [MR. CONNELL]: Sure. I want to move on to one of
11 the other government slides. Just a moment.

12 This is the government's slide which describes
13 paragraph 147 of the third, fourth and fifth U.S. response to
14 the Committee Against Torture. It describes three different
15 ways in which the United States enforces the Convention
16 Against Torture. One of those is that the Federal Government
17 may bring civil actions to enjoin acts or patterns of conduct
18 that violate criminal rights, constitutional rights, including
19 those that would amount to acts of torture.

20 The significance -- the constitutional right
21 reference is significant as an aside, because both in the
22 Detainee Treatment Act and in the reservations, understandings
23 and declarations -- slowing down -- to the adoption of the

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1 Convention Against Torture, the Congress expressed its
2 understanding that the Eighth Amendment itself prohibits
3 ways -- one of the many ways that the United States seeks to
4 implement the international norm against torture.

5 But, of course, for the Federal Government to
6 bring a civil action to enjoin acts or patterns of conduct
7 that constitute torture, someone has to be able to complain to
8 them. Someone has to be able to provide information to the
9 civil rights division of the Department of Justice, or to an
10 Attorney General office of a state. Someone has to be able to
11 provide that information to them, which 2(g)(5) prohibits us
12 from doing.

13 Mr. al Baluchi cannot write to the U.S. Attorney
14 for a certain place, or for the District of D.C., for example,
15 or for -- to a state Attorney General or somebody else, to try
16 to complain, to begin the process of bringing the government
17 machinery into place.

18 The same is true for the second example that the
19 prosecution gives, which is that the U.S. law provides for
20 criminal prosecution of individuals believed to have committed
21 such crimes. Of course, someone has to report a violation of
22 the U.S. law before prosecution can go forward. Unlike many
23 countries, in the United States we don't have individual

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1 criminal prosecutions. We don't have direct victim
2 participation in criminal prosecutions, and so you have to
3 complain to a prosecutor, which is something that we're
4 prohibited from doing under the protective order.

5 And finally, perhaps the most ironic government
6 alternative that it identifies is the Torture Victim
7 Protection Act which, as we discussed earlier, is a law that
8 recognizes a pre-existing international norm against torture,
9 provides some procedures, a statute of limitations, et cetera,
10 that it has to go forward with, and allows people to sue in
11 federal court for acts of torture which have been committed
12 against them. The irony, of course, is that Mr. al Baluchi
13 could not, as we discussed earlier, plead such a case. He
14 could never survive a 12(b)(6) motion because everything that
15 he has to say as it's currently structured would be
16 classified, or treated as classified under the protective
17 order. So just to give you -- there's one other argument. We
18 have talked about international fora. We have talked about
19 other parts of the executive and the legislative branch and
20 the judicial branch.

21 The last thing that I really want to bring to your
22 attention is, I want to commend 200 (AAA), Attachment B, which
23 is our classified supplement to you as the unclassified

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1 heading discusses, it talks about the impact that the
2 classification has on Mr. al Baluchi's ability to seek medical
3 treatment, that there are -- because his statements of his
4 observations and experiences, that limits his ability to seek
5 medical treatment because he cannot describe his clinical
6 history, how he obtained injuries, et cetera, because that is
7 considered -- treated as classified under 12(g)(5). I won't
8 say anything else about that.

9 The last part that I want to address is sort of
10 the procedural posture that we find ourselves in. Despite the
11 goal and assurance of the military commission that we would
12 not address issues that everybody would have a chance to fully
13 brief issue, at least if we weren't -- if we weren't dilatory
14 in some way ----

15 I'm sorry, I'm getting an interpreter stop. And
16 interpreter go.

17 There are two issues that are still out there.
18 There's AE 200G which is our motion for the Dr. Nowak, the
19 motion to compel the prosecution to allow Dr. Nowak to
20 testify. The question of the subpoena came up yesterday. And
21 regardless of the ability to compel people to come, that's not
22 actually an issue here, right? Because Dr. Nowak is willing
23 to appear or we could arrange a video teleconference. The

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1 question is whether the prosecution will allow him to appear,
2 and that's -- we're asking the military commission to compel
3 the prosecution in AE 200G.

4 Yesterday, the prosecution filed its -- or sent us
5 its refusal of our other two witnesses, Dr. 1 and HM6, who are
6 throughout the medical records that we submitted to the court.
7 The -- we will very shortly be filing a motion to compel the
8 appearance of Dr. 1 and HM6. And I just want to be 100%
9 resolute in my position that we acted diligently and followed
10 the rules at every opportunity, and it's really not
11 appropriate to sanction us by not letting us bring the
12 witnesses that we think are important on a procedural point.

13 MJ [COL POHL]: Mr. Connell ----

14 LDC [MR. CONNELL]: Sir.

15 MJ [COL POHL]: ---- we will address the witness
16 production issues in due course.

17 LDC [MR. CONNELL]: Very good.

18 MJ [COL POHL]: And if they are produced and you wish to
19 supplement an argument based on that evidence, you will
20 certainly be permitted to do it.

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

22 MJ [COL POHL]: So you suffered no prejudice ----

23 LDC [MR. CONNELL]: Very good.

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1 MJ [COL POHL]: ---- by delaying their -- but as I
2 understand from your motion, is Dr. Nowak -- Novak, Nowak?

3 LDC [MR. CONNELL]: Nowak, yes, sir.

4 MJ [COL POHL]: ---- isn't available until January 14th
5 to begin with.

6 LDC [MR. CONNELL]: He's not available. The motion
7 won't be heard until December. He is available in person in
8 January. He can appear by videoconference on a different
9 schedule. He lives in Europe. We could get him to someplace
10 in Europe where they have a video teleconference.

11 MJ [COL POHL]: Okay. But just in my mind, I'm thinking
12 about it, video teleconference from Florida is so difficult,
13 but from Europe would ----

14 LDC [MR. CONNELL]: Video teleconference from Florida?

15 MJ [COL POHL]: No, what I'm -- I'm just saying that the
16 technology does not seem to be all that great.

17 LDC [MR. CONNELL]: I agree with you, Your Honor, but I
18 don't think it's the distance between us and -- that's the
19 problem.

20 MJ [COL POHL]: That's not -- but I'm not going back to
21 computer issues.

22 LDC [MR. CONNELL]: Very good. I will close by saying
23 that I also want to -- I think under the rules I'm required

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1 to, I want to adopt the arguments in 200J, which is the brief
2 by the proposed intervenor.

3 The military commission will rule on whether
4 you're allowed to intervene or not, but one thing that they
5 addressed very well that I don't think that any of the other
6 briefs really captured was the question of the interplay
7 between the procedural aspects of the norm against torture,
8 such as the right to complain and a right to a remedy, and how
9 those are intimately wrapped up with the norm against torture
10 itself.

11 MJ [COL POHL]: Just to be clear, is procedurally, at an
12 intervenor's request can be both parties have an opportunity
13 to respond at whether or not it should be permitted or not.

14 LDC [MR. CONNELL]: Absolutely.

15 MJ [COL POHL]: Because some intervenors may not be
16 consistent with the defense position or the government
17 position, and so not that it's dispositive ----

18 LDC [MR. CONNELL]: Sure.

19 MJ [COL POHL]: ---- but you certainly have an
20 opportunity. I believe that was filed last week, anyway,
21 right, on Friday, so ----

22 LDC [MR. CONNELL]: Right. There is the rule of court
23 that if something is treated as an amicus, that it won't be

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1 considered unless it's adopted by one of the parties. So I'm
2 just saying that I think there's a lot of good reasoning in
3 it, and I commend it to the court.

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

5 LDC [MR. CONNELL]: Thank you.

6 MJ [COL POHL]: Trial Counsel, do you wish to respond?

7 MDTC [MR. TRIVETT]: No, sir.

8 MJ [COL POHL]: And Mr. Connell, I let you go before I
9 asked you one question. Let me ask you one other question.

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

11 MJ [COL POHL]: Going down to paragraph 5 ----

12 LDC [MR. CONNELL]: Of the protective orders?

13 MJ [COL POHL]: Of the protective orders. Yes.

14 LDC [MR. CONNELL]: Let me go get my copy ----

15 MJ [COL POHL]: Yeah, please.

16 Mr. Trivett, I'm going to ask you the same question in a
17 minute, so...

18 LDC [MR. CONNELL]: Paragraph 5.

19 MJ [COL POHL]: Yeah, looking at it, you would
20 characterize it as an offending paragraph?

21 LDC [MR. CONNELL]: I think the real offending paragraph
22 is in 2(g), but I'll ----

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: Do you mean Foxtrot?

2 MJ [COL POHL]: No, I mean 2(g).

3 LDC [MR. CONNELL]: (G)(5)?

4 MJ [COL POHL]: (G)(5).

5 LDC [MR. CONNELL]: That is the offending paragraph,
6 Your Honor, yes.

7 MJ [COL POHL]: Now, you see the two words where it
8 says "without limitation"?

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: If those words were deleted and these
11 words were added would it address your concern? There are not
12 that many.

13 LDC [MR. CONNELL]: Okay.

14 MJ [COL POHL]: Because it's consistent with later in
15 the same order. So instead of "without limitation," the words
16 are, "attain as a result of participation in these commission
17 proceedings"?

18 LDC [MR. CONNELL]: Sure.

19 MJ [COL POHL]: It's similar language that's used later
20 in the order, so ----

21 LDC [MR. CONNELL]: Okay.

22 MJ [COL POHL]: Right now it says, "without limitation,"
23 which I think is causing the concern -- and, again, I'm

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1 paraphrasing now because I just scribbled them -- instead of
2 "without limitations," the words would be, "information shall
3 include," comma, "information obtained as a result of
4 participation in the commission proceedings."

5 LDC [MR. CONNELL]: And then it stops there?

6 MJ [COL POHL]: Well, then you continue with the rest.

7 LDC [MR. CONNELL]: So ----

8 MJ [COL POHL]: What I'm trying to -- what the -- and
9 this is a question, because ----

10 LDC [MR. CONNELL]: Right.

11 MJ [COL POHL]: ---- because it strikes to me, there is
12 a distinction here of the same kind of information.

13 LDC [MR. CONNELL]: I see the distinction.

14 MJ [COL POHL]: There's information from personal
15 experiences and there's information that is gleaned from these
16 proceedings ----

17 LDC [MR. CONNELL]: Mm-hmm.

18 MJ [COL POHL]: And okay. So that's my question.
19 Information gleaned from the proceedings could still -- would
20 it still be classified, even if the same information ----

21 LDC [MR. CONNELL]: Right.

22 MJ [COL POHL]: ---- was from life experiences.

23 LDC [MR. CONNELL]: I think -- let me -- I think I know

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1 what you mean. Let me give you this example.

2 So let's say that the government produces
3 information that Mr. al Baluchi was held in country X.

4 MJ [COL POHL]: Right.

5 LDC [MR. CONNELL]: Okay. And al Baluchi says I never
6 knew I was -- I didn't know I was in country X ----

7 MJ [COL POHL]: Right.

8 LDC [MR. CONNELL]: ---- I thought I was in country Y.
9 And so that's information obtained in the course of the
10 military commissions. It's government -- it was government
11 information in the first place and it stays government
12 information ----

13 MJ [COL POHL]: Right.

14 LDC [MR. CONNELL]: ---- if it's turned over in
15 discovery, right?

16 MJ [COL POHL]: Yeah. That's the easy example.

17 LDC [MR. CONNELL]: Right. Easy example.

18 MJ [COL POHL]: Same example ----

19 LDC [MR. CONNELL]: Right.

20 MJ [COL POHL]: ---- government says he was held at
21 country X, and he says I know I was held in country X.

22 LDC [MR. CONNELL]: Right.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: So then it's a source question.

2 MJ [COL POHL]: Exactly.

3 LDC [MR. CONNELL]: Right? So there's actually a case
4 that I cite in 13HH which is on this question. It was an army
5 case out of the D.C. district where -- excuse me,
6 D.C. Circuit, the name is escaping me -- but where they were
7 dealing with the question of restricted zones in Poland, and
8 the question was whether the classified information had come
9 from the person's job, where he had access to restricted areas
10 in Poland, or whether he had gotten it from a newspaper,
11 right? It's a little bit -- and what the D.C. Circuit said
12 was that if he got it from a newspaper, it's not from a
13 classified source and he can't be held responsible and you
14 can't take away his security clearance.

15 So in the -- in that second example ----

16 MJ [COL POHL]: No, but your newspaper example is,
17 depending on the source, the same information ----

18 LDC [MR. CONNELL]: Right. Exact same information ----

19 MJ [COL POHL]: ---- is classified or ----

20 LDC [MR. CONNELL]: Or not classified.

21 MJ [COL POHL]: Or not classified.

22 LDC [MR. CONNELL]: Right.

23 MJ [COL POHL]: Okay. Would that ----

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1 LDC [MR. CONNELL]: That same distinction applies here.
2 If the source came from life experience -- I mean, as I
3 understand the proposed language, if the course came from life
4 experience, I knew I was in country X, then it's not
5 classified. If it came from the prosecution, then that's
6 government -- that's information controlled, et cetera, by the
7 prosecution.

8 MJ [COL POHL]: And if there's -- if it's the same
9 information, it's a source issue.

10 LDC [MR. CONNELL]: Then it's really a source question
11 of where does the information come from.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: Now, am I saying that that might not
14 cause more problems than it solves, right, whereas we -- you
15 know, argue about ----

16 MJ [COL POHL]: I'm not saying it's the solution. I'm
17 just asking about it.

18 LDC [MR. CONNELL]: I know we're all looking for a
19 compelling solution.

20 MJ [COL POHL]: Because I can understand the
21 government's perspective is where the information comes from.

22 LDC [MR. CONNELL]: Right. Their classified information
23 remains classified.

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1 MJ [COL POHL]: Exactly. But that doesn't mean, and I
2 know that you all respect your requirement, I've got that.
3 But sometimes ----

4 LDC [MR. CONNELL]: Exactly.

5 MJ [COL POHL]: ---- it can happen and it's consistent
6 with a prior ruling about when the accused can be excluded
7 under possessing classified information. Again, I'm not
8 saying that's the way I'm going to go, but ----

9 LDC [MR. NEVIN]: Could I ask a question, Your Honor?

10 MJ [COL POHL]: Sure.

11 LDC [MR. NEVIN]: Would that apply -- what you're
12 speaking of now, would that apply to the prior paragraph and
13 its subparagraphs as well? In other words, (g)(4),
14 subparagraphs (a) through (e) would refer to -- not to the
15 information in general, but rather to information if it were
16 acquired during the course of the military commission
17 proceedings?

18 MJ [COL POHL]: Well, the way I'm reading everything
19 else, that you're getting it -- it's all been already
20 classified. So the answer is probably no, if I understand
21 your question.

22 What I'm saying is, is all that's already been
23 classified. The question is -- the question -- the narrow

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1 question that I'm trying to address is information that the
2 accused has from -- to use Mr. Connell's words, life
3 experiences, that has also been classified by the United
4 States Government.

5 LDC [MR. NEVIN]: Okay.

6 MJ [COL POHL]: So what I'm saying is I don't think
7 how -- I'm willing to listen to a counterargument. I'm not
8 sure how that distinction would apply to that information.

9 LDC [MR. CONNELL]: If I could jump in there, I really
10 have two thoughts about this. The first one is that -- I
11 think that problem is largely addressed by 013HH, and I -- and
12 the military commission has -- which is the open-source
13 handling, how do we deal with open-source information.

14 You know, it's the classic problem of, if we read
15 about country X, did we read about it in *The New York Times*,
16 and it's not classified in *The New York Times* but it becomes
17 classified when we say it, but if we got that information from
18 the prosecution, it would be classified at every level,
19 including at the original underlying document, whereas *The New*
20 *York Times* itself is not classified.

21 So 013HH would mostly address this issue, I think.
22 And most of the changes in 013HH which are agreed are a matter
23 of record, and I know the military commission is probably

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1 waiting to get all of the issues solved at one time, and I'm
2 fine with that.

3 The second thing that I want to observe, though,
4 is the language that the military commission just gave us
5 about obtained as a result of participation in military
6 proceedings -- military commission proceedings. I like the
7 Court's interpretation of that language. I like it in 5(f).
8 I did not know that's what it meant, so if you can explain
9 that ----

10 MJ [COL POHL]: But it's ambiguous. What did you think
11 it meant?

12 LDC [MR. CONNELL]: I thought it was simply -- what is
13 the right word -- a nonrestrictive clause that did not
14 actually add any meaning to the rest of the sentence.

15 Because I thought, well, everything -- the whole
16 reason I'm involved in the case is military commissions, so
17 everything involved in the military commissions is obtained as
18 a result of the military commissions proceeding. I did not
19 know that you meant, you know, from government channels,
20 right, which is really -- that makes sense to me.

21 When I read *The New York Times* now, I'm obtaining
22 that information in the course of military commissions
23 proceedings because I'm reading it -- that was the ambiguity

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1 to me, and I like your interpretation, and I support it.

2 MJ [COL POHL]: But what I'm saying is we're starting
3 with a category of classified information, so it's got to be
4 classified to begin with, right?

5 LDC [MR. CONNELL]: Right. That's my point.

6 MJ [COL POHL]: So it's always got to be classified to
7 begin with, and some of these handling devices that are in
8 this are no different than what you get anyway.

9 LDC [MR. CONNELL]: Sure.

10 MJ [COL POHL]: And the question was asked earlier: Why
11 do we even need the protective order?

12 LDC [MR. CONNELL]: Right. Some of them are duplicative
13 and repetitive.

14 MJ [COL POHL]: I've got that, and I just read the rule,
15 and the rule says upon request you issue the protective order.
16 That's the concept.

17 LDC [MR. CONNELL]: I got that.

18 MJ [COL POHL]: So we start with it's all classified
19 information. So if it's classified information, and then
20 it's -- now, if you get exposed to classified information
21 outside the military commission context, then that's handled
22 in a whole different way, right?

23 LDC [MR. CONNELL]: Yes. That's handled, right ----

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1 MJ [COL POHL]: I mean, as we discussed in *The New York*
2 *Times* thing. So I'm not sure what the ambiguity is.

3 LDC [MR. CONNELL]: I'm not pressing for ambiguity.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: I did not -- in my own reading of
6 the protective order, I did not understand the language
7 obtained as a result of participation in these military
8 commissions to be an additional limiting factor on the scope
9 of the protective order. I'm happy for it to be a limiting
10 factor on the scope of the protective order, and I'm not
11 telling to you change the language. I am saying that I'd like
12 to rely on that interpretation in the future, and ----

13 MJ [COL POHL]: Well, the words you've now ----

14 LDC [MR. CONNELL]: It may not be as unambiguous as you
15 think.

16 MJ [COL POHL]: You have now piqued my interest. What
17 did you think it meant other than what I said?

18 LDC [MR. CONNELL]: I thought it meant me. I'm
19 participating in the military commissions, anything that I
20 obtain as -- if I am surfing the web looking for information
21 on ----

22 MJ [COL POHL]: It's got -- but, Mr. Connell, you are
23 causing me confusion.

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1 LDC [MR. CONNELL]: Yeah.

2 MJ [COL POHL]: It has to be classified to begin with,
3 right?

4 LDC [MR. CONNELL]: Does what have to be -- no. If I
5 mean -- that's -- that brings me back to my first point, which
6 is that the protective order treats a vast amount of
7 unclassified -- actually unclassified information as
8 classified. Let me give you a perfect example.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: AE 200Q, right, is a description of
11 an injury ----

12 MJ [COL POHL]: I got it.

13 LDC [MR. CONNELL]: ---- in CIA custody.

14 MJ [COL POHL]: I got it.

15 LDC [MR. CONNELL]: It is unclassified. It's been
16 reviewed multiple times at my request and the prosecution's
17 request. Under the terms of the protective order, it falls --
18 it's an observation/experience regarding one of the four
19 categories. It's defined as classified. In reality, as we
20 determined yesterday at the 505(h) hearing, it's not
21 classified.

22 MJ [COL POHL]: Okay. This is a variation of the theme
23 that Ms. Bormann brought up yesterday, and I could add the

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1 word "classified" a million different times as adjectives in
2 here. This protective order only addresses classified
3 information. If tomorrow the President of the United States
4 decides that one of the RDI things is now unclassified, that
5 is no longer in the order; that restriction is no longer
6 there. This does not address unclassified information.

7 Now, if it's being interpreted to do that, then we
8 need to clarify the interpretation, but it is not intended to
9 treat anything unclassified as classified. Never was, never
10 intended. That's why it's -- it's under a 505 rubric. It
11 only addresses currently classified information.

12 If there's a -- for example, the four
13 categories -- the five categories of the RDI program,
14 arguably, they don't even need to be in here because they're
15 classified somewhere else.

16 LDC [MR. CONNELL]: That's been my point.

17 MJ [COL POHL]: I got it. But if they become
18 unclassified tomorrow, they are, by definition, no longer part
19 of the order, right? I mean, that's -- so now, if you're
20 interpreting something or you need guidance that, well, is
21 this covered by the order or not, the first question is, is it
22 classified currently. And if the answer to that is no, it is
23 not covered by the order.

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1 LDC [MR. CONNELL]: And we have language in 013HH that I
2 believe was agreed to by the prosecution making that clear
3 because as ----

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: ---- as I have said before, we are
6 not the only actors in this system.

7 MJ [COL POHL]: I understand that, and I understand -- I
8 hate to say this, this may end up being a living document --
9 but most of those changes have already been made that have
10 been agreed to. It's just not been promulgated because we're
11 now on this.

12 LDC [MR. CONNELL]: Sure.

13 MJ [COL POHL]: Do you understand what I'm saying?

14 LDC [MR. CONNELL]: I do.

15 MJ [COL POHL]: And this -- I wanted to address what
16 Ms. Bormann says. This only covers currently classified
17 information.

18 LDC [MR. CONNELL]: Understood. Very good.

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

20 LDC [MR. CONNELL]: Thank you.

21 MJ [COL POHL]: Mr. Trivett, understanding that -- okay.
22 My question is the same one I gave to him, the two
23 words "without limitation." And so the question becomes: Is

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1 the government's position on life experiences -- I'm going to
2 use that term -- of the accused, that they know personally,
3 would that be classified information?

4 MDTC [MR. TRIVETT]: Yes.

5 MJ [COL POHL]: Okay. Then I come back to the executive
6 order about being in control of the United States Government,
7 I'm not paraphrasing it.

8 MDTC [MR. TRIVETT]: Yes.

9 MJ [COL POHL]: Is that considered in control of the
10 United States Government, if it's in the accused' brain?

11 MDTC [MR. TRIVETT]: The accused are currently in
12 control of the United States Government. That's one part of
13 the analysis.

14 MJ [COL POHL]: Okay.

15 MDTC [MR. TRIVETT]: The second part of the analysis is
16 the fact that the accused were exposed to sensitive sources
17 and methods that were produced by the U.S. Government.

18 MJ [COL POHL]: Okay.

19 MDTC [MR. TRIVETT]: So that's our position. We asked
20 for the protective order we need in order to protect the
21 classified information that we know will be at issue in this
22 case ----

23 MJ [COL POHL]: If ----

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1 MDTC [MR. TRIVETT]: ---- so we object to any change to
2 the protective order that you have proffered to Mr. Connell.

3 MJ [COL POHL]: And, again, I just throw out ideas.

4 MDTC [MR. TRIVETT]: Yes, sir.

5 MJ [COL POHL]: Okay. So it's your position -- it's the
6 government's position, that if the government voluntarily
7 exposes sources and methods to a -- I'm going to say a foreign
8 national, no privity to the United States Government, that
9 that information -- and if that individual then is in U.S.
10 control, that the appropriate authorities can prevent that
11 person from conveying that information to any third parties?

12 MDTC [MR. TRIVETT]: In the context of ongoing
13 hostilities with alien unlawful enemy belligerents,
14 absolutely. And I think we may take exception to the
15 voluntarily exposing. I mean, we were in a situation where we
16 were at war and we needed intelligence, and that's where this
17 all generated from. So it has to be considered in that
18 context.

19 MJ [COL POHL]: No, I'm with you in the context.
20 I might take an issue about your quibbling over the word
21 "voluntary," but that's not clear. That's not necessary now.

22 Okay. I understand the government's position.

23 MDTC [MR. TRIVETT]: Thank you, sir.

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1 MJ [COL POHL]: Thank you.

2 Ms. Bormann?

3 LDC [MS. BORMANN]: Yesterday, Mr. Trivett argued the
4 robust procedures which Mr. Connell touched on a bit, and just
5 now, I heard Mr. Trivett claim that the United States
6 Government can prevent people from complaining about torture,
7 regardless of whether -- as long as they capture them. I
8 guess that's the argument. As long as they capture them, they
9 can prevent them from complaining about torture.

10 I need to be, with all frankness, clear with this
11 court that this is not an area of expertise I hold. Present
12 in Guantanamo Bay currently is an expert in this particular
13 field, who is a pro bono at no cost to the United States
14 Government, consultant, who is an expert in this area. He
15 is ----

16 MJ [COL POHL]: What area? I'm sorry, which area?

17 LDC [MS. BORMANN]: International law. He is -- his
18 name is Toby Cadman. I have noticed him to the convening
19 authority and copied the government on him. He is a barrister
20 who specializes in international law. He has been barred
21 before the International Criminal Tribunal For the Former
22 Yugoslavia, the International Criminal Court, the Bosnian
23 criminal proceedings where he prosecuted persons who committed

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1 atrocities against Muslims. He currently represents
2 individuals before the International Tribunal War Crime Courts
3 in Bangladesh. He has been counsel in torture cases here in
4 the United States dealing with victims of torture, and I am
5 asking for an unusual remedy, because this is an area I'm
6 unfamiliar with, and it is clear that the court has questions.

7 I'm asking that Mr. Toby Cadman be allowed to
8 address the court, on just those few little issues that we
9 talked about, which is whether or not complaining to the
10 Department of Defense, ICRC and this commission satisfy the
11 right to complain that is required under the body of
12 international law, not just the Convention Against Torture,
13 and whether or not the body of international law allows the
14 United States Government to classify complaints of torture.

15 MJ [COL POHL]: Okay. Trial Counsel, response?

16 MDTC [MR. TRIVETT]: Sir, we would object to that for a
17 myriad of reasons, one of which is we had no notice except
18 this morning that there was this request to have a pro bono
19 expert consultant be present in the courtroom for the
20 unclassified pretrial hearings. So that wasn't a witness
21 request. In my mind, that was a request for access to
22 counsel.

23 We obviously have a different concern because, as

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1 we have consistently done throughout this proceeding, anyone
2 who has direct contact with or is able to converse with any of
3 the accused needs to have the proper classification levels.
4 It doesn't appear that he does.

5 If she is now asking for a witness to testify ----

6 MJ [COL POHL]: Just a second.

7 LDC [MS. BORMANN]: I am not asking that he meet with
8 Mr. Bin'Attash. That's not what I'm asking for.

9 MJ [COL POHL]: Let me ask you just a quick question.
10 It may not be relevant. Does this person have any clearance?

11 LDC [MS. BORMANN]: No, none, like Mr. Schultz, who
12 argued for the media, like the ACLU attorney who appeared.
13 No, no clearance.

14 MJ [COL POHL]: You want him as a witness?

15 LDC [MS. BORMANN]: No, I actually want him to
16 address -- he is a pro bono consultant for Mr. Bin'Attash. He
17 has donated his time because he has an expertise in this very
18 area that I am deficient in, so I sought out -- the government
19 wouldn't pay for me to have a pro bono -- to have a consultant
20 in this area, so what I did was I sought out somebody who
21 would offer his services free of charge because this is an
22 area where I am not effective.

23 MJ [COL POHL]: No, I understand.

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1 LDC [MS. BORMANN]: So in order to be effective for
2 Mr. Bin'Attash, I am asking this court to entertain a brief
3 argument from Mr. Cadman, C-A-D-M-A-N, a registered barrister
4 in the United Kingdom, who has counselled on cases here in the
5 United States and in a variety of international tribunals
6 dealing with this very issue.

7 He is, I would guess, the most qualified attorney
8 present in Guantanamo Bay to answer the Court's questions, and
9 that's what I'm asking to do. There is nothing classified
10 that will be discussed in his presence, so clearly, that's not
11 an issue.

12 MJ [COL POHL]: Mr. Trivett?

13 MDTC [MR. TRIVETT]: Sir, to the extent that this is an
14 amicus brief or an intervenor, it needs to follow the Rules of
15 Court. It needs to be briefed. We need to have an
16 opportunity to look at it, to see whether or not we would
17 object to their intervention, or their pro bono consultancy.
18 He doesn't appear to be a United States attorney, which I
19 think is one of the requirements. He's not a counsel of
20 record. I can probably go on for the next ten minutes about
21 how improper this is, but I think I'm going to stop now.

22 MJ [COL POHL]: Ms. Bormann, I'm somewhat at a loss why
23 we should permit an attorney to argue under these

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1 circumstances.

2 LDC [MS. BORMANN]: He has been asked by ----

3 MJ [COL POHL]: No, but what I understand is he's not an
4 attorney of record.

5 LDC [MS. BORMANN]: No.

6 MJ [COL POHL]: He's not an intervenor.

7 LDC [MS. BORMANN]: No.

8 MJ [COL POHL]: He's part of the defense team.

9 LDC [MS. BORMANN]: He is a consultant for
10 Mr. Bin'Attash and a licensed attorney in a variety of places
11 and international tribunals.

12 MJ [COL POHL]: I understand. Okay. Now, but his
13 status to argue, as opposed to his status as a witness --
14 that's why I asked you earlier, is -- it would not appear that
15 he would meet any qualified status to argue. I'm not talking
16 about as a witness. That's a separate issue. I'm just simply
17 saying that ----

18 LDC [MS. BORMANN]: I understand that, sir. I will
19 confine first my comments regarding arguing.

20 This commission deals with areas of law that
21 are -- in fact, the Hamdan opinion says this commission is
22 based on international law. If we are going to charge these
23 men with international crimes that -- dealing with the law of

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1 war, this is an international tribunal. As a result, this
2 international tribunal should entertain the arguments that I'm
3 asking for this particular argument to be made, because I know
4 what he's going to be able to argue ----

5 MJ [COL POHL]: But Ms. Bormann, you're not asking for
6 an argument, you're asking me to take it as evidence.

7 LDC [MS. BORMANN]: No, I'm not asking you to take it as
8 evidence. The evidence I'm -- I'm asking you to listen to the
9 argument -- this is a -- this is a human being who has
10 knowledge of international law. I'm asking you to allow him
11 to argue the concepts of international law that rebut the
12 government's allegations.

13 I don't know them. This is not an area I am an
14 expert in. And so as a result, I am not capable. I am not
15 effective in this particular area, which is why I asked for
16 assistance, and it was not granted. But now we have a pro
17 bono consultant who has that expertise and I'm asking that he
18 be able to address the commission to rebut the government's
19 arguments.

20 MJ [COL POHL]: Is he going to make any averments of
21 fact?

22 LDC [MS. BORMANN]: No. No.

23 MJ [COL POHL]: Then what's he adding?

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1 LDC [MS. BORMANN]: No, this is all about the Rome
2 Statute, this is about the application of international law as
3 it applies to preventing these men from talking about their
4 torture.

5 MJ [COL POHL]: I've got that. Okay. What I'm saying
6 is this: We have these all fully briefed by every side.
7 Okay. Okay. He's not going to stand up here and say any fact
8 that's not already in the briefs.

9 LDC [MS. BORMANN]: Well, let's -- it's fully briefed.
10 Let me -- let me correct that.

11 So what happened yesterday is Mr. Trivett got up
12 and for the first time argued that there were robust -- it's
13 not in any of their pleadings -- that there are robust
14 protections that satisfy domestic law with respect to the
15 Convention Against Torture.

16 Just a moment ago he got up and argued that the
17 right to complain -- that the U.S. Government can properly
18 classify the thoughts of another human being as long as they
19 capture them. Those two arguments are repugnant to
20 international law. This is not something I am familiar with,
21 which is why I am asking Mr. Cadman to address the court on
22 that issue. And let me -- let me also say that I would also
23 like to take the opportunity to ask that Mr. Cadman be able to

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1 submit a brief to the court on that issue as well. Because I
2 think it's important that somebody correct the record.
3 Because that isn't the state of international law, as I
4 understand it, in my very limited ability to develop that area
5 of expertise over the last several months.

6 I mean, unfortunately, I also have to be an expert
7 in about a million other things. This particular area, I am a
8 little short on. And I know it's unusual, but then this is an
9 unusual situation.

10 MJ [COL POHL]: I understand that. But basically what
11 you're asking is for an attorney who is not authorized to
12 appear before the tribunal to appear before the tribunal --
13 before the commission, I'm sorry.

14 LDC [MS. BORMANN]: In federal court and in the state of
15 Illinois we have something we call pro hac vice, which is a
16 sponsored attorney who has a particular area of expertise or
17 interest and can assist the court in making determinations. I
18 guess there's nothing in the rules that prohibits a pro hac
19 vice application, so maybe I'll fashion this as a request to
20 have Mr. Cadman assist pro hac vice.

21 MJ [COL POHL]: But in essence, at the end of the day,
22 you're asking for a member of -- defense counsel as part of
23 the defense team to present argument before the court or

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1 before the commission. And he's a foreign citizen who is not
2 authorized to do that ----

3 LDC [MS. BORMANN]: Well, I ----

4 MJ [COL POHL]: ---- in that capacity.

5 LDC [MS. BORMANN]: I ----

6 MJ [COL POHL]: Earlier, we were talking about
7 Dr. Nowak, which sounds like a similar theme here of what
8 they're going to talk about. Maybe different, I don't know.
9 I mean, and again, I asked you earlier whether he's here as a
10 witness or as an attorney, but you know -- and quite frankly,
11 Ms. Bormann, where would this -- if this procedure was
12 permitted that -- oh, we have this technical little area, and
13 I'm not disputing that, I mean -- I struggle with some of the
14 same things that you are struggling with, is that the next
15 time I want this person as an expert in national security law
16 to argue it. I want somebody an expert in this. And quite
17 frankly, I -- where would it end?

18 LDC [MS. BORMANN]: Well, I am quite ----

19 MJ [COL POHL]: Not to paraphrase myself from yesterday,
20 but on this issue, is the rules are clear who can represent
21 the accused. You want him to appear as an attorney
22 representing your client's interests in this thing.

23 LDC [MS. BORMANN]: Correct.

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1 MJ [COL POHL]: And it's not -- and quite frankly, it's
2 just not going to permit it, and I'm not going to permit it in
3 this particular case.

4 LDC [MS. BORMANN]: Then I'm asking leave to be able to
5 supplement the record with ----

6 MJ [COL POHL]: If you wish to file a supplemental
7 brief, that's fine. But that's your brief.

8 LDC [MS. BORMANN]: That's fine.

9 MJ [COL POHL]: Okay.

10 LDC [MS. BORMANN]: That's fine. I am asking to file a
11 supplemental brief.

12 MJ [COL POHL]: Because we're always talking about time.
13 Realistically, we still have to address the witness production
14 issues, which are not fully briefed, today. So when we meet
15 in December, if you wish to.

16 LDC [MS. BORMANN]: In light of the commission's
17 decision not to allow him to argue, I am asking leave to file
18 a supplemental brief. And do you want to give me a date
19 certain to have that in? Lawyers always work better with
20 deadlines.

21 MJ [COL POHL]: I know you do work better with
22 deadlines. Unfortunately, I don't have a calendar in my head.

23 LDC [MS. BORMANN]: Two weeks from today?

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1 MJ [COL POHL]: Well, you're giving yourself -- I tell
2 you what, a week from next Monday. That will give you time
3 after you get back. So that would be close of business --
4 today's what, the 23rd? What's the -- today's date? The
5 23rd. Okay. No, I'm not going to give you that much time out
6 of that ----

7 LDC [MS. BORMANN]: That's a week and a half.

8 MJ [COL POHL]: Yeah, I know. I struggle with
9 calendars. Okay. 4 November.

10 LDC [MS. BORMANN]: 4 November. Thank you.

11 MJ [COL POHL]: Okay.

12 LDC [CDR RUIZ]: Judge?

13 MJ [COL POHL]: Commander.

14 LDC [CDR RUIZ]: I would like an opportunity to respond
15 to Mr. Trivett's last argument, which hadn't been raised
16 before, and I -- which I have not had an opportunity to
17 address.

18 MJ [COL POHL]: Okay.

19 LDC [CDR RUIZ]: And that 4 November date would go to
20 any of the defense counsel that want to file a supplemental
21 pleading. Go ahead.

22 LDC [MS. BORMANN]: Thank you.

23 LDC [CDR RUIZ]: I'm sorry. Can you repeat that, just

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1 so I'm clear on the parameters.

2 MJ [COL POHL]: 4 November.

3 LDC [CDR RUIZ]: For supplement on ----

4 MJ [COL POHL]: Ms. Bormann asked to file a supplemental
5 brief on 200, and I gave her the opportunity to do that, and
6 the same opportunity is provided to all of the defense
7 counsel.

8 LDC [CDR RUIZ]: Okay. Thank you.

9 MJ [COL POHL]: And specifically which point, the -- the
10 capture issue?

11 LDC [CDR RUIZ]: Judge, specifically, I think it was in
12 response to the observations and experiences, life
13 experiences, where the response by the prosecution was that,
14 in this context they took issue with the voluntariness of
15 exposure, and that it was in the context of ongoing
16 hostilities and in the state of war and that we needed
17 intelligence, that they were exposed to sources and methods,
18 and I just want to translate that. What they're basically
19 saying is we were at war; we captured him and wanted to
20 torture him, and it was okay because we were at war.

21 That's the translation for that. The language I
22 want to cite comes directly from the ----

23 MDTC [MR. TRIVETT]: Objection, misstates the record.

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1 MJ [COL POHL]: I heard what the comment was, and I hear
2 what the commander is saying. I will take it as I heard it.
3 Go ahead.

4 LDC [CDR RUIZ]: Sources and methods means they were
5 tortured, and that's the exposure. You may not want to say
6 that, but that's the reality. And the Convention Against
7 Torture says this very clearly. We led off with this very
8 paragraph in our motion before this court. No exceptional
9 circumstances whatsoever, whether a state of war, a threat of
10 war, internal political instability or any other public
11 emergency may be invoked as a justification of torture; a/k/a,
12 sources and methods.

13 This is the law of our land, because the United
14 States has ratified the Convention Against Torture, and
15 because the President of the United States of America has
16 affirmed those commitments.

17 So once again, to end by saying that we were in a
18 state of war, ongoing hostilities -- judge, any nation that's
19 ever been at war has either wanted to kill the enemy or
20 torture them. We have hoped to try to transcend that. That's
21 not a justification in this case for the exposure to the
22 source and methods and that voluntariness. Thank you.

23 MJ [COL POHL]: Commander, while you're here, let's

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1 address the issue about Mr. Broyles testifying. Trial
2 Counsel, yesterday, you indicated that you opposed this?

3 MDTC [MR. TRIVETT]: I did, sir.

4 MJ [COL POHL]: I'm assuming -- is there any written
5 summary of the testimony?

6 MDTC [MR. TRIVETT]: No, sir.

7 MJ [COL POHL]: So, Commander, I believe you're the one
8 requesting him, right?

9 LDC [CDR RUIZ]: Yes, sir. Judge, the issue ----

10 MJ [COL POHL]: What's the ----

11 LDC [CDR RUIZ]: ---- AE 008, which is the defective
12 referral motion. The specific issue is translation and the
13 adequacy of the translation language proficiency of
14 Mr. Hawsawi. Mr. Broyles will be called to rebut a number of
15 different statements made and submitted by the prosecution in
16 advancing their position. There is a declaration that was
17 submitted by the prosecution from Darrell Roberson, who is the
18 contracting officer from the convening authority, who makes a
19 number of statements, factual statements for consideration by
20 the commission regarding our conduct in terms of accepting or
21 denying representation from translators, as contained in the
22 records. It's been accepted by the commission.

23 There's been a second declaration that was also

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1 submitted by the prosecution from the agents, the FBI agents
2 that place at issue the language proficiency of Mr. Hawsawi.

3 MJ [COL POHL]: But didn't they testify?

4 LDC [CDR RUIZ]: They did testify. I'm sourcing for you
5 all of the information that has been put forth in the
6 relevancy and the area that's been raised.

7 Third, the prosecution also submitted to the
8 commission a summary of fees and records that articulate a
9 number of money that was billed presumably on behalf of the
10 defendants, each defendant. It was not just for our
11 defendant, for Mr. Hawsawi, as to how much money was expended
12 for translation services for a relevant period of time.
13 Mr. Broyles is in a position to rebut and explain what those
14 numbers mean and why they are misleading.

15 And fourth, during the testimony of
16 Admiral MacDonald, the convening authority, he made a number
17 of statements under oath on the record as to how many
18 translations and how many translators the defense -- Hawsawi's
19 defense had been provided and indicated that they had been
20 turned down. We want to call Mr. Broyles to rebut that
21 information directly.

22 And finally, General Martins, the chief prosecutor
23 in this case, has on a number of occasions made statements on

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1 the record regarding the defense availing themselves, or
2 opportunities to avail themselves of proper translation
3 services. Of course, this all surrounds the adequacy of
4 translation that was available to Mr. Hawsawi during the very
5 critical stage that the death qualifications and referral
6 process was ongoing.

7 Mr. Broyles' testimony will be directly relevant
8 to rebutting all of those pieces of information at evidence
9 that have been placed at issue on the record and by the
10 prosecution.

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

12 MDTC [MR. TRIVETT]: Sir, just to respond directly to
13 Commander Ruiz's comments, when I was answering the
14 voluntary -- when I was concerned about your use of
15 voluntary ----

16 MJ [COL POHL]: That's right. We got two issues here.

17 MDTC [MR. TRIVETT]: Right.

18 MJ [COL POHL]: Let's start with 200. Start with 200
19 and -- are you doing the Broyles issue, too?

20 MDTC [MR. TRIVETT]: I am.

21 MJ [COL POHL]: Right. Start with 200 and then we'll go
22 to Broyles.

23 MDTC [MR. TRIVETT]: Roger.

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1 MJ [COL POHL]: Go ahead.

2 MDTC [MR. TRIVETT]: And just very briefly, sir, our
3 quibble with the voluntary exposure to classified information
4 was just to reinforce the point that the United States didn't
5 choose to go to war with al Qaeda; al Qaeda chose to go to war
6 with us. That was the context in which I was answering your
7 question, was an additional argument. It was an answering of
8 your question directly.

9 MJ [COL POHL]: But the -- the issue was not who started
10 the conflict, the issue was exposures of sources and methods,
11 and you said you -- apparently since now we're going down this
12 road, that it wasn't somehow a voluntary exposure to sources
13 and methods, and you still stand by that?

14 MDTC [MR. TRIVETT]: Yes, sir. Because of the context,
15 and that was all I was discussing. I just wanted to clarify
16 that. I can move off of that at this point.

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

18 MDTC [MR. TRIVETT]: All right. Commander Ruiz
19 specifically cites to Mr. Roberson's affidavit, statements by
20 FBI agents, and summaries of fees that were billed. Those
21 were all attached to the government's motion, and I believe
22 that was done a month after arraignment. So to the extent
23 that Mr. Broyles can rebut that, I don't know why we're

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1 hearing about this witness for the first time. This is the
2 first proffer I've heard of it to date.

3 So I think it's an untimely request. I don't
4 think in any way it should prevent us from arguing the 008.
5 Commander Ruiz stood up during the arraignment and said this
6 was something we needed to argue immediately, because it was
7 jurisdictional in nature, and the commission could not proceed
8 without arguing this.

9 All of that information was in our response. So
10 there's no clear indication as to why Mr. Broyles has to
11 testify now about stuff that Commander Ruiz was aware of 14 or
12 15 months ago.

13 The most recent thing he cited was
14 Admiral MacDonald's testimony, which happened many months ago
15 as well. So that shouldn't be a reason for this request, and
16 this proffer, coming at this point in time. So we think it's
17 untimely. I don't think it's necessary for the adjudication
18 of any part of D, 008, and we would ask that the witness
19 request be denied.

20 MJ [COL POHL]: Of course, this whole issue about the
21 language proficiency of Mr. Hawsawi was brought up in the
22 government's response as somehow relevant to the issue before
23 me. I take motions as they're provided to me, not necessarily

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1 assuming your definition of relevance is going to be mine. On
2 this whole issue, do you think it has any substantive
3 relevance -- the whole issue about his language proficiency
4 prior to referral has much to do with the real issue before me
5 about the defective referral.

6 MDTC [MR. TRIVETT]: The real issue ----

7 MJ [COL POHL]: No, it's a simple question. What I'm
8 saying is, you raised it.

9 MDTC [MR. TRIVETT]: No, sir. Oh, I disagree with that
10 characterization.

11 MJ [COL POHL]: Okay. But what I'm saying is, whether
12 or not he has any language proficiency of English prior to
13 referral, does that really have much to do with the
14 substantive issue raised by the defense?

15 MDTC [MR. TRIVETT]: The government doesn't believe so,
16 because legally we believe that the referral was adequate and
17 the commission could advance.

18 However, what the defense has put into issue
19 specifically, not the government, the defense put into issue
20 that they didn't have adequate resources to provide a
21 mitigation package to Admiral MacDonald. They put that into
22 issue. One of the issues raised by Commander Ruiz was his
23 lack of a translator. We then simply rebutted what he put

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1 into issue by saying, well, even though you had a lack of a
2 translator for whatever period of time, to the extent that
3 your client spoke English and you were able to communicate
4 with him, that shouldn't have been an issue that prevented you
5 from presenting a mitigation package. So we put it into issue
6 only to rebut the allegation that they made.

7 Now, I don't think resources are legally required,
8 but we did want to establish the record so that if this case
9 goes to appeal, we have established what resources they have,
10 because they put their resources into issue. But I agree with
11 Your Honor from the fact that from a legal perspective,
12 because of the mitigation -- the government's position is that
13 the mitigation process is not required by law, and because the
14 pretrial advice was adequate and sufficient, that the
15 resources shouldn't matter. I agree with that.

16 MJ [COL POHL]: But again, we're down to a very narrow
17 resource here is simply English proficiency.

18 MDTC [MR. TRIVETT]: I agree.

19 MJ [COL POHL]: Okay. You're agreeing. I'm not sure
20 what you're agreeing with, but that's okay.

21 MDTC [MR. TRIVETT]: I agree it's a very narrow issue
22 that doesn't really have that much impact on the motion. It
23 has no legal significance, but the government ----

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1 MJ [COL POHL]: So if we simply conclude it has no legal
2 significance as you say, then for the sake of the motion, it
3 is then -- then we assume for the sake of the motions he
4 doesn't have English proficiency and we simply resolve it from
5 that point forward. I mean, that's ----

6 MDTC [MR. TRIVETT]: I'm sorry. I didn't follow that
7 aspect.

8 MJ [COL POHL]: Okay. What I'm saying is you're saying
9 it has no legal significance. Okay. Commander Ruiz believes
10 it has some. I got it. Okay. So we can do -- which we have
11 done over and over again, is litigate this minor little -- in
12 my view -- minor little issue on the bigger issue of defective
13 referral. You just said it has no legal significance.

14 MDTC [MR. TRIVETT]: Right.

15 MJ [COL POHL]: So can't we just say for the sake of
16 this motion we will assume -- we will assume the proffer by
17 the defense that he doesn't have language proficiency in
18 English back then is accurate and we just decide the issue on
19 that without going down that road?

20 MDTC [MR. TRIVETT]: You can ----

21 MJ [COL POHL]: You just said it had no legal
22 significance, so why are we fighting over it? Excuse me. Why
23 are you fighting over it?

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1 MDTC [MR. TRIVETT]: I'm fighting against additional
2 testimony on this issue. To the extent that Your Honor ----

3 MJ [COL POHL]: The question is, does the issue even
4 matter. You just said it had no legal significance.

5 MDTC [MR. TRIVETT]: I don't believe it does.

6 MJ [COL POHL]: Okay.

7 MDTC [MR. TRIVETT]: If you are prepared to rule for us,
8 we would not have to argue. That's the problem we're in.

9 MJ [COL POHL]: I'm with you. I know. You don't know
10 what I'm going to do. I've got that. I've got that.

11 MDTC [MR. TRIVETT]: But I believe that you can decide
12 the issue to the extent that you agree with the government's
13 position on the issue.

14 MJ [COL POHL]: Doesn't work that way, though.

15 MDTC [MR. TRIVETT]: And then ----

16 MJ [COL POHL]: You don't get a ruling and then decide
17 what you want to present. Here's where we are at. Here's
18 where we are at, Mr. Trivett. It's up to you. If you want
19 to -- do you still want to take issue or litigate the issue
20 about language proficiency of Mr. Hawsawi as it's been
21 litigated so far?

22 MDTC [MR. TRIVETT]: I think it's been fully litigated.
23 I don't think there's any additional litigation that's

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1 necessary or proper at this time.

2 MJ [COL POHL]: You think there's a sufficient factual
3 predicate now, but it's still an issue that needs to be put to
4 bed unless I rule in your favor. Perhaps you want to talk to
5 General Martins for a second.

6 MDTC [MR. TRIVETT]: Hold on a second. For the sake of
7 this motion we'll agree to do that, sir. Agree to put the
8 issue to bed if Mr. Broyles doesn't testify, for purposes of
9 this, of this motion.

10 MJ [COL POHL]: Okay, now, Commander, sounds like you
11 won, but sometimes -- okay.

12 LDC [CDR RUIZ]: I just want to make sure.

13 MJ [COL POHL]: Well, let me ask -- for purposes of this
14 motion we're assuming that Mr. Hawsawi's language proficiency
15 in English is what was inadequate, for want of a better term,
16 correct?

17 CP [BG MARTINS]: Your Honor, that's correct. I want to
18 make note that the record -- make note that the record built
19 relates to other litigation. And we have issues relating --
20 you know, contested issues relating to presence and other
21 kinds of things where it was important for to us make that
22 record.

23 MJ [COL POHL]: Exactly.

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1 CP [BG MARTINS]: The way you phrased it, for the
2 purposes of this motion, if you assume in your analysis that
3 he's not proficient, we have no objection to that analytical
4 approach. If he's wanting more, then we go back to the status
5 of the issue before relating to the witness.

6 MJ [COL POHL]: Got it.

7 LDC [CDR RUIZ]: Here's what I would like. I would like
8 the prosecutor to stand up and say, I stipulate that
9 Mr. Hawsawi did not speak English properly and have proper
10 proficiency to communicate with counsel during this time
11 frame. That's what I would like.

12 MJ [COL POHL]: He can't -- two things. Okay. The
13 government says this is no longer an issue. They're going to
14 accept that. He cannot speak -- nobody can -- about
15 Mr. Hawsawi's ability to talk to you. Only you or Mr. Hawsawi
16 can do that. So how they can stipulate to that is beyond me.
17 Okay. Okay. Okay. So I'm not going to ask them to do that,
18 because I don't think they can do that or they should do that.
19 You've got the issue before you. I've got what their position
20 is on 008. Do you still want Mr. Broyles?

21 LDC [CDR RUIZ]: I'm not sure I understand -- they're
22 not contesting his ability to speak English? They're not
23 going to stand up and say that he could ----

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1 MJ [COL POHL]: On 008 only. The issue of defective
2 referral, as we remember last May, two Mays ago actually, now,
3 and the defective referral issue, any -- any ability that
4 impacts on that by his ability to speak English, they are
5 stipulating and conceding that for this motion and this motion
6 only he did not have sufficient English capability to do that.

7 LDC [CDR RUIZ]: Can we do that in writing? I'd like to
8 do that in writing.

9 MJ [COL POHL]: You like to do things anyway. I'm not
10 going to do it in writing.

11 LDC [CDR RUIZ]: I'd like to do that in writing for a
12 number of reasons for the appellate record, and we ----

13 MJ [COL POHL]: If you want to work it out, knock
14 yourself out. What you prefer for the appellate record and
15 what's already on the appellate record, in my view, is already
16 on there, so it is what it is, okay? In light of their
17 concession on that issue, do you ----

18 LDC [CDR RUIZ]: We'll try to work it out.

19 MJ [COL POHL]: Let me go to the next question, though.
20 Do you still want Mr. Broyles?

21 LDC [CDR RUIZ]: Well, I just -- I'm not sure of the
22 parameters because there's so many different pieces. I'm not
23 trying to overly complicate it, but they have information on

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1 the record that goes to financial considerations. Translators
2 being paid. Are we simply going to ignore the issues?

3 MJ [COL POHL]: The issue we're talking about is the
4 language proficiency of your client. And they're agreeing
5 that prior to referral he had a -- he did not -- was not
6 proficient in the English language for considering 008. All
7 of the other stuff, I'm not sure what that goes to. I mean,
8 that's the only issue. I mean, that's the issue we have been
9 spending all this time on with the FBI agents and everything
10 else. Okay?

11 LDC [CDR RUIZ]: That's correct. And what I'm trying to
12 understand is if that, to them, means we're just -- they're
13 not going to talk about that anymore.

14 MJ [COL POHL]: I don't know what they're going to talk
15 about. That's up to them. And if they -- if they make their
16 argument -- if they make their argument that Mr. Hawsawi spoke
17 perfect English and therefore somehow that impacts the legal
18 issue, which again one might cause one pause of what impact it
19 actually has, but that's neither here nor there for now, they
20 can say whatever they want. But right now their position is
21 that's not their position. Their position is he didn't speak
22 sufficient English prior to the time of referral to
23 necessarily impact that.

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1 LDC [CDR RUIZ]: That's correct.

2 MJ [COL POHL]: That's their position. I'm sorry, did I
3 misstate it?

4 CP [BG MARTINS]: This is for the purposes of 008 ----

5 MJ [COL POHL]: Right.

6 CP [BG MARTINS]: ---- and your ruling and your
7 consideration of the motion, the analytical approach that
8 assumes for the purposes of deciding the issue, the legal
9 issue of whether or not the referral was adequate and the
10 pretrial advice was adequate. Assume for the sake of this
11 consideration that he could not understand counsel, that's all
12 we're acknowledging here, because for use of any other
13 approach to this opens up a lot of other areas in terms of
14 presence ----

15 MJ [COL POHL]: Okay.

16 CP [BG MARTINS]: ---- motions that we have had, other
17 averments that counsel has been making related to his client,
18 that we do not concede.

19 MJ [COL POHL]: It's narrow to an ability to communicate
20 in English ----

21 CP [BG MARTINS]: Right.

22 MJ [COL POHL]: ---- prior to referral as it relates to
23 008, and it has nothing to do with any other issue currently,

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1 or already addressed.

2 CP [BG MARTINS]: If counsel were going to then seek to
3 say -- say at trial that somehow the government has conceded
4 my client can't speak English, that would be out of line. He
5 would be out of bounds on this.

6 MJ [COL POHL]: No. No. We're only talking 008,
7 period.

8 LDC [CDR RUIZ]: So as I hear that, they are willing to
9 assume that Mr. Hawsawi could not speak sufficient English to
10 understand counsel during the relevant time period?

11 MJ [COL POHL]: As it relates to 008. That is not
12 assuming any other -- and that's simply a concession for that
13 particular motion. And it doesn't bind them for his English
14 proficiency in the same time on other issues.

15 LDC [CDR RUIZ]: Okay. Let me get back to you after
16 lunch, after I have some time to think ----

17 MJ [COL POHL]: I'll be here.

18 LDC [CDR RUIZ]: Okay.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: Your Honor.

21 MJ [COL POHL]: Yes.

22 LDC [MR. CONNELL]: The prosecution has gotten to speak
23 twice on 200 and I have only ever spoken -- they have spoken

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1 four times on it. I'd like to address the points that
2 Mr. Trivett made in his last two arguments.

3 MJ [COL POHL]: Can you do it in 17 minutes?

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: Go ahead. Whatever time you need.

6 LDC [MR. CONNELL]: The two specific arguments that he
7 makes are that the -- the observation experiences of the
8 defendants are controlled by the United States because they
9 controlled the physical persons of the defendants. So what I
10 want to point out about that is that what the executive order
11 says is that the information is controlled by the United
12 States, not that a person is controlled by the United States.

13 And, in fact, that ACLU versus DoD case kind of
14 addresses this question. It talks about the fact that the
15 records that the United States keeps that it had withheld from
16 the combatant standards tribunals from public release, the
17 United States records it keeps are its records and it talked
18 about the possibility that detainees could be released as
19 detainees have been released, being an independent question
20 from the question of whether the government's records are
21 classified.

22 So that really goes back to that question that you
23 raised earlier about information coming from the prosecution

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1 versus information coming from life experience. Information
2 coming from life experience is not controlled by the
3 government, whereas information coming from their own internal
4 records is.

5 The second point that I want to make is on the
6 voluntary disclosure question. And I don't want to beat up
7 the prosecution too much about that, but there is an important
8 classification law aspect of that, which is that the -- you
9 know, when the United States conducted secret bombings in
10 Cambodia the pilots were bound by their nondisclosure
11 agreements for what they did. The peasants on the ground in
12 Cambodia weren't -- couldn't say, my village has been bombed.
13 I mean, the person -- people to whom the United States
14 chooses, whether it feels compelled to by whatever
15 considerations, chooses to expose its information to do not
16 thereby become bound in privity with the United States.

17 I mean the defendants in this case were exposed to
18 sources and methods in the same way that the citizens of
19 Hiroshima were exposed to the classified Manhattan Project.
20 That the source and method was used against them and that
21 can't thereby put them in privity with the United States.

22 MJ [COL POHL]: But does it come back to the part of the
23 executive order of government-owned information?

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1 LDC [MR. CONNELL]: Yes. Not government-controlled
2 people, but government-controlled information.

3 MJ [COL POHL]: So we're focusing on the information,
4 and then -- but the information also has a source comment or
5 component to it?

6 LDC [MR. CONNELL]: Yes. That's right. It does.

7 MJ [COL POHL]: That's what I asked earlier, is the same
8 information could be classified and owned by the government,
9 and unclassified owned by an uncleared third party who knows
10 it. That's your point?

11 LDC [MR. CONNELL]: Yes. That's correct.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: Thank you.

14 MJ [COL POHL]: Thank you.

15 LDC [MR. NEVIN]: Your Honor, can I say ----

16 MJ [COL POHL]: Sure.

17 LDC [MR. NEVIN]: Because this -- and this is -- this
18 doesn't bear just on 200, it bears on other matters that are
19 pending before the court, such as 013.

20 And I wanted to make sure that I understood
21 Mr. Trivett correctly, and I don't know whether the court
22 would ask him to clarify this or not, but I took it that the
23 court had said that the United States voluntarily, that is as

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1 a matter of the United States's own voluntary choice, exposed
2 sources and methods to Mr. Mohammad.

3 MJ [COL POHL]: Just to be clear, because -- Mr. Nevin,
4 just because I think we have been around enough that --
5 because yesterday you quoted me as saying my position was X on
6 a certain issue. Okay.

7 Don't take anything I say in these discussions as
8 necessarily I have made up my mind or that is my position.

9 LDC [MR. NEVIN]: No, I understand that.

10 MJ [COL POHL]: But yesterday you kind of -- on the
11 issue of the classification, the court says that there's no
12 difference between the classification regime and the order
13 itself, or something to that effect. And you understand, a
14 lot of my questions are not based on that's my position.

15 LDC [MR. NEVIN]: Oh, I know what the court is referring
16 to. Right.

17 MJ [COL POHL]: That's not ----

18 LDC [MR. NEVIN]: I was saying, I think what I said or
19 what I meant to say was, you had said that during the day,
20 that you had made that comment.

21 MJ [COL POHL]: Yeah.

22 LDC [MR. NEVIN]: I understood that ----

23 MJ [COL POHL]: But that doesn't mean that I agree with

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1 the comment or I ----

2 LDC [MR. NEVIN]: I understand.

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

4 LDC [MR. NEVIN]: So anyway, I was just troubled and
5 have always been troubled by some of the pleadings in 013
6 where the government said that this information could be
7 classified because Mr. Mohammad had participated in the RDI
8 program. They referred to him as a participant. So I heard
9 the discussion that the court engaged in a moment ago.

10 MDTC [MR. TRIVETT]: Objection, sir. What this has to
11 do with my comments, I have no idea.

12 LDC [MR. NEVIN]: I want to be ----

13 MJ [COL POHL]: Objection is overruled. Go ahead.

14 LDC [MR. NEVIN]: I just want to be clear. I just want
15 to understand if what Mr. Trivett is saying now on behalf of
16 the government is that Mr. Mohammad voluntarily participated
17 in the RDI program. And there's just a confusion in my mind
18 about whether that's what he's -- what the government is
19 claiming now.

20 I took it that the court -- when the court made
21 its remark it said something about United States voluntarily
22 revealed the information. Are we talking about the United
23 States voluntarily ----

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1 MJ [COL POHL]: No, my -- it came up about in the
2 overall concept of a voluntary exposure to sources and methods
3 to uncleared persons. That I believe was the context of my
4 comment. His response back was something to the effect that
5 either it wasn't voluntary because we were at war with
6 al Qaeda or something along those lines. I got it, Mr. Nevin.

7 LDC [MR. NEVIN]: So the court doesn't take Mr. Trivett
8 to have said that -- to have claimed that Mr. Mohammad
9 voluntarily participated in the RDI program.

10 MJ [COL POHL]: Whether he did or didn't, the facts
11 speak for themselves. Are you with me on this? I mean, the
12 government -- both sides take positions on all sorts of
13 things. I mean, whether or not Mr. Mohammad or any of these
14 accused voluntarily, in any commonsense definition of that
15 term, participated in the RDI program, again, the facts will
16 speak for themselves. And what the government -- because
17 lawyers can disagree on what voluntarily means -- I mean ----

18 LDC [MR. NEVIN]: No, no. I mean, my only point is
19 this: If to the extent that the court or -- to the extent
20 that the military commission is going to make a ruling that is
21 based on the proposition that Mr. Mohammad voluntarily
22 participated in the RDI program, I would like to be heard on
23 that, prior to the court making such a ruling, because

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1 that's -- we -- that's not factually correct.

2 MJ [COL POHL]: I got it.

3 LDC [MS. BORMANN]: Judge, I would second that with
4 respect to Bin'Attash, because I'm here to tell you that he
5 absolutely did not voluntarily participate in the RDI program.

6 MJ [COL POHL]: Again, the facts will speak for
7 themselves. I mean, I got it.

8 Before we recess for lunch, just to kind of go
9 over the order of march. As we discussed on a couple of
10 occasions, my intent would be to go through 073, I think,
11 Delta, Echo and Golf. 156D and 164 next. Both sides, on
12 that. So we'll start there and then we'll be -- when we
13 complete there, then we may -- we'll start with 008, 031 and
14 032.

15 That being said, the commission is recessed until
16 1345.

17 [The Military Commission recessed at 1223, 23 October 2013.]

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