

1 [The R.M.C. 803 session was called to order at 0917,  
2 12 February 2024.]

3 MJ [Col McCALL]: This commission is called to order.

4 Good morning, Mr. Trivett. Please identify who's in  
5 attendance on behalf of the United States, both here and at the  
6 Remote Hearing Room.

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

8 Representing the United States here in the courtroom is  
9 myself, Mr. Clay Trivett; Mr. Christopher Dykstra; and Colonel  
10 Josh Bearden. Also at counsel table are paralegals Rudolph Gibbs and  
11 Ms. Karissa Grippando.

12 Also present in the courtroom from the Federal Bureau of  
13 Investigation is Intelligence Analyst Christina Volker and Special  
14 Agent Justin Zuccolotto.

15 Representing the United States in the Remote Hearing  
16 Facility in Virginia is Mr. Jeff Groharing and Lieutenant Commander  
17 Robert Baxter. Major Neville Dastoor will be joining later.

18 MJ [Col McCALL]: All right.

19 MTC [MR. TRIVETT]: Also in the RHR is Paralegal Staff  
20 Sergeant Samantha Resendiz.

21 Your Honor, these proceedings are being transmitted via  
22 closed-circuit television to sites in the continental United States  
23 pursuant to the commission's orders.

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1 MJ [Col McCALL]: All right. Thank you, Mr. Trivett.

2 Good morning, Mr. Sowards.

3 LDC [MR. SOWARDS]: Good morning, sir. How are you?

4 MJ [Col McCALL]: I'm fine.

5 Could you please indicate who's in attendance both here in  
6 the courtroom and at the RHR for Mr. Mohammad?

7 LDC [MR. SOWARDS]: Yes, sir.

8 Mr. Mohammad is present, along with me, Gary Sowards;  
9 Melanie Partow; Gabriela McQuade; Denise LeBoeuf; Lieutenant Colonel  
10 Nicholas McCue.

11 And then in the RHR we have Major Elspeth Theis, Lieutenant  
12 Colonel Kathleen Potter, and Lieutenant William Xu.

13 MJ [Col McCALL]: All right. Thank you, Mr. Sowards.

14 LDC [MR. SOWARDS]: Thank you.

15 MJ [Col McCALL]: Good morning, Mr. Engle.

16 LDC [MR. ENGLE]: Good morning, Your Honor.

17 On behalf of Mr. Bin'Attash, myself, Matthew Engle; William  
18 Montross; and Analyst Waseem Halabi in the courtroom.

19 In the Remote Hearing Room we have Ms. Tasnim Motala, Anisha  
20 Gupta, Edwin Perry, and Investigator Chris Pipe.

21 MJ [Col McCALL]: All right. Thank you, Mr. Engle.

22 Good morning, Mr. Connell.

23 LDC [MR. CONNELL]: Good morning, sir.

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1           On behalf of Mr. al Baluchi, present in the Courtroom 2 are  
2 myself, James Connell; Alka Pradhan; Rita Radostitz; Defne Ozgediz;  
3 Major Daniel Kim.

4           Present in the Remote Hearing Room is Lieutenant Corey  
5 Krzan.

6           MJ [Col McCALL]: All right. Thank you.

7           Mr. Ruiz, good morning.

8           LDC [MR. RUIZ]: Judge, good morning.

9           Walter Ruiz, Ms. Suzanne Lachelier, Captain Patrick Tipton,  
10 Captain Kerry Mawn, and Mr. Sean Gleason are here on behalf of  
11 Mr. Hawsawi.

12          MJ [Col McCALL]: All right, thank you.

13          All right. I do want to just remind everyone that -- at the  
14 start of a new session, I like to remind everyone that, again, we  
15 have interpreters that are listening in to everything we're saying  
16 so -- and we also have the court reporters here in front of me, so  
17 please be cognizant of that. Try to speak slowly so that we can make  
18 sure that we're getting a good translation for the accused and a good  
19 record for the case.

20          All right. I'll now advise the accused of their right to be  
21 present and their right to waive said presence. I note that all four  
22 accused are present this morning.

23          So you each have the right to be present during all sessions

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1 of the commission. If you request to absent yourself from any  
2 session, such absence must be voluntary and of your own free will.  
3 Your voluntary absence from any session of the commission is an  
4 unequivocal waiver of the right to be present during that session.  
5 Your absence from any session may negatively affect the presentation  
6 of the defense in your case.

7 Your failure to meet with and cooperate with your defense  
8 counsel may also negatively affect the presentation of your case.

9 Under certain circumstances, your attendance at a session  
10 can be compelled regardless of your personal desire not to be  
11 present. Regardless of your voluntary waiver to attend a particular  
12 session of the commission, you have the right at any time to decide  
13 to attend any subsequent session. If you decide not to attend the  
14 morning session, but wish to attend the afternoon session, you must  
15 notify the guard force of your desires. Assuming there is enough  
16 time to arrange transportation, you will then be allowed to attend  
17 the afternoon session.

18 You will be informed of the time and date of each commission  
19 session prior to the session to afford you the opportunity to decide  
20 whether you wish to attend that session.

21 Mr. Mohammad, do you understand what I just explained?

22 ACC [MR. MOHAMMAD]: Yes.

23 MJ [Col McCALL]: Mr. Bin'Attash, do you understand what I

1 just explained to you?

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

3 MJ [Col McCALL]: Mr. Ali, do you understand what I just  
4 explained to you?

5 ACC [MR. AZIZ ALI]: Yes.

6 MJ [Col McCALL]: And Mr. al Hawsawi, do you understand what I  
7 just explained?

8 ACC [Mr. Al HAWSAWI]: Yes.

9 MJ [Col McCALL]: All right. So it is my understanding  
10 that -- first, let's discuss the prayer time and meal times for this  
11 session.

12 So it's my understanding that three of the daily prayer  
13 times are scheduled to take place during what we have as our normal  
14 court hours and that the prayer times will occur approximately at  
15 1215, 1530, and 1800. And I understand that the dining facility is  
16 open from 1100 to 1330 for lunch and 1630 to 1900 for the evening  
17 meal.

18 So in order to accommodate prayer time and meal time, I  
19 intend to take a lunch recess from 1200 to 1330, an afternoon break  
20 from 1530 to 1600, and then if we're working late, an evening recess  
21 sometime before 1830. I assume that adequately accommodates for  
22 meals and prayer time?

23 Appears so. All right. Let me know if that becomes

1 problematic.

2 All right. I'd like to summarize the R.M.C. 802 conference  
3 that we had. On Sunday, 11 February 2024, I conducted a brief  
4 conference with trial and defense counsel in accordance with Rule for  
5 Military Commission 802. The accused were absent.

6 At this administrative conference we discussed the following  
7 scheduling issues: I began by reaffirming my intent to make use of  
8 the majority of the next four weeks to hear witness testimony. The  
9 plan will be to hear oral argument on the first two days and then  
10 additional oral argument if we end up with some unexpected white  
11 space due to finishing early with one or more of the scheduled  
12 witnesses.

13 I informed the parties that I intended to issue a second  
14 amended docket order adopting the witness schedule proposed by the  
15 prosecution in AE 9240. However, I had a couple of questions for the  
16 prosecution regarding the availability of one of the witnesses,  
17 Dr. Mitchell, and the prosecution's desire to have an ex parte  
18 session to discuss the testimony of another witness, Supervisory  
19 Intelligence Analyst Waltz.

20 Mr. Trivett also informed the commission that he anticipated  
21 making certain disclosures pertaining to SIA Waltz in accordance with  
22 Rule for Military Commission 914 within the next few days, but noted  
23 that those disclosures would be later than normally required due to

1 the commission's moving up the date of her testimony.

2 I also informed Mr. Connell that it doesn't appear that we  
3 will have time to hear from his proposed witness, Dr. Morgan, this  
4 session. I did however indicate that if we unexpectedly had some  
5 free time materialize during the fourth week that I would be amenable  
6 to making an expedited decision on whether or not to have Dr. Morgan  
7 testify if he was still available.

8 As we were discussing witnesses, I informed the parties that  
9 I would like the parties to begin discussing which witnesses are  
10 available for the April/May session and that I wanted to have those  
11 April/May witnesses scheduled before we end this session later in  
12 March.

13 I also noted that another military commission case is  
14 currently set to overlap with the last week of this session and asked  
15 that the parties remain flexible as we work through issues such as  
16 courtroom use, hours, and the administrative support that we need to  
17 conduct the commission.

18 I then covered the expected schedule for this week. So  
19 today, the 0900 start with all four accused, going over their  
20 attendance rights. That would be the same procedure as previous  
21 hearings. Entry of appearances and oaths for all new counsel, and  
22 then moving into oral argument in accordance with the docket order  
23 beginning with AE 688, that's Mr. al Hawsawi's motion to dismiss due

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1 to outrageous government conduct. And then AE 729, that is Mr. al  
2 Hawsawi's motion to dismiss for violation of his speedy trial rights.

3 And then on Tuesday, again we would be in an open session  
4 continuing with oral argument, generally in accordance with the  
5 docket order.

6 And then Wednesday, Thursday, and Friday of this week, we  
7 will have the testimony of Special Agent Fitzsimmons.

8 After that the parties raised several administrative issues,  
9 the first being the fact that certain policy changes within the Joint  
10 Task Force may impact the ability or willingness of certain accused  
11 to be present for these hearings. After some discussion, the  
12 commission was informed that the affected accused would be in  
13 attendance but might desire to address the commission regarding the  
14 issue.

15 The second issue that was raised involved the fact that the  
16 only fully cleared military counsel for one of the accused,  
17 Mr. Bin'Attash, had tested positive for COVID and would be in  
18 quarantine, in accordance with the JTF policies. As such, military  
19 counsel would be unavailable for the beginning of the session and the  
20 accused was unwilling to waive said counsel's presence.

21 The learned counsel for the affected team noted that another  
22 military counsel was available but that that counsel had not been  
23 read onto the required SAP programs. The prosecution indicated that

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1 they would look into the matter and assist in trying to get the  
2 counsel read on.

3 Mr. Bruck raised an issue as to the ability for his client  
4 to observe some of the proceedings, primarily the witness that is  
5 scheduled for later this week, Wednesday through Friday.

6 Mr. Connell noted that the prosecution's recent filing of a  
7 revised classification guide and that he was discussing the guide  
8 with the prosecution. Accordingly, he indicated that we may need to  
9 hold a closed session to further discuss the guidance.

10 And then last, Mr. Sowards raised the issue of  
11 Mr. Mohammad's pending objection to Ms. Waltz' testimony. I informed  
12 him that I had decided to deny his motion and that I'd be issuing a  
13 ruling later in the evening, which I did. And that's AE 922N.

14 All right. I think I've covered everything. Did counsel  
15 have any additions or corrections to my summary of the R.M.C. 802  
16 conference?

17 Apparently not.

18 All right. We'll go into the entry of appearance by new  
19 counsel. As noted earlier, I believe we do have potentially some new  
20 counsel who have not yet entered an appearance.

21 So, Mr. Trivett, does the prosecution have anyone present  
22 who needs to enter an appearance?

23 MTC [MR. TRIVETT]: No, sir.

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1 MJ [Col McCALL]: Mr. Sowards, do you have anyone who needs to  
2 enter an appearance?

3 LDC [MR. SOWARDS]: Not today, Your Honor. Thank you.

4 MJ [Col McCALL]: All right.

5 Mr. Engle?

6 LDC [MR. ENGLE]: No, not today, Your Honor.

7 MJ [Col McCALL]: Mr. Connell?

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

9 MJ [Col McCALL]: All right. And Mr. Ruiz?

10 LDC [MR. RUIZ]: No, Your Honor.

11 MJ [Col McCALL]: All right.

12 All right. Any other housekeeping matters to take up  
13 before -- actually, we are going to take a short recess. I hope it  
14 will be short. I understand that the parties are working out perhaps  
15 some of the items they wanted to display during oral argument, so I'm  
16 going to take a recess to allow for that. But any other housekeeping  
17 matters before we move into that?

18 MTC [MR. TRIVETT]: Sir, we looked into the read-on yesterday.  
19 We asked Washington Headquarters Services to coordinate with National  
20 Programs to get Lieutenant Ridgeway's clearance hopefully done today.  
21 It would have been quicker if you were on island, because we have  
22 someone who can obviously do it right here. He's not, so they have  
23 to work through a different part of the government to get that done,

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1 but they are still working on it.

2           However, if all of the SCI is removed from wherever he is up  
3 in the RHR, he probably doesn't need the read-on in order to be  
4 present at the RHR. So that was communicated back to us today, the  
5 SAP.

6           MJ [Col McCALL]: And ----

7           MTC [MR. TRIVETT]: I'm sorry, not the SCI. I'm sorry. I  
8 misspoke.

9           So if the SAP is -- any SAP material is removed from the  
10 RHR, he can be present without the full read-on.

11           MJ [Col McCALL]: Okay. And then I know you mentioned that  
12 the person who would do the read-on is down here, so it made it a  
13 little bit more logistically difficult. What about the idea of  
14 perhaps during our lunch break that attorney could go into the RHR  
15 and the person down here, they could do the read-on that way? I  
16 don't ----

17           MTC [MR. TRIVETT]: We'll look into it, sir.

18           MJ [Col McCALL]: Okay. Anything more on that, Mr. Engle?

19           LDC [MR. ENGLE]: Just that Lieutenant Ridgeway is on standby  
20 waiting to do the read-on as soon as possible.

21           MJ [Col McCALL]: Okay. And as Mr. Ruiz noted yesterday, the  
22 first two AEs that we're moving into -- that we're getting into,  
23 Mr. Bin'Attash did put out a notice of declination of joinder, so I'm

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1 planning on pressing ahead with those two, and then we'll kind of  
2 take it from there.

3 Any other housekeeping matters to take up?

4 LDC [MR. ENGLE]: Yes. Just briefly, Your Honor. I know that  
5 we had mentioned yesterday Mr. Bin'Attash perhaps explaining some of  
6 the problems he was experiencing in the camp to Your Honor. We're  
7 not going to do that this morning.

8 I would just like to inform Your Honor that the problems are  
9 ongoing. There is some progress being made. We are trying to work  
10 behind the scenes to see that those don't interfere with  
11 Mr. Bin'Attash's ability to attend the commissions when he wishes to,  
12 but we are working on those.

13 Mr. Bin'Attash would like me to inform you that he will be  
14 leaving fairly early today, and that is a voluntary absence.

15 And I would just note that even this morning, as we met with  
16 Mr. Bin'Attash in the back here, there were a number of security  
17 precautions that were taken that simply haven't been the case as long  
18 as I've been around, and my understanding is that they haven't  
19 existed for over a decade, if not longer.

20 So the problems are real. And I'm not trying to minimize  
21 those, but we are trying to resolve them and we are, I guess,  
22 cautiously optimistic that they won't interfere with the hearings.

23 MJ [Col McCALL]: All right. I appreciate that.

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1           And just for the accused, your counsel did raise this issue  
2 yesterday at our conference, as I put on the record. So I  
3 understand.

4           My understanding is that the parties, to include the defense  
5 teams, the prosecution, and perhaps the JTF, are still working out  
6 these issues and hopefully will have some type of resolution.  
7 Obviously, if this reaches an impasse or starts to impact our  
8 proceedings, counsel can file a motion asking for me to get involved.

9           I'll just comment on the record that -- I mean,  
10 Colonel Jemmott, when he testified at one of the previous sessions,  
11 had mentioned how changes in the normal procedure caused thrash such  
12 as this. So I would ask the prosecution to see if they can work with  
13 the JTF to keep the procedures uniform and not changing every time  
14 there is a new regime.

15           Again, I don't know what the details are. I don't know the  
16 reason for the policy changes, and it's a bit outside my lane. So,  
17 you know, I would ask you just to continue to work to resolve these  
18 differences.

19           All right. And then -- yes? Go ahead, Mr. Ruiz.

20           LDC [MR. RUIZ]: Judge, I'll wait until you finish.

21           MJ [Col McCALL]: Oh, no. Go ahead.

22           LDC [MR. RUIZ]: Just a couple of additional matters.

23           864 and 865 have also been unjoined by Mr. Bin'Attash, if

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1 you wanted to track that.

2 And then, also, reminding of one matter that I failed to  
3 mention at the hearing yesterday, but I want to mention it now before  
4 we lose track of it; and is that at the last session of the  
5 commissions, there was some testimony and we had some measurements  
6 that were submitted to the commission.

7 We ask that the commission take judicial notice of the  
8 measurements in the courtroom. It was in context of testimony from  
9 the linguist who had identified Mr. al Hawsawi voice's purportedly  
10 from his hearing in the courtroom.

11 You may remember that we submitted the photographs that we  
12 asked to take. That was submitted as an exhibit to 632. But the  
13 court still has pending before it our request for judicial notice of  
14 the measurements that we submitted. There were three measurements  
15 from the lectern to the witness stand, from the back chairs to our  
16 counsel table, and from the back chairs to the front table. Those  
17 are still pending for your consideration on judicial notice.

18 The government had also said that they would conduct their  
19 own measurements and submit those to the court. And as I did then, I  
20 will do now, we have a tape measure here in the courtroom, and  
21 they're welcome to use that if they want to submit their own  
22 measurements. But I just want to make sure that's on the record and  
23 that the Court is mindful of that since it's been quite a while.

1 MJ [Col McCALL]: I appreciate you raising that, and I'll take  
2 it under consideration.

3 LDC [MR. RUIZ]: Thank you.

4 MJ [Col McCALL]: All right. The last thing before we take a  
5 recess is my understanding is that another person tested positive for  
6 COVID. You know, we've all dealt with this during the height of  
7 COVID. I am not going to change the procedures for the courtroom at  
8 this time.

9 Again, I'm going to try to follow the CDC guidance and the  
10 GTMO guidance. But, obviously, anyone is free to wear a mask in this  
11 courtroom. That's to include whether you're at counsel table or if  
12 you're at the podium presenting argument.

13 Having worked through COVID, I am very good at understanding  
14 counsel when they're speaking with a mask. It really doesn't -- it  
15 may be a bit uncomfortable, but it doesn't impact the clarity of  
16 whether I can understand what you're trying to say.

17 So if you want to wear a mask at the podium, that's fine.  
18 The only people that will be required to go maskless would be  
19 witnesses.

20 But I just want to put that out there. And again, we'll  
21 continue to monitor and adjust the policies and procedures, if  
22 needed.

23 All right. My understanding again --

1 Mr. Sowards?

2 LDC [MR. SOWARDS]: Yes, Your Honor. Just to make sure you  
3 understand that also our table was not trying to inject any air of  
4 alarm into the proceedings with all of us wearing masks.

5 But so you know, unfortunately I was asked to stand next to  
6 the member of the Bin'Attash team who tested positive when we were  
7 testing in fairly confined quarters for about 35, 40 minutes. And  
8 then, unfortunately, the other individual you mentioned who tested  
9 positive was seated on the plane next to one of our detailed military  
10 counsel.

11 So what we're doing is just monitoring the situation for the  
12 next three to four days following the CDC guidance. And in the  
13 meantime, the masks that you see are for the protection of  
14 Mr. Mohammad and actually for all of our colleagues here in the  
15 courtroom.

16 Whatever's going to happen to us is going to happen, but we  
17 thought we didn't want to walk around and unknowingly be infectious  
18 to somebody else.

19 MJ [Col McCALL]: I appreciate that, Mr. Sowards.

20 All right. Again, as I mentioned earlier, I believe that  
21 one of the defense teams, and I believe the prosecution, are working  
22 to resolve potentially some of the items that might be displayed  
23 during oral argument. So we'll take an open-ended recess. Please

1 let my staff know when you're ready to proceed, and we'll go back on  
2 the record.

3 Commission's in recess.

4 **[The R.M.C. 803 session recessed at 0938, 12 February 2024.]**

5 **[The R.M.C. 803 session was called to order at 1036,**  
6 **12 February 2024.]**

7 MJ [Col McCALL]: Commission is called to order.

8 The parties are again present. It appears the four accused  
9 have left the courtroom.

10 All right. Are we ready to go forward with oral argument,  
11 Mr. Ruiz?

12 Mr. Trivett?

13 MTC [MR. TRIVETT]: Just an administrative issue, sir.

14 So if Lieutenant Ridgeway's name is authorized by the  
15 commission to be placed on the RHR access roster, he can be available  
16 there as soon as that happens and as soon as he can get over there.

17 MJ [Col McCALL]: All right.

18 MTC [MR. TRIVETT]: They were not able to schedule the read-on  
19 today, but tomorrow around 0800 is the target for that. So he could  
20 be available today at the RHR for the defense counsel and then get  
21 fully read on tomorrow at 0800.

22 MJ [Col McCALL]: All right. I authorize that.

23 MTC [MR. TRIVETT]: Thank you.

1 MJ [Col McCALL]: Good morning, Mr. Ruiz.

2 LDC [MR. RUIZ]: Good morning, Your Honor. I'm ready to  
3 proceed.

4 MJ [Col McCALL]: Go ahead. Proceed.

5 All right. We'll hear oral arguments.

6 LDC [MR. RUIZ]: We appreciate your indulgence this morning.  
7 We appreciate it.

8 MJ [Col McCALL]: Okay.

9 LDC [MR. RUIZ]: We'll try to get those last few things ironed  
10 out. My apologies for that.

11 MJ [Col McCALL]: Not a problem.

12 LDC [MR. RUIZ]: Your Honor, one thing I want to discuss  
13 before I launch into the argument is you will notice that  
14 Mr. al Hawsawi has left the courtroom. He is not present for this  
15 argument.

16 This particular motion is very important and, as you will  
17 see, directly relates to the conduct that he endured, the torture  
18 that he endured during the time in captivity in the black sites.

19 Mr. al Hawsawi is not here in large part because of the  
20 difficulties that they've had at the camp and the difficulties that  
21 they continue to encounter when they come to court.

22 So it's a significant factor. I know that a number of  
23 counsel had raised it. I just wanted to flag it for you in the event

1 it continues to erode his ability to participate, in the event that  
2 it also has collateral consequences down the future.

3 It is an important issue. And for men who have been held  
4 for this long amount of time, it can exacerbate things and take it to  
5 a point where it makes things very difficult for them and for us. So  
6 I wanted to make sure that was on the record.

7 MJ [Col McCALL]: All right. Well, I mean, are you asking to  
8 have the oral argument later? I mean, we have some adjustment that  
9 we could do if ----

10 LDC [MR. RUIZ]: No, I'm not. He's waived voluntarily.

11 MJ [Col McCALL]: Okay.

12 LDC [MR. RUIZ]: But I just wanted to -- the record to reflect  
13 the fact that that is a factor ----

14 MJ [Col McCALL]: Understood.

15 LDC [MR. RUIZ]: ---- in his decision to absent himself.

16 MJ [Col McCALL]: All right.

17 LDC [MR. RUIZ]: Judge, this motion deals directly with the  
18 government's conduct in custody of Mr. al Hawsawi, which has involved  
19 physical and psychological abuse and torture on a scale that no  
20 criminal court in the United States has ever encountered.

21 The depravity of this enterprise is eclipsed in history by  
22 only a handful of examples, showing what the brutality of unchecked  
23 governments claiming righteous motives and noble purposes are capable

1 of inflicting on other human beings.

2 For years, agents of the United States Government willfully  
3 and deliberately engaged in what can only be described as a criminal  
4 enterprise which unconscionably promoted profiteering from torture  
5 and ultimately facilitated human trafficking across international  
6 state lines.

7 The CIA's Rendition, Detention, and Interrogation Program  
8 was an international criminal enterprise, operating squarely outside  
9 the confines of domestic and international law. I say that because  
10 even though we have operated under the fiction that some of this  
11 torture was legalized torture, the so-called torture memos in the  
12 Office of Legal Counsel authorizations, we'll demonstrate to you that  
13 even if we were to accept that legalized torture is something a  
14 democratic nation can engage in and can legalize, even under those  
15 norms, the conduct of the United States Government agents who  
16 detained Mr. al Hawsawi and tortured him for years exceeded, ignored,  
17 and violated even those specific guidelines that purported to  
18 legalize torture in our civilized society.

19 And what follows, I'm going to take you through a factual  
20 basis that will show you what can only be described as a culture of  
21 deception and deceit. As I said, they will describe how this  
22 legalized torture guidelines were ignored, exceeded, and violated  
23 repeatedly.

1           And I will also show you the inextricable linked  
2 relationship between the criminal prosecution and capital prosecution  
3 of Mr. al Hawsawi in this case and the torture and treatment he  
4 endured in those black sites.

5           And what you will see after this presentation, which you've  
6 already seen a significant amount of evidence and testimony, is that  
7 Mr. al Hawsawi's capital prosecution, where his very life is in the  
8 balance, is inextricably linked to the conduct of the FBI and the CIA  
9 and the interconnected nature of the investigation leading to this  
10 prosecution.

11           I'm going to break this up in two segments of presentation  
12 for you, Judge.

13           The first one is I'm going to give you the factual  
14 background, the factual foundation to establish the coercion, the  
15 violence, and the brutality that shocks the conscience, that forms  
16 the very foundation of an outrageous government conduct motion. That  
17 is the language that is used in the D.C. Circuit, the controlling  
18 circuit, and the language that is reserved for viable claims that  
19 are, in fact, still alive and well in this circuit.

20           After that I will provide you with the legal framework that  
21 will show you that you have every legal tool and every legal  
22 authority at your disposal with these facts in this incomparable case  
23 to grant the relief that we are requesting that you grant.

1 I'm going to take you through a progression of exhibits.  
2 Some are unclassified, some are classified. It's going to be a  
3 little bit methodical, perhaps tedious at times. But I think it is  
4 important to give you a roadmap that you can use for your findings of  
5 fact when the findings of fact that we're going to ask you to provide  
6 in this case.

7 What I'll ask you to pay particular attention to in that  
8 presentation is the flow of information. And even though the public  
9 will be deprived of some of the most significant, some of the most  
10 impactful, some of the most abhorrent facts that truly go to the  
11 heart of what shocks the conscience, you will have that. And you, at  
12 the end of the day, are the person who is going to be charged with  
13 assessing this motion and making a determination if relief is  
14 granted.

15 But the interplay between unclassified and classified, in  
16 and of itself, is interesting, because you'll be able to see how we  
17 go from unclassified facts that are deemed worthy of the public's  
18 knowledge and attention to classified facts that very much do, in my  
19 view, shock the conscience but cannot be shared with the world.

20 Of course, we do not believe that there is a legitimate  
21 governmental interest in the classification of those facts, but we  
22 will, of course, abide by the rules that exist for the presentation  
23 of this evidence. And we've gone to great lengths to try to stay

1 within those guidelines.

2           But I think it's important for you as you look at each of  
3 these facts, particularly some of these classified facts, to be going  
4 through that mental analysis as to what the rationale may have been  
5 for this classification; not because you're going to revisit that in  
6 any way, shape, or form, but because I think it informs the lens  
7 through which you view this conduct and the shocking nature of the  
8 conduct and the culture of deception and deceit that has engendered  
9 this program from the very beginning and has continued through the  
10 present day to come straight into this courtroom and to shape the  
11 very fabric of this litigation.

12           One of the things that -- just from a procedural standpoint,  
13 all of the exhibits that we are going to use have been submitted to  
14 the commission in our notice of exhibits and they've also been  
15 provided -- I think they were provided last week along with our  
16 motion. We had supplemental exhibits that were provided, so you have  
17 those on the record.

18           The exhibits that I'm going to be displaying at times have  
19 highlights on them and have underlines that the exhibits in the  
20 record do not. So what I would like to do at the end of our  
21 presentation, as opposed to doing it piecemeal throughout to  
22 facilitate the flow of the presentation, is that we will make a  
23 composite exhibit, if that meets with your approval, of all of the

1 exhibits that we've utilized, displayed to the court, displayed to  
2 the public, and submit a copy of those exhibits for the record that  
3 have the underlines, that have the highlights so that the record  
4 reflects that as well if that is ----

5 MJ [Col McCALL]: I appreciate that. I think that that  
6 process will work.

7 LDC [MR. RUIZ]: All right. Thank you very much.

8 With that said, Judge, then, I will begin our presentation.  
9 And I'm going to ask to have the feed from the camera on Table 5.

10 MJ [Col McCALL]: Okay. And is this for display to the  
11 gallery?

12 LDC [MR. RUIZ]: Yes, sir. At AE 688J, LLLLL ----

13 MJ [Col McCALL]: And go ahead. It can be displayed to the  
14 gallery. Sorry. As we work through this, I know that you have some  
15 matters that you aren't going to display to the gallery, it will just  
16 be for counsel. So that's fine. This one can be displayed to the  
17 gallery.

18 LDC [MR. RUIZ]: Sure. And what I plan to do, Judge, is I  
19 plan to call out the AE number as well as the exhibit number and the  
20 classification of the document.

21 MJ [Col McCALL]: Okay.

22 LDC [MR. RUIZ]: And before I ask to display it, let you know  
23 if I want that displayed to the parties and the court or is one that

1 I believe can be displayed to the gallery as well.

2 MJ [Col McCALL]: I appreciate that.

3 LDC [MR. RUIZ]: This first exhibit, 688J, LLLLL, is an  
4 unclassified exhibit, and this particular version has been cleared  
5 for release to the public.

6 I'm not a fan of reading things to the court or to the  
7 parties, so I've tried to highlight for the court and for the parties  
8 the documents, or the pieces of the document, that I think are  
9 relevant for your consideration. So when I put them up there, I'm  
10 simply going to ask you to refer to that and I may make comments on  
11 the information that is already referenced in that. And I'll give  
12 you a minute to read it, Judge.

13 MJ [Col McCALL]: Okay, thank you.

14 Okay.

15 LDC [MR. RUIZ]: So the concept that COBALT, [REDACTED]  
16 [REDACTED] which is the black site where Mr. al Hawsawi was held and  
17 tortured, is in and of itself an enhanced interrogation technique.

18 It's a very important one, because one of the defenses that  
19 the government has put forth in their brief and that witnesses like  
20 Dr. Mitchell, Dr. Jessen have put forth is that they were legally  
21 authorized to use what they called techniques that were enhanced,  
22 what we call legalized torture.

23 The fact that the black site itself was considered to be an

1 enhanced interrogation technique is not addressed anywhere with any  
2 type of legal authority. And as I will demonstrate throughout the  
3 presentation, it was meant to break these men. It was meant to force  
4 them into compliance. The manner in which Mr. al Hawsawi was held,  
5 constantly shackled in complete darkness, isolated cells with loud  
6 noise, buckets for defecation and for human waste, lack of heat and  
7 extreme conditions, are all matters that impact directly into the  
8 conscience -- the conduct that shocks the conscience, even though  
9 these things were never addressed in any kind of legal authority as  
10 to how Mr. al Hawsawi could be held in this facility. So that's a  
11 concept that I think is important to understand.

12 We're not just talking about the torture that was inflicted  
13 on Mr. al Hawsawi when they brought him into the interrogation room  
14 and when they proceeded to torture him with those individual  
15 techniques, but we're also talking about the manner in which he was  
16 imprisoned and the depravity and the conditions of how he was  
17 imprisoned.

18 Obviously, one of the -- one of the ways that Mr. al Hawsawi  
19 was held is with loud, deafening, nonstop noises.

20 The next exhibit is 688J. It's a Secret exhibit, would be  
21 for display only to the parties and to the judge. So 688J ----

22 MJ [Col McCALL]: All right.

23 LDC [MR. RUIZ]: ---- XXXX. And I simply ask you, Judge, to

1 take ----

2 [The security classification button was pushed in the courtroom which

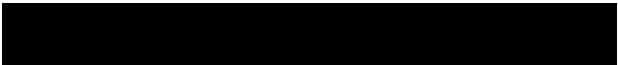
3 caused the video feed to terminate at 1050, 12 February 2024.]

4 [END OF PAGE]

1 **[The Military Commission resumed at 1052, 12 February 2024.]**

2 MJ [Col McCALL]: All right. I believe we're back up.

3 So, Mr. Trivett, my understanding, what was relayed to me by  
4 my CISO, was that maybe that was inadvertent, that the prosecution  
5 believed that there may have been a mistake that it was being  
6 published to the gallery.

7 MTC [MR. TRIVETT]: Right. 

8 

9 MJ [Col McCALL]: Okay.

10 MTC [MR. TRIVETT]: And -- but it was our understanding that  
11 it was being displayed to the gallery, not that it wasn't. So I  
12 apologize for that.

13 MJ [Col McCALL]: Okay. No. That's fine.

14 And we always have some of these hiccups when it's Monday,  
15 the start of a session, and we've been out for a few months. So if  
16 we can just go slow. Mr. Ruiz, just, as you mentioned earlier, we'll  
17 just be very methodical on this.

18 So before you actually pull something up on the projector,  
19 if you could tell me what it is, and I'll say whether or not it can  
20 be published just to counsel and to me or whether we can publish it  
21 to the gallery; and that will just make sure that everybody has a  
22 chance to be on the same page.

23 And if -- while we're already in a pause, I know during the

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1 recess I saw that counsel were adjusting their screens, if we can  
2 just make sure, especially those on the back row can make sure that  
3 their screens aren't visible to the gallery, even though there's some  
4 distance, just make sure that it's angled properly.

5 All right. Back to you, Mr. Ruiz.

6 LDC [MR. RUIZ]: Yes, sir.

7 So I was referring to AE 688J, XXXX, just a Secret document,  
8 and that will be the convention I use when I identify what I'm going  
9 to use.

10 And what you'll see is that in many of these classified  
11 exhibits, I'm really not going to make comment on it, because comment  
12 that I may make would tend to maybe reveal the contents of that.  
13 But, as I said, this is a roadmap for you. I'm trying to lay this  
14 roadmap on the record so you can follow the flow of this information.

15 And while I speak about the unclassified, I will try to  
16 correlate that with the classified exhibits that fit within the flow  
17 of that information. And I think you'll be able to make that  
18 connection without me really needing to say anything more about the  
19 exhibit, other than to show it to you and give you an opportunity to  
20 look at it, which I think is important.

21 MJ [Col McCALL]: I appreciate that. That will be helpful.

22 LDC [MR. RUIZ]: All right. So if I could have 688J again,  
23 XXXX, just displayed to the parties and to the court.

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1 MJ [Col McCALL]: So that can be displayed to the parties and  
2 the court.

3 **[Pause.]**


4 LDC [MR. RUIZ]: Okay. Thank you.

5 Moving on to page 19 of 688J, LLLLL, which is an  
6 unclassified exhibit. Judge, I'm going to ask that page 19 of 688J,  
7 LLLLL, it's an unclassified exhibit, be displayed to the parties as  
8 well as to the public.

9 MJ [Col McCALL]: This can be displayed to the gallery.

10 No. If you could stop so -- if you could take it down,  
11 Mr. Ruiz.

12 **[Pause.]**

13 MJ [Col McCALL]: All right. Do you need further guidance on  
14 this? 

15 

16 

17 LDC [MR. RUIZ]: We resubmitted -- I understood we had  
18 resubmitted that.

19 MJ [Col McCALL]: Let's do this: The CISO can leave the  
20 bench, step out into the well, and if you explain to counsel.

21 **[Counsel and court personnel conferred.]**

22 MJ [Col McCALL]: And, Counsel, just be careful as you come up  
23 to the podium that the mic is probably live.

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1 **[Counsel and court personnel conferred.]**

2 MJ [Col McCALL]: All right.

3 LDC [MR. RUIZ]: We only have about 58 to go, Judge.

4 MJ [Col McCALL]: I understand. This can be complicated,  
5 so ----

6 LDC [MR. RUIZ]: I understand.

7 So in terms of this exhibit, 688J, LLLLL, we're going to ask  
8 it be displayed to the parties and to the court, not to the public,  
9 but I am going to read from the document because the offending  
10 portion doesn't enter into the actual substantive part that I wanted  
11 to read to the court.

12 MJ [Col McCALL]: All right. That's fine.

13 LDC [MR. RUIZ]: So page 19 of this document, if I can have  
14 the document displayed.

15 MJ [Col McCALL]: This will be displayed to counsel and the  
16 court.

17 **[Pause.]**

18 LDC [MR. RUIZ]: Okay. This is page 19 of the SSCI Report.

19 And I want to draw your attention, Judge, to footnote 32  
20 that refers to learned helplessness. And it says: In this context  
21 was the theory that detainees might become passive and depressed in  
22 response to adverse, uncontrollable events, and would thus cooperate  
23 and provide information.

1           This is a memo from Grayson Swigert, Ph.D., February 1,  
2 2003, "Qualification supervised special mission interrogations  
3 consultation."

4           Moving on to page 58 of the same exhibit, it's also just for  
5 display to the parties and to the court.

6           MJ [Col McCALL]: All right.

7           LDC [MR. RUIZ]: Drawing your attention to footnote 291 of the  
8 report, it references: As described above, Gul Rahman likely froze  
9 to death at detention site COBALT sometime in the morning of  
10 November 2002.

11           Again, COBALT [REDACTED] is, in fact, where  
12 Mr. al Hawsawi was imprisoned and where the most extreme form of his  
13 torture and detention took place in 2003 to late 2003.

14           And moving on to page 100 of the same exhibit, again for  
15 display to the court and to the parties. Footnote 584 of this  
16 document reads that: CIA leadership, including General Counsel Scott  
17 Muller and DDO James Pavitt, was also alerted to allegations that  
18 rectal exams were conducted with excessive force on two detainees at  
19 detention site COBALT. CIA Attorney -- blank -- was asked to follow  
20 up. And although CIA records do not indicate any resolution of the  
21 inquiry, CIA records indicate that one of the detainees, Mustafa  
22 al Hawsawi, was later diagnosed with chronic hemorrhoids and anal  
23 fissure and symptomatic rectal prolapse.

1           Now, the interplay of, as I said, unclassified and  
2 classified in this is key, and I want you to keep that in mind as we  
3 move forward.

4           The characterization of the rectal exam with excessive force  
5 is, of course, what we, throughout the representation of  
6 Mr. al Hawsawi, have referred to as sodomy, have referred to as  
7 essentially something that amounts to rape.

8           And when a person undergoes the treatment that  
9 Mr. al Hawsawi endured in this particular instance, but for the fact  
10 that he is a detainee in Guantanamo, charged in this criminal  
11 prosecution, I will submit to you that virtually nobody who had a  
12 friend or family or a relative or a member that was close in relation  
13 to them would characterize this as something so benign. And we'll  
14 move through that process in a minute.

15           Judge, the next exhibit is going to be -- is marked FOUO, so  
16 I'm going to ask that that be displayed to the parties as well as to  
17 the public, is 688J, UUUU.

18           MJ [Col McCALL]: It can be displayed to the gallery.

19           LDC [MR. RUIZ]: And I'll draw your attention to the  
20 highlighted portions of this document.

21           MJ [Col McCALL]: Okay.

22           LDC [MR. RUIZ]: So March 4th of 2003, when Mr. al Hawsawi was  
23 initially assessed, he was found to have a normal rectal examination

1 and was determined to be a healthy young male with no significant  
2 medical problems. This was the medical assessment at the time.

3 We can move to MEA-2877 of that same document. And I'll  
4 draw your attention to those highlighted portions, Your Honor.

5 MJ [Col McCALL]: All right.

6 LDC [MR. RUIZ]: Moving on, the next exhibit is classified at  
7 the Secret level, so I'll ask that be displayed to only the parties  
8 and to the court.

9 MJ [Col McCALL]: All right. This one will be displayed only  
10 to counsel and the commission.

11 LDC [MR. RUIZ]: This is 688J, FF. And, again, I'll draw your  
12 attention in this classified document to the highlighted and  
13 underlined portions.

14 MJ [Col McCALL]: All right.

15 LDC [MR. RUIZ]: If we can scroll a little bit further, bring  
16 the document a little bit further up, I just want to make sure that's  
17 everything, all the way to the bottom.

18 MJ [Col McCALL]: Okay.

19 LDC [MR. RUIZ]: So, Judge, as I said, this is a document  
20 marked SECRET. The government has obviously invoked a classified  
21 information equity in this document. But this is one of those  
22 documents where we think its marking says "SECRET." But the reality  
23 thing is it should say "dirty secret," because this is information

1 that is directly relevant to your assessment of these issues and, at  
2 least I would submit that the infrastructure and the national  
3 security of the United States would not collapse if the world and the  
4 public were allowed to actually see this document. But you have it  
5 for your consideration.

6 The next document is also a Secret document, so I'll ask for  
7 display to the parties and to the judge only.

8 MJ [Col McCALL]: All right.

9 LDC [MR. RUIZ]: 688J, HH. I draw your attention to the  
10 yellow highlights as well as the red underlines.

11 MJ [Col McCALL]: All right.

12 LDC [MR. RUIZ]: All right. And one of the -- one of the  
13 arguments in passing that the government makes in their response  
14 brief to this motion is they take issue with the characterizations of  
15 defense counsel as to what actually happened and what the impact was  
16 on Mr. al Hawsawi and the language that we used.

17 Of course, they take issue with that and I think are willing  
18 to argue that in a closed session. But I think that the documents  
19 you've reviewed speak volumes and certainly support the verbiage and  
20 the way that we've characterized what happened, in actuality and in  
21 truth, the impact of that for Mr. al Hawsawi.

22 So the next exhibit is marked FOUO. So I'll ask that that  
23 be displayed to the public as well as to the court and to the

1 parties.

2 MJ [Col McCALL]: It can be displayed to the gallery.

3 LDC [MR. RUIZ]: 688J, UUUU.

4 MJ [Col McCALL]: All right.

5 LDC [MR. RUIZ]: So I'll ask you, with that, again to draw the  
6 connection between the initial exam and where we are now in terms of  
7 Mr. al Hawsawi's health and what happened from that point to this  
8 point, what you've seen in unclassified to what you've seen in  
9 classified as the progression in Mr. al Hawsawi from a relatively  
10 healthy young male to a person that now has to have surgery to repair  
11 a rectal prolapse.

12 Moving on, the next exhibit is an unclassified exhibit.  
13 Now, however, you may -- that one I'm not sure. We had a number of  
14 SSCI exhibits that we substituted because of the banner markings. I  
15 haven't seen this one since we kind of went through that exercise, so  
16 this may or may not have the markings on them. So I'd say initially  
17 we can display it to just the court and to the parties, and then from  
18 there I may ask that it be displayed to the public as well.

19 MJ [Col McCALL]: Okay. That's fine.

20 LDC [MR. RUIZ]: That's 688J, LLLLL.

21 MJ [Col McCALL]: Initially we'll just display it to counsel  
22 and the commission.

23 LDC [MR. RUIZ]: Okay. I think this one is appropriate for

1 display to the public as well, Your Honor.

2 MJ [Col McCALL]: Can you scroll down to the bottom of the  
3 page?

4 All right. It can be displayed to the gallery.

5 LDC [MR. RUIZ]: Judge, moving on, this is a transitional  
6 document from the treatment that -- and I want to give you a couple  
7 examples.

8 The first example was the problem with Mr. al Hawsawi's  
9 rectal cavity and the progression of treatment. This one focuses on  
10 waterboarding.

11 MJ [Col McCALL]: All right.

12 LDC [MR. RUIZ]: Can you scroll down to the bottom of this  
13 page, please? And keep going. Okay. All right.

14 All right. Just if I can draw your attention, Judge, to the  
15 middle -- top paragraph of this page.

16 MJ [Col McCALL]: All right.

17 LDC [MR. RUIZ]: This is the one that directly begins the  
18 progression from the waterboard, Mr. al Hawsawi's description of what  
19 ultimately we believe happened with the waterboard.

20 The reason this is particularly significant in  
21 Mr. al Hawsawi's outrageous government conduct claim is because, even  
22 within that fiction of legalized torture that we've talked about,  
23 there is never any kind of authorization that authorized

1 waterboarding of Mr. al Hawsawi.

2           So if he, indeed, was waterboarded, which we believe he was,  
3 and we're about to, I think, prove to you that he was waterboarded,  
4 then that was done outside the limits, outside these parameters that  
5 were supposedly the legal guidelines and that gave them legal  
6 authority to do this to Mr. al Hawsawi and other men who were  
7 tortured as well.

8           As this indicates, Mr. al Hawsawi made a report and there  
9 was at least an assessment that what happened to him could be in  
10 distinguishable from the waterboard. During that process,  
11 Mr. al Hawsawi cried out, "Forgotten."

12           I can go to page 1 of 6 in footnote 620 of that. And I'll  
13 direct your attention to footnote 620 at the bottom of the page.

14           MJ [Col McCALL]: All right.

15           LDC [MR. RUIZ]: So we know for a fact, based on this  
16 particular report, that, in fact, the instrumentality that would be  
17 used to waterboard somebody was found, was located, was actually  
18 documented and photographed. It was present at the time and the  
19 location where Mr. al Hawsawi was held.

20           Next exhibit is going to be at the Secret/ORCON level, so  
21 I'm going to ask that that only be provided to Your Honor, as well as  
22 to the parties.

23           MJ [Col McCALL]: All right.

1 LDC [MR. RUIZ]: 6 -- 688P, LLLLLL. And I'd just direct your  
2 attention to the highlighted portion.

3 **[Pause.]**

4 MJ [Col McCALL]: All right.

5 LDC [MR. RUIZ]: If we could go to page 376 and the top of  
6 that page, draw your attention to the highlighted portion.

7 MJ [Col McCALL]: All right.

8 LDC [MR. RUIZ]: All right. Next exhibit is a classified  
9 document as well. I ask that displayed to Your Honor, as well as to  
10 the parties. 688P, PPPPP, pages 327 to 328.

11 MJ [Col McCALL]: All right. And this is just displayable to  
12 counsel and the commission.

13 All right.

14 LDC [MR. RUIZ]: All right. Next document is going to be  
15 unclassified, so I'll ask that that be provided to the parties as  
16 well, the court, and to the gallery. 688J, VVVV.

17 MJ [Col McCALL]: All right. This can be displayed to the  
18 gallery.

19 LDC [MR. RUIZ]: Scroll up slightly.

20 **[Pause.]**

21 MJ [Col McCALL]: All right.

22 LDC [MR. RUIZ]: Okay. Next exhibit is at the Secret level,  
23 so I'll ask that that be displayed to the court, to Your Honor, not

1 to the parties -- not to the gallery.

2 MJ [Col McCALL]: All right. That will be -- this exhibit  
3 will just be displayed to counsel and the commission.

4 LDC [MR. RUIZ]: This is 688J, JJJJ.

5 And I'll trust, Judge, that you will make the associations  
6 between the descriptions and what I'm displaying for your review.

7 MJ [Col McCALL]: Yes.

8 LDC [MR. RUIZ]: Okay. Next exhibit is going to be at the  
9 Secret level, Judge, so I'd ask that that be provided to you and to  
10 the parties, not to the gallery. 688 attach -- 688J, attachment MM.

11 MJ [Col McCALL]: It will be displayed to counsel and the  
12 commission.

13 LDC [MR. RUIZ]: And draw your attention to the highlighted  
14 portion.

15 If you'll scroll down, please. The two highlighted portions  
16 in the lower bottom of the document.

17 MJ [Col McCALL]: All right.

18 LDC [MR. RUIZ]: And I think this is a very good example of  
19 that culture of deceit and deception that I've referenced earlier in  
20 my argument.

21 Okay. Next exhibit is going to be also at the Secret level.  
22 I ask that be displayed to the parties, as well as to the court.

23 MJ [Col McCALL]: All right.

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1 LDC [MR. RUIZ]: 688P, RRRRR.

2 MJ [Col McCALL]: All right.

3 LDC [MR. RUIZ]: Highlighted portion at the bottom of page 18.

4 **[Pause.]**

5 LDC [MR. RUIZ]: Again, culture of deceit and deception.

6 All right. Next exhibit is also Secret, of course, and I  
7 ask that that be displayed to Your Honor, as well as to the parties,  
8 but not to the gallery.

9 MJ [Col McCALL]: All right. It will be displayed to counsel  
10 and the commission.

11 LDC [MR. RUIZ]: This is 688P, WWWW, bottom of page 363 to  
12 bottom of page 364. If you could scroll up, please. Right there.

13 MJ [Col McCALL]: All right.

14 LDC [MR. RUIZ]: All right. Next exhibit is also Secret.

15 MJ [Col McCALL]: It will be displayed to counsel and the  
16 commission.

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

18 688J, RRR.

19 MJ [Col McCALL]: All right.

20 LDC [MR. RUIZ]: And if you can go to page 107, the next page.

21 **[Pause.]**

22 MJ [Col McCALL]: All right.

23 LDC [MR. RUIZ]: Again, I think that affirms that culture of

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1 deception and deceit. It also highlights for you, I think, one of  
2 the reasons why -- one of the things you've heard consistently from  
3 us in our defense and our advocacy of Mr. al Hawsawi is why records  
4 aren't enough and why witnesses are paramount, eyewitnesses to what  
5 happened at [REDACTED].

6 We made that argument, as you well know, in our recent  
7 motion to reconsider Judge Parrella's ruling. I think this informs  
8 that as well, and also to say that -- I'm not sure if you're aware of  
9 this, but I think you are, that when we began litigating the motion  
10 to suppress, one of the matters that I discussed with Judge Cohen at  
11 the time is that much of the testimony we expected to come out would  
12 also have direct impact and overlap with the outrageous conduct  
13 motion.

14 So you'll hear me from time to time refer back to testimony  
15 that we've heard, with the understanding that, as we had, that that  
16 testimony is relevant as well for your assessment and your  
17 determination in this cause.

18 All right. Next exhibit is an unclassified exhibit approved  
19 for release. So I would say, just out of an abundance of caution,  
20 initially display it to the parties and to the court, as I'm not sure  
21 if this one got changed out or not.

22 MJ [Col McCALL]: Understood. It will be displayed to counsel  
23 and the commission for now.

1 LDC [MR. RUIZ]: 688J, VVVV. I do believe this one is fine  
2 for display to the gallery. I see your CISO over there ----

3 MJ [Col McCALL]: It can be displayed to the gallery.

4 LDC [MR. RUIZ]: If we can go to the highlighted portion on  
5 that. Can you scroll further down? Keep going. Further down.

6 I need a moment to check on this exhibit, Your Honor.

7 MJ [Col McCALL]: That's fine.

8 **[Pause.]**

9 LDC [MR. RUIZ]: Okay. Could I have you scroll to  
10 paragraph 13, please.

11 So this is -- I neglected to highlight this particular  
12 paragraph, but this is a paragraph I wanted to draw your attention  
13 to.

14 So Mr. al Hawsawi, in the course of his torture, was hung  
15 from the ceiling and shackled to the wall. He was subjected to  
16 cramped confinement. He was slapped in the body and the face. He  
17 was slammed against the wall. He was put in the stress positions,  
18 kneeling forward against the wall. And he was also forced into  
19 psychological pressures that are, and remain unspecified, also with  
20 the use of women to further increase his sexual humiliation.

21 So these are some of the torture that was implemented on  
22 Mr. al Hawsawi.

23 The next exhibit is a Secret exhibit, so I'm going to ask

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1 that that be simply shown to the court and to the parties.

2 MJ [Col McCALL]: It will be displayed to counsel and the  
3 commission.

4 LDC [MR. RUIZ]: And this is 688J, CCCC.

5 If it's not apparent to the court what that is, I will  
6 elaborate in closed session.

7 MJ [Col McCALL]: All right.

8 LDC [MR. RUIZ]: And can you let me know if you -- if you  
9 think it's apparent? Do you know what it is or ----

10 MJ [Col McCALL]: I have a guess, but it wouldn't hurt for you  
11 to specify in a closed session.

12 LDC [MR. RUIZ]: I'll make a note and come back to that.

13 All right. Next exhibit is also Secret, 688J, GG. Ask that  
14 be displayed to the court and to the parties.

15 MJ [Col McCALL]: That's fine.

16 LDC [MR. RUIZ]: I'll draw your attention to the highlighted  
17 portion with the red marks.

18 **[Pause.]**

19 MJ [Col McCALL]: All right.

20 LDC [MR. RUIZ]: And then this is a Top Secret document, and I  
21 think is definitely worthy of the category of dirty secret.

22 Our own assessment is that if we had the power to classify,  
23 this wouldn't necessarily implode the national security of the United

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1 States, but it certainly would be embarrassing and ugly and shocking.

2 The next exhibit is an unclassified exhibit. So I'm going  
3 to ask that that be displayed to the parties, to the court, and to  
4 the public.

5 MJ [Col McCALL]: It can be displayed to the gallery.

6 LDC [MR. RUIZ]: This is 688P, QQQQQQ. Actually...

7 I'm looking to your CISO because I want to make sure this is  
8 displayable to the -- to the gallery.

9 MJ [Col McCALL]: It's fine.

10 LDC [MR. RUIZ]: Okay. All right.

11 So this is a description by Dr. Mitchell of what he saw as  
12 a, quote, bath, right? That was utilized in COBALT, [REDACTED]  
13 [REDACTED]. Again, a place where Mr. al Hawsawi was held. And you can  
14 see for yourself what his description of that is.

15 And the reason I think it's relevant is because one of the  
16 defenses that was used or one of the arguments that was used to say  
17 that Mr. al Hawsawi wasn't waterboarded is they would say, well, he  
18 was given a bath, right?

19 Now, I think I've conclusively shown you in progression of  
20 facts and evidence that he was indeed waterboarded. I think we  
21 demonstrated that. But even if he wasn't waterboarded and what he  
22 got was a bath, this was a [REDACTED] COBALT bath. I think that it  
23 fits squarely within the realm of what we would call shocking conduct

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1 and brutal and unnecessary in the course of his detention.

2 So the next exhibit is a classified exhibit. So I'm going  
3 to ask that it be displayed to Your Honor and to the parties but not  
4 to the public.

5 MJ [Col McCALL]: It will be displayed to counsel and the  
6 commission.

7 LDC [MR. RUIZ]: This is 688P, TTTT. And I'll draw your  
8 attention to the highlighted paragraph.

9 MJ [Col McCALL]: All right.

10 LDC [MR. RUIZ]: So it's an interesting interplay between the  
11 previous unclassified testimony in open court and this classified  
12 document. That's all I will say in this regard.

13 And then next document is a Secret document I ask to display  
14 to the court, to the parties, and not to the gallery.

15 MJ [Col McCALL]: It will be displayed to counsel and the  
16 commission.

17 LDC [MR. RUIZ]: 688J, XXX.

18 And then the red quotation there is my -- a little bit of my  
19 argument to you, Judge. Since I can't say it out loud, I thought I'd  
20 put it in the document.

21 MJ [Col McCALL]: All right.

22 LDC [MR. RUIZ]: All right. We can take that document off.

23 Judge, this -- this then takes us to, again, one of the

1 subjects that I've talked about, which is this notion that the CIA,  
2 the interrogators, were lawful in their conduct.

3 In the prosecution's brief, page 4, Attachment B, the  
4 government puts forth once again this concept. And it's interesting  
5 that the only attachment that they attached to their responsive  
6 pleading was the CIA's apologia, or basically their response to the  
7 SSCI Report, where they seek to justify their course of conduct. And  
8 they talk about the fact, as they say, and also as Dr. Mitchell,  
9 Dr. Jessen, which we referred to as the CIA's fall guys, they  
10 essentially threw these two contractors under the bus and brought  
11 them forth, indemnified them so they would be here to testify and so  
12 the government could, in fact, argue that we've had this great  
13 exposition of evidence about what was happening at the black sites.

14 But they also used the same -- the same rhetoric, the same  
15 narrative that talks about this lawfulness of the conditions of  
16 detention and the legalization of torture, of course. Thankfully  
17 we've corrected course as a nation, and we've corrected course in the  
18 sense that this conduct today would be unlawful.

19 At least one president has acknowledged what no prosecutor  
20 in this court, what no CIA agent has ever acknowledged, which was the  
21 fact that we, quote, tortured some folks.

22 So as -- the next section I want to demonstrate to you,  
23 while even if you were to accept the knowledge of this legalized

1 torture, that they were well placed to engage in this civilized or  
2 genteel or measured way of torturing people, by renaming it as  
3 enhanced interrogation techniques and regulating it as such a thing,  
4 we'll demonstrate to you in the next section that they routinely  
5 violated those rules. They exceeded any parameters, and they ignored  
6 it.

7 Many reasons for that. Some cases, it was abusive drift.  
8 Some cases, it was outright vengeance and retribution. Some cases,  
9 it was lack of guidance and lack of experience.

10 But whatever those reasons were, the undeniable fact is that  
11 interrogators at [REDACTED], where Mr. al Hawsawi was tortured, and  
12 interrogators at other black sites routinely violated whatever  
13 guidance they had, if they had any guidance, which places this  
14 conduct squarely outside the confines of the law, which is when I  
15 opened in my argument, I said this was a program existing squarely  
16 outside the boundaries of the law.

17 Because even if we were to accept that law -- and I think  
18 any civilized society, and certainly our nation, should never again  
19 accept that we can actually legalize torture and that torture was at  
20 one point in our history legalized, even if that were the fact and we  
21 were to accept that as a people, it is undeniable that those  
22 interrogators exceeded those bounds, ignored those bounds, didn't  
23 have any guidance for this purported legalized torture, or had any

1 experience.

2 So that's what this next section is going to demonstrate for  
3 you, Your Honor, so that you can have a roadmap here and now for  
4 those findings of fact to squarely reject that argument from the  
5 prosecution.

6 The next exhibit is going to be a Secret exhibit. And by  
7 the way, not surprisingly, this section is going to be virtually  
8 secret. All right?

9 So next exhibit is Secret, so I'll ask that that be  
10 displayed to the court, to the parties, of course not to the public.

11 MJ [Col McCALL]: It can be displayed to counsel and the  
12 commission.

13 LDC [MR. RUIZ]: This is 688P, DDDDDD.

14 **[Pause.]**

15 MJ [Col McCALL]: All right.

16 LDC [MR. RUIZ]: Can you scroll down a bit on that? Up one  
17 more. Come up again, please.

18 All right. Next exhibit is also Secret, so I'll ask to  
19 display that to the court and to the parties, not to the public.

20 MJ [Col McCALL]: It can be displayed to the counsel and the  
21 commission.

22 LDC [MR. RUIZ]: This is AE 688P, AAAAAA.

23 MJ [Col McCALL]: All right.

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1 LDC [MR. RUIZ]: Next exhibit is also Secret. I ask that be  
2 displayed to the court, to the parties, not to the public.

3 MJ [Col McCALL]: All right.

4 LDC [MR. RUIZ]: This is 688P, QQQQQ.

5 And I ask you to pay particular attention to the time frame.

6 MJ [Col McCALL]: All right.

7 LDC [MR. RUIZ]: And I will submit to you Mr. al Hawsawi was  
8 at location COBALT as of March of 2003 through the end of 2003.

9 Next exhibit, also a Secret exhibit.

10 MJ [Col McCALL]: It can be displayed to counsel and the  
11 commission.

12 LDC [MR. RUIZ]: 688P, TTTTT.

13 MJ [Col McCALL]: All right.

14 LDC [MR. RUIZ]: All right. So the next exhibit is  
15 unclassified, but I understand -- well, actually, I understand but I  
16 don't understand. But before I call this one up, it is a -- it is a  
17 portion of a transcript that is unclassified, has gone through the  
18 redaction process.

19 And what I'd purport to quote is not classified, but I can't  
20 display the document, apparently, so I have to simply read it. So  
21 I'll ask that the exhibit itself only be displayed to the court and  
22 to the parties, although I understand I can read from the exhibit to  
23 the public.

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1 MJ [Col McCALL]: All right. It can be displayed to counsel  
2 and the commission, and then you can read it into the record.

3 LDC [MR. RUIZ]: This is 688P, QQQQQQ.

4 And this is a portion of trial transcript at page 30985,  
5 testimony of Dr. Mitchell, where he says:

6 Question: In one -- so one of the unauthorized techniques  
7 you've explained on page 115 of your book was also cigar smoke being  
8 blown in someone's face.

9 Answer: I do describe that, yes.

10 Question: Okay. And then on page 130, you describe the  
11 threats with a handgun and a drill.

12 Answer: I do describe those there as well.

13 And I'll submit that this was based on Dr. Mitchell's  
14 testimony about experience at [REDACTED] COBALT.

15 Next exhibit is the same. It's an unclassified portion of a  
16 transcript, and I'll ask to be displayed to the court and to the  
17 parties, and I'll read from that exhibit.

18 MJ [Col McCALL]: Okay. That's fine.

19 LDC [MR. RUIZ]: 688P, QQQQQQ again.

20 This is in reference to statements Mr. al Hawsawi had made  
21 in connection to the waterboarding allegation.

22 Dr. Mitchell says: My recollection is there was a lot of  
23 water involved in it. They sort of poured it all over him, and some

1 of it was on his face.

2 And from what I understand in having listened to your  
3 testimony -- question -- in your view, if somebody were waterboarding  
4 or attempting to waterboard someone, that would not be the  
5 appropriate, if there is such a thing -- right? -- the appropriate  
6 way of doing that?

7 Answer: I don't think it would be an appropriate way of  
8 water dousing a person either. I don't think it's an appropriate  
9 thing to do. Right?

10 So, again, what essentially he's saying is, hey, there's an  
11 appropriate way of waterboarding a person. Right? And, by the way,  
12 I did it very civilly within the boundaries of civilized justice and  
13 the rules that have been given to us. But, in this instance, I don't  
14 think this was appropriate at all. Right? So this goes back to the  
15 concept of conduct outside of even that legalized torture that we  
16 keep talking about.

17 All right. The next exhibit is a Secret exhibit. I ask it  
18 be displayed to the court, to the parties, not to the public.

19 MJ [Col McCALL]: It can be displayed to the counsel and the  
20 commission.

21 LDC [MR. RUIZ]: Scroll down, please.

22 **[Pause.]**

23 MJ [Col McCALL]: All right.

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1 LDC [MR. RUIZ]: Okay. In keeping with the theme, the next  
2 exhibit, also a Secret exhibit, I ask to display that to the judge  
3 and to the parties, not to the public. 688P, 00000.

4 MJ [Col McCALL]: All right.

5 **[Pause.]**

6 MJ [Col McCALL]: All right.

7 LDC [MR. RUIZ]: Okay. The next exhibit is an unclassified  
8 portion of a transcript, so I'd ask that be displayed to the court,  
9 to the parties, and I'll read from the relevant portion. 688P,  
10 QQQQQQ.

11 MJ [Col McCALL]: All right. It will be displayed to counsel  
12 and the commission, and you can read it into the record.

13 LDC [MR. RUIZ]: Could you scroll down a little bit more, too?  
14 Further down. All right, up. Can you bring it down a little bit?  
15 All right.

16 So this is Dr. Mitchell testifying about interrogation  
17 course. And he was focused on a statement that he made that  
18 indicates he got the impression that timing, meaning timing of the  
19 application of the water, wasn't emphasized in the early CIA  
20 interrogation course.

21 He says: That's what I wrote and that's what I believe.

22 Question: And it was the training of that personnel, those  
23 were the personnel who would have been sent to locations such as

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1 [REDACTED] to staff those locations under the program as you said  
2 that was created, correct?

3 Scroll further down.

4 Dr. Mitchell refers to not knowing exactly who was being  
5 sent. He says: But I do know that those were the personnel that  
6 were sent there.

7 Okay. But as you indicated, your impression was that the  
8 timing wasn't emphasized. Again, the timing of the application of  
9 the water.

10 Answer: My impression was that the training they gave the  
11 original people was inadequate and one of those inadequacies was the  
12 timing.

13 So this is a fact in evidence of one of the reasons why they  
14 exceeded, violated, ignored, or just simply didn't have the  
15 appropriate training for appropriately torturing and waterboarding  
16 someone like Mr. al Hawsawi.

17 Next exhibit is a Secret exhibit I'll ask to display to the  
18 court and the parties.

19 MJ [Col McCALL]: It can be displayed to counsel and the  
20 commission.

21 LDC [MR. RUIZ]: This is 688P, YYYYY. And I'll simply ask  
22 you, Judge, to read the highlighted portions.

23 **[Pause.]**

1 MJ [Col McCALL]: All right.

2 LDC [MR. RUIZ]: Can you actually go back to the top of that  
3 document, please? All right.

4 And I draw your attention to the subject line of that  
5 document.

6 MJ [Col McCALL]: All right.

7 LDC [MR. RUIZ]: All right. The next document is Secret. I  
8 ask that be displayed to the court and to parties, not to the public.

9 MJ [Col McCALL]: It can be displayed to counsel and the  
10 commission.

11 LDC [MR. RUIZ]: This is 688P, WWWWW.

12 **[Pause.]**

13 MJ [Col McCALL]: All right.

14 LDC [MR. RUIZ]: All right. The next exhibit is an  
15 unclassified portion of a transcript, 688P, QQQQQQ. So I'm going to  
16 ask that that be displayed to the court, to the parties, and I'll  
17 read from the relevant portion.

18 MJ [Col McCALL]: You may do so.

19 LDC [MR. RUIZ]: And this goes to the quality of the training  
20 that they were receiving.

21 Question: All right. All right. So when you saw NX2  
22 teaching those, the broomstick-behind-the-knee technique at the  
23 training, what did you do?

1 Dr. Jessen and I left the room. We walked down the hall and  
2 called two people I previously mentioned, told them what was going  
3 on, and they immediately came out to the site and pulled NX2 out.  
4 And I can't repeat precisely what he said. He said "knock that shit  
5 off." And that was the last -- that was the last that particular  
6 thing was trained that day.

7 NX2 is one of the interrogators at [REDACTED] who had  
8 quite a bit of control over the conduct at [REDACTED] And in  
9 the public setting, he was teaching other interrogators techniques  
10 that at least Dr. Mitchell, offended his sense of appropriate torture  
11 sensibilities and made him even step out and say, well, maybe this  
12 shouldn't be taught to the people who are going out there. But at  
13 least we know that it was.

14 And we know this was a person who was in that site and who  
15 was in a position of authority and control over detainees like  
16 Mr. al Hawsawi during the course of their interrogations and during  
17 the course of their torture.

18 The next document is also a portion of a transcript,  
19 unclassified. 688P, QQQQQQ. I ask that that be displayed to the  
20 parties, to the court and that I may read from it.

21 MJ [Col McCALL]: You may do so.

22 LDC [MR. RUIZ]: I thought this really -- you know, although I  
23 tend to be very critical of the usefulness of anything Dr. Mitchell

1 and Dr. Jessen really had to say when it comes to the suppression and  
2 the conduct that Mr. al Hawsawi endured since they didn't actually  
3 see it, but this I think was very useful in terms of outrageous  
4 government conduct.

5 And here's what it says. He says: Here's what I actually  
6 object to. It looks like they used your client as a training prop.

7 And this particular client he's referral to Mr. -- to AAA,  
8 Mr. Ali Abdul Aziz.

9 And what this cable suggests to you is that they used him as  
10 a training prop?

11 Answer: The number of facial slaps and belly slaps, that  
12 number of stuff.

13 So essentially he is agreeing that, based on a cable that  
14 he's reading about what was done to Mr. Ali, that it appeared to him  
15 that he was used essentially as a training prop, right? And the next  
16 document will complete the loop for you in respect to Mr. al Hawsawi.

17 The next document is unclassified. It's at 688J, VVVV.  
18 This one is one that I would say display to the court and to the  
19 parties so they may look at the banner markings before being  
20 displayed to the gallery.

21 MJ [Col McCALL]: All right. It will initially be displayed  
22 to counsel and the commission.

23 **[Pause.]**

1 MJ [Col McCALL]: All right. It can be published to the  
2 gallery.

3 LDC [MR. RUIZ]: So just the relevant portion for this piece  
4 is that one top paragraph, Judge. It talks about the second time  
5 Mr. al Hawsawi was tortured. And it references that there were  
6 several newly trained interrogators in the process of being  
7 certified, right? So part of the certification process was some  
8 hands-on experience in the torture of Mr. al Hawsawi.

9 And that is one of the features that we've talked about in  
10 our motion in terms of what is coercive, violence, brutality, but  
11 conduct that shocks the conscience, right? Here you have essentially  
12 people who, in order to become full-fledged torturers, have to go  
13 through a certification process on the appropriateness of how to  
14 properly torture a human being, in this case Mr. al Hawsawi.

15 All right. Again, referring back to the training prop,  
16 comments from Dr. Mitchell, this again confirms, corroborates that  
17 this was, in fact, a salient feature of this program in 2003-2004,  
18 when Mr. al Hawsawi was going through that particularly extreme  
19 period of interrogations and torture.

20 Next document is a Secret document. I ask that be displayed  
21 to the court and to the parties.

22 MJ [Col McCALL]: Go ahead.

23 LDC [MR. RUIZ]: This is 688P, ZZZZZ. Ask you to read the

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1 highlighted portions of this document.

2 **[Pause.]**

3 MJ [Col McCALL]: All right.

4 LDC [MR. RUIZ]: So I think that document fits squarely within  
5 the present theme and certainly demonstrates that there were some  
6 consequences if you didn't tow the line.

7 This I've highlighted in portions of the argument one of the  
8 reasons why these legalized torture techniques were violated is lack  
9 of training and lack of guidance. The next section will focus on  
10 lack of guidance as well.

11 So the next document is a Secret document. It is -- I ask  
12 that you display it to the court, to the parties, not to the public.  
13 688P, XXXXX.

14 MJ [Col McCALL]: It can be displayed to counsel and the  
15 commission.

16 LDC [MR. RUIZ]: Page 347 through '48.

17 **[Pause.]**

18 MJ [Col McCALL]: All right.

19 LDC [MR. RUIZ]: Next page.

20 **[Pause.]**

21 MJ [Col McCALL]: All right.

22 LDC [MR. RUIZ]: Okay. So some washing of the hands there.

23 And the next exhibit's also a classified exhibit. Ask to

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1 display that to court, to the counsel, not to the public. 688P,  
2 NNNNN.

3 MJ [Col McCALL]: All right. That's fine.

4 **[Pause.]**

5 MJ [Col McCALL]: All right.

6 LDC [MR. RUIZ]: The next exhibit is an unclassified SSCI  
7 exhibit. I will ask that that be displayed to the court and to the  
8 counsel until we can check the banner markings. It's 688J, LLLLL.

9 MJ [Col McCALL]: All right. It will initially be displayed  
10 to counsel and the commission.

11 LDC [MR. RUIZ]: And you've seen this one already, Judge. I  
12 think this one is -- well, actually, no, this one can't be -- yeah.  
13 This one cannot be displayed to the public, but you've seen this one  
14 before.

15 And I believe I can read from this one, correct?

16 All right. So the portion I want to direct your attention  
17 to ----

18 MJ [Col McCALL]: If you'd hold off for a second.

19 All right. Go ahead.

20 LDC [MR. RUIZ]: The portion I want to direct your attention  
21 to, Judge, is one that we've talked about, but I think it's a segue  
22 to the next section. And then the flow of information that I want to  
23 show you next is about COBALT being itself an enhanced interrogation

1 technique. And I made a few comments about that initially ----

2 MJ [Col McCALL]: Right.

3 LDC [MR. RUIZ]: ---- how it fits into the conduct that shocks  
4 the conscience, something that was clearly not regulated, was outside  
5 the law. And I think that the flow of exhibits and facts now  
6 demonstrate to you again how this system was outside of the law and  
7 certainly nothing that would be recognized or accepted in the United  
8 States.

9 All right. Next document is classified. I'm going to ask  
10 that be displayed to the court, to the counsel, but not to the  
11 public.

12 MJ [Col McCALL]: It can be displayed to counsel and the  
13 commission.

14 LDC [MR. RUIZ]: 688P, SSSSS, page 50.

15 **[Pause.]**

16 MJ [Col McCALL]: All right.

17 LDC [MR. RUIZ]: Next document is also Secret, so I ask that  
18 that be displayed to the court, to the counsel, not to the public.

19 MJ [Col McCALL]: It can be displayed to counsel and the  
20 commission.

21 LDC [MR. RUIZ]: This is 688P, BBBB, page 59.

22 **[Pause.]**

23 MJ [Col McCALL]: All right.

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1 LDC [MR. RUIZ]: Next exhibit is a classified exhibit. Same  
2 thing, I'd ask display to the court, to the counsel, but not to the  
3 public.

4 MJ [Col McCALL]: It can be displayed to counsel and the  
5 commission.

6 LDC [MR. RUIZ]: 688P, EEEEEEE, page 2187.

7 **[Pause.]**

8 MJ [Col McCALL]: All right.

9 LDC [MR. RUIZ]: And particularly important is the purpose  
10 stated.

11 Page 2208 of that same exhibit.

12 **[Pause.]**

13 MJ [Col McCALL]: All right.

14 LDC [MR. RUIZ]: All right. Next exhibit is also Secret. Ask  
15 to display that to the court, to the counsel, not to the public.

16 MJ [Col McCALL]: It can be displayed to counsel and the  
17 commission.

18 LDC [MR. RUIZ]: 688P, CCCCCC, pages 338 and '39.

19 **[Pause.]**

20 MJ [Col McCALL]: All right.

21 LDC [MR. RUIZ]: Scroll down to '39.

22 **[Pause.]**

23 MJ [Col McCALL]: All right.

1 LDC [MR. RUIZ]: And again, note the location that we're  
2 referencing here as well, Judge. It's in the above paragraph, but  
3 I'm not sure that you caught that, but it's immediately above the  
4 highlighted paragraph.

5 MJ [Col McCALL]: I see that.

6 LDC [MR. RUIZ]: All right. Okay. Judge, the -- so with that  
7 section, I think that concludes at least a portion that references  
8 facts that I think give you a roadmap to reject outright any  
9 government defense or any justification defense that the conduct that  
10 was taking place was within legal parameters.

11 I think squarely have demonstrated with factual documents  
12 and evidence that this was not the case at that location and  
13 certainly not the case with Mr. al Hawsawi, which even in that  
14 legalized torture world places it squarely outside the bounds of  
15 those laws.

16 Moving on to the next section I want to talk about ----

17 MJ [Col McCALL]: Mr. Ruiz, before -- would this be a good  
18 time to break? We're coming up on the lunch and prayer hour, hour  
19 and a half. So we'll go -- and I know that you have a ways more to  
20 go, so ----

21 LDC [MR. RUIZ]: Sure.

22 MJ [Col McCALL]: Let's go ahead, and we'll recess for lunch  
23 and give those who choose an opportunity to pray. We'll be back in

1 here at 1330.

2 Any issues to take up before we recess?

3 Apparently not.

4 Commission's in recess.

5 **[The R.M.C. 803 session recessed at 1200, 12 February 2024.]**

6 **[The R.M.C. 803 session was called to order at 1338,**

7 **12 February 2024.]**

8 MJ [Col McCALL]: The commission is called to order. Parties  
9 are present. The accused are still absent.

10 Mr. Ruiz, over to you.

11 LDC [MR. RUIZ]: Thank you, Judge.

12 The next section that I'm going to focus on is a section  
13 that focuses on the massive amounts of money and infrastructure in  
14 terms of prisons, personnel for torture, planes, and the vast  
15 transportation network that facilitated this criminal enterprise.

16 And as I said from before, we do think that's what it is and  
17 what it was. And we factually think that what we've provided to the  
18 court, the facts that you've seen, support that.

19 In this particular instance, what you have and what you'll  
20 see is the vast amounts of money that were exchanged by agents from  
21 our government with foreign nations. And the amounts are staggering.

22 Obviously, the intention was to bring foreign partners,  
23 foreign nations into complicity, into hosting these black sites. And

1 I think that, in and of itself, reveals the purpose, the intention,  
2 and the design which was to operate in the shadows, operate outside  
3 the light of the law, and outside of the oversight and the authority,  
4 not only of our own institutions, but of those countries'  
5 institutions.

6           There will be no evidence whatsoever presented by the  
7 government that any of these nations lawfully hosted these sites  
8 where torture and degradation took place in contravention to their  
9 domestic laws and to their international obligations. In fact, to  
10 this day their shame is so great that they continue to ask the United  
11 States Government to continue to maintain, to hide their identities  
12 and the identities of these nations. It is one of the facts that  
13 remains highly classified, the identity of these nations who  
14 conspired -- I think that's an appropriate word -- conspired with  
15 agents of our government to erect this vast infrastructure where  
16 Mr. al Hawsawi and where other similarly situated men were kept  
17 outside of the color of the law and outside of the eyes and the ears  
18 and the conscience of the world.

19           What you will see is that there were vast amounts of money  
20 that went into buildings and infrastructure that was created for this  
21 explicit purpose. Obviously, the people who created, erected,  
22 maintained those buildings profited from that money and profited from  
23 this enterprise.

1           Certainly the transportation network that was implemented to  
2 transport Mr. al Hawsawi across state lines in the dark of night,  
3 certainly they profited mightily from transporting human cargo,  
4 because that's essentially what they were doing. They were  
5 transporting human cargo from one black site to another black site,  
6 from one complicit nation to another complicit nation for the  
7 explicit purpose of holding and torturing Mr. al Hawsawi, for the  
8 explicit purpose of extracting information from Mr. al Hawsawi.

9           And so you do have multiple partners. You have multiple  
10 nations. You have buildings and infrastructure. You have a  
11 transportation network for the explicit purpose of transporting these  
12 men, as I said, under the cover of night to foreign nations where  
13 their own populus was well unaware of what their nations were doing.  
14 Money was exchanged, local officials were bribed, and the business of  
15 torturing prospered. And a lot of people made a lot of money.

16           And that ultimately, of course, brings us to Torture, Inc.  
17 And Torture, Inc. was Dr. Mitchell and Dr. Jessen's company, which,  
18 as we know from the Senate's intelligence report, had a contract that  
19 exceeded just for those two individuals incorporated under that  
20 company \$180 million of taxpayer money that went into their services,  
21 into their creation and their effectuation of what is and what was  
22 the CIA's torture program. That is just one institution. That is  
23 just two men.

1           We're not even there talking about the benefits to the local  
2 economies of the nations that hosted these black sites, who also  
3 basically had a jobs program for personnel who would assist in the  
4 detention and in the torture ring of these men.

5           And so when you have a international criminal enterprise,  
6 you have to have a profit motive, which I think they did. And you  
7 also have to have a commodity that is being sold. In this instance  
8 that commodity, and certainly the commodity that Torture, Inc.,  
9 Dr. Jessen, Dr. Mitchell were selling and eliciting, was information,  
10 was evidence.

11           When Dr. Mitchell testified, one of the lines of examination  
12 that I pursued with Dr. Mitchell was his submissions to the CIA to  
13 renew his contract, the justifications that were included in the  
14 renewal of those contracts. And he was evasive, but ultimately we  
15 established that, in fact, there was a renewal process. Part of that  
16 renewal process was justifying the need for that service and the need  
17 for that company.

18           And, of course, we talked to him and cross-examined him on  
19 the conflicting nature of his dual-hatted role: One being a  
20 torturer -- right? -- and, second, supposedly being a mental health  
21 professional with ethical responsibilities in regard to the people  
22 who he was assessing as being properly available and ready to be  
23 exploited for torture and for information.

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1           And I would submit to you that if that information pipeline  
2 had run out, so would have Dr. Mitchell and Dr. Jessen's gravy train.

3           So there you have it. Those are all facts. Those are facts  
4 that exist by admission from Dr. Mitchell. It has been well reported  
5 that these vast amounts of money exchanged hands; that there was a  
6 transportation network that was in the millions and millions of  
7 dollars for this explicit purpose; and that these facilities were, in  
8 fact, created, erected, maintained in these foreign nations for this  
9 explicit purpose.

10           And as I indicated when I started out, one other focus that  
11 I wanted you to take particular attention of was the detention  
12 facilities, the prisons themselves -- right? -- these torture pits  
13 that were built in foreign lands and the conditions that were  
14 created, facilitated, and advanced in these torture pits in order to  
15 break the will of these men.

16           And that's where -- that's where that causal link will  
17 begin, right? Because we're going to demonstrate later on in the  
18 presentation the causal link between what happened in these black  
19 sites and what's happening in this court; between what they set out  
20 to do to Mr. al Hawsawi and what they've extracted, profited, and  
21 benefitted from, not only in money, but in information; and  
22 ultimately what they seek to profit in, which is an execution of  
23 Mr. al Hawsawi. His life itself is what they seem -- seek to derive

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1 and have started deriving from day one. So we'll talk about that.

2 The next exhibit that I want to display to the court is an  
3 unclassified open-source exhibit, but I'd ask that this be displayed  
4 only to the court and only to the prosecution and the parties at this  
5 time, as I believe there may be some discussion about this particular  
6 exhibit, which is 680P **[sic]**, VVVVVV.

7 MJ [Col McCALL]: It can be displayed to the commission and  
8 the counsel.

9 LDC [MR. RUIZ]: If you could scroll to the highlighted  
10 portion, please.

11 This is a document from a newspaper article reporting  
12 information that was disclosed during particular court hearings, and  
13 I would like to display this to the gallery, Your Honor.

14 MJ [Col McCALL]: Prosecution?

15 MTC [MR. TRIVETT]: We would oppose it being shown to the  
16 gallery, any references to the facts. And it could be done in a  
17 closed session, but not in open session.

18 MJ [Col McCALL]: All right.

19 LDC [MR. RUIZ]: And the opposition is -- are you invoking?

20 MTC [MR. TRIVETT]: We're not actually invoking the national  
21 security privilege. We just believe that if a clearance-holder is  
22 going to discuss facts in open sources that he's found that have  
23 classified information, as defined by the Third Amended Protective

1 Order, that it would need to be in closed session.

2 MJ [Col McCALL]: All right. And so this document contains  
3 those facts that are classified?

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

5 MJ [Col McCALL]: All right.

6 LDC [MR. RUIZ]: Well, I think, if I can kind of unwrap that a  
7 little bit, I think what they're saying is the facts themselves are  
8 not classified because they're in an open source. But the fact that  
9 I happen to hold a clearance and want to say to you and to the, you  
10 know, public, this is what this particular newspaper article says  
11 about this topic, under their interpretation, makes it classified.  
12 So the facts themselves are not, but it's the fact that I would be  
13 referencing those facts, I think is what their objection is.

14 MJ [Col McCALL]: Would you like to clarify, Mr. Trivett?

15 MTC [MR. TRIVETT]: No. That's not exactly the government's  
16 position.

17 We believe this is at an interplay of Third Amended  
18 Protective Order #1, specifically 2.g.(2) and 2.g.(4) in Appellate  
19 Exhibit 013 -- I'm sorry -- and paragraph 6.f. of Third Amended  
20 Protective Order #1, the use of open-source material as a  
21 clearance-holder that would otherwise contain classified information.  
22 And that's -- that's where we believe puts this portion of the  
23 argument into closed, should he want to make it.

1 MJ [Col McCALL]: All right. And I understand that position.  
2 So do -- and I believe counsel understand as well. Do counsel need  
3 to crosstalk or -- I believe ----

4 LDC [MR. RUIZ]: I don't.

5 MJ [Col McCALL]: ---- the parties understand the government's  
6 position.

7 LDC [MR. RUIZ]: I do.

8 MJ [Col McCALL]: All right. So we're not going to publish it  
9 to the gallery at this time.

10 LDC [MR. RUIZ]: Very well. Then I would just ask you, Judge,  
11 to refer to the highlighted sections.

12 MJ [Col McCALL]: And I have.

13 LDC [MR. RUIZ]: Okay. The next exhibit is kind of in the  
14 same boat, and I would ask that be displayed to the parties and to  
15 the court. I do think it is an exhibit that is unclassified and  
16 should be displayed to the public.

17 MJ [Col McCALL]: Okay.

18 LDC [MR. RUIZ]: 688P, WWWWWW.

19 MJ [Col McCALL]: Okay. And for now it can be published to  
20 the counsel and the commission.

21 LDC [MR. RUIZ]: And what I will say about this document is  
22 that it is an amicus brief that was submitted in support of [REDACTED]

23 [REDACTED]

1

2 So we think that this fact should take this document out of  
3 the realm of otherwise classified information since it was used in  
4 public, open proceedings in the United States Supreme Court in a case  
5 that was widely reported and in a document that was utilized in that  
6 litigation.

7 MJ [Col McCALL]: Understood.

8 Mr. Trivett?

9 MTC [MR. TRIVETT]: Based on that description and the fact  
10 that it's not being shown to the public and he's just referencing it  
11 to the military judge to review, we would ask, though, that no  
12 further citations be made to the specific case that he's referencing.

13 MJ [Col McCALL]: All right. And I believe -- Mr. Ruiz, was I  
14 understanding you correctly that you're asking it to be published?

15 LDC [MR. RUIZ]: Correct. That was my argument for why it  
16 should be published to the public.

17 MTC [MR. TRIVETT]: We oppose on the same grounds as the  
18 previous document.

19 MJ [Col McCALL]: Right. And that's my understanding,  
20 Mr. Ruiz. So obviously I understand that this is an amicus brief  
21 with the Supreme Court. I don't control the Supreme Court, but I  
22 have a duty to protect what has been -- I'm told is classified  
23 information. So I'll just leave it at that.

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1 LDC [MR. RUIZ]: I understand.

2 MJ [Col McCALL]: So it can't be published to the gallery at  
3 this time, but I understand your desire to.

4 LDC [MR. RUIZ]: Thank you.

5 And so if we could scroll to the highlighted portion.

6 **[Pause.]**

7 MJ [Col McCALL]: All right.

8 LDC [MR. RUIZ]: All right. Next document, same category of  
9 documents. I, again, think that this is a document that should be  
10 provided to the public, but I'll ask that it be published to the  
11 judge and to counsel in the meantime. It's 688P, UUUUUU.

12 MJ [Col McCALL]: It can be published to counsel and the  
13 commission.

14 LDC [MR. RUIZ]: And so I'm also asking for this one to be  
15 published to the gallery, Your Honor.

16 MJ [Col McCALL]: Understood.

17 And, Mr. Trivett?

18 MTC [MR. TRIVETT]: Same objection.

19 MJ [Col McCALL]: All right. And the commission has the same  
20 position as well, so it can't be published to the gallery at this  
21 time.

22 LDC [MR. RUIZ]: Very well.

23 Next document is a Secret document. I ask that be published

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1 to the court and to counsel, 688P, XXXXXX.

2 MJ [Col McCALL]: All right. It can be published to the  
3 counsel and the commission.

4 **[Pause.]**

5 MJ [Col McCALL]: All right.

6 LDC [MR. RUIZ]: Okay. If you can move down to the next page,  
7 please.

8 **[Pause.]**

9 MJ [Col McCALL]: All right.

10 LDC [MR. RUIZ]: Thank you.

11 The next exhibit is a unclassified exhibit. These are SSCI  
12 documents, but I would ask that initially it be published to the  
13 court, to counsel to have an opportunity to confirm their banner  
14 markings are -- have been removed.

15 MJ [Col McCALL]: All right. We'll initially publish it just  
16 to counsel and the commission.

17 LDC [MR. RUIZ]: So I believe this document can be, and I ask  
18 that it be published to the public.

19 MJ [Col McCALL]: It can be published to the gallery.

20 LDC [MR. RUIZ]: And this is marked as -- this is a little bit  
21 weird. The first page is marked at 688P, JJJJJJ. And the second  
22 page -- I'm not sure why this ended up happening -- is K. 688P,  
23 KKKKKK.

1           This document, Your Honor, I think supports the argument  
2 I've made about the vast expenditure of money: \$300 million just in  
3 non-personnel costs, including constructing and maintaining these  
4 facilities. Millions of dollars, and some were never even used. So  
5 they were essentially left there, I guess, as a gift to the foreign  
6 nation who were willing to accept and agree to help.

7           Okay. Moving on. So the next exhibit is -- actually, the  
8 next section I'm transitioning to is where I begin for you to draw  
9 the causal connection between the FBI, the CIA, the law enforcement  
10 approach, the seeking, providing, assisting, and deriving information  
11 that ultimately has and will be used against Mr. al Hawsawi and  
12 debunks this myth of separation that the prosecution has continuously  
13 tried to press in their narrative of why this evidence in this case  
14 shouldn't be dismissed, why the evidence should be suppressed.

15           In the next section, I'm going to provide you with factual  
16 bases from both testimony and documents that demonstrate that that's  
17 just not the reality. Regardless of how much the government wants to  
18 make that argument, does make that argument, tries to forward that  
19 narrative, this is simply not congruent with the facts as they exist  
20 with the testimony that we've heard and with some of the documents  
21 that we currently possess.

22           And so to start off with, I want to start off with some of  
23 the testimony itself, sworn testimony by agents of the FBI who

1 themselves have come before this court and have testified regarding  
2 what it is that they believe they were contributing to, what the  
3 essence of that was, and what those efforts were focused on.

4 I understand that the -- we can't display the transcripts  
5 themselves, just to a timing issue. This comes from an unclassified  
6 transcript, redacted unclassified in the review, but I'll have to  
7 read it.

8 So the exhibit itself, 688P, RRRRRR, is unclassified. It's  
9 a transcript reference for page 37274 to '5. And if we can bring  
10 that up and just display it to the court and to the parties.

11 MJ [Col McCALL]: We can display it to counsel and the  
12 commission.

13 LDC [MR. RUIZ]: And for the purposes of the public, I'll read  
14 it, Judge.

15 This is my cross-examination of [REDACTED]  
16 who you may recall testified regarding his interrogation and his  
17 involvement in the interrogation of Mr. Mohammad and other aspects of  
18 this investigation.

19 My question to him was: Really what was -- the question was  
20 geared towards the heart of what he viewed his mission to be, right?  
21 And I asked him: Once you identified him, was -- was it your goal to  
22 identify and to kill, or not? Or to identify ----

23 He said: Identify, indict, and apprehend, yes.

1 Right?

2

3

4

5 [REDACTED] as opposed to 2023 and 2024 when the government has now  
6 constructed a theory of admissibility and a narrative that they must  
7 hold the line on. Right?

8 What they were thinking at the time and what they were doing  
9 at the time was significantly more important. And he said: That's  
10 correct. It was not to identify and to kill. It was to identify,  
11 apprehend, and indict.

12 Well, he says: Usually indict before we apprehend, but yes.

13 And if we can scroll down a little bit more.

14 A little more. All right. Come back up, please. A little  
15 bit more. I didn't highlight that one other line which says: In  
16 your work, your contributions were focused in assisting those  
17 efforts? And that's referencing back to "identify, apprehend, and  
18 indict," and he says: Yes.

19 So I think Agent Pellegrino's testimony is important on that  
20 point, because I think he confirms that that was the focus of his  
21 efforts. It was to identify, not identify and kill, it was to  
22 capture, and then to take that person to a place of indictment. And  
23 ultimately you'll see from other FBI agents that they wanted to

1 extract confessions and convict.

2 The next exhibit is also an unclassified reference to a  
3 transcript. This is 688P, SSSSSS. I'm going to ask that that be  
4 displayed to the parties and to the military judge.

5 This is a transcript of Special Agent Perkins at 39300 to  
6 '301.

7 MJ [Col McCALL]: It can be displayed to the counsel and the  
8 commission.

9 LDC [MR. RUIZ]: So that first portion is in reference to  
10 questioning of Agent Perkins about the pitch for access and for  
11 involvement in the interrogations of Mr. al Hawsawi and other  
12 captured detainees.

13 And she says: I think the argument we were making to him,  
14 the director, was based on our past history, our past successes. I  
15 was specifically involved in the East Africa bombing case,  
16 extraordinary success in that case.

17 And the success she's referencing, I think you may be aware,  
18 Judge, is that those men were indicted, they were tried, and they  
19 were convicted for those offenses. I think that is what she is  
20 referencing when she says it was an extraordinary success.

21 The next page. She says: It was more. We can get good  
22 information using rapport-based techniques that will permit us to  
23 take these individuals to federal court and prosecute them,

1 protecting that ability to do so.

2 So, again, they're making this pitch back at the time of  
3 capture, back at the time that Mr. al Hawsawi and these men have come  
4 into the custody of the United States Government. And she's making  
5 the pitch that they're best situated to use rapport-based techniques  
6 that will permit them to take them to federal court and to prosecute  
7 them, protecting the ability to do so. That's a statement of intent,  
8 then existing state of mind of a law enforcement agent who is acting  
9 in accordance with the law enforcement agency's mission, right?

10 She wasn't saying, oh, let us access Mr. al Hawsawi because  
11 we want to be able to derive intelligence because we're best suited  
12 to do intelligence work. That's not what they were saying.

13 They were saying we want to get at them because we're in the  
14 best position to indict, prosecute, and ultimately take them to a  
15 process where, by a court, they will be convicted. And she doesn't  
16 say executed, but that's why we're here, right?

17 Next page. This is at 39298.

18 So there she says: There was a time that a group of us  
19 tried to convince Director Mueller that we were better served as a  
20 country for the FBI to conduct these interviews because we've done it  
21 very successfully in the past.

22 Now, what does that mean, "very successfully," right?

23 I would submit to you that "very successfully" to her means

1 prosecuting these men, prosecuting Mr. al Hawsawi, and convicting  
2 them. We have a history of success. Again, she had referenced the  
3 embassy bombings case and the extraordinary success in that case.

4 We have a history of getting confessions from people with  
5 our normal course, rapport-building interviews, and that we were best  
6 suited to do it.

7 She's not talking about intelligence-gathering. She's not  
8 talking about any of those issues. She's talking about confessions.  
9 Confessions. Confessions aren't necessary for intelligence-gathering  
10 that I'm aware of. Information may very well be. But a confession  
11 is a term of art explicitly reserved for a judicial process where  
12 those statements are going to be used to prosecute, to convict, and,  
13 depending on the type of case, either to imprison or to kill.

14 And that is exactly what was in her mind at that time, is  
15 what exactly her and her FBI colleagues were focused on doing at that  
16 time and were engaged in doing at that time. We were really the  
17 experts at interviewing in these sort of circumstances.

18 She can't possibly be referring to intelligence interviews,  
19 right? If that's the -- if that's the CIA's bailiwick, the term she  
20 used, she has to be referring to law enforcement extracting  
21 confessions, obtaining evidence to prosecute, and to convict.

22 Next page, 39299.

23 So this was the effort to try and get down the time frame

1 for when that happened. And she was not completely clear on this,  
2 but she thinks it was a possibility that it was as early as Zubaydah,  
3 Zubaydah being captured. This would have been in the 2002 time  
4 frame. So we know that it dates back very close in time and maybe  
5 even before Mr. al Hawsawi was captured.

6 Okay. That's all for that exhibit.

7 So that's the beginning of this section. And I thought it  
8 was most appropriate to begin with two of the most important FBI  
9 agents that you've heard from, important in the sense that they  
10 had -- well, Agent Perkins had a direct involvement in  
11 Mr. al Hawsawi's interrogation in 2007, and Agent Pellegrino worked  
12 closely with Agent Perkins. They were both attorneys, and you may  
13 remember that line of examination.

14 The fact of the matter is that no matter how the government  
15 tries to spin this narrative and this history, the FBI was involved  
16 explicitly for the purpose of assisting and gathering information  
17 that would lead to a prosecution. That's why they sought access to  
18 Mr. al Hawsawi and other men.

19 And that is why when they didn't get the access that they  
20 wanted, they turned to another tool that I will discuss as I move  
21 through this progression of exhibits. And that was sending  
22 requirements and sending questions and providing information in order  
23 to get information back to be utilized in the interrogations of

1 Mr. al Hawsawi to fill gaps in their investigation, leading to  
2 questions that would elicit incriminating information from  
3 Mr. al Hawsawi.

4 And let's not forget that that law enforcement function was  
5 enabled by the very fact that the whole purpose of that initial  
6 capture was to break down the will and the resistance of  
7 Mr. al Hawsawi and to condition him -- right? -- condition him, in  
8 the words of Dr. Mitchell, using a psychological profile and a  
9 psychological methodology used on dogs. So when they would be  
10 stimulated, they would provide a certain response. That began in the  
11 very, very beginning. And I'll give you the cite to that shortly.

12 The next exhibit -- and also obtaining physical evidence. I  
13 will also have some documents that will demonstrate to you that  
14 physical evidence was also being obtained in conjunction with the CIA  
15 and foreign partners in the exchange of information.

16 The next exhibit is transcript, unclassified, at 688P,  
17 QQQQQQ, page 31181, and ask that be displayed to the court and to the  
18 parties.

19 MJ [Col McCALL]: It can be displayed to counsel and the  
20 commission, and you can read it into the record.

21 LDC [MR. RUIZ]: So this is another piece. This is another  
22 piece in that FBI basket -- right? -- for lack of a better term. It  
23 doesn't necessarily stand all alone and by itself.

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1           But the court has to look at that in the totality of the  
2 analysis of what various agents from the same agency were thinking  
3 and doing during the course of this investigation early on during the  
4 time that Mr. al Hawsawi had been captured and had been rendered and  
5 put in this black site in this period of time.

6           And what Dr. Mitchell says -- and just remember,  
7 Dr. Mitchell had the ability and the opportunity to interact with  
8 quite a few agents from the Federal Bureau of Investigation. So this  
9 is his testimony where he's saying: The CIA officers were focused  
10 exclusively on obtaining actionable information to stop potential  
11 upcoming terror attacks.

12           In contrast, the FBI seemed interested, especially Soufan,  
13 seemed interested in obtaining a confession -- again, that word,  
14 "confession." Perkins uses the same verbiage when she testifies:  
15 We're best suited to obtain confessions.

16           In contrast, the FBI seemed interested, especially Soufan,  
17 in obtaining a confession of wrongdoing and building a criminal case.  
18 Soufan seemed more interested in following his own line of  
19 questioning than on focusing on intelligence requirements coming from  
20 CIA Headquarters.

21           I would submit to you, again, this is one more piece of  
22 evidence about that institutional focus that came from the  
23 institution of the FBI and the agents who were working and trying to

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1 gain access, trying to get at information to do exactly what  
2 Dr. Mitchell says Soufan seemed most interested in, obtaining a  
3 confession of wrongdoing to build a criminal case.

4 And along that line of analysis, I don't have exhibits for  
5 this, but I will talk to you a little bit later in argument on the  
6 law about other facts that demonstrate that this was the focus early  
7 on.

8 First, the president of the United States at the time,  
9 President Bush, said so very early on following the 9/11 attacks. He  
10 said we will use all of our resources to bring these men to justice  
11 and, in fact, implemented what was Military Commission Order No. 1.  
12 It was creating a system, military commissions, for the explicit  
13 purpose of prosecuting these men when they were captured and when  
14 they came into the custody of the United States.

15 Of course, that legal framework, thankfully, was rejected  
16 because better and cooler and more wise heads prevailed that any such  
17 system needed to have congressional approval, and ultimately we had a  
18 Military Commissions Act.

19 But it is important when you look at the context of where  
20 these agents were acting, doing at the time, what the President of  
21 the United States was saying and doing, not only publicly, but he was  
22 also creating the very beginnings of the foundation of what has  
23 become this court. And obviously it has evolved from where President

1 Bush envisioned it to where we are today.

2 And we should also not be remiss, Your Honor, that, as I'll  
3 demonstrate later as well, there was a belief that military courts  
4 were, in essence, inferior courts. Now, nobody I think has actually  
5 ever used that word. But the idea was that if we were to send, like  
6 Mr. al Hawsawi and the co-accused to federal courts, they would,  
7 quote, lawyer up. John Rizzo said that in his book. And they would  
8 have too many rights and too much ability to defend themselves.

9 So guess what? Military courtrooms, military lawyers they  
10 thought would be a better alternative, because I guess we would  
11 simply just kind of push them along and let them get to the end where  
12 they could claim victory and justice.

13 I think that has been absolutely proven wrong as well, but  
14 that was the mindset at the time. The mindset was we're going to  
15 prosecute them. We're going to put them in a military court. We're  
16 going to create the very order that is going to begin that process.  
17 And then it evolved into what it has evolved today as well.

18 The next attachment, the next exhibit is 688J. It's a  
19 Secret attachment. 688J, QQ. And I ask that this be displayed to  
20 the court and to counsel.

21 MJ [Col McCALL]: It can be published to the counsel and  
22 commission.

23 **[Pause.]**

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1 MJ [Col McCALL]: All right.

2 LDC [MR. RUIZ]: If you can scroll down, please. That  
3 paragraph at the bottom I think is particularly on point.

4 MJ [Col McCALL]: All right.

5 LDC [MR. RUIZ]: Further down, please.

6 MJ [Col McCALL]: All right.

7 LDC [MR. RUIZ]: And then a little bit further down, 1318,  
8 page 1318.

9 **[Pause.]**

10 MJ [Col McCALL]: All right.

11 LDC [MR. RUIZ]: The next document is Secret. I ask that be  
12 displayed to the court, to the parties. It's found at attachment  
13 688J, TT.

14 MJ [Col McCALL]: All right. Go ahead.

15 LDC [MR. RUIZ]: The next exhibit is Top Secret found at  
16 attachment -- 688J, Attachment B, (b)(2), Bravo 2. I ask, Judge,  
17 that that be displayed to the court and to the counsel.

18 MJ [Col McCALL]: It can be displayed to counsel and the  
19 commission.

20 LDC [MR. RUIZ]: If you can lower it just a little bit so the  
21 subject line heading is showing as well. Thank you.

22 MJ [Col McCALL]: All right.

23 LDC [MR. RUIZ]: Scroll down further, please, page 6.

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1 **[Pause.]**

2 MJ [Col McCALL]: All right.

3 LDC [MR. RUIZ]: And then finally, page 7.

4 **[Pause.]**

5 MJ [Col McCALL]: All right.

6 LDC [MR. RUIZ]: Next exhibit is also Top Secret. I'd ask  
7 that that be displayed to the court, to the parties. It's found at  
8 688J, Attachment F.

9 MJ [Col McCALL]: All right. It can be displayed to counsel  
10 and the commission.

11 **[Pause.]**

12 MJ [Col McCALL]: All right.

13 LDC [MR. RUIZ]: And then in this particular document, I  
14 think, Judge, the red underline I think further demonstrates one of  
15 the points I've made in my argument leading up to this document.

16 Page 87. 87.

17 **[Pause.]**

18 MJ [Col McCALL]: All right.

19 LDC [MR. RUIZ]: The next document is classified. I ask it be  
20 displayed to the court and to the parties. It's 688J Attachment ZZ.

21 MJ [Col McCALL]: All right. It can be displayed to the  
22 commission and the counsel.

23 LDC [MR. RUIZ]: Page 40. In particular, the red brackets

1 there, Judge, are the point I wanted to highlight from this document.  
2 There's other important points on here, but the one in the red  
3 brackets I think is important as well.

4 MJ [Col McCALL]: All right.

5 LDC [MR. RUIZ]: Next exhibit is Secret -- Top Secret. It's  
6 found at 688P, TTTTTT. And I ask that this be displayed to the court  
7 and the parties.

8 MJ [Col McCALL]: It can be displayed to counsel and the  
9 commission.

10 **[Pause.]**

11 MJ [Col McCALL]: All right.

12 LDC [MR. RUIZ]: All right. Judge, the next exhibit is one  
13 that did not get marked. It was just an oversight for not getting  
14 marked. We have marked it. I have provided to the prosecution for  
15 inspection.

16 We'd like to tender it into evidence now and display it  
17 using the overhead projection to the court and to the parties. It is  
18 a document that contains Secret information, so I'm just asking it be  
19 displayed to the court and to the parties. It is Appellate Exhibit  
20 688Q (MAH), and it is a two-page document. And I will tender this  
21 into evidence after I've had an opportunity to display it unless  
22 you'd like to take a look at it.

23 MJ [Col McCALL]: Okay. Go ahead.

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1 LDC [MR. RUIZ]: And can I have the overhead projector,  
2 please?

3 Judge, I'm going to ask that this be displayed, as I said,  
4 to the commission and to the parties only.

5 MJ [Col McCALL]: All right.

6 LDC [MR. RUIZ]: Judge, this is a document that will give you,  
7 I think, a glimpse of -- well, I think you need to read it, and then  
8 I'm not sure that I can read it.

9 **[Pause.]**

10 MJ [Col McCALL]: All right.

11 LDC [MR. RUIZ]: You've had an opportunity to look at that?

12 MJ [Col McCALL]: I have.

13 LDC [MR. RUIZ]: And I'll discuss this far more in the closed  
14 session, but I just wanted you to have an opportunity to view the  
15 interplay here.

16 MJ [Col McCALL]: Understood.

17 **[Pause.]**

18 MJ [Col McCALL]: Okay.

19 LDC [MR. RUIZ]: May I approach, Judge?

20 MJ [Col McCALL]: You may.

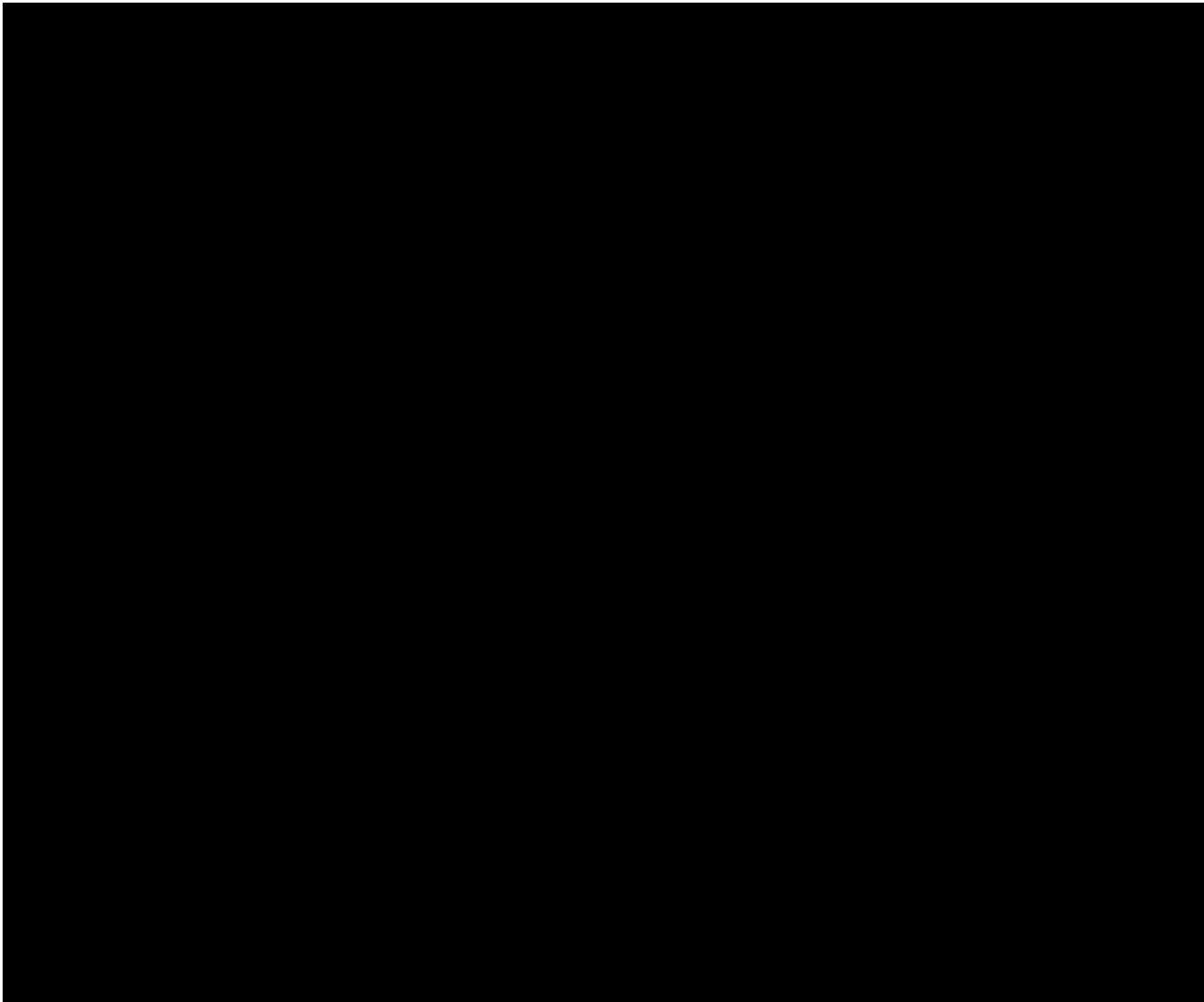
21 **[Pause.]**

22 MJ [Col McCALL]: You can go ahead and proceed, Mr. Ruiz.

23 LDC [MR. RUIZ]: And so kind of closing -- getting very close

1 to the session, I'll refer again to a portion of the transcript. I  
2 don't have an actual document on this, but I will cite to you  
3 transcript at 28155 to '56, 30 October 2019, [REDACTED]

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20 [REDACTED] I think  
21 that's, again, a significant point and fact in your analysis.

22 The next exhibit -- and we have two more, just in case you  
23 were wondering -- is a classified exhibit. It's Attachment 688J,

1 RRR. I'd ask that it be displayed to the court, to the parties.

2 MJ [Col McCALL]: It can be published to counsel and the  
3 commission.

4 **[Pause.]**

5 MJ [Col McCALL]: All right.

6 LDC [MR. RUIZ]: Okay. And if you can scroll down to  
7 page 103. I think you've probably seen this document before as well,  
8 Judge. In fact, I'm sure.

9 MJ [Col McCALL]: All right.

10 LDC [MR. RUIZ]: All right. And then, finally, page 104.

11 **[Pause.]**

12 MJ [Col McCALL]: All right.

13 LDC [MR. RUIZ]: All right. Of course, in January 10th of  
14 2007, before examination of Agent Fitzgerald, we first obtained  
15 the -- what I have called the CIA's ground rules for the FBI's  
16 interrogation in 2007. The interesting thing is it seems that  
17 somebody forgot to tell Agent Fitzgerald before he took the stand  
18 that we had actually acquired that information the night before.

19 And you may recall that during a recent examination, Agent  
20 Fitzgerald said that he was very upset about that examination, and I  
21 questioned him about that. And he said, well, the judge permitted  
22 questioning that was outside the scope of what I thought was  
23 permissible.

1           And what that relates back to is the fact that we had just  
2   obtained that piece of information literally the night before he took  
3   the stand, and I questioned him and cross-examined him on them. And,  
4   to his credit, he towed the line that he thought he was still  
5   supposed to be towing in terms of access to CIA materials.

6           He denied it. He said he hadn't had access to CIA  
7   materials. He declined to tell us much of what he later told us two  
8   years later once he, I think, realized that in fact the defense had  
9   acquired this information.

10          But I think that that is significant when you look at,  
11   again, the mindset of FBI agents and really, you know, their  
12   willingness to continue to hold a line and to fulfill and advance the  
13   narrative of the prosecution now in 2023 and 2024; that there was  
14   this intelligence and law enforcement separation and that there was  
15   this independence between the FBI and the CIA and that they've got  
16   clean hands and that there is nothing that is derived from this  
17   criminal enterprise, from that system and that process that was  
18   derived especially for breaking men, obtaining information, and  
19   ultimately, as the agents have testified, as they have alluded to, as  
20   people who have worked with them have said, was geared towards  
21   evidence collection, building a case, obtaining confessions, all of  
22   the terms of art that go into a criminal prosecution and,  
23   significantly, as I'll talk about in a minute, a capital criminal

1 prosecution.

2           So, Judge, that concludes the presentation, the factual  
3 bases. And then now I would like to turn to the legal argument. But  
4 I'll ask for a 15-minute break so that we can kind of move some  
5 things around before we begin that.

6           MJ [Col McCALL]: No, I was thinking the same thing. We've  
7 been going about an hour.

8           So it's 1432 by the clock on the back wall. Let's plan on  
9 being back in here at 1447.

10           Commission's in recess.

11 **[The R.M.C. 803 session recessed at 1432, 12 February 2024.]**

12 **[The R.M.C. 803 session was called to order at 1456,**  
13 **12 February 2024.]**

14           MJ [Col McCALL]: The commission is called to order. Parties  
15 are again present. The accused are absent.

16           Because we don't have the accused here for the rest of the  
17 afternoon, I believe, we're going to drive on and not take the  
18 afternoon prayer break as scheduled. We'll still -- I'll try to be  
19 cognizant of the time and take a short recess about every hour or so.  
20 But any issues with that?

21           Apparently not.

22           All right, Mr. Ruiz.

23           LDC [MR. RUIZ]: Thank you, Your Honor.

1           So Judge, to this point, my goal has been to give you the  
2 factual bases, the foundational bases for ruling and providing relief  
3 in this motion, and I think that we have done that.

4           We've provided you with ample evidence of coercion, the  
5 violence, and the brutality that was visited upon Mr. al Hawsawi and  
6 certainly conduct that shocks the conscience.

7           And that particular verbiage, that particular language, is  
8 the language that the controlling circuit utilizes when it discusses  
9 the doctrine of outrageous government conduct, which is why I'm  
10 highlighting that conscience here -- that language here.

11           I'm going to start with Rochin v. California at 342 U.S.  
12 165. Rochin v. California was a case where the police entered the  
13 defendant's home and roused him from his bed. And he ingested a  
14 couple of capsules prior to being arrested.

15           Subsequent to his arrest, he was taken to a medical facility  
16 where the government proceeded to direct that he be given a solution,  
17 have the contents of his stomach pumped so that they could derive the  
18 evidence that they would use in his prosecution.

19           And the court ultimately reversed that conviction. And the  
20 court found that that conduct was conduct that shocked the conscience  
21 and also indicated that this course of proceedings by agents of the  
22 government to obtain evidence was conduct that shocked the  
23 conscience.

1 I think that particular language is on point for this case,  
2 because that's exactly what happened in this case. It was a course  
3 of proceedings by agents of the government to obtain evidence.  
4 Certainly the CIA and the FBI, it's uncontrovertible, are agents of  
5 the United States Government.

6 The language that the Supreme Court uses in Rochin is  
7 directly on point in this case. They talk about the requirement for  
8 due process inescapably imposing upon that court, this court, an  
9 exercise of judgment upon the whole course of the proceedings.

10 And then, of course, as I indicated, they follow that term  
11 by talking about the proceeding of the agents in the course of  
12 obtaining evidence for prosecution in that case. And then they  
13 finish by saying this is too close to the rack and to the screw to  
14 permit of constitutional differentiation, and ultimately the court  
15 reversed the defendant's conviction.

16 I think this is an important case in our motion for, you  
17 know, this particular cause because in this instance, it is clear  
18 that the government's conduct came after the crime had been  
19 committed. He had possessed and he had already ingested what was the  
20 offending evidence in this case.

21 One of the distinctions the government seeks to draw in this  
22 case is that this was post-arrest conduct, as opposed to the  
23 government facilitating the conduct or the wrongfulness of the

1 conduct in this case.

2 But the Rochin case and the facts of that case are in  
3 opposite to that. That was a case where the government did not  
4 facilitate the commission of the crime. The government did not  
5 provide the instrumentalities of the crime.

6 It wasn't an entrapment case at all. It was simply a case  
7 where they acted in a manner that shocked the conscience of the court  
8 in an effort to obtain evidence that was going to be used in the  
9 prosecution of that defendant. And that is exactly what the case is  
10 here.

11 And during the factual bases of the argument, I alluded to  
12 some of the things that definitely demonstrate from the very  
13 beginning there was an intention at the highest levels of government  
14 to bring Mr. al Hawsawi and to bring men who were captured in  
15 connection with 9/11 to, quote, justice.

16 That's why I asked the question of Agent Pellegrino: Was  
17 your mission to capture or mission to kill? And he predictively  
18 testified that it was in conformity with what he normally does as an  
19 FBI agent.

20 And that's consistent with what our government was putting  
21 out at the time. It's consistent with, as I said, Military  
22 Commission Order No. 1, which set out the very beginnings of the  
23 system that would ultimately be used to try and criminally prosecute

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1 Mr. al Hawsawi and as, in this instance, a capital case.

2 So it's really important from the very beginning not to  
3 dissociate those very clear statements of intent at the highest  
4 levels of government, not just the statements of intent, but the  
5 actions of our government officials to create the very system that is  
6 now being used to prosecute Mr. al Hawsawi.

7 And in the course of this investigation -- because it was an  
8 investigation. It was a capture, it was a detention, and it was an  
9 investigation in the truest sense of investigation, where agents from  
10 the FBI were trying to get in to do what they do best, which is  
11 obtain confessions, indict accused, prosecute them in federal courts,  
12 and ultimately gain convictions. That's not me just saying it. I'm  
13 simply repeating it.

14 And that was in their minds at that time. There wasn't this  
15 separation of intelligence and evidence collection. It was a  
16 symbiotic relationship between the CIA and between the FBI in an  
17 effort to do perhaps all of those things. But it wasn't this clear  
18 line of demarcation that the government continues to seek, to draw  
19 and continues to seek even against the abundance of evidence that  
20 we've presented to the contrary, even against testimonial evidence  
21 that demonstrates to the contrary.

22 So Rochin is directly on point, because it is government  
23 conduct in the course of proceedings that leads to evidence that is

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1 going to be introduced in this particular instance to take  
2 Mr. al Hawsawi's life.

3 And, of course, that's a significant fact because, as I will  
4 discuss later on in the presentation, the fact of the matter is that  
5 it belies a little bit of credibility or, I would say, a lot of  
6 credibility for the government to argue that Mr. al Hawsawi is not  
7 entitled to due process in a capital prosecution and must be informed  
8 through the lens of the Eighth Amendment and heightened due process  
9 and reliability. And we'll get to that point.

10 But at least for now, we'd certainly think that Rochin  
11 encompasses the type of conscience -- the kind of conduct that shocks  
12 the conscience and that leads to, in the whole course of the  
13 investigation, obtaining evidence that is going to be used in this  
14 prosecution.

15 I really do feel like in the sense of providing you with the  
16 tools to make that finding of fact about conduct that's coercive,  
17 brutal, violent, and shocking of the conscience, you have everything  
18 you need to make that finding of fact, that that's, in fact, the  
19 conduct that took place.

20 Following up on Rochin, the United States Supreme Court at  
21 411 U.S. 423 in United States v. Russell, now, that was an entrapment  
22 case where you had -- it was a distribution of methamphetamine, and  
23 the investigating agent actually provided a key ingredient to the

1 accused in that case.

2 Now, in that case they found that the conduct did not shock  
3 the conscience. There was predisposition on the part of the offense.  
4 So it was a more traditional entrapment case, which this is not.  
5 We're not advancing an entrapment defense. In fact, we think that  
6 the apparatus of what you can operate within the law that exists is  
7 perfectly fine. It's not necessarily just tied to entrapment cases,  
8 it's just that those are the kinds of facts that often come up.

9 Anyway, in United States v. Russell at 411 U.S. 423, the  
10 court says: While we may someday be presented with a situation which  
11 the conduct of law enforcement agents is so outrageous that due  
12 process principles would absolutely bar the government from invoking  
13 judicial processes to obtain a conviction, the instance [sic] case is  
14 distinctly not of that breed.

15 There's been a great deal of litigation citations around  
16 United States v. Russell. I know the government themselves in their  
17 response try to claw back the statement of the Russell court, but it  
18 still remains.

19 And the, I think, key ingredient here, Judge, is that this  
20 is that case. This is that instance. This is that day. And the  
21 absence of precedent that mirrors this case, thankfully, is to be  
22 expected. Because I actually think that's a good thing, right?

23 If we had an entire body of developed law around the type of

1 coercion, around the type of brutality, around the type of violence,  
2 shocking the conscience that you've seen in Mr. al Hawsawi's  
3 treatment during the course of these proceedings, if you had a body  
4 of law that mirrored and that informed this analysis and it was well  
5 developed, I would say that we have a really, really big problem with  
6 the way that we do things. And thankfully we don't, but there are  
7 some examples of that kind of conduct.

8           The fact of the matter is that, Judge, the fact that there  
9 is a lack of or nonexistence of similar facts to this case is a good  
10 thing. It's not a bad thing, and it doesn't necessarily mean that  
11 this cause, this day, these facts under these circumstances should  
12 not and definitely merits relief, the kind of relief that we're  
13 asking the court to provide in this case.

14           The prosecution in their response brief tries to frame our  
15 argument as a jurisdictional argument under the Toscanino analysis.  
16 And Toscanino is a case in the United States Courts of Appeals for  
17 the Second Circuit, 500 F.2d 267.

18           Toscanino was, I think you're probably well aware, a case  
19 where government agents abducted a person from Uruguay, transported  
20 them to Brazil, and ultimately brought them within the jurisdiction  
21 of the court to be prosecuted. And in the process of doing  
22 that -- this is, I think, probably the case that comes the closest to  
23 having similar facts in terms of the torture and the depravity and

1 the violence and the coercion -- they tortured the individual for 17  
2 days, right?

3 And they also -- he was -- alleged that he was made to walk  
4 up and down a narrow hallway, that they had attached electrodes to  
5 his earlobes, that alcohol was flushed into his eyes and nose, and  
6 other fluids were forced up his anal passage.

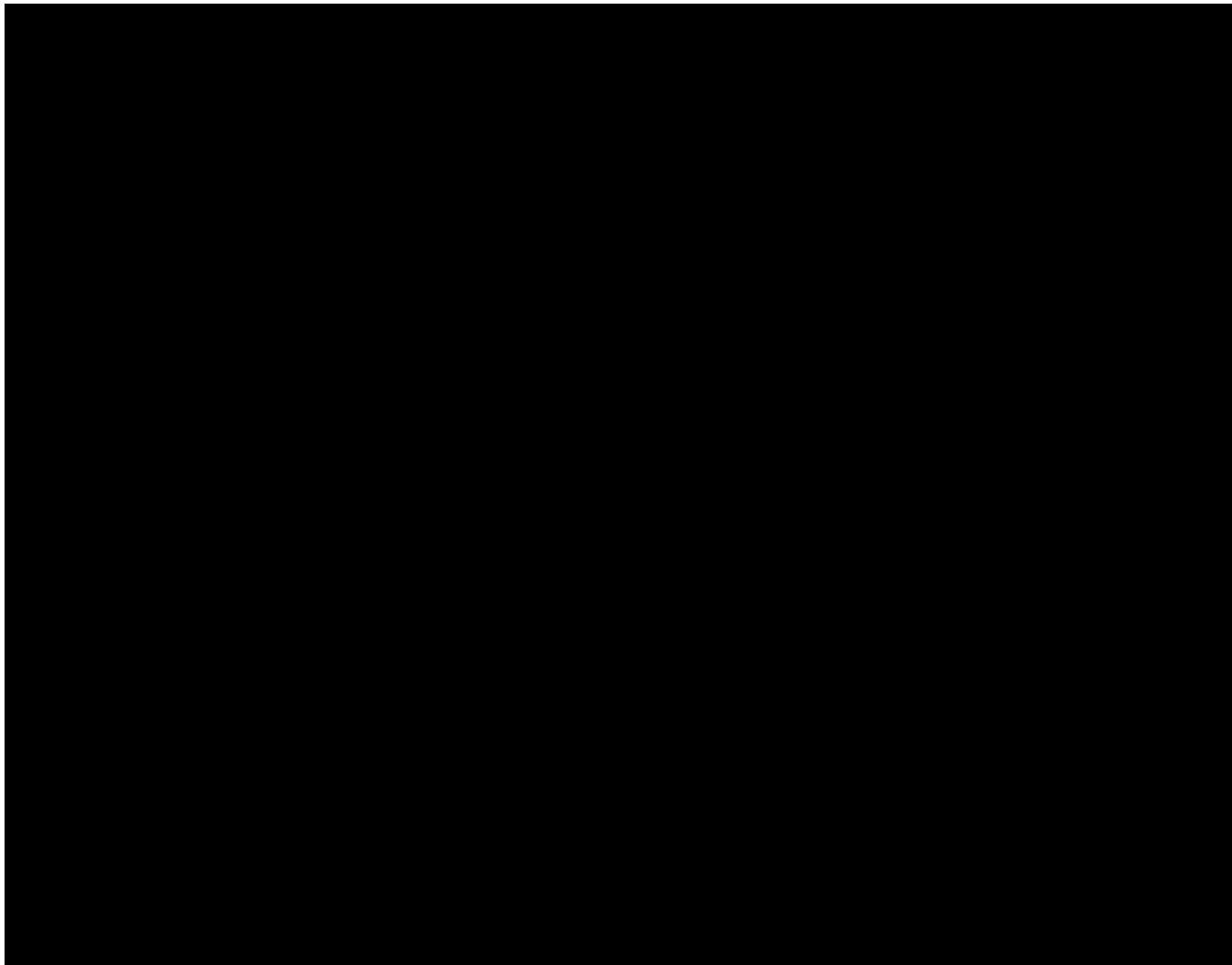
7 And the Second District viewed this as conduct that was so  
8 shocking, that was so cruel, violent, coercive, that it could, in  
9 fact, represent the fruit of the government's exploitation of its own  
10 misconduct, the body itself of the defendant who was brought into the  
11 jurisdiction for purposes of -- and they remanded the case to the  
12 district court to hold a hearing so he could show the government  
13 agents, provide evidence that it was at the behest of government  
14 agents or it was U.S. Government agents who actually had perpetrated  
15 the abuse and facilitated the rendition of Toscanino to the United  
16 States. On remand, the hearing was denied because he was not able to  
17 present and provide that information.

18 We don't have that problem here. We don't have any kind of  
19 issue in demonstrating that the people who tortured Mr. al Hawsawi  
20 were absolutely United States Government agents. They were agents of  
21 the CIA. They were contracted by the CIA. [REDACTED]

22 [REDACTED]

23 [REDACTED]

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16           And also during the time that he was being interrogated in  
17 Guantanamo, the flow of information at that point in and out of the  
18 interrogation room is something that we have on the record and will  
19 demonstrate to you in closed session.

20           So when the court talks about a causal connection -- and  
21 I'll get to this when I talk about the Ghailani case. The Ghailani  
22 case was denied because there was no causal connection in that case.  
23 I don't want to jump there just yet, but I just want to give you a

1 little preview to that.

2 So Toscanino has been disfavored but has never been outright  
3 rejected. And part of the reason is, as I said, I just don't think  
4 there's ever been a case that was worthy of that type of relief until  
5 now. This is that case. If this isn't that case, then that case  
6 doesn't exist because of the amount of information that we have about  
7 government conduct in this case.

8 And in Toscanino, the court also said, although the issue in  
9 most cases forming part of the evolutionary process that led to their  
10 decision was whether evidence should have been excluded, right? And  
11 they cite to Miranda, Wong Sun, and Silverman, said it was  
12 unnecessary in those cases to invoke any other sanction to ensure  
13 that an ultimate conviction would not rest on government illegality.  
14 Right?

15 But where suppression of evidence will not suffice, however,  
16 we must be guided by the underlying principle that government should  
17 not be -- that government should be denied the right to exploit its  
18 own illegal conduct. That is Wong Sun v. United States at 371 U.S.  
19 471.

20 Moving on to United States v. Ghailani. United States v.  
21 Ghailani, as you are aware, similar claim of outrageous government  
22 conduct was brought before a federal court in Judge Kaplan's court.  
23 His ruling was grounded in the notion that the deprivation of liberty

1 that Ghailani experienced was entirely unconnected to the alleged due  
2 process violation and says required a causal connection.

3 Well, here's the thing for Mr. Ghailani. What happened in  
4 that case was essentially a fraud upon the court, because you had a  
5 defendant in that case litigating a motion with incomplete evidence  
6 and incomplete discovery. That case predates 2010. It predates the  
7 conclusion of facts in the U.S. Senate's intelligence report that  
8 gave the first inclination of the depth and the degree of the  
9 depravity that took place in the black sites. In fact, at that time  
10 we learned a lot of new information on the defense that we hadn't  
11 otherwise learned through discovery. And that led us to a process  
12 where we filed an incredible amount of discovery requests to continue  
13 to inform our understanding.

14 But understand this, Judge: That information wasn't just  
15 turned over by the government before that. They didn't volunteer  
16 that. And they certainly didn't disclose it and they certainly  
17 didn't do it in Ghailani.

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23 So in that sense, Ghailani to us really is irrelevant. And

1 it's irrelevant because we stand here in 2024 and we have a wealth of  
2 information, some of which I have previewed for you today and shown  
3 you today in these documents, that demonstrates the degree of those  
4 connections and the degree of that connectivity that exists between  
5 the FBI, the CIA, the flow of information, evidence that was  
6 obtained, derived, and is going to be used in Mr. al Hawsawi's  
7 capital prosecution.

8           The same thing with United States v. Padilla. I think they  
9 have and they suffered in the same particular fate as they were  
10 operating with very little information in Padilla.

11           The government next cites to a number of cases in the Sixth  
12 and Seventh Circuit that are entrapment-type cases that reject a  
13 outrageous government conduct defense. Well, they may have chosen to  
14 do away with that defense. But the reality is that the controlling  
15 circuit, which is the D.C. Circuit, continues to provide the vehicle  
16 for an outrageous government conduct defense where this court is well  
17 positioned to grant relief. So you're bound by D.C. Circuit cases  
18 and D.C. Circuit opinions.

19           United States v. Kelly at 228 U.S. Appeals Court D.C., 55,  
20 the court used the following language: There must be a demonstrable  
21 level of outrageousness. Fundamental fairness, guarantees of due  
22 process was not transgressed absent coercion, violence, or brutality  
23 of the person. The importuning of that case of Congressman Kelly and

1 others offers made to him were extraordinary and in excess of  
2 real-world opportunities as they appear to have been, but they did  
3 not involve the infliction of pain or physical or psychological  
4 coercion, right?

5 So the court denies relief in that case because of the  
6 absence of the very evidence that exists in this case.

7 And, of course, the clear implication there is the decision  
8 may very well have been very different if in fact there had been  
9 coercion, violence, and brutality, psychological or physical, of the  
10 person.

11 The court goes on in footnote 13 to say lower courts have  
12 generally read Supreme Court precedent to confine the broad  
13 due-process check on the conduct of law enforcement officers to the  
14 slim category of cases in which the police have been brutal employing  
15 against a defendant's physical or psychological coercion that shocks  
16 the conscience. Again, utilizing the same language. Right?

17 And, of course, I know the distinction the government seeks  
18 to draw here is to say, well, you know, it wasn't Agent Perkins and  
19 it wasn't Agent Fitzgerald who were applying, as the terms that are  
20 used in Rochin, the rack and the screw, right?

21 But they were basically asking them to do it for them,  
22 right? They were asking them to ask them questions and to extract  
23 information.

1           So while they may not have been applying the waterboarding,  
2 while they may not have been hanging them from a bar, they were  
3 certainly an integral part of that process and part of the stimulus  
4 for engaging in that process to obtain information for those  
5 government agents, and that is conduct that shocks the conscience.

6           And it contributed to the torture that Mr. al Hawsawi  
7 endured in the black sites, because it was perpetrated on their  
8 behalf in order to obtain answers, in part, to their questions. So  
9 they cannot be divorced and they cannot wash their hands of their own  
10 complicity in this instance.

11           United States v. Jenrette at 74 F.2d 817, it's a D.C.  
12 Circuit 1984 case, same language. Court utilizes the same language,  
13 demonstrable level of outrageousness, and again cites to the narrow  
14 category of cases where the conduct involves coercion, violence, or  
15 brutality to the person, something that I think we have absolutely  
16 established with the evidence that is available to us in the case.

17           United States v. Gariria, 116 F.3d 1498, D.C. Circuit 1997,  
18 same language is used by the court. Limited the defense to conduct  
19 involving coercion, violence, and brutality.

20           So all that to say that this doctrine is alive and well  
21 because, unfortunately, this case has an abundance of coercion,  
22 violence, brutality, and conduct that shocks the conscience. And it  
23 so shocks the conscience that the United States Government has

1 leveraged the classification privilege to keep the public from seeing  
2 these facts that really do, in fact, shock the conscience.

3           That's why I made the decision to take us through this  
4 presentation today as somewhat lengthy or methodical, whatever we  
5 want to characterize it, because I wanted you to have the opportunity  
6 to see the flow of information from unclassified to classified, back  
7 to unclassified, and for you to see the selective application of the  
8 classification privilege to information that no doubt if the public  
9 had it would shock their conscience. And it should. It should shock  
10 the conscience of this court. It should shock the conscience of  
11 government agents that are involved in this case.

12           But therein lies the issue with classification authorities,  
13 right? And the classification authority in this case is, in fact,  
14 the CIA, who is front and center and was front and center in  
15 perpetrating the very torture that we are here litigating today and  
16 the very actions that they perpetrated in complicity with the Federal  
17 Bureau of Investigation.

18           And they get to call the balls and strikes when it comes to  
19 this kind of issue. And they get to tell the American people and  
20 they get to tell the public what they get to see and what we get to  
21 argue in closed sessions out of the eyes and ears of the world where  
22 they can't hear and see this conduct.

23           So we've talked about the Supreme Court. We've talked about

1 D.C. Circuit cases. We've also talked about servicemembers and  
2 rights that they enjoy at court-martial. And then I'll get into  
3 later the Article 3 analysis that applies to this case and that  
4 brings in due process by implication in terms of what a regularly  
5 constituted court is.

6 But I think it's undeniable that servicemembers are also  
7 entitled to be free from outrageous government conduct and that  
8 outrageous government conduct in military cases bars prosecution in  
9 that narrow category of cases, again, where the government is  
10 responsible for physical or psychological brutality that shocks the  
11 conscience of a civilized society.

12 In that sense, we have United States v. LeMaster at 40 M.J.  
13 178. In that particular case, agents from the OSI for the Air Force  
14 targeted a 24-year-old female who was suffering from severe  
15 depression.

16 They utilized an informant who fed her drugs and was  
17 complicit in using drugs and also carried on a sexual affair with the  
18 24-year-old servicemember to then turn around and turn her in and  
19 have her prosecuted for possession and the use of those drugs.

20 In that case the court says that the police activity was  
21 outrageous and, at a minimum, it violated the fundamental norms of  
22 military due process. And in that case, it was the functional  
23 equivalent of entrapment.

1           There were separate concurrences in the case, because a  
2 majority declined to actually pass on the issue of the outrageous  
3 government conduct. And the separate concurrence said I would  
4 concur, but I find that the conduct was patently outrageous. Second  
5 concurrence called it outrageous government conduct. And the third  
6 one said it was so outrageous, it would be fundamentally unfair and  
7 shocking to the universal sense of justice.

8           Similarly, in United States v. Bell, at 38 M.J. 358, this  
9 was a case where the government provided crack cocaine to a  
10 servicemember who was then a recovering addict and was actually  
11 enrolled in one of the recovery programs that was implemented by the  
12 military, provided him the cocaine and then had him prosecuted.

13           In that case, the conviction for the use of that substance  
14 that was provided to him was overturned. And, again, in that case  
15 the military court found that the conduct shocked the conscience and  
16 violated fundamental fairness. All right?

17           So if we also look at the fact that under Article 3, there  
18 are due process rights that apply in regularly constituted courts.  
19 And we know that Article 3 applies to this military commissions  
20 because DoD directives delineate that, as well as setting precedent,  
21 then we know that also when we look at military cases, military  
22 members are free to be free from outrageous government conduct that  
23 shocks fundamental fairness in the prosecution of their cases.

1           So we have the Supreme Court, we've got D.C. Circuit cases,  
2   and we have military jurisprudence, which are the authorities that  
3   matter and should matter most and that bind this court in the ability  
4   to issue the type of relief that we are asking in this case.

5           The government argues, and no doubt will continue to argue,  
6   that due process -- Mr. al Hawsawi is not due any process outside of  
7   the confines of the Military Commissions Act.

8           Well, number one, we know this is a capital commission where  
9   Mr. al Hawsawi, the government seeks to deprive him of  
10  life -- right? -- at the end of this process. It's a capital case:  
11  Deprivation of life, liberty, or property. So certainly it would be  
12  incomprehensible to think that there is no process which is due to  
13  Mr. al Hawsawi in the fundamental fairness of how such a conviction  
14  would be obtained in this case.

15          And that's where I go back again, and I say due process must  
16  be informed in this military commission through the lens of the  
17  Eighth Amendment, freedom from cruel and unusual punishment and  
18  heightened due process and reliability that is uncontrovertible in  
19  death penalty jurisprudence and is the law of the land. So that's  
20  the beginning point.

21          The Supreme Court, the Department of Defense, and the  
22  commission have already upheld Mr. al Hawsawi's rights under Common  
23  Article 3 and have talked about the language that refers to a

1 regularly constituted court, which basically means regular military  
2 court that would provide normal procedural process and due process to  
3 servicemembers in a regular court unless there's a reason to depart  
4 from that particular course of conduct.

5           And in this case we cite to the -- actually, citing to the  
6 prosecution's position in AE 629 -- 625A (Gov). In that particular  
7 motion, the government opposed our motion to find that the Military  
8 Commissions Act was, in fact, a bill of attainder.

9           In opposing that requested relief, the government in 625A  
10 cited legislative history that emphasized how Congress, in passing  
11 the Military Commissions Act, encouraged the Secretary of Defense to  
12 consider the death penalty jurisprudence in the application of Common  
13 Article 3 of the Geneva Conventions which, as I've said, requires you  
14 afford all of the judicial guarantees which are recognized  
15 indispensable by civilized people.

16           They went on to quote Common Article 3 and said the  
17 prosecution, the Military Commission Act provides for possible  
18 sentence of death or imprisonment in this case, such punishment  
19 authorized only after the prosecution has proven its case beyond a  
20 reasonable doubt, and only as the end result of a judicial process  
21 affording all the judicial guarantees recognized as indispensable by  
22 civilized people. They were citing to al Bahlul.

23           They also quoted Republican -- Representative Duncan Hunter,

1 the chairman of the Armed Services Committee, where he says: We will  
2 give them due process rights that the world will respect. We uphold  
3 basic human rights and we do this in a way that the world  
4 acknowledges is fair.

5 That is the stated intention at least. That is the position  
6 the government took in 625A. And the court's ruling in that case is  
7 and was rested on the fact that, according to the court, it is clear  
8 that the overall intent of Congress in delineating military  
9 commission procedure was to punish by deprivation -- was not to  
10 punish by deprivation of rights but to provide a fair trial in a  
11 forum appropriately tailored to the status of the offenders in the  
12 context of the offenses.

13 So all that to say due process, we believe, is alive and  
14 well, yes, in 2024; yes, in this military commission; yes, by  
15 application of Common Article 3; yes, by delineation in U.S. DoD  
16 directive number 2310.1E, which says that Common Article 3 does, in  
17 fact, apply.

18 And there's never been any other indication that Common  
19 Article 3 no longer applies. I think that bridge has been crossed  
20 and that is an accepted fact now here, today in this prosecution.

21 We do also believe that, separately from Common Article 3,  
22 Fifth Amendment due process protections do apply directly to  
23 Mr. al Hawsawi. And for that we have to look to some federal case

1 law and habeas cases.

2 And in Qassim v. Trump, 927 Federal 3d, 522, the court ruled  
3 that a previous ruling by the same circuit was in error. That is  
4 that all the rights of due -- binding circuit precedent denies Qassim  
5 all rights of due process was in error. The due process clause does  
6 not invest detainees who have already been granted habeas corpus with  
7 the substantive due process rights to be released in the United  
8 States.

9 So that court did not claw back all due process right but  
10 simply said that the decision previously had been in error because it  
11 created a substantive due process right as of right for those  
12 detainees who have already received habeas corpus.

13 And most recently in al Hela v. Biden at 66 Federal 4th 217,  
14 the en banc decision assumed, without the citing, that the due  
15 process clause applies to detainees in Guantanamo raising civil  
16 habeas corpus cases.

17 The government argued in that case that the Fifth Amendment  
18 does not apply, and only two of the 14 judges on the D.C. Circuit  
19 would uphold that position today. The other 12 judges did not agree  
20 with that position, specifically because they would, quote, foreclose  
21 all due process claims by noncitizens challenging the procedures or  
22 rulings of military tribunals at Guantanamo Bay. That was D.C.  
23 Circuit 2023, and that was in reference to habeas litigation.

1           And, again, if we talk about a capital case and the finality  
2 of a capital case, there's a reason we say a capital case where death  
3 is different. And certainly if some process is due to a detainee in  
4 a habeas proceeding, a great more deal of process is due to  
5 Mr. al Hawsawi when he is facing the full force and impact of the  
6 government's evidence against him in a capital prosecution.

7           Now, finally, in our brief we cite a case for the  
8 proposition that you need not decide the full scope of  
9 Mr. al Hawsawi's due process rights if you don't want to necessarily  
10 reach that question. And that case was Lynch v. Cannatella, 810  
11 Federal 2d, 1363. It's a Fifth Circuit case. But I think it is  
12 illustrative and informative and somewhat persuasive.

13           In that particular case you had Jamaican stowaways who were  
14 excludable aliens as opposed to actually illegal aliens who have  
15 already come on land or crossed into the territorial integrity of the  
16 United States, but they were excludable aliens. And the question  
17 that the court answered was whether they had any due process rights  
18 based on their status.

19           And here's what the court said. Said: Whatever due process  
20 rights excludable aliens may be denied by virtue of their status,  
21 they are entitled under the Due Process Clause of the Fifth and the  
22 Fourteenth Amendments to be free of gross physical abuse at the hands  
23 of state or federal officials.

1           And this stemmed from the fact that they once -- once they  
2 took them off the containers and the ship that they were on, they  
3 were mistreated from there on in terms of their detention, where they  
4 were hosed down and they were denied proper sleeping arrangements,  
5 food and clothing, those kinds of things.

6           But it was instructive that the court, even under the  
7 circumstances and the status of excludable aliens, said that they  
8 were to be free from gross physical abuse at the hands of state and  
9 federal officials.

10           So I think, as I've said from the very beginning, you have  
11 all the instruments necessary to find coercion, violence, and  
12 brutality, and you have the legal framework to provide relief here.  
13 And you should reject any notion that due process does not apply to  
14 Mr. al Hawsawi here in a capital case where he is fighting for his  
15 life.

16           And I think you have ample authority, not only in my  
17 argument today but in the brief that we've extended to the court on  
18 this issue, to make that finding that Mr. al Hawsawi is entitled to  
19 due process and is entitled to be free from the fruits of that  
20 torture and fruits of that coercion that will be utilized to make the  
21 case to put him to death in this case, in this prosecution by this  
22 government.

23           That's all I have for now, Judge.

1 MJ [Col McCALL]: Sorry, I didn't have my mic on. No  
2 questions at this time, Mr. Ruiz.

3 All right. We've been going for a while. Let's go ahead  
4 and take a 10-minute recess. So it's 1536. Let's be back in here at  
5 1547.

6 The commission's in recess.

7 **[The R.M.C. 803 session recessed at 1536, 12 February 2024.]**

8 **[The R.M.C. 803 session was called to order at 1553,**  
9 **12 February 2024.]**

10 MJ [Col McCALL]: Commission is called to order.

11 Parties are present. The accused are all absent.

12 Mr. Trivett.

13 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

14 MJ [Col McCALL]: Good afternoon.

15 MTC [MR. TRIVETT]: Today is not the day for the commission to  
16 become the first court in 51 years to dismiss a case based on the  
17 post-offense conduct of the government and especially not in the  
18 context in which this government conduct was committed.

19 Today is not the day for this court to be the first court to  
20 find that alien unlawful enemy combatants, with no substantial  
21 connections to the United States, enjoy due process rights under the  
22 Fifth Amendment, be they be procedural or substantive.

23 We're really contemplating just resting on brief because, at

1 the end of the day, our position has not changed and nothing that  
2 Mr. Ruiz said changed anything about our legal position. You can  
3 consider everything he said as a fact for purposes of this motion,  
4 and they still lose as a matter of law.

5 We pointed to the Ghailani case. We pointed to the Padilla  
6 case. They have both dealt with very similar circumstances and very  
7 similar law of war detention claims from both Mr. Padilla and Mr.  
8 Ghailani. Both of those outrageous government conduct motions were  
9 denied.

10 The reason why we stand up today to argue anything was  
11 something that Mr. Ruiz said in his argument about Special  
12 Agent Perkins and the extraordinary success that she claimed for the  
13 prosecution of the East Africa embassy bombings. And by all  
14 accounts, that was an extraordinary success for the U.S. Government  
15 in the prosecution of the case. For the 224 people that died, it was  
16 an abject failure.

17 After September 11th, a decision was made by the President  
18 of the United States within days, while the towers were still  
19 smouldering, that we would not be on a simple  
20 catch-apprehend-indict-prosecute footing any longer because we could  
21 not afford to be. There were 2,976 people that were dead. We were  
22 having to get onto a war footing which we had not yet been on,  
23 although we had taken what attempts we could to eliminate Usama

1 bin Laden and his threat as early as 1998.

2           So it all depends on how you define success and who gets to  
3 define that for the government. And ultimately, that was the  
4 President of the United States making a determination that when we  
5 captured individuals suspected to be Al Qaeda members, and especially  
6 the highest value detainees amongst those, that they would be  
7 rendered, interrogated, and detained, not so we could have the  
8 success of a successful prosecution at the end with all of those  
9 Americans dead, but that we could prevent it from ever happening  
10 again. That is the backdrop of all of the decisions and all of the  
11 facts that you heard today.

12           This is not to suggest that Mr. Hawsawi or the other accused  
13 in this room do not have a right -- and I believe the last thing  
14 Mr. Ruiz said -- to be free from the fruits of the evidence that were  
15 gathered from his treatment in the RDI Program. We are in violent  
16 agreement that he should be and that he is under 10 U.S.C. 948r.

17           We continue to take the position that none of the evidence  
18 that we intend to use in this case, not any information that was  
19 gathered, not any gaps that the FBI might have had in their 9/11  
20 investigation, any evidence we intend to use against him to establish  
21 his guilt for his role in the September 11th attacks will be free  
22 from any of the taint of his treatment in the RDI Program.

23           And to the extent that we have disagreements with the

1 defense over that, they can file motions to suppress just like they  
2 filed the motions to suppress for the statements given to the FBI in  
3 2007. That's the only remedy he's entitled to under law.

4 He's not entitled to the windfall of a dismissal of a case  
5 in which he has very proudly proclaimed his involvement in the murder  
6 of 2,976 people. It's never done before, and this should not be the  
7 first day that any court decides to hand out the windfall because of  
8 how someone was treated post-offense in a law of war context when  
9 2,976 people were killed. And there were worries, if you recall,  
10 about additional sleeper cells, additional attacks.

11 They are asking you to look at this through the lens of  
12 2024. But in reality, when understanding the justification for all  
13 of it, that was done through the lens of September 12th, 2001, when  
14 there was lots of uncertainty, there were lots of concerns. There  
15 was a belief that there were additional attacks and there was a  
16 president of the United States who was committed to ensuring that  
17 what had happened the day before would never happen again.

18 In a lot of ways -- and Mr. Ruiz's argument definitely  
19 meandered over into the suppression argument. I'm not going to make  
20 an entire suppression argument. We're obviously continuing to  
21 litigate that. But they do have that remedy available to them under  
22 10 U.S.C., we acknowledge that. We believe that's their sole source  
23 of rights to ensure that tortured evidence never gets into

1 this -- ever gets into this case.

2 But in a lot of ways the only way their arguments work is if  
3 they have a time machine, and if they can bend the space-time  
4 continuum to somehow convince the military commission that all of the  
5 evidence that was gathered before they were captured is somehow  
6 tainted by their later treatment.

7 As Special Agent Perkins testified, and I believe just about  
8 every agent testified because we did ask them these questions  
9 specifically, could you have done the same interview that you did  
10 with the accused the day they were captured, before they were treated  
11 in any way under the RDI Program, before enhanced interrogation  
12 techniques were applied?

13 And almost all of them to an agent said, yes, I could have.  
14 All of that was gathered. And if not all of it, then almost all of  
15 it. And the information that wasn't gathered from it, we can show  
16 under inevitable discovery would have been gathered anyway and that  
17 was not actually the fruits.

18 So that's where Hawsawi's argument fails, because they  
19 cannot acknowledge all of the documents leading to his involvement in  
20 assisting the hijackers and in the return of all of the funds from  
21 the hijackers, because all of that information was gathered well  
22 before he was captured. That's the information we intend to rely on.

23 So when you look at all of the case law, and any of the case

1 law that doesn't reject this concept of outrageous government conduct  
2 outright, which a bunch of circuits do, it's always with either  
3 governmental participation in the crime, which is an entrapment-type  
4 defense, which they do have an entrapment defense in the Military  
5 Commission Act that they can make if they'd like. I don't believe  
6 that that's at issue here, but that is actually a statutorily  
7 provided defense that they can raise. Or it's in the using of  
8 evidence directly obtained -- directly obtained -- from the purported  
9 outrageous government conduct, right? That's the Rochin case, right?

10 In Rochin, they rush in. They believe he's got drugs. They  
11 see him swallow drugs. They try to make him throw those drugs up to  
12 get them out. When he doesn't do that, they take him to the  
13 hospital. They chain him to a bed. They then ask that those -- that  
14 his stomach be pumped for the drugs to come out, and then that  
15 becomes the principal evidence by which he is convicted. That's the  
16 Rochin case.

17 The Rochin case is 20 years prior to Russell and 22 years  
18 prior to Hampton. And Hampton rejects this concept that we can  
19 divest ourselves of justification simply because of the actions taken  
20 by the government agents.

21 So we stand by the case law as cited. I would note that  
22 Mr. Ruiz does not have any evidence that Judge Kaplan didn't have  
23 information about the treatment of the accused. So there's no

1 evidence of that that -- that that's the case.

2 We certainly know that the prosecution had obligations to  
3 disclose certain things about the RDI Program to the judge both in  
4 Ghailani and in Padilla, so I did not want to let that go unanswered  
5 in this context.

6 But it can't be outrageous and it can't be that their claim  
7 of outrageous government conduct rests somehow on the FBI integrating  
8 with the CIA after the attacks. It would have been outrageous if  
9 they didn't.

10 As you recall, there's already been testimony -- there will  
11 be additional testimony later over the next weeks of this  
12 session -- that will establish that it was the CIA and the FBI  
13 believing that there was a wall where they could not communicate that  
14 likely -- that likely would have prevented the attacks had they  
15 shared that information.

16 So that wall was torn down after September 11th, and rightly  
17 so, so that the whole-of-government approach could be utilized  
18 against an enemy that had declared war against the United States and  
19 systematically began attacking our embassies, our warships, and then  
20 our homeland on September 11th, right?

21 So it's not whether or not there was some information or  
22 some evidence that the FBI was involved and integrated with the CIA  
23 during the RDI Program. There's nothing outrageous about that. I

1 don't know whether or not Judge Kaplan or the judge in Padilla had  
2 that information, but it should be irrelevant because there's nothing  
3 outrageous about that concept at all.

4 So I would ask the judge to simply deny the motion for the  
5 relief of the dismissal of the charges and to deal with any  
6 suppression motions that may come up on an individual basis, hearing  
7 the actual evidence of how they -- how the government obtained it.

8 Obviously, a lot of times, from a temporal standpoint, we  
9 can show that it was before the capture of any of these accused and  
10 that should render the question moot. To the extent that we have any  
11 contested facts within there, we should be allowed to argue that, we  
12 should be able to marshal the evidence that establishes how we  
13 obtained it and why it was free from the taints of any of the  
14 individuals' treatment.

15 But that's where ultimately the Ghailani case came down,  
16 that's where the Padilla case came down, and that's where we're  
17 asking Your Honor to come down.

18 Subject to your questions, sir.

19 MJ [Col McCALL]: No questions, Mr. Trivett. Thank you.

20 Mr. Connell?

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

22 I want to address a procedural point, and I had asked  
23 Mr. Ruiz if he preferred -- what -- his preference, and he said go

1 ahead.

2 MJ [Col McCALL]: Okay.

3 LDC [MR. CONNELL]: The military commission and counsel for  
4 Mr. Hawsawi have recognized that we and other counsel have declined  
5 joinder to this motion.

6 MJ [Col McCALL]: Right.

7 LDC [MR. CONNELL]: And the only reason why I raise to mention  
8 it is because there was a, what could only be really called a fiasco  
9 around the AE 502 series when -- the personal jurisdiction challenge,  
10 when Mr. al Hawsawi's team challenged personal jurisdiction. And  
11 despite our best efforts to fully participate, and we weren't allowed  
12 to fully participate, and then we were held responsible for the ----

13 MJ [Col McCALL]: I recall. I've reviewed the record. It was  
14 before my time, but I have.

15 LDC [MR. CONNELL]: Very good. I just wanted to say it now so  
16 that, you know, fool me twice, shame on me kind of thing, that it is  
17 our understanding that if the military commission chooses to rule on  
18 this motion one way or another, that it doesn't bind our position  
19 because there is still a deadline which is open for us to file a  
20 motion using similar or related grounds.

21 MJ [Col McCALL]: I understand your position. Yeah, I mean,  
22 there's reason that you put out a declination of joinder. So I  
23 understand.

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

2 MJ [Col McCALL]: Mr. Ruiz?

3 LDC [MR. RUIZ]: Judge, just on that procedural point, we, of  
4 course, think that the commission is well placed to rule on  
5 Mr. al Hawsawi's motion for outrageous government conduct, and we  
6 would ask that the commission do that at its earliest opportunity,  
7 when you've had an opportunity to fully digest the evidence and the  
8 facts that we've provided.

9 MJ [Col McCALL]: Understood.

10 LDC [MR. RUIZ]: All right. So I'm going to jump around a  
11 little bit, in the nature of rebuttal, as it happens to be; nothing  
12 quite prepared.

13 MJ [Col McCALL]: That's fine.

14 LDC [MR. RUIZ]: So I'll just kind of jump around.

15 I certainly disagree with Mr. Trivett that we want the  
16 commission to look through the lens of 2023-24. In fact, much of my  
17 argument kept alluding to going back to 2002 and 2001 and referencing  
18 what the agents were doing, how they were acting, and what they were  
19 doing going about their business and what the witnesses said on the  
20 stand.

21 We very much want the court to focus on what they were  
22 saying then versus what they're saying now, almost 20 years after the  
23 fact when they have a criminal prosecution and when they're towing

1 the line to the government's narrative about this separation between  
2 intelligence and law enforcement action.

3           We do think that what they did at the time, the actions they  
4 took at the time, and the statements they've made now regarding what  
5 they were doing and what they were trying to get the director to do  
6 and the reasons they were trying to get the director to do at the  
7 time carry a great deal of weight. Because, at that point, the  
8 prosecution hadn't constructed its narrative, hadn't been confronted  
9 with the defense's challenges based on the evidence and the way it's  
10 developed. And I think it is credible that they testified that they  
11 were looking at collecting evidence, people they were working with  
12 were saying they were looking at collecting evidence, didn't care  
13 about evidence and didn't care about intelligence, and they were best  
14 placed to indict, convict, and prosecute people at that time, which  
15 we think is important obviously for the reasons that I've stated to  
16 the commission, that it was in this sectioned-off intelligence  
17 operation that Mr. Trivett and, you know, his colleagues -- I  
18 understand why they're pushing that narrative, I understand why  
19 that's the legal position they must take, but the facts simply don't  
20 support that. And testimony that we've seen, the evidence that  
21 exists simply doesn't support that.

22           And what is outrageous is not the fact that the FBI  
23 integrated with the CIA. That's -- I'm not sure what commission he's

1 watching, but that's certainly not why I spent three hours going  
2 through all of these exhibits with the commission to illustrate for  
3 you what the coercion, the violence, the brutality, and the  
4 outrageous conduct was, which was the coercion, violence, and  
5 brutality that was perpetrated upon Mr. al Hawsawi.

6           And like I said in my argument, the FBI, Agent Fitzgerald  
7 wasn't the one doing the waterboarding. He wasn't -- Agent Perkins  
8 wasn't the one hanging him from the ceiling or slapping him or in the  
9 room to sexually humiliate him. They weren't the ones that were  
10 doing that.

11           But what was outrageous is the fact -- and some of the  
12 testimony bears this out -- that they knew that the CIA was doing  
13 things outside the traditional norms of rapport-based and building.  
14 That's why they ultimately didn't get involved in the actual -- you  
15 know, dirty their hands in the actual interrogation room with the  
16 screws and the rack -- right? -- that Rochin refers to.

17           But their involvement in that process and the questions that  
18 they pose to the torturers themselves is what makes their involvement  
19 part and parcel of the outrageous conduct, right?

20           So it's as though if you were to stand in the corner of the  
21 interrogation room when they're doing the mock executions, where  
22 they're putting the drill to the head, where they're doing the gun to  
23 the head, they're doing all of these things to Mr. al Hawsawi, and

1 someone says, hey, ask him this question, right? Ask him that  
2 question. And when he doesn't give the answer to that question, what  
3 happens? Right?

4 So is the person who is not in the room or who happens to be  
5 in the corner of the room or happens to be behind the glass wall  
6 somehow not tainted by their involvement and by the information  
7 they're seeking that is causing, at least in part, the torturers to  
8 continue to apply the torture?

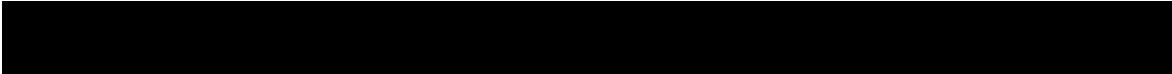
9 That, Mr. Trivett, is what is outrageous. That is what  
10 makes the FBI's integration in this sense outrageous government  
11 conduct and why they are inextricably tainted.

12 Agent Perkins testified that she could not dissociate  
13 completely what was information from the CIA, what was information  
14 from the FBI. She acknowledged that under oath.

15 And if they had such a great case prior to Mr. al Hawsawi's  
16 capture, then why did they even need to go through this entire  
17 production of trying to convince the director of the FBI that they  
18 were the best placed agency in the United States Government to do  
19 what they do best? Obtain confessions, is what she said.

20 Why was Agent Pellegrino saying I felt that my contribution  
21 to this was to indict and to prosecute, right? Normally we indict  
22 them first, right?

23



1  
2  
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Those are the facts, and those facts may be inconvenient to Mr. Trivett. And I understand why he may not have wanted me to have an opportunity to get back up here and talk again, because those facts did not serve their statements on the law.

The law supports us in this case. And this is the day. This is the case for this court to do exactly what the government led off their response brief with. So the government led off their response brief with a statement about deterrence and about deterring unlawful conduct that leads to procedural and substantive due process violations in court and in a capital case -- right? -- where the stakes are the highest.

I think that deterrence is a good point to talk about, because you do have, after today, a roadmap about the conduct, the coercion, the violence, the brutality that shocks the conscience. You have that.

There's more of that in the brief. I only gave you a relatively short overview of all of the information we put into the brief that supports the finding of outrageous government conduct and

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1 shocks the conscience as coercive, violence, brutality. You have  
2 that.

3 And you have the links and the interconnections between that  
4 conduct, between that extraction of evidence, between the interplay  
5 of the FBI and the CIA and the information that they use to perfect  
6 and to continue to prosecute Mr. al Hawsawi.

7 And as much as Mr. Trivett may want to try to cleanse that,  
8 he can't do it.

9 Once they've thrown that skunk into the jury box, you can't  
10 get rid of that stench. And that stench of that torture, that stench  
11 of that conduct is all over the FBI and it's all over this evidence  
12 and it's all over this case. And no matter how many cleaners they  
13 bring into this courtroom to clean that up, it stinks. It's not  
14 going to change. It smells. And it smells and wreaks of torture and  
15 depravity and coercion and violence and brutality. And no matter how  
16 much they want to do away with that, that's the reality of this case.

17 And that's why, Your Honor, you have the opportunity to  
18 grant the relief that we've asked in this case. And one of the  
19 relief that we did ask, if you do not think that divesting this court  
20 of jurisdiction is the appropriate relief, is the suppression of the  
21 fruits of that torture and of that complicity from the FBI. That is  
22 one remedy that is available to you. You can do that in this case  
23 under this doctrine in this motion with these facts.

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1           You can also remove the death penalty and say the government  
2 should not be able to profit from this evidence to put Mr. al Hawsawi  
3 at jeopardy to lose his life during this process because of the  
4 outrageous conduct that the government engaged in in this case and  
5 the derivation of evidence that is going to be used by the government  
6 in this case.

7           You have the power. You have the authority. More  
8 importantly, you have the evidence and you have the law to support  
9 that ruling.

10           Going back to the President's statements, Mr. Trivett got up  
11 here and talked about how the President said we were no longer going  
12 to indict and prosecute and do all that at the time. But what I can  
13 tell you is very clear public statement was when he said, they're  
14 going to be brought to justice.

15           He didn't say they're going to be brought to undisclosed  
16 black sites and they're going to be interrogated for intelligence  
17 purposes. And I guess I understand why maybe he may not do that, but  
18 it was a very clear statement of intent to bring them to justice.

19           Justice in our nation is normally administered in a court of  
20 law. That is what we associate with justice. We don't associate  
21 justice with clandestine black sites around the world with rogue  
22 foreign nations who we're bribing to host torture sites. That's not  
23 what we associate with justice. Maybe back then some people

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1 associated that with justice. But what we associate with justice is  
2 courts of law and rule of law and accountability under the law.  
3 That, I think, is what the President was talking about.

4 And you know, if we get into that time machine and go back,  
5 you know, we'll take Mr. Trivett with us again so he can take a good  
6 look. We get into a time machine and go back. What did the  
7 President do in November of 2001? He issued that Military Order No.  
8 1 to establish a military commission system. For what purpose? To  
9 bring them to justice, which is exactly what he said. So we don't  
10 only have to rely on what we say he said, but we can rely on what he  
11 actually did.

12 Now, of course, that was rejected because of a number of  
13 infirmities, procedural infirmities. But it informs what was in his  
14 mind at the time and what the country and what he was thinking and  
15 what he wanted people to do when they were captured, and that was  
16 bring them to a court, bring them to justice, and have that  
17 accountability.

18 Now, in their brief the government didn't squarely take on  
19 this, and I think I understand why they didn't do it. But they kind  
20 of alluded to it when they talk about the towers coming down and the  
21 smouldering ruins and the death and destruction that we understand  
22 took place. And they talked about -- Mr. Trivett talked about they  
23 were concerned about sleeper cells and sleeper cell attacks and they

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1 were concerned about protecting the homeland.

2           Again, the President was very focused on bringing those  
3 responsible to justice. And I think at that time we were very well  
4 placed as a nation and as a people to seek that accountability, to  
5 seek that justice, to seek some retribution for what was that attack.  
6 And that is what the President set out to do.

7           And at that point we had the high moral ground. But make no  
8 mistake that the CIA, the FBI, the law enforcement and intelligence  
9 apparatus failed to protect the homeland on September 11th, 2001.  
10 They had failed to do that.

11           And ever since then, they've been constructing this  
12 narrative about their noble purpose and their noble efforts in  
13 protecting us against additional and further attacks. When in  
14 reality, much of what happened and much of the additional  
15 self-inflicted wound that came after the towers came down is what  
16 happened in those black sites.

17           Because while when those towers came down people perished,  
18 people died, the nation grieved, that was something that was very  
19 palpable. But when our own government agents erected these black  
20 sites and set out on this criminal enterprise, it was a  
21 self-inflicted attack on our own soul, the nation's soul, and one  
22 that we're still paying for. It's been called that original sin.

23           And they did so, I would say to you, not just out of a noble

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1 purpose but because they felt responsible for not protecting the  
2 homeland in the first place. And much of what happened, the reason  
3 they exceeded even the boundaries of these so-called lawful torture  
4 is that there was retribution to be had. There was revenge to be  
5 had. There was anger and it was taken out on the people who were  
6 captured and who were there for the purpose of eventually convicting  
7 them.

8 So justice was, in fact, something that was very much looked  
9 at at that point in time. And it wasn't just an intelligence  
10 collection and protection of the homeland. Yes, that was part of it,  
11 I think, but it wasn't the only thing. And I think to divest the  
12 record of what is clearly true simply doesn't support the  
13 government's position in this case.

14 So I'm going to talk more specifically about what I talked  
15 to you about in terms of the interplay because I have to get into the  
16 actual substance of some of these documents and the FBI.

17 But 

18 

19

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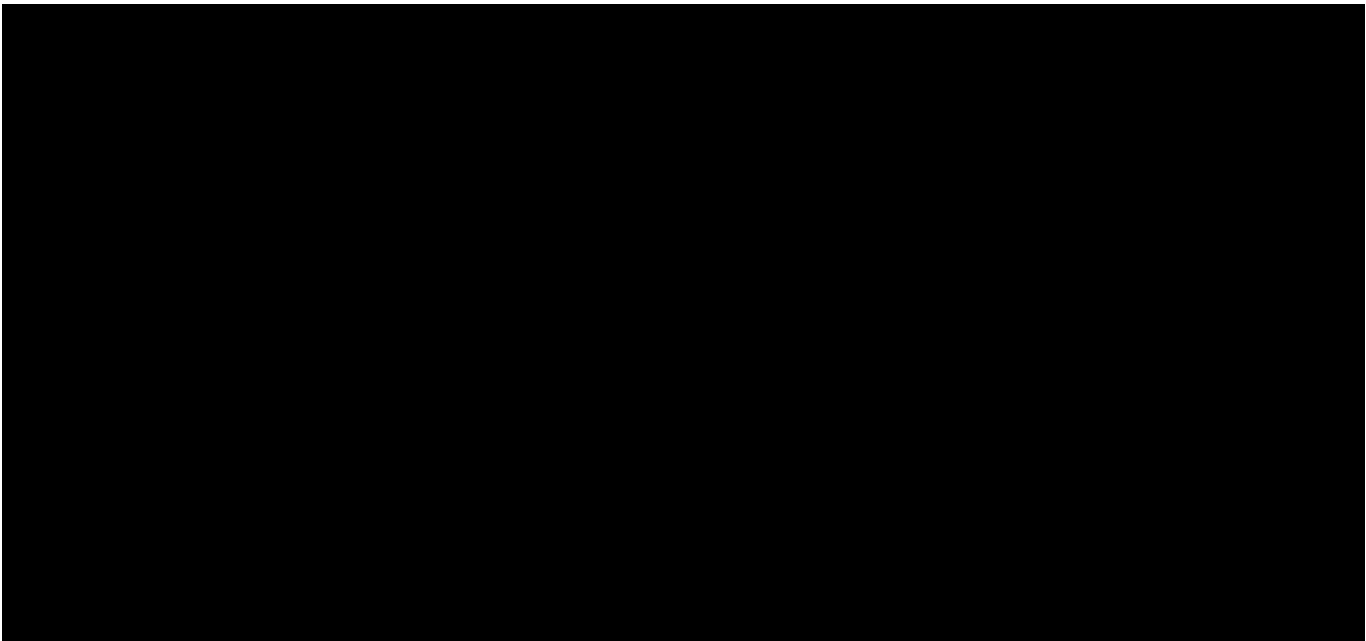
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So this so-called perfected, clean, sanitized case that

1 didn't need anything from the CIA and didn't take anything from the  
2 CIA, well, I would beg to say that if we get in that time machine and  
3 go back to that time, what we will find is that they were very much  
4 working to continue to derive, to continue to obtain evidence, and



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14           So again, you know, we can -- I understand their position,  
15 but the facts are the facts. If they didn't need this, if they  
16 didn't want it, if they had a perfect case, they should have just  
17 simply gone on to a federal court once Mr. al Hawsawi was captured,  
18 indicted him, and brought him to justice, instead of continuing to  
19 elicit information and obtain information that would be used to  
20 prosecute him in a capital commission.

21           So in terms of the Rochin case Mr. Trivett cited, he talked  
22 about the evidence being pumped from the stomach; I talked about that  
23 as well. And what I want to go back to is what Dr. Mitchell said

1 about the conditioning process, right?

2 And Dr. Mitchell said on page 152 to 153 of his book that  
3 Mr. Mohammad's resistance was overcome with a combination of walling  
4 and sleep deprivation. It wasn't that he broke suddenly and spilled  
5 his guts, it was a result of a gradual conditioning process. Right?

6 The reason I think that's significant, and when you look at  
7 it in the context of Rochin, is because that's where the evidence  
8 collection process, that's where the pumping began in this case. It  
9 wasn't a pumping of the stomach to obtain the contents of the stomach  
10 itself, but it was a deliberate effort to condition Mr. al Hawsawi  
11 and other men in custody of the CIA to become information-producing  
12 individuals. And that, as we've talked about, was the conditioning  
13 that has led us to 2007. [REDACTED]

14 [REDACTED] That's a significant fact.

15 But, like I said, I think you can easily dismiss or easily  
16 suppress the statements just on these facts, just based on this  
17 doctrine, based on the evidence that you have, based on the law that  
18 exists in this circuit that allows and provides for that when you  
19 reach this level of coercion, violence, brutality, and you have the  
20 causal connection that Judge Kaplan was denied in that case. Right?

21 Remember, Judge, it took us until 2017 in this case before  
22 the government let go from their hands the piece of evidence that  
23 first allowed us to see the interconnectedness between the FBI and

1 the CIA, and it was because we brought this jurisdictional motion.  
2 It had the intended effect. They had to give it up. That was 2017.

3 Remember, in 2008, this -- portions of this same prosecuting  
4 team were looking to go to trial within months of these men being  
5 brought to Guantanamo Bay. That's 2008. 2017 is when we realized  
6 this evidence existed.

7 Think about all the litigation prior to that, just like the  
8 litigation that they're citing to to carry the day in this case, in  
9 the Ghailani case, where they didn't have that information. They  
10 didn't have these facts, and these are important facts, right?

11 So that's why I think that this case, this time, this  
12 evidence gives you everything you need to do this; gives you  
13 everything to do so you make a ruling that stands the test of time,  
14 that sends the message of the times; that says that Mr. al Hawsawi  
15 has due process rights; that says he should be free from the fruits  
16 of that coercion, that violence, and that brutality in the case where  
17 his life is at issue, at stake.

18 And it is the time to do that. Now is that time, and this  
19 is that case.

20 Thank you, Judge.

21 MJ [Col McCALL]: Thank you, Mr. Ruiz. No questions.

22 **[Counsel conferred.]**

23 MJ [Col McCALL]: Mr. Ruiz.

1 LDC [MR. RUIZ]: So Mr. Trivett indicated that during my  
2 argument I alluded to the use of a drill, the use of a gun. And it  
3 was their understanding that I used it in connection to  
4 Mr. al Hawsawi.

5 If that was the impression I gave, that was incorrect. I  
6 simply meant to give those as examples of exceeding limits that were  
7 within the ambit of ----

8 MJ [Col McCALL]: The program.

9 LDC [MR. RUIZ]: ---- his lawfulized right at the location  
10 where Mr. al Hawsawi was seated, so I wanted to clarify that.

11 MJ [Col McCALL]: All right. I appreciate that clarification.  
12 Thank you.

13 All right. It's about 1630. So I understand the parties'  
14 positions. We're going to go ahead -- and I know I mentioned that we  
15 might try to go to 1700. It doesn't make sense to me to start a new  
16 AE at this point. So what we'll do is go ahead and recess for the  
17 evening, come back tomorrow at 0900.

18 I do want to let the parties know -- again, I understand the  
19 difficulties of dealing with the different classification guidance  
20 that we have and what can come in and what can't, so I asked my CISO  
21 to stay around after we recess for the evening. So he's going to be  
22 in here.

23 And if the parties have questions about some of the exhibits

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1 that they want to get into this session, now would be a perfect time  
2 to just make sure that you're on the same page with the commission so  
3 we aren't trying to scramble and, like, fix exhibits early in the  
4 morning.

5 Any housekeeping, any saved rounds before we recess for the  
6 evening?

7 Apparently not.

8 All right. I'll see you tomorrow at 0900.

9 Commission is in recess.

10 **[The R.M.C. 803 session recessed at 1630, 12 February 2024.]**

11 **[END OF PAGE]**