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1 **[The R.M.C. 803 session was called to order at 0900, 14 May 2024.]**

2 MJ [Col McCALL]: The commission is called to order.

3 Good morning, Mr. Trivett. Can you please identify who's
4 here on behalf of the United States both in the courtroom and at the
5 RHR?

6 MTC [MR. TRIVETT]: Yes, sir. Good morning.

7 Representing the United States today in the courtroom in
8 Guantanamo is myself, Mr. Clay Trivett; Lieutenant Commander Robert
9 Baxter; Mr. Christopher Dykstra. Also present, paralegal Mr. Rudolph
10 Gibbs. And from the FBI, we have Special Agent Aaron Kellerman and
11 Staff Operations Specialist Kiana Ray.

12 Representing the United States today from the Remote Hearing
13 Room is Colonel Joshua Bearden, Major Neville Dastoor, and also
14 present from the FBI is Supervisory Intelligence Analyst Kimberly
15 Waltz.

16 Your Honor, these proceedings are being broadcast to CCTV
17 sites in the continental United States pursuant to the commission's
18 orders.

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

20 Good morning, Mr. Sowards.

21 LDC [MR. SOWARDS]: Good morning, Your Honor.

22 Appearing on behalf of Mr. Mohammad, who is not present, are
23 Gary Sowards; Gabriela McQuade; Kathleen Potter, Lieutenant Colonel,

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1 United States Air Force; Denise LeBoeuf; Elspeth Theis, Major, United
2 States Air Force.

3 And in the Remote Hearing Room is Michael Leahy, Captain,
4 United States Air Force.

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

6 LDC [MR. SOWARDS]: Thank you, sir.

7 MJ [Col McCALL]: Good morning, Mr. Montross.

8 DC [MR. MONTROSS]: Good morning, Your Honor.

9 On behalf of Mr. Bin'Attash: William Montross, Lieutenant
10 Austin Ridgeway.

11 In the RHR, Ms. Tasnim Motala, Captain Marian Messing,
12 Matthew Engel, and Prax Kennedy.

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

14 Good morning, Mr. Connell.

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

16 On behalf of Mr. al Baluchi in the courtroom are myself,
17 James Connell, and Defne Ozgediz.

18 Rita Radostitz is in the Remote Hearing Room.

19 MJ [Col McCALL]: All right.

20 Good morning, Mr. Ruiz.

21 LDC [MR. RUIZ]: Good morning, Judge.

22 I'm here on behalf of Mr. al Hawsawi along with Ms. Suzanne
23 Lachelier, Captain Kerry Mawn, Captain Patrick Tipton, and Mr. Sean

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1 Gleason.

2 MJ [Col McCALL]: All right. I note that the accused are not
3 present in the courtroom this morning. Mr. Dykstra, do you have a
4 witness to account for these absences?

5 DMTC [MR. DYKSTRA]: Yes, Your Honor.

6 MJ [Col McCALL]: Go ahead.

7 **CAPTAIN, U.S. Air Force, was called as a witness for the prosecution,**
8 **was previously sworn, and testified as follows:**

9 **DIRECT EXAMINATION**

10 **Questions by the Deputy Managing Trial Counsel [MR. DYKSTRA]:**

11 Q. Good morning, Captain.

12 A. Good morning, sir.

13 Q. Is your mic working?

14 A. Yes, sir. Now it is. All right.

15 Q. For purposes of the record, what is the pseudonym or call
16 sign that you go by?

17 A. Doc.

18 Q. And you previously testified yesterday, correct?

19 A. Yes, sir.

20 Q. I just remind you that you remain under oath.

21 A. Yes, sir.

22 Q. Now, did you have the chance to advise the accused of
23 their right to attend today's proceedings?

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1 A. Yes, sir. Between approximately 0630 and 0650 hours this
2 morning I advised each of the accused of their right to attend
3 today's session using the statement -- English version of the
4 Statement of Understanding, Right to Be Present for Commission
5 Proceedings. I also had a translated version and a linguist present
6 with me when I advised them.

7 DMTC [MR. DYKSTRA]: Your Honor, if I may approach the
8 witness, I'm going to hand him what has previously been marked as
9 Appellate Exhibit 943KKK (KSM), 943LLL (WBA), 943MMM (AAA), and
10 943NNN (MAH).

11 MJ [Col McCALL]: Go ahead.

12 Q. Are these the forms that you used to advise the accused
13 this morning?

14 A. Yes, sir. They are.

15 Q. And what was the response when you advised them of their
16 right to attend this -- this morning's proceedings?

17 A. The accused declined to be present for commission
18 sessions, though several did accept legal meetings either at Echo II
19 or here at the ELC.

20 Q. And are there any accused present in the adjacent
21 facilities?

22 A. Yes, I believe Mr. Ali is present in the adjacent
23 facilities.

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1 Q. All right. Thank you.

2 DMTC [MR. DYKSTRA]: No further questions, Your Honor, for
3 this witness.

4 MJ [Col McCALL]: All right. Thank you, Mr. Dykstra.

5 Do any defense counsel have questions for this witness?

6 Mr. Montross.

7 DC [MR. MONTROSS]: May I confer with Mr. Dykstra?

8 MJ [Col McCALL]: Sure.

9 **[Counsel conferred.]**

10 DMTC [MR. DYKSTRA]: Your Honor, if I may approach the witness
11 and obtain the waivers just to check something.

12 MJ [Col McCALL]: Sure.

13 **[Pause.]**

14 DMTC [MR. DYKSTRA]: Your Honor, I just needed to verify the
15 Arabic version was signed. I inadvertently neglected to hand that
16 signed copy to defense counsel, which I'll correct after today's
17 proceedings.

18 MJ [Col McCALL]: Okay. Perfect.

19 So again, based on that, any defense counsel have questions
20 of this witness?

21 Apparently not.

22 All right. Thank you for your testimony. You're excused.

23 WIT: Thank you, Your Honor.

1 **[The witness was excused and withdrew from the courtroom.]**

2 MJ [Col McCALL]: The commission finds that Mr. Mohammad,
3 Mr. Bin'Attash, Mr. Ali, and Mr. al Hawsawi have knowingly and
4 voluntarily waived their right to be present at today's session,
5 although it sounds like perhaps Mr. Ali will join us. He's in the
6 adjacent facility where he can, sounds like, listen in.

7 All right. Yesterday the commission received unclassified
8 testimony from Dr. WK5I. After some objections as to the proper
9 scope of her testimony were raised by the defense, the commission
10 decided to postpone the remainder of her testimony to permit the
11 parties to brief the issues in writing.

12 I am putting out an order this morning that will set that
13 out to the parties exactly what I'm looking for and the way forward
14 with this witness.

15 Because the remaining witness for this hearing session,
16 former Special Agent Robert McFadden, is not available today, we're
17 going to hear some oral argument.

18 So I know there was a bit of back-and-forth yesterday on
19 which ones we could handle, but I think this morning we're going to
20 hear AE 874. That's the defense -- Mr. al Hawsawi's motion to remove
21 the death penalty and grant sentencing credit for pretrial
22 punishment. And AE 877, that's Mr. al Hawsawi's motion in limine to
23 exclude overseas business records.

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1 And then thereafter, we're going to have a closed session at
2 some point, probably starting after the lunch hour, to hear closed
3 argument on AE 692. That's the government-elicited opinion from the
4 first Camp VII commander, the issues relating to that.

5 AE 878, which is Mr. al Hawsawi's motion to suppress
6 non-consensually recorded custodial statements; and then AE 874,
7 again, the classified portion of the defense motion to remove the
8 death penalty and grant sentencing credit.

9 All right. Any housekeeping matters to take up before we
10 start with oral argument?

11 Apparently not.

12 All right. Let's start with 874. Again, this is
13 Mr. al Hawsawi's motion to remove the death penalty and grant
14 sentencing credit for pretrial punishment.

15 DC [MR. GLEASON]: Good morning, Your Honor.

16 MJ [Col McCALL]: Good morning, Mr. Gleason.

17 DC [MR. GLEASON]: Your Honor, in early March 2003,
18 CIA Headquarters approved the following torture techniques on
19 Mr. Hawsawi: Attention grasp, facial hold, insult slap, abdominal
20 slap, walling, stress position on knees/body slanted backwards,
21 stress position/forehead on walls supporting bodyweight, cramped
22 confinement, and sleep deprivation in excess of 72 hours. This was
23 in addition to constant white noise and continuous darkness.

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1 The first CIA cable we have from this period that's
2 unclassified states that: Hawsawi has been left the previous 24
3 hours in the seated position in his cell, shackled to the wall.
4 Prior to this session, the guards reported that Hawsawi had defecated
5 and urinated in his diaper. Therefore, prior to the session, he was
6 given a bath, which we know is a euphemism for cold water dousing
7 that was used at that black site.

8 The cable says: He was subsequently taken to the
9 interrogation room for questioning. At the end of questioning,
10 Hawsawi was put in his cell, placed in a standing sleep-deprivation
11 position, nude with his hands shackled above his head. The cell was
12 cooled to 64 degrees Fahrenheit. He was not provided food or sleep.

13 The next cable, unclassified again, from the CIA reports
14 that: Hawsawi has been in the standing sleep-deprivation position
15 for slightly over 24 hours. He was subsequently taken out of the
16 position and interrogated for two more hours.

17 The cable reports that Hawsawi was visibly shaking at the
18 start of the interrogation. But due to his cooperation, he was
19 allowed to be shackled to the wall of his cell in the seated
20 position, a reward over the standing position that he had been for
21 the past 24 hours.

22 The next report indicates that Hawsawi was interrogated for
23 two more hours. The interrogation started with Hawsawi being

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1 subjected to cold-water dousing while being questioned. He was then
2 brought to the interrogation room and slapped, put in the
3 forehead-against-the-wall stress position and put in the
4 kneeling-backwards stress position. He was returned to his cell and
5 again placed in the standing sleep-deprivation position for 24 hours.

6 Following 24 hours of standing sleep deprivation, the next
7 cable reports that Hawsawi underwent 19 continuous hours of
8 interrogation, which he was subject to, again, cold-water dousing.

9 He was described as shaking and being soaked in his own urine.

10 Following this session, he was left in his cell for 24 hours shackled
11 to the wall with one hand free.

12 The post-torture compliance phase psychological evaluation
13 reports that Hawsawi -- this again was conducted by a psychiatrist or
14 psychologist that was assigned to the black site -- reports that
15 Hawsawi was noticeably anxious as manifested by shakiness, and
16 appeared scared. His clothes were stained with his own urine.

17 The psychologist, B7F, described Hawsawi as being very
18 anxious, and he recalls that Hawsawi was the only detainee he ever
19 observed urinate on himself in fear during the psychological
20 evaluation.

21 Following this first torture session, the chief interrogator
22 at Location 2 cabled CIA Headquarters on 12 March, just 11 days after
23 Hawsawi's arrest. And in that cable, he states that: Hawsawi does

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1 not appear to be a person that's a financial mastermind.

2 Based on three extended sessions over the past few days, an
3 assessment was made that Hawsawi's a person who was used on occasion
4 to conduct financial transactions for al Qaeda and to maintain the
5 books.

6 However, it is not believed that Hawsawi had a significant
7 role in al Qaeda. Three other detainees had been questioned about
8 Hawsawi's role in al Qaeda, and all three stated he did not play a
9 major role in finances or anything else.

10 And I'll note that this chief interrogator at Black Site 2
11 resigned in protest following this interrogation session of
12 Mr. Hawsawi.

13 Your Honor, that is a picture of the first 11 days of the
14 past 21-plus years of Mr. Hawsawi's pretrial punishment. Mr. Hawsawi
15 was subsequently tortured in a similar fashion at Black Site 2,
16 again, in April and May of 2003, just so that the new chief
17 interrogator that was brought in to replace the one that resigned was
18 assured that Mr. Hawsawi didn't play a significant role in al Qaeda
19 or anything else.

20 Your Honor, during the past 21-plus years, Mr. Hawsawi has
21 not only endured that torture, but he's also endured being anally
22 raped by medical providers leading to permanent anal injuries and
23 constant pain and suffering that plagues him to the current time.

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1 Every time he has a bowel movement, he goes through retraumatization
2 of pain and suffering.

3 Mr. Hawsawi, during this time, has been infected with the
4 hepatitis C virus, and he was not treated for 11 years, causing
5 permanent liver damage. He was subjected to prolonged sleep
6 deprivation which has permanently disrupted his ability to sleep
7 normally. Even to this day he can't sleep more than four hours per
8 night.

9 At Black Site 2 he was repeatedly beaten, starved, and
10 chained to the wall in what has been described as a dungeon for a
11 period of nine months. He was subjected to forced disappearance,
12 which is a crime under international law. He was also subjected to
13 total solitary confinement and total incommunicado detention for
14 three and a half years.

15 He has been -- he was subject to near-solitary confinement
16 for the subsequent 15 years while he was at the other black sites in
17 Camp VII -- actually at Camp VII. I'm sorry. 15 years at Camp VII.

18 He was denied access to legal counsel for five years, and he
19 has had the threat of the death penalty and the anxieties that brings
20 hanging over his head for the past 16 years.

21 He has been subjected to not only torture, but cruel,
22 inhuman, and degrading treatment on a scale that far exceeds any
23 published case in U.S. law.

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1 Your Honor, as the U.S. Supreme Court stated 88 years ago in
2 Brown v. Mississippi, which was -- I don't know if you recall the
3 case, but it was a number of young black men that were accused of
4 committing a murder and they were tortured by the local police
5 officers until they confessed. Following their confession, they had
6 a trial and they were all sentenced to death.

7 The issue of torture came up during the trial and the judge
8 dismissed it. The judge recognized the torture occurred, but he
9 still upheld the conviction.

10 What the Supreme Court said in that case is the trial judge
11 has a duty to protect the constitutional rights of a person on trial
12 for his life, a duty which rises above the local rules of procedure
13 and requires a trial judge to refuse to sanction such violations when
14 they occur and to apply a corrective remedy when he's aware that they
15 did occur. That's Brown, 297 U.S. 278 at 287, Supreme Court case
16 from 1936.

17 So, Your Honor, this is what the defense requests in AE 874.
18 We request that you provide a corrective remedy for the 21-plus years
19 that Mr. Hawsawi has been subjected to pretrial punishment.

20 And we submit that the remedy should include a dismissal of
21 this case with prejudice. But if the commission finds that to be too
22 extreme, then the remedy should be the dismissal of the death penalty
23 and life in prison as possible punishments and a cap of no additional

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1 punishment that the members can award.

2 Your Honor, I've broken the argument into three questions
3 which the commission will need to address in its motion -- or in its
4 order. I'm sorry.

5 The first question is whether the commission has legal
6 authority to grant a remedy for pretrial punishment.

7 The second question is whether Mr. Hawsawi was subjected to
8 pretrial punishment based on the facts of this case.

9 And the final question is what is a meaningful remedy based
10 on the facts of Mr. Hawsawi's case.

11 To answer the first question, the commission does have legal
12 authority to grant a remedy for pretrial punishment. The law on
13 pretrial punishment is straightforward. It's a bedrock principle of
14 the criminal justice system that a person accused of a crime retains
15 the presumption of innocence and may not be punished before trial.

16 The seminal U.S. Supreme Court case on point is Bell v.
17 Wolfish, 441 U.S. 520, 1979 case, which held under the due-process
18 clause of the Fifth Amendment a pretrial punishment cannot occur.
19 What Bell further held is that pretrial conditions of confinement
20 must be rationally related to a legitimate penological interest and
21 that conditions may not be excessively harsh in relation to that
22 interest.

23 The court went on to hold that if a restriction or condition

1 is not reasonably related to a legitimate goal, then the court must
2 assume that it's arbitrary and purposeless and that the purpose of
3 the government's action is to punish which may not constitutionally
4 be inflicted upon detainees because they are detainees. That's Bell
5 at 539.

6 In explaining the point, this specific point, Bell's
7 famously quoted as saying, quote: Loading a detainee with chains and
8 shackles and throwing them in a dungeon may ensure his presence at
9 trial and preserve the security at the institution. But it would be
10 difficult to conceive of a situation or conditions so harsh employed
11 to achieve objectives that could be accomplished in so many
12 alternative and less-harsh methods would not support a conclusion
13 that the purpose for which they were imposed was punishment, unquote.
14 That's Bell at 539, note 20.

15 And as you know from hearing testimony in this case, sir,
16 that's exactly the conditions of confinement that Mr. Hawsawi
17 endured, not only at the black sites, but also at Camp VII. There
18 was definitely less strict ways to ensure his presence at trial and
19 security institution, as we will discuss.

20 So in addition to the Bell decision, the military justice
21 system also has its own rules against pretrial punishment. The
22 military justice system has had a protection against pretrial
23 punishment that far predates Bell. Ever since the 1950s, Congress

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1 passed Article 13 of the UCMJ which prohibits pretrial punishment.
2 And what Article 13 says is that: No person, while being held for
3 trial, may be subjected to punishment or penalty other than arrest or
4 confinement upon the charges pending against him. Nor shall the
5 arrest or confinement imposed upon him be any more rigorous than the
6 circumstances required to ensure his presence.

7 The wording of Article 13 says it applies to all persons.
8 The wording does not limit it to just servicemembers.

9 The text, like Bell, prohibits two things. It prohibits the
10 imposition of punishment before trial, and it also prohibits
11 conditions of pretrial confinement that are more rigorous than
12 necessary to ensure the accused's presence.

13 As Your Honor is aware, the primary remedy for an Article 13
14 violation is the award of confinement credit, though a military judge
15 has the discretion to dismiss the case with prejudice in severe
16 cases.

17 The key cases in the military justice system are:
18 United States v. Zarbatany, 70 M.J. 169, a CAAF case from 2011;
19 United States versus Lerner, 24 CMA, 197, Court of Military Appeals
20 case from 1976; and United States v. Suzuki, 14 M.J. 491, Court of
21 Military Appeals case from 1983.

22 In addition to Article 13, the President of the
23 United States has also promulgated rules prohibiting pretrial

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1 punishment, which are found in the Manual for Courts-Martial at Rule
2 for Courts-Martial 304 and 305.

3 304(f) prohibits pretrial punishment and requires
4 confinement conditions follow the regulations by the secretary
5 concerned.

6 305(f) requires the prompt appointment of defense counsel
7 once someone is placed in pretrial confinement.

8 And 305(k) provides a remedy for pretrial punishment of at
9 least day-for-day credit in addition to the day-for-day Allen credit
10 that a servicemember receives for pretrial confinement.

11 The rule goes on to state that the military judge may award
12 additional credit for confinement that involves unusually harsh
13 conditions, leaving room for an additional credit under Article 13 of
14 the UCMJ.

15 And, Your Honor, we know from the case of Hamdan v. Rumsfeld
16 that the court-martial rules must apply in a military commission
17 unless their uniformity proves to be impractical. And there's no
18 reason that pretrial punishment is impractical in the military
19 commission. That holding from the Supreme Court is at 548 U.S. 557,
20 end cite 620, a case from 2006.

21 When Congress passed the Military Commissions Act of 2006
22 and 2009, it didn't address Article 13 of the UCMJ or Rules for
23 Courts-Martial 304 and 305. It did exclude other articles from the

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1 UCMJ and other rules for military -- or Rules for Courts-Martial, but
2 those two it did not address.

3 And the intent of Congress in the Military Commissions Act
4 is clear that it did not want pretrial punishment to occur. The
5 Military Commissions Act not only prohibits torture but also cruel
6 and inhuman treatment. That's found at 10 United States Code,
7 Section 949s. The Military Commissions Act excludes statements that
8 were obtained by torture. That's at 10 United States Code,
9 Section 948r.

10 The Military Commissions Act criminalizes the act of
11 torturing a detainee. That's at 10 United States Code 950t,
12 subparagraph (11).

13 The Military Commissions Act also criminalizes the act of
14 subjecting a detainee to cruel and inhuman treatment. That's at 10
15 United States Code 950t, subparagraph (12). And at 10 United States
16 Code 950t, subparagraph (11), it says: It is a war crime to inflict
17 severe physical or mental pain or suffering upon a detainee for the
18 purpose of obtaining information, or for obtaining of a confession,
19 or for punishment, or for intimidation, or for coercion, or any
20 reason based on discrimination of any kind. Those are all war crimes
21 according to the Military Commissions Act.

22 Finally, it's the official policy of the U.S. Department of
23 Defense that all law of war detainees will be treated humanely and in

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1 accordance with U.S. law, the law of war, and applicable U.S. policy
2 without regard to a detainee's legal status.

3 The DoD instruction goes on to state that: Criminal
4 punishment of a detainee for any offense, including serious
5 violations of the law of war, will only be conducted in accordance
6 with the previous judgment announced by a regularly constituted court
7 that affords all required judicial guarantees. That's a DoD
8 directive 2310.01-e.

9 The DoD directive states that inhumane treatment of law of
10 war detainees is never justified and it expressly prohibits cruel,
11 inhuman, or degrading treatment, or outrages upon personal dignity of
12 law of war detainees.

13 So thus under military law, the Military Commissions Act,
14 and DoD policy, the prohibition against torture and ill treatment of
15 pretrial law of war detainees is absolute without exception.

16 The Geneva Conventions also expressly prohibit collective
17 punishment as a great breach when it occurs. Prohibits collective
18 punishment, sanctions, harassment, or administrative action taken
19 against a group of detainees in retaliation for an act committed by
20 an individual who is considered part of the group.

21 So under that -- under the Geneva Convention, the government
22 cannot label a select group of detainees as high-value detainees and
23 then subject them to collective punishment because of the alleged

1 crimes of one of the members of that group. To do so is a grave
2 breach of the Geneva Convention.

3 Your Honor, the issue of a military commission's authority
4 to award a remedy for pretrial punishment has come up before in
5 this -- not in this specific military commission but other military
6 commissions. In September 2008, the military commission in the case
7 of United States v. Jawad found that there was no doubt that a
8 military commission judge may dismiss charges because of abusive
9 treatment. And the judge stated that other remedies are also
10 available to adequately address pretrial punishment, included, but
11 not limited to, sentence credit towards any approved period of
12 confinement.

13 Judge Henley's opinion is found at United States v. Jawad,
14 2008 US CMCR Lexis One. I'll note that the military commission's
15 charges against Mr. Jawad were subsequently dismissed before a remedy
16 was issued and he has been released from confinement.

17 In June 2020, the military judge presiding over the case of
18 United States v. Khan found that the military commission judge has a
19 legal authority to grant administrative sentencing credit as a remedy
20 for pretrial punishment.

21 Judge Watkins, who was the judge in that case, issued a
22 43-page ruling, which obviously was a lot of work by both himself and
23 his judicial staff to put that together. And what Judge Watkins says

1 in his ruling is he rejected the prosecution's argument that Rule for
2 Military Commission 1001(g) prevents the award of pretrial
3 confinement credit.

4 Judge Watkins also rejected the government's argument that
5 co-occurring law of war detention prevents the commission from
6 awarding pretrial punishment credit.

7 What Judge Watkins concluded is that the lawful basis for
8 law of war detention does not relieve the government of its
9 obligation to treat detainees humanely. And he found that the
10 absence of Article 13 UCMJ for the Military Commissions Act was not
11 dispositive. He stated that Article 13 merely codifies the
12 longstanding practice of awarding judicial remedies for violations of
13 the presumption of innocence.

14 Judge Watkins ruled that a military commissions judge not
15 only has the inherent authority to award pretrial confinement credit,
16 but also a legal duty to do so to ensure the fundamental fairness and
17 the appearance of fairness of the military commissions.

18 Judge Watkins also found that the law does not prevent an
19 accused from presenting evidence of pretrial punishment to the judge
20 to grant a remedy and also presenting the same evidence to a panel of
21 members during mitigation. Judge Watkins cited the case of United
22 States v. Carter, 74 M.J. 204, a CAAF case from 2015, which made that
23 distinction.

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1 I'll note that since Mr. Khan had already pled guilty, Judge
2 Watkins originally envisioned considering pretrial punishment
3 evidence presented during sentencing and then crafting a remedy at
4 that point. He later changed his mind and decided to hold an
5 interlocutory hearing to receive testimony from CIA witnesses about
6 the torture that Mr. Khan endured. And his plan was to issue a
7 remedy before the sentencing hearing.

8 This hearing, interlocutory hearing, never occurred because
9 following Judge Watkins' ruling, the government entered into a new
10 pretrial agreement with Mr. Khan that allowed for his release shortly
11 after the sentencing hearing. Therefore, in return for that,
12 Mr. Khan's defense team withdrew the pretrial punishment motion.

13 MJ [Col McCALL]: Well, let me stop you there. Can you
14 address the issues that the government raises as far as ripeness,
15 then? Is there a reason that this should be addressed now versus at
16 a later point during the commission?

17 DC [MR. GLEASON]: I think there is, sir. And if you look at
18 the case of United States v. Carter, what Carter says is the judge
19 has an obligation to issue a remedy for pretrial punishment and what
20 they instruct is that the remedy must be issued before sentencing.
21 That way the members will know what the remedy was that was issued by
22 the judge and they aren't left to guess.

23 If the judge waits until after the members reach a verdict,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 then the members are going to be told during sentencing, I'm assuming
2 from the government, that, hey, members, you don't have to -- you can
3 give him a high sentence because the judge is going to issue a remedy
4 after this, or has the option of issuing a remedy.

5 MJ [Col McCALL]: Well, no, I guess the question, then, is:
6 Then is there a reason that the decision wouldn't be made after a
7 possible conviction, you know, versus making a decision now at the
8 pretrial stage?

9 DC [MR. GLEASON]: Yes, sir. Because, again, you -- the
10 decision about the remedy needs to be issued before the members are
11 instructed. I think it would be error for them -- for a remedy not
12 to be issued and them not to be instructed about the fact that the
13 judge has already issued a remedy. And the distinction is that when
14 they rule on a sentence ----

15 MJ [Col McCALL]: But you see what I'm -- maybe we're speaking
16 past each other.

17 DC [MR. GLEASON]: Yes, sir.

18 MJ [Col McCALL]: I guess the question would be: Would it be
19 after a -- if the accused are convicted of any of the charges, at
20 that point the military commission would decide whether or not
21 there's pretrial confinement credit and could at that point give the
22 limitations and incorporate that into the instructions that would be
23 given for sentencing instructions? I mean, there may not be

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sentencing at this stage, is my point.

2 DC [MR. GLEASON]: And what I'd point out, sir, is I believe
3 that was Judge Watkins' original intent and what he looked at when he
4 looked at the witnesses that were going to be called for the hearing.
5 It's going to be also -- mostly CIA witnesses, and what the
6 government objected to was that they were not relevant for
7 sentencing, but they were relevant -- what the judge found is they
8 weren't relevant for mitigation phase, but they were relevant for
9 this pretrial punishment decision that he had to make.

10 That's why he bifurcated the proceedings. He wanted to have
11 the hearing -- interlocutory hearing beforehand to complete the
12 factual record with witness testimony.

13 MJ [Col McCALL]: Sure. And what it sounds like, though, is
14 it sounds like that Judge Watkins made that decision, or was going to
15 hold that hearing after the guilty plea -- right? -- but before
16 sentencing?

17 DC [MR. GLEASON]: The guilty plea had already occurred, sir.

18 MJ [Col McCALL]: That's what I'm saying.

19 DC [MR. GLEASON]: Yeah. Mr. Khan had pled guilty in 2012.
20 Judge Watkins' opinion was in 2020 or 2021.

21 MJ [Col McCALL]: Right.

22 DC [MR. GLEASON]: So it was well after the fact that Judge
23 Watkins issued his ruling.

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1 MJ [Col McCALL]: So my question is: Why wouldn't I follow
2 Judge Watkins and do something like that if I was inclined to rule in
3 the defense's favor?

4 DC [MR. GLEASON]: I will make three points on that, sir.

5 MJ [Col McCALL]: Perfect.

6 DC [MR. GLEASON]: First is that Mr. Khan had already pled
7 guilty. Mr. Hawsawi is presumed innocent. He has not pled guilty
8 and he is still being subjected to these conditions of pretrial
9 punishment.

10 Next, Your Honor, Mr. Khan's case was noncapital.
11 Mr. Hawsawi's is a capital case where a heightened due process
12 applies.

13 And the third point, sir, is that Mr. Hawsawi has been
14 pending trial since 2008 and there is no trial date in sight. This
15 case has been dragging on indefinitely, and it seems like it's going
16 to continue to do so. All the while, Mr. Hawsawi is still being
17 subjected to pretrial punishment.

18 So I believe that the commission has an obligation to issue
19 a remedy at this point to not only remedy the past abuses, but also
20 to send a message to the government that these abuses cannot
21 continue, especially when it's going to be several more years before
22 this case goes to trial.

23 So I don't know if that answers your question, sir.

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1 MJ [Col McCALL]: It does. It does.

2 DC [MR. GLEASON]: Sir, that is -- concludes the discussion
3 about the first point about the commission's legal authority to issue
4 a remedy.

5 Do you have any questions about the law, sir, before I move
6 on?

7 MJ [Col McCALL]: No.

8 DC [MR. GLEASON]: So the second key question that the
9 commission has to address in its order is whether Mr. Hawsawi was
10 subjected to pretrial punishment based on the facts of his case. And
11 as I already stated, he clearly was and he continues to be, all the
12 way from 1 March 2003 when he was arrested up until the present time.

13 And I'll note that, unlike some other detainees that were
14 captured on the battlefield and the government had no idea who they
15 were and they needed to interrogate them and put together a case,
16 that's not the case with Mr. Hawsawi. The government knew exactly
17 who he was beforehand.

18 We've heard testimony that following the 9/11 attacks, he
19 was quickly identified as a suspect in the attacks and he appeared as
20 a named co-conspirator in their indictment of Zacarias Moussaoui in
21 December 2001. The government admits as much in -- in their response
22 to the Allen credit motion, 876A (Gov) at III. They said within the
23 first few weeks following the 9/11 attacks, Mr. Hawsawi was

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1 identified by the FBI by his true name as a suspect in the attacks.

2 We heard testimony that the FBI and the U.S.
3 Department of Justice had prepared an arrest warrant and drafted a
4 federal indictment for Mr. Hawsawi prior to his capture. And
5 Mr. Hawsawi was not captured on the battlefield. He was captured in
6 the fourth largest city in Pakistan and placed under confinement at
7 the direction of the President of the United States and the U.S.
8 Department of Justice. That is conceded by the government 874A (Gov)
9 at II.

10 So by the time Mr. Hawsawi was arrested on 1 March 2003, the
11 government knew exactly who he was and knew they were going to
12 prosecute him for the 9/11 attacks.

13 I'll submit that the government's torture and treatment of
14 Mr. Hawsawi since then has had nothing to do with him being a law of
15 war detainee and everything to do with him being suspected of being
16 involved in the 9/11 attacks, which is the current charges -- capital
17 charges he faces in this commission.

18 The government also makes an argument in its response that
19 Mr. Hawsawi's torture and cruel treatment was necessary to prevent
20 future attacks. Again, that argument is completely baseless when it
21 applies to Mr. Hawsawi's case.

22 We know from the cables sent by the chief of CIA
23 interrogations at the Black Site Number 2. Within 11 days of his

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1 arrest, the CIA had concluded that Mr. Hawsawi had no intelligence
2 value or information about future attacks.

3 We know that Mr. Hawsawi's conditions of confinement since
4 arrest have not been rationally related to a legitimate penological
5 interest and they have been excessively harsh in relation to keeping
6 him off the battlefield, which is the intent that the government
7 cites in -- for pretrial confinement.

8 Safety and security concerns have not justified these harsh
9 conditions of confinement. The facts show that Mr. Hawsawi's
10 detention history show that he's been quiet and compliant and he has
11 followed the rules and not caused problems.

12 He is not a detainee who has required enhanced security
13 measures at the confinement facilities because he's never been a
14 threat to himself or others.

15 I'll also note that most of the law of war detainees,
16 several hundred, in fact, that have been held at Guantanamo since
17 2002, were held in a communal living environment with access to other
18 detainees and regular contact with their family members. The
19 conditions of confinement in those communal living camps have
20 prevented these detainees from returning to the battlefield and
21 they've been sufficient to protect the security of the institution.
22 So there's no reason why harsher confinement conditions have been
23 applied to Mr. Hawsawi.

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1 Again, the only difference between Mr. Hawsawi and the other
2 law of war detainees at Guantanamo in the communal living camps is
3 that Mr. Hawsawi was identified as a suspect in the 9/11 attacks and
4 he's been identified for prosecution in this commission.

5 These allegations alone are textbook pretrial punishment
6 that removes the presumption of innocence from Mr. Hawsawi. And the
7 government has said essentially that we can treat him harshly because
8 of what he's accused of.

9 So I want to just briefly go through Mr. Hawsawi's
10 confinement conditions. The ones at Camp VII I'll have to go through
11 in a closed session because the government has placed a lot of
12 information about those conditions under the classified information
13 privilege or under a -- under seal under 506.

14 So what we know about Mr. Hawsawi's CIA detention, again, is
15 limited based on the discovery we received in FOIA releases, but he
16 was arrested on 1 March 2003, and he was held until November 2003 at
17 Black Site Number 2, which the Senate report also refers to as
18 COBALT.

19 He was held there in incommunicado detention. For nine
20 months he was in a pitch-black cell with no bed -- no bed and no
21 toilet. He was shackled to the floor, the wall, or the ceiling of
22 his cell depending on the day and the mood of the interrogators.

23 He had no natural light, no windows, and he was kept in

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1 total darkness. Loud music was blaring in his cell 24 hours a day,
2 seven days a week, and he was routinely deprived of sleep exceeding
3 48 hours at a time.

4 He was provided no toilet to relieve himself. Instead, he
5 was given a bucket to urinate and defecate into, a bucket that would
6 be changed at irregular intervals, so he was constantly surrounded by
7 the smell of human waste.

8 Black Site Number 2 lacked central heating, and one detainee
9 froze to death shortly before Mr. Hawsawi's arrival.

10 We know from what's been released that upon his arrival,
11 Mr. Hawsawi was subjected to freezing water baths. A CIA eyewitness
12 to this torture described Mr. Hawsawi's baths as, quote, going on for
13 a long time, unquote. She said the water was very cold, freezing
14 cold. The witnesses said that Mr. Hawsawi was held down naked on a
15 tarp on the floor with the tarp pulled up around him to form a
16 makeshift bathtub.

17 Mr. Hawsawi was hooded, naked, and shackled at his hands and
18 feet during the process. One set of guards held his arms over his
19 head while the other held his feet. He would thrash and scream as
20 the guards held his arms and legs down, and interrogators poured
21 freezing cold water from metal buckets onto him for 20 to 30 minutes.

22 QY7, who witnessed Mr. Hawsawi undergoing a bath, said he or
23 she threw up after seeing what was done, it was so disgusting.

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1 At Black Site 2, Mr. Hawsawi was routinely deprived of food
2 and water, and in nine months he lost 28 percent of his bodyweight
3 from starvation.

4 Mr. Hawsawi was subjected to prolonged shackling in the
5 standing position, which we heard testimony from Dr. Morgan that such
6 a position causes fluid to accumulate in swollen tissues of the legs
7 and feet. The CIA unclassified medical report said that medical
8 personnel would periodically measure the circumference of the
9 swelling of the legs to determine whether the torture could continue.
10 Medical personnel would only stop if the swelling became life
11 threatening.

12 The reports indicated that Mr. Hawsawi was also subjected to
13 forced stripping, forced shaving, and stiff-brush baths.

14 Dr. Mitchell in his book, *Enhanced Interrogations*, describes
15 this stiff-brush bath as a stiff bristle brush being used to scrub
16 the detainee's, quote, ass and balls and then his mouth, unquote.
17 That's Dr. Mitchell's book, pages 115, 120, and 122.

18 Rectal examinations with excessive force were conducted on
19 Mr. Hawsawi at Black Site 2, resulting in chronic hemorrhoids, anal
20 fissure, and rectal prolapse, according to the Senate report.

21 When Mr. Hawsawi was transferred out of Black Site Number 2
22 to his next stop, which was Guantanamo, it was reported that he
23 jumped a yard in the air when the attending physician assistant gave

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1 him a rectal exam with excessive force using a rectal probe without
2 lubricant, causing a rupture of his hemorrhoids.

3 Mr. Hawsawi, according to the medical reports, upon his
4 arrival at Black Site 2 in March '03, was described as a healthy
5 young male. When he was transferred nine months later in
6 November 2003, he had been infected with the hepatitis C virus, and
7 the medical report said he suffers from insomnia, anxiety,
8 nightmares, and he lived in constant fear of being physically beaten.

9 The reporting that we have from CIA personnel describes
10 Black Site 2. The chief of CIA interrogations described Black Site 2
11 as a dungeon where its intent was to deprive detainees of basic human
12 needs, such as food, water and light.

13 A senior government agent stated that Black Site 2 was
14 itself an enhanced interrogation technique. A seasoned CIA official
15 said that: Location Number 2 was a nightmare. It was down there by
16 Dante's *Circle of Hell*. It was the most horrific thing I've ever
17 seen in my life.

18 Another CIA official said: Black Site 2 looked like an old
19 Nazi concentration camp. It was surreal.

20 A senior CIA interrogator who saw Black Site 2 said the
21 conditions of confinement served no legitimate purpose, which is key
22 for your analysis. She said she got a lot more of these people out
23 of talking to them like humans and said the prison was a disgrace.

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1 She said she felt ashamed for participating and said it was a
2 nightmare.

3 In November 2003, as I mentioned, Mr. Hawsawi was
4 transferred from Black Site 2 to Guantanamo and he was placed in
5 Black Site Number 6, which we now know as Echo II, which you actually
6 inspected a couple weeks ago, sir.

7 You'll know from your inspection that Echo II is just yards
8 away from the communal military-run detention camp that Mr. Hawsawi
9 could have been placed in in November '03, and it's just a few miles
10 away from the military commission courtroom, which Mr. Hawsawi could
11 have been brought to and arraigned back in 2003, but he wasn't.

12 Instead, he was held for five months at Guantanamo in
13 solitary confinement and incommunicado detention in a small cell that
14 was approximately 40 square feet. The cell had no windows and he had
15 no human contact other than his interrogators.

16 I know during the tour that you spent a lot of time looking
17 at the cell at Echo II and you saw how small that was. That was
18 Mr. Hawsawi's universe for a period of five months, sir.

19 The lights in his cell were kept on 24 hours a day, and
20 Mr. Hawsawi was prohibited from covering his eyes to sleep. And you
21 can imagine how much having lights on 24 hours a day would disrupt
22 his normal sleep cycle.

23 Notably, the reports from his time at Echo II state that

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1 Mr. Hawsawi presented no safety or security threats, and he was
2 considered very respectful and participatory when questioned. So
3 there's no legitimate safety or security concerns justifying these
4 conditions.

5 Medical reports from his time at Echo II state that:
6 Mr. Hawsawi suffers from abdominal pain, suffers from diarrhea, which
7 he's had for the past five months. He also suffers from bleeding,
8 painful hemorrhoids, left ear pain, headache, and dizzy spells.

9 In December 2003, it was reported that his blood work tested
10 positive for the hepatitis C virus, and detention medical officials
11 or CIA medical officials made a decision not to treat the virus or to
12 notify Mr. Hawsawi.

13 As you know, Mr. Hawsawi was removed from Echo II in
14 April 2004, and the reason for his removal was to avoid him being
15 assigned an attorney based on the pending Supreme Court decision.

16 Mr. Hawsawi has subsequently moved to Black Site Number 5,
17 where he again was kept in total isolation except for contact with
18 his interrogators. The lights in his cell at Location 5 were kept on
19 24 hours a day and he was prohibited from covering his eyes to sleep.

20 Medical reports from Location 5 say that Mr. Hawsawi had
21 hemorrhoid pain, left ear pain, joint pain, still diarrhea, still
22 dizziness, lightheadedness, migraine headaches, vertigo, sadness,
23 sleep disturbance, and excess worry.

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1 In 2005, Mr. Hawsawi was transferred to Black Site Number 8,
2 where he remained until early 2006. Again, at Black Site 8, he was
3 kept in total incommunicado detention and in total isolation. He had
4 no contact with anyone other than his interrogators. He had no
5 access to sunlight and the lights in his cell were kept on 24 hours a
6 day.

7 The reporting from Location Number 8 states that:
8 Mr. Hawsawi has never been a behavioral concern and he behaves
9 appropriately and according to facility detention rules.

10 Medical reports from this period state that: He suffers
11 from large external hemorrhoids, a rectal prolapse, anal fissures,
12 rectal tears, kidney stones, dizziness, headaches, depression, joint
13 pain, and a broken molar and tooth pain.

14 Medical reports state that: Mr. Hawsawi manually reinserts
15 his rectal prolapse after each bowel movement and that surgery is
16 recommended to correct it.

17 The unclassified reporting says that the country that was
18 hosting Black Site 8 refused to allow Mr. Hawsawi to receive medical
19 treatment for these conditions and Mr. Hawsawi was subsequently
20 transferred because of that.

21 A psychological evaluation conducted at Location 8 states
22 that: Mr. Hawsawi has no concept of the time of day, morning or
23 night, and he has no concept of the year. He could not identify if

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1 it was 2005 or 2006.

2 The psychological doctor doing the evaluation said his
3 symptomology is consistent with major depressive disorder, and the
4 doctor recommended that he be allowed interaction with other
5 detainees and that the guard force speak to him and that the lights
6 in his cell be dim so that he can sleep. All three of those
7 recommendations were not granted by the CIA.

8 In early 2006, Mr. Hawsawi was transferred to Black Site
9 Location Number 9. Again, at Location 9 he was kept in total
10 isolation, solitary confinement. His only human contact was with his
11 interrogators. He had no access to sunlight and the lights in his
12 cell were kept on 24 hours a day, but the improvement at Location 9
13 was that they dimmed the lights from 2200 to 0800 in order to try to
14 help his sleep pattern.

15 Medical records from this time state that: Mr. Hawsawi
16 continues to have pain from his hemorrhoids. He suffers headaches
17 and he has depression.

18 The psychological doctor doing the evaluation recommended
19 that he be considered for social pairing and indicates that without
20 such pairing, his symptoms of depression are likely to continue to
21 worsen.

22 The doctor noted that Mr. Hawsawi has a symptomatic rectal
23 prolapse and requires surgery. The doctor stressed that: The

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1 increasing discomfort he's experienced, coupled with the risk of
2 infection, call for a surgical solution as soon as possible.

3 The doctor recommended that: In addition to the surgery,
4 Mr. Hawsawi has chronic hepatitis C and requires a liver biopsy to
5 guide treatment decisions.

6 We know from the records that sometime in mid-2006,
7 Mr. Hawsawi was transferred to a third country for surgery. We don't
8 know the name of the country or the location. We did receive some
9 classified medical reports that were written from the surgeon.

10 The surgeon revealed that Mr. Hawsawi, upon examination, has
11 chronic liver disease from the hepatitis C virus. He has kidney
12 disease. He has gravel in both kidneys. He has third-degree
13 hemorrhoids, which are hemorrhoids that bulge from the anus during
14 bowel movements, and he has extensive circumferential hemorrhoids.

15 While the surgeon attempted to repair Mr. Hawsawi's anus, he
16 told the captors that Mr. Hawsawi -- he recommended that
17 Mr. Hawsawi's bowel movements be normalized for several weeks to
18 prevent the development of a permanent anal stricture.

19 What we know, though, is instead of being allowed to
20 recuperate from that surgery, Mr. Hawsawi was transferred immediately
21 afterwards and he subsequently developed a permanent anal stricture,
22 which is tightness of the anal muscles that cause him permanent pain
23 and suffering whenever he has a bowel movement.

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1 Mr. Hawsawi was transferred back to Black Site 9 following
2 the surgery. And the medical reports from mid-2006 up until his
3 transfer to Guantanamo in September '06, state that he reports very
4 painful bowel movements from the anal stricture.

5 By August 20th, 2006, it's reported that he's still plagued
6 with hemorrhoids, accompanied by rectal bleeding and physical
7 discomfort.

8 The psychological report that I'm assuming was done prior to
9 his transfer to Guantanamo in 2006, reports that while Mr. Hawsawi's
10 consistently denied feeling depressed, he shows signs consistent with
11 it, notably social withdrawal and lack of purposeful activity. The
12 report goes on to state that: Mr. Hawsawi has not been a behavioral
13 problem and interacts in a quiet and polite manner.

14 During his initial intake medical screen when he arrived at
15 Camp VII, the doctor doing the screening reported that Mr. Hawsawi
16 complains of problems sleeping, pain from his surgery site, and blood
17 in his stool.

18 When he arrived at Camp VII, Mr. Hawsawi was kept in total
19 solitary confinement. About a month into his transfer, he was
20 allowed one hour per day to speak to another detainee with no visual
21 contact -- or no physical contact and visual contact. He was not
22 allowed to see or view news material or have access of any sort to
23 the outside world.

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1 While he was allowed to meet with the ICRC and send one
2 letter and one postcard to his family, that letter and postcard were
3 held up in classification review for a number of months.

4 At Camp VII, the lights in Mr. Hawsawi's cell were brightly
5 illuminated 24 hours a day and he was not allowed to cover his eyes
6 to sleep. The guards would actually wake him up whenever he tried to
7 cover his eyes.

8 All personal items that he had accumulated over the last
9 three and a half years in CIA detention were taken from him when he
10 arrived at Camp VII and never returned, to include his eyeglasses.
11 At Camp VII he was shackled and subjected to sensory deprivation
12 anytime he left his cell, and his cell was turned upside down by the
13 guards whenever he left.

14 Medical reports from September and October '06 state that
15 Mr. Hawsawi's sleep is, quote, not good, unquote. And it notes that
16 the guards wake him up whenever he covers his eyes in an attempt to
17 sleep. He was subsequently diagnosed with a sleep disorder, pain,
18 hemorrhoids, and weight loss. His rectal pain was recorded at a
19 level of 8 out of 10.

20 Now, Judge, I'll go into more details during the closed
21 session about Camp VII, but I did want to point out a couple of
22 reports that were publicly released.

23 The first is the Walsh Report from February 2009, and I'm

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1 assuming you're familiar with the Walsh Report. What the Walsh
2 Report noted is that the conditions of confinement at Camp VII were
3 harsher from those of other detainees at Guantanamo and noted that
4 only Camp VII detainees are limited to a single recreation partner
5 while other detainees were held in communal living where they could
6 interact with all other detainees.

7 It noted that only Camp VII detainees were prohibited from
8 engaging in communal prayer, where other law of war detainees were
9 allowed communal prayer. And it noted that Camp VII was the only
10 camp where detainees were prevented from speaking with other
11 detainees in other cells.

12 It noted that Camp VII detainees were the only detainees
13 denied telephone calls with their family members. Other law of war
14 detainees at Guantanamo had regular contact with their family
15 members. And it noted that Camp VII detainees were the only
16 detainees that were excluded from the literacy, amenities, and arts
17 program.

18 Finally, it noted that only Camp VII detainees had their
19 letters and postcards sent through the ICRC delayed.

20 The Walsh Report strongly recommended giving the detainees
21 in Camp VII the opportunity for group prayer, similar to other camps.
22 It recommended expanding recreation options to allow for greater
23 communal recreation opportunities. And it recommended increasing

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1 detainee-to-detainee contact so that detainees can not only
2 communicate with each other in other cells, but that they could
3 engage in communal activities.

4 Following the release of his report, Admiral Walsh, who was
5 the vice chief of the Navy at the time, actually conducted a press
6 conference at the Pentagon which included the full transcript of
7 relevant portions in our motion, sir.

8 But what he shared during that press conference is that the
9 detainee mental welfare at Camp VII was a real concern and that
10 prolonging the current conditions of confinement back -- this was in
11 February 2009 -- would fall below Geneva Convention standards between
12 six weeks and six months. He said the conditions of confinement at
13 Camp VII were comparable to a supermax facility, and he recommended
14 changing the conditions as soon as possible.

15 What I'll represent in this open session is -- we can go
16 more in the closed session -- is that these supermax conditions of
17 confinement didn't continue for six weeks or six months, they
18 continued for the next ten years that Mr. Hawsawi was at Camp VII.

19 And we know from Dr. Morgan's testimony last week that
20 isolation stress is one of the most damaging stress to mental health.
21 And you can not only take Dr. Morgan's word for it, but you can take
22 the Supreme Court's word for it.

23 The Supreme Court has held for at least 130 years that

1 isolation stress is a peculiar kind of stress and torture. I'll cite
2 to the 1890 Supreme Court case of In Re Medley where the court
3 discussed that solitary confinement is a punishment of such a severe
4 kind that it is spoken of as a further terror and peculiar mark of
5 infamy. That's at 134 U.S. 160 at 170.

6 I also point out in this open session that in June 2023, the
7 United Nations Special Rapporteur for Human Rights conducted the
8 first-ever independent assessment of the detention facility at
9 Guantanamo. And what she found in her report is that the conditions
10 of confinement constitute ongoing cruel, inhumane, and degrading
11 treatment and they may even rise to the level of torture.

12 What she found is that: Severe mental and physical pain and
13 suffering and the cumulative compounding effects of the identified
14 practices and admissions from the dignity and fundamental rights and
15 freedoms of the detainee population were reasonably foreseeable to
16 cause ongoing torture and -- or ongoing mental issues.

17 She concluded that: The totality of these factors, without
18 a doubt, amounts to ongoing cruel, inhuman, and degrading treatment
19 at the Guantanamo Bay detention facility and may meet the legal
20 threshold for torture.

21 One thing that she cited is the constant stress that the
22 detainees are undergoing up until this day is undue use of
23 restraints, arbitrary and problematic implementation of SOPs,

1 constant rule changes, structural and entrenched physical and mental
2 health care deficiencies, and inadequate access to family.

3 And what we know from what you've seen in court, sir, is
4 that the ever-changing rules continue. That's a constant complaint
5 from the detainees, not only in June 2023 but up until the present
6 time. That's a constant stressor that is ongoing.

7 So, Your Honor, again, I'll go more into the details of
8 Camp VII in the closed session. But it's clear from the evidence
9 that Mr. Hawsawi's conditions of confinement from March 2003 up until
10 the present time are more rigorous than required to ensure his
11 presence at trial, which is the standard.

12 I'll note, too, that lesser -- less cruel conditions are
13 possible at Guantanamo. We see that not only in the law of war camp
14 that has communal detention, but we saw that in the case of Majid
15 Khan. Majid Khan, like Mr. Hawsawi, was designated as a high-value
16 detainee and he was originally kept at Camp VII. But Majid Khan's
17 conditions of confinement improved significantly in 2012. And they
18 improved not because he was less of a danger or a threat, but because
19 he signed an agreement to cooperate with the prosecution.

20 I'll note from a detention and security standpoint, based on
21 the discovery we have, Majid Khan was clearly a greater security risk
22 than Mr. Hawsawi. He was also charged with more egregious overt acts
23 than Mr. Hawsawi was.

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1 Majid Khan had been charged with conspiring with
2 Usama bin Laden, Khalid Shaikh Mohammad, Hambali, and other members
3 of al Qaeda to commit murder, terrorism, and spying.

4 He had hand carried \$50,000 in cash to Hambali to be used
5 for the car bombing attack on the Marriott Hotel in Indonesia, which
6 resulted in the death of 11 and the injury of 81.

7 Majid Khan had also been plotting with al Qaeda to conduct
8 attacks within the United States, and he conducted targeting
9 observation of possible targets in the U.S.

10 Finally, Majid Khan also attempted to assassinate the
11 President of Pakistan by serving as a suicide bomber. Majid Khan had
12 recorded a martyr video and strapped on a suicide vest, but he was
13 unable to carry out the suicide operation because the President
14 didn't show up at the -- the location.

15 I'll just -- I point that out, sir, to contrast it with the
16 criminal -- the criminal actions of Majid Khan with the alleged
17 crimes of Mr. Hawsawi, which if you look at the overt acts in the
18 charge sheet, Mr. Hawsawi was alleged to have run administrative
19 errands while in the UAE that could have been conducted by anybody.

20 Also in contrast with Majid Khan, who was a noncompliant
21 detainee, Mr. Hawsawi has been one of the most compliant detainees
22 throughout his detention. So there's simply no legitimate
23 explanation for the government's differentiation and conditions of

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1 confinement for Majid Khan and Mr. Hawsawi.

2 Getting better conditions of confinement because someone
3 agrees to cooperate with the prosecution is actually coercion. It's
4 not a legitimate penological interest.

5 And I'll note, too, Your Honor, that in 874, we've requested
6 an evidentiary hearing to receive testimony from CIA witnesses to
7 Mr. Hawsawi's torture and conditions of confinement. Our witness
8 list is attached at 874 Attachment J.

9 And that was the procedure that Judge Watkins ordered in the
10 case of Majid Khan. He ordered -- found that it was necessary to
11 have an evidentiary hearing, receive testimony from those witnesses
12 about the pretrial punishment.

13 And I'll note again that Majid Khan's was a noncapital case
14 where the defendant had already pled guilty. Mr. Hawsawi's case is a
15 capital case and he is still presumed innocent. So the heightened
16 standard of due process applies fully in this case.

17 Your Honor, I'd like to shift to the last point, which is
18 what is a meaningful remedy in this case. I cited three prior cases
19 in our motion. The first is United States v. Zarbatany, which is an
20 Air Force case decided by the CAAF.

21 And in that case, Airman Zarbatany was confined to a cell
22 except for recreation, showers, and to meet with his wife, attorneys,
23 and members of his unit. So what they found was, like, a

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1 near-solitary confinement regime. And the judge in that case found
2 that the near-solitary confinement regime warranted four-for-one days
3 of credit of pretrial punishment.

4 In United States v. Suzuki the accused was billeted,
5 mingled, and worked with adjudged and sentenced prisoners. The judge
6 in that case found that the pretrial punishment -- that type of
7 pretrial punishment was so severe as to warrant three-for-one
8 pretrial punishment credit.

9 And just to bring in the law of war context, I cited the
10 case of United States v. General Noriega, the former ruler of Panama,
11 who was arrested as a POW as part of Operation Just Cause, and he was
12 held as a POW but he was also prosecuted in federal court.

13 And the judge in that case, a federal judge in Noriega's
14 case, awarded not only Noriega day-for-day pretrial confinement
15 credit, but he also awarded ten years of additional pretrial
16 punishment credit. And that was because General Noriega was isolated
17 from the rest of the inmate population for a period of nine years.

18 This was -- this ten years of credit was awarded even though
19 General Noriega, as the record states, received regular visits from
20 the Education Department for training. He received visits from his
21 family and friends at the prison. He received visits from the ICRC
22 at the prison. And he had access to cable television and exercise
23 equipment for recreation. So I'll submit that Mr. Hawsawi's

1 conditions were far more egregious than General Noriega's, and they
2 continue to be.

3 What the judge in Noriega's case found was that while he had
4 some benefits to offset the isolation, the judge found that,
5 nevertheless, he was largely deprived of the social environment many
6 experts feel is important for mental health. The judge concluded
7 that being segregated from the general population is a more
8 difficult, harder type of confinement, warranting sentencing credit
9 as a remedy. That's found at United States v. Noriega 40 F.Supp. 2d,
10 1378 Southern District of Florida 1999.

11 Your Honor, the pretrial punishment that Mr. Hawsawi has
12 endured in the past and continues to endure is far greater, as you
13 are aware, than that experienced by General Noriega, Suzuki or
14 Zarbatany. Given the horrific facts of punishment that have occurred
15 in Mr. Hawsawi's case, we believe that this is a case that rises to
16 the level of dismissal with prejudice. There is no published case
17 that even comes close to comparing to this case.

18 And if the commission finds that dismissal with prejudice is
19 too extreme of a remedy, then we suggest that the commission should
20 find that Mr. Hawsawi be awarded no additional punishment in this
21 case.

22 And on that point, sir, I'll point out that Mr. Hawsawi is
23 going to turn 56 years old in August, and the average life

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1 expectancy, according to the CDC, for an adult male is 73.5 years.
2 So Mr. Hawsawi roughly -- if he lived to that life expectancy for
3 the average, he would have 17.5 years left.

4 So by awarding a confinement credit of no punishment, no
5 additional punishment, sir, it's really less than one-for-one day
6 credit that you'd be awarding, which is a very low request based on
7 the case law and also based on the treatment that Mr. Hawsawi has
8 endured.

9 I suggest, too, sir, that awarding a pretrial punishment
10 remedy of no punishment would also incentivize the government to
11 bring Mr. Hawsawi's case to a quick conclusion instead of dragging it
12 out for a countless number of additional years awaiting a trial that
13 may or may not ever occur.

14 I submit, sir, that Mr. Hawsawi has already been, over the
15 last 21 years, punished way more than enough for his relative
16 culpability, especially when compared to the case of Majid Khan who
17 ended up only serving 19 years -- or less than 19 years in
18 confinement for his crimes. And I'll point out, too, that Majid
19 Khan, from 2012 until his release, actually had good conditions of
20 confinement.

21 Therefore, Your Honor, we respectfully request first that
22 you dismiss the case with prejudice. And if you're not willing to do
23 that, Your Honor, if you find that to be too extreme a remedy, then a

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1 sentence cap of no additional punishment should be awarded.

2 That's all I have, Your Honor, pending your questions.

3 MJ [Col McCALL]: No questions at this time.

4 Thank you, Mr. Gleason.

5 DC [MR. GLEASON]: Thank you, sir.

6 MJ [Col McCALL]: Any other defense teams? I know there were
7 some, I believe, declinations of joinder on this motion. I'm not
8 sure.

9 LDC [MR. CONNELL]: Your Honor, we remain joined, and
10 Ms. Pradhan will address is from the RHR.

11 MJ [Col McCALL]: All right.

12 Good morning, Ms. Pradhan.

13 ADC [MS. PRADHAN]: Good morning, Your Honor.

14 Your Honor, we adopt the arguments of our colleagues on
15 Mr. al Hawsawi's team, particularly the legal arguments on this
16 motion.

17 It is not lost on occasion here in the military commission
18 that we have a number of emperor-has-no-clothes moments, and this is
19 perhaps never so stark as when we talk about constitutional
20 protections at the military commissions. This is one of those
21 occasions.

22 And I want to talk first about the use of the phrase or the
23 word, depending on how you look at it, "pretrial."

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1 As the military commission knows, U.S. Government made a
2 conscious choice after September 11th not to prosecute the men who we
3 detained abroad. Dr. Mitchell testified about it. It is their
4 details and documentary evidence provided in the AE 628 and AE 628
5 (AAA Sup). And so those initial years of confinement for
6 Mr. al Baluchi and the other defendants was just straight illegal
7 arbitrary detention.

8 In September 2006, or shortly before that, when the decision
9 was made to bring them to Guantanamo Bay and then to prosecute them,
10 that is when those years of detention converted, if you will, to
11 pretrial, became pretrial. And so a lot of what we do here is
12 retroactively trying to apply the law that we have spent a couple
13 hundred years building to this unprecedented program.

14 And so with that, with just recognition of the milieu in
15 which we are using that phrase, "pretrial," I want to talk
16 briefly -- I want to just add a few facts to what my colleague
17 presented pertinent to Mr. al Baluchi, starting with the
18 circumstances under which Mr. al Baluchi was wrongfully detained by
19 the CIA and rendered. And this falls under the rubric of considering
20 the legality of pretrial punishment, because detention itself without
21 legal basis is punishment.

22 As the military commission is likely aware, the report by
23 the Office of the Inspector General of the CIA concluded that

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1 Mr. al Baluchi's detention and rendition to the black sites was,
2 quote, extralegal.

3 And this was for two reasons. Number one, Mr. al Baluchi
4 was arrested in Pakistan. He was in Pakistani custody. And at
5 AE 628RRRRR Attachment C, page 2C-00000430, the CIA itself refers to
6 Mr. al Baluchi's, quote, loaner status from Pakistan, meaning he was
7 not legally within the custody of the United States.

8 The second reason Mr. al Baluchi's detention and rendition
9 by the CIA was illegal is that it did not meet the requirements for
10 the Memorandum of Notification issued by President Bush after
11 September 11th, and that is detailed by the Inspector General at
12 pages 2C-00000486 and 00000487 of the OIG report.

13 And they state: If the CIA did not meet the legal
14 requirements for rendition, they could not have met the requirements
15 for detention and the use of EITs after that. That is automatically
16 pretrial punishment. That is punishment.

17 And then we move to the punishment itself, what actually
18 happened. We heard that Dr. Mitchell discussed how the use of
19 so-called enhanced interrogation techniques were punishment. He used
20 the word "punishment."

21 Those techniques were used to punish detainees, in the case
22 of Mr. Mohammad for talking about September 11th and those events, in
23 the case of Mr. al Baluchi for appearing -- appearing to withhold

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1 information during his interrogations even though in 2008 when the IG
2 issued that report and they went through and interviewed CIA
3 personnel, they found on each occurrence that he was suspected of
4 withholding information, that, in fact, there was no basis to believe
5 he was. That is the definition of punishment. Except on occasions
6 when he made up information to make the torture stop.

7 Mr. al Baluchi was also held at COBALT, and Your Honor has
8 heard quite a lot of testimony about the conditions of confinement at
9 COBALT. Dr. Mitchell testified that he was used as a -- as a
10 training prop for interrogators to receive certifications for their
11 ability to use enhanced interrogation techniques on him and on other
12 detainees.

13 The IG report discusses as well his mock drowning on a tarp,
14 similar to what was done to Mr. al Hawsawi. The IG report describes
15 his walling where a number of interrogators lined up to smash his
16 head against a wall over and over again because fatigue would set in
17 for each one of them.

18 And in a footnote on that page regarding his walling, it
19 states that his size, compared to some of the interrogators, the size
20 differential was quite large.

21 Mr. al Baluchi suffered numerous traumatic brain injuries as
22 a result of that walling, which the government still refuses to
23 concede. But his head trauma was documented as early as mid-2003 at

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1 COBALT while he was there.

2 He talked about the fact that he passed out, that he saw
3 lights. He's created art in order to attempt to explain what happens
4 in his head when his traumatic brain injury caused vertigo that lasts
5 to this day.

6 He was also sleep deprived, first as an enhanced
7 interrogation technique and then as a standard condition of
8 confinement, as my colleague described in some detail.

9 Initially he was held at COBALT in total darkness and he was
10 subjected to what was called standing sleep deprivation, which is a
11 technique that was ably depicted in the film *Zero Dark 30* where the
12 character Ammar was strung up by his arms on either side of him in
13 exactly the way Mr. al Baluchi was strung up naked and beaten.

14 He then moved to Location Number 7, another location we've
15 heard quite a lot about both in testimony from Dr. Mitchell and from
16 Dr. Morgan. That location had 24/7 light, as the Locations Number 5
17 and Number 8 did after that.

18 It also had very low temperatures of -- over which he had no
19 control. He was essentially freezing and sleep deprived for several
20 years. Adding to the effects of his traumatic brain injuries, these
21 have caused lasting sleep disruptions, and he was diagnosed with
22 severe -- with severe sleep apnea several years ago, something he has
23 never recovered from.

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1 At Location Number 5, he's reported that he could hear
2 detainees screaming, which is something that was verified and is in
3 the record in AE 628.

4 At Location Number 8 he underwent a psychiatric assessment,
5 interestingly, by an interrogator, NZ7. I'm not sure why but he did.
6 And that resulted in a number of conditions being identified in him,
7 including anxiety, including susceptibility to sounds as triggers,
8 and including the observation that he still had vivid memories of the
9 torture that he had suffered earlier in his confinement.

10 Location Number 9, the use of light was interesting by the
11 CIA because initially they were held in this very, very dark
12 location, Location Number 2, COBALT, the dungeon. Locations 7, 5,
13 and 8 were 24/7 light, and Location Number 9 had the ability for 24/7
14 light but, as Mr. Gleason described, at this point in their detention
15 the CIA personnel themselves were starting to identify
16 psychiatric -- psychological disorders in the men, and so gave an
17 order for Mr. al Baluchi as well to have the light dimmed from
18 10:00 p.m. to 8:00 a.m. so that they could -- they could start to
19 attempt to recover those sleep -- sleep patterns. It didn't work,
20 but there was an attempt there.

21 At the same time, though, Mr. al Baluchi was held in a cell
22 that I can't describe fully in open session, but I believe the
23 military commission saw a photograph of it last week, which would

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1 have had a very strange effect on the use of lights 24/7. And so
2 it's really unclear the conflicting effect of light on his sleep
3 abilities at Location 9, which of course is the last site he was held
4 before he was brought to Guantanamo Bay, where, as Mr. Gleason
5 described, he was again, along with the other defendants, subjected
6 to 24/7 light after that brief period in which they were allowed to
7 sleep for a few hours at Location Number 9, or at least the attempt
8 was made.

9 The conditions at Camp VII mirrored -- intentionally
10 mirrored many of the conditions at the black sites and that is
11 detailed in some length in AE 628 (AAA Sup). I can't discuss it in
12 open session but it's all there. I can give you specific page
13 numbers if the military commission requires it.

14 And finally, with regards to Mr. Gleason's last remarks
15 about current conditions, the punishment continues to this day. My
16 colleague referenced the report of the Special Rapporteur on the
17 promotion of human rights in counterterrorism from her -- from her
18 visit to Guantanamo Bay last year and her conclusion that conditions,
19 including stressors that have dated back to initial capture in 2003,
20 continue to be imposed at Guantanamo and may rise -- rise at least to
21 the level of cruel, inhuman, and degrading treatment and may rise to
22 the level of torture.

23 There has been a lack of adequate medical care, and that was

1 confirmed in testimony from the chief medical officer two years ago
2 in the Hadi al-Iraqi case, and an absolute inability of Joint Task
3 Force-Guantanamo to provide complex medical care for the detainees in
4 U.S. custody, including Mr. al Baluchi, including Mr. al Hawsawi.

5 Mr. al Baluchi was diagnosed with a spinal tumor early last
6 year. We still do not have a conclusive diagnosis about what kind of
7 tumor that is because of the inability of the United States to
8 provide adequate medical care at Guantanamo, which according to the
9 Convention Against Torture Article 14 and numerous legal authorities
10 constitutes an ongoing violation of the Convention Against Torture.

11 So dating back to 2003, we have pretrial punishment starting
12 with the legality of detention and going into the details of
13 continuous torture, both intentional and perhaps unintentional, but
14 regardless, amounting to CIDT and torture to the present day.

15 It has been 21 years since Mr. al Baluchi was initially
16 arrested. This sort of punishment, this sort of egregious treatment
17 has really -- I venture to say there has never been a
18 case -- right? -- as Mr. Gleason has said, there just has never been
19 a case in which this kind of egregious punishment has ever been
20 imposed before trial and with such a lack of legal foundation.

21 And so we're left here in 2024 trying to retroactively apply
22 our long-built legal standards, our long-held rule of law to this
23 outlier of a program established by the United States Government.

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1 I don't envy the military commission in doing so, but that
2 is the standard -- those are -- these are the standards we have and
3 this is the time to apply them.

4 Subject to any questions, Your Honor.

5 MJ [Col McCALL]: Well, let me ask you a question based on
6 that last comment that you had. You say that now is the time to
7 apply them.

8 ADC [MS. PRADHAN]: Yes.

9 MJ [Col McCALL]: Why now? Again, answer the issue on
10 ripeness, whether this is really a matter to be handled if we ----

11 ADC [MS. PRADHAN]: So ----

12 MJ [Col McCALL]: ---- get into a presentencing phase.

13 ADC [MS. PRADHAN]: Absolutely. There are a couple of points
14 on this.

15 The first is we would argue that at the time in 2006 when
16 detention decisively retroactively became pretrial would have been
17 the time to start considering and assessing credit and that, even
18 now, it's a little bit late for that but not too late.

19 The government has argued, I believe -- it was last week or
20 the week before. I'm losing all sense of time, sir. But in the
21 arguments regarding -- in Mr. Trivett's comments regarding plea
22 negotiations, they said that they continue to be seized of plea
23 negotiations and we continue to have those conversations.

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1 In terms of ripeness, Mr. al Baluchi needs to know now what
2 the range of possibilities are in the pretrial phase. Because once
3 we get into a capital trial, there's no -- there's no credit given
4 once you're sentenced to death. It's now that we need to know that
5 range of possibilities, as we are still in a plea negotiation
6 posture. That's why it's important to know now.

7 MJ [Col McCALL]: All right. No further questions.

8 ADC [MS. PRADHAN]: Thank you, sir.

9 MJ [Col McCALL]: Any other defense teams desire to be heard?

10 LDC [MR. CONNELL]: No, Your Honor, but may I have the
11 opportunity to consult with Ms. Pradhan over the break?

12 MJ [Col McCALL]: You can do it right now. I mean, is it
13 something that you need a little more time? We can go ahead and
14 break.

15 LDC [MR. CONNELL]: No, sir. There's one particular answer to
16 that -- to your question from the death penalty world that I wanted
17 to mention to her.

18 MJ [Col McCALL]: Well, let's just do this. I was going to go
19 ahead and take a recess anyways, but I'll just go ahead and take a
20 recess now and allow you a chance to confer.

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

22 MJ [Col McCALL]: So it's 1033. Let's be back in 15 minutes.
23 Commission is in recess.

1 **[The R.M.C. 803 session recessed at 1033, 14 May 2024.]**

2 **[The R.M.C. 803 session was called to order at 1050, 14 May 2024.]**

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

4 The parties are present. The accused are absent.

5 Ms. Pradhan.

6 ADC [MS. PRADHAN]: Thank you, sir. I'll make this brief.

7 One of the benefits of this system is the ability for me to
8 learn from my capital defense colleagues, and so I have just a couple
9 in addition to what I said before the break in response to your
10 question.

11 So Judge Watkins has already decided the ability to issue
12 pretrial credit, right? And so the question before you is when to
13 apply it, and I think that's what you asked before the break. We've
14 discussed two possible remedies.

15 The first, which Mr. Gleason discussed in some detail, is
16 dismissal. The second is striking the death penalty. And that needs
17 to be pretrial because it has a major effect on the composition of
18 the member -- or of the panel, the selection of members.

19 So during voir dire, as Your Honor knows, the government
20 will be able to ask about the members' ability to impose the death
21 penalty, and the ultimate composition of the panel depends in large
22 part on that key question. And so whether or not they are
23 death-qualified is an issue that needs to be decided pretrial before

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1 we get into that. So that's why it needs to be now.

2 Pending any other questions, sir.

3 MJ [Col McCALL]: No other questions. Thank you.

4 ADC [MS. PRADHAN]: Thank you.

5 MJ [Col McCALL]: Any other defense teams?

6 Apparently not.

7 All right. I see Colonel Bearden getting up. I take it
8 you're arguing for the government.

9 DTC [COL BEARDEN]: Good morning, Your Honor.

10 MJ [Col McCALL]: Good morning.

11 DTC [COL BEARDEN]: The phrase "rearranging the deck chairs on
12 the Titanic" was first published in a 1969 article in *Time Magazine*.
13 The article described efforts to overcome deficiencies in American
14 religion.

15 In this instance today, 874, 876, 732, and 693, are the
16 defendants' proverbial deck chairs on the sinking ship that is
17 pretrial confinement credit.

18 Three weeks ago we had about a 30-minute argument on
19 ripeness in and of itself. And I'm sure I had everybody on the edge
20 of their seat waiting to discuss the justiciability doctrine that is
21 standing political question, lutinous, ripeness, but they are very
22 real constitutional measures.

23 And what we have here are the arguments today relative to

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1 this particular case in this particular motion are principally the
2 same. Number one, the challenge in this instance, much like 874 and
3 soon to be 693 and 732, is simply not ripe for adjudication. It's
4 just simply not. And I'll explain why in a moment.

5 Law of war detention does not constitute punishment and,
6 therefore, does not justify pretrial confinement credit. Now, the
7 movement of the chair in this particular instance on the proverbial
8 sinking ship is the newly added Article 13 and R.C.M. -- pardon
9 me -- R.M.C. 304 and 305 having any applicability whatsoever for
10 AUEBs. They simply do not.

11 So let's start back to where we were a couple of weeks ago,
12 and I promise I won't go into as much detail as we did then, but it's
13 important given the discussion and obviously the multiple questions
14 you've asked regarding this particular issue.

15 This challenge is not ripe for adjudication, as we
16 previously said, unless and until members find the accused guilty of
17 at least the charges and sentence them to some punishment other than
18 death or life imprisonment, no pretrial confinement should be had.

19 There's no prejudice -- and this is the point I think you're
20 getting to -- there's no prejudice to the accused from waiting to
21 litigate this issue.

22 What do I mean by that? There's no impact to the
23 defendants' ability to prepare for voir dire, irrespective of

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1 Ms. Pradhan's assertions, or trial or mitigation in the case.

2 What do I mean? The accused in this instance may present
3 matters in extenuation and mitigation, including and especially for
4 death penalty cases. And that's included every death penalty case
5 that I have ever worked in 20 years, having been a former capital
6 litigation prosecutor. It does not add to or detract their ability
7 to do that.

8 Now, ripeness. A claim is not ripe for adjudication if it
9 rests upon contingent future events that may not occur. There are a
10 lot of variables at play, whether the individual pleads guilty,
11 whether the individual goes to trial. There are a number of
12 different factors where there's a negotiated agreement. How does
13 courts make this determination? What has been traditionally and
14 historically the standard?

15 And that can be found in the seminal case of Abbott
16 Laboratories 1967, and they gave two hard and fast factors that apply
17 to all cases without any prioritization to a death penalty case. And
18 those factors were, number one, the fitness of the issues for
19 judicial decision and, number two, the hardship to the parties.

20 And when they define hardship, their definition says: Is
21 there a sufficient and immediate impact? There is not a sufficient
22 and immediate impact to rule on this principal issue today.

23 Courts such as this commission should actually do the exact

1 opposite. Should do the exact opposite in accordance with the
2 principle of constitutional avoidance. Avoid constitutional issues
3 and keep from deciding what this commission has already said before
4 in AE 057, deciding theoretical disputes over discrete issues. It's
5 not necessary.

6 What would be the equivalent? And I thought about this from
7 the perspective of Article III federal court. The equivalent in this
8 instance would be for a federal judge to employ a departure or a
9 variation before guilt had even been established.

10 Think of how backwards that is, to establish a variation or
11 a departure from a sentence before guilt had even been established,
12 before a presentence investigative report had been had for
13 mitigation, attenuation, aggravation could even be heard.

14 Not to mention principally -- and it's not lost on me in
15 this particular instance -- that the accused are charged with death
16 penalty in this particular instance, but that's also a negotiating
17 point on behalf of the government to maintain that interest.

18 We've charged it. We believe we can prove it beyond a
19 reasonable doubt. But that's also part of our ability to negotiate
20 as well as the government.

21 So it's simply not ripe. Mr. Hawsawi in this instance is,
22 in fact, a law of war detainee that's been held in this certain
23 circumstance and status since the 2001 AUMF. Nothing has changed.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Law of war detention does not constitute punishment and, therefore,
2 does not justify pretrial confinement credit.

3 Now, we've heard about Judge Watkins and his opining and his
4 opinion. 1001(g) was established a long time ago when the Commission
5 Act came out states, in fact: The physical custody of alien enemy
6 belligerents -- which this accused are -- captured during hostilities
7 does not constitute pretrial confinement for purposes of sentencing
8 and the military judge shall not grant credit for pretrial detention.

9 Now, two weeks ago, or three weeks ago, it was Allen credit
10 and ex post facto. Today it's Suzuki credit and no death penalty
11 whatsoever.

12 The accused in this case were not -- and despite pretrial
13 proceedings that we're having now -- held in punitive custody for the
14 acts for which they are now charged.

15 I was given the theoretical complicated question of whether
16 there's a dual track or whether there's an overlay, and I submit to
17 this court the individuals here, irrespective of the charges, are
18 still considered law of war detainees. They were and remain that for
19 their associations with the al Qaeda terrorist organization.

20 Now, Mr. Gleason earlier, I think, was having difficulty
21 making a determination whether his guy had a major role or whether he
22 had a minor role. At one point it's like they knew who he was, and
23 another point, oh, he's kind of akin to an "also ran" with al Qaeda.

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1 Let's clear that up a little bit, especially with respect to
2 Majid Khan. Mr. Hawsawi booked travel -- this is what the evidence
3 shows -- booked travel to the United States for four hijackers in
4 June of 2001. He assisted the opening of bank accounts for hijacker
5 Fayez Banihammad.

6 There's circumstantial evidence to believe that he
7 maintained telephone contact with hijacker Mohamed Atta. There's
8 financial transactions on the 8th, the 9th, the 10th of September
9 leading up to the attacks. There's the procurement of ATM card that
10 had thousands of dollars on it. And he got a credit card for
11 Mr. Mohammad.

12 More importantly, we heard a lot of discussion about sleep
13 deprivation, headaches, a variety of other ills. What we seldomly
14 hear in this commission is that real human beings in real buildings,
15 on real planes, had to make real decisions about their life, whether
16 to jump out of a building or burn alive ----

17 DC [MR. GLEASON]: Objection. Relevance.

18 MJ [Col McCALL]: Objection overruled.

19 DTC [COL BEARDEN]: Whether to make a decision on an airplane
20 against their best interest and fears.

21 So it's important that when we contrast that, when we
22 contrast what's going to be in mitigation potentially, it's also
23 important to also think about perhaps what might be an aggravation,

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1 because that gets lost oftentimes. But it's coming down the
2 pipeline. And those things also warrant potentially the death
3 penalty.

4 More so, that's the reason why, as we said earlier about
5 ripeness, that argument is best had once the evidence is in, once
6 decisions are made, and once the pretrial sentencing is before this
7 commission.

8 There are several federal court cases that we talked about
9 last time that have found nonpunitive detention, such as law of war
10 detention, does not equal pretrial confinement for purposes of
11 sentencing credit.

12 And rather than go into a lengthy discussion about it, the
13 three cases we talked about then that are applicable now that the
14 defense counsel conveniently gloss over -- let's talk about Hamdi v.
15 Rumsfeld. The United States Supreme Court noted that pretrial
16 detention is certainly an important incident of war.

17 Now, there's a lot of variables as to what that could be.
18 It could be intelligence gathering. It could be keeping someone off
19 the battlefield. There are a variety of things.

20 And when they quoted Quirin, they noted that the purpose of
21 law of war detention is to prevent exactly that, captured individuals
22 from returning to the battlefield.

23 And make no mistake about it, the accused in this case are

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 being held for reasons beyond ensuring simply their presence at
2 trial. Simply put, as we talked about last argument, they are indeed
3 terrorists with the al Qaeda organization that were responsible for
4 killing 3,000 innocent Americans.

5 Now, last argument I was accused of being, quote/unquote,
6 wild in my assessment that, charges notwithstanding, the accused can
7 be held until the cessation -- make sure I make that point
8 clear -- for the cessation of hostilities. That can be found at
9 Aladahi v. Obama, 613 F.3d 1102, 1103, and that's the D.C. Circuit in
10 2010. And there's a good discussion in our brief at footnote 12 on
11 page 12.

12 Another way to put it, alien unprivileged enemy belligerents
13 are subject to capture and detention. But in addition to that, they
14 can also be subject to trial and punishment before this commission
15 for acts which their belligerency was deemed unlawful.

16 The case I recognized last month -- or a few weeks ago for
17 this commission that's on point was al Marri v. Davis, and that's 714
18 F.3d 1183, 10th Circuit, 2013.

19 Now, one of the arguments that was made by Mr. Gleason last
20 motion series that I didn't have an opportunity or probably should
21 have rebutted was this assertion that he was given credit in that
22 case. He was. He actually was given federal credit for the time he
23 had spent in the federal institution. And that's being promulgated

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1 by the Attorney General of the United States, not being promulgated
2 to the Secretary of Defense.

3 And what al Marri says in this ripe challenge is the time
4 that he spent in confinement in the brig in South Carolina was not
5 authorized in his capacity and status to receive pretrial credit.
6 And the court reaffirmed in that case that law of war detention is
7 indeed preventative rather than punitive, and they didn't award any
8 credit to al Marri for the time that he had in law of war detention.
9 And that can exist for the duration of the relevant conduct.

10 Now, the last point is on the defense's attempt to smuggle
11 in the UCMJ and other measures that we have litigated time and again
12 under this abstract statutory construction that just because they
13 didn't specifically -- "they" being Congress -- come out and
14 blatantly say we're excluding 13, that somehow that means that it's
15 included.

16 Well, in this instance, what did Congress do, the
17 individuals that actually have the authority, statutory authority to
18 make this decision, is they specifically contemplated and expressly
19 chose not to incorporate Article 13. Now, counsel earlier tried to
20 suggest that it should include all persons. That's not what the
21 statute says. What the statute says is only certain persons are
22 subject to the UCMJ under Title 10 United States Code 802. And that
23 does not include alien unprivileged enemy belligerents.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And it would be impractical to apply that standard because
2 the UCMJ in this instance contemplates only one thing in terms of its
3 confinement measure, and that's the anticipation of a criminal
4 proceeding. It has to be separate and apart from the fact in the
5 commissions that there could be individuals held, as in this case, as
6 law of war detainees. And to give credit for that measure is
7 expressly prohibited under R.M.C. 1001(g).

8 So rearranging the deck chairs on the Titanic is what we're
9 seeing with these particular four motions. I mean, they implicate
10 both ripeness and the distinction of status in all four of them, and
11 then there's a little bit of nuance as to whether 1001(g) is
12 constitutional, whether this particular case is, you know, ripe for
13 the death penalty, et cetera.

14 The icebergs in the defendants' way in this case, in this
15 motion, and the other three, quite frankly, are the law, Congress'
16 intent, and the promulgation authority afforded to the Secretary of
17 Defense to make the determinations that they made, that he's made or
18 she's made.

19 Simply put, this issue is not ripe. The accused's detention
20 does not justify pretrial confinement credit, and removing the death
21 penalty is indeed an unjustified drastic remedy. And the defense's
22 attempt to smuggle in the UCMJ and other military statutes intended
23 for military personnel simply fail.

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1 Now, counsel in this instance stood here a moment ago and
2 said there's never been a case like this. You've got that right.
3 There has never been a case like this -- I agree -- in which
4 terrorists, including these individuals, indiscriminately killed
5 3,000 Americans which necessitated decision-making that's
6 unprecedented in the history of our country.

7 And we've heard the testimony of professionals who have
8 spent their life doing this that, one, we absolutely 100 percent were
9 trying to prevent another attack. We had to make decisions at that
10 time based on the information that we had.

11 Circumstances they are in now, they're still law of war
12 detainees during the phase of the hostilities that still exist. We
13 still hear implications of al Qaeda and their existence. And at some
14 point there will be either a trial or a plea in which some of these
15 instances that we're arguing today and that we argued a few weeks ago
16 indeed after a conviction or a plea certainly become ripe.

17 And nothing about the government's proposition in this
18 instance suggests that the accused in this case are somehow precluded
19 from making those mitigation arguments. They are. And they should.
20 The government's going to make their arguments and the defense will
21 make theirs.

22 But at the end of the day, there has never been a case like
23 this before. Decisions had to be made and the government stands by

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1 them.

2 Subject to your questions, Your Honor.

3 MJ [Col McCALL]: All right. Well, let me start off with
4 where you left off.

5 So if I'm understanding the government's position correctly,
6 for the issue of illegal pretrial punishment, the government believes
7 that the only authority that the commission has is under R.M.C. 1001;
8 is that right? That it's just a matter to be decided as far as
9 mitigation at sentencing?

10 DTC [COL BEARDEN]: Just as a practical matter, it certainly
11 applies and it's given the indication that it's, you know, as I said
12 earlier, physical custody of alien enemy belligerents captured during
13 hostilities does not constitute pretrial confinement for purposes of
14 sentencing, and the military judge should not grant credit for
15 pretrial detention.

16 MJ [Col McCALL]: Well, so let's unpack that. I mean, so,
17 yeah, I can understand the idea for credit and for pretrial
18 confinement. But pretrial confinement like punishment as far
19 as -- so -- and I think you know I don't like to go into too many
20 outrageous hypotheticals to try to, you know, draw either
21 side's -- you know, where their arguments reach the level of
22 absurdity, but -- so what is the accused's recourse if they are being
23 illegally punished in pretrial confinement, if they're being

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1 mistreated?

2 DTC [COL BEARDEN]: Well, in this instance, I think that's
3 something that they could very well mitigate. I mean, it's a big
4 difference between purposes for pretrial confinement and if they have
5 egregious acts that they think justify mitigation. I'm quite certain
6 that's something that could be factored in.

7 MJ [Col McCALL]: Well, but what is the -- again, so their
8 recourse if they're being mistreated in confinement over a course of
9 years is they have to wait until they actually go to trial and if
10 they get convicted, they can then bring it up at the sentencing
11 phase?

12 DTC [COL BEARDEN]: That's traditionally how it's done. I
13 mean, that's how mitigation and aggravation works. There's either
14 going to be ----

15 MJ [Col McCALL]: Well, let me cut you off for a second.

16 So, I mean, CAAF has said -- right? -- for illegal pretrial
17 punishment under Article 13, that it should be initially brought up
18 at the -- with the magistrate -- right? -- when there's a hearing to
19 determine whether somebody really should be held in confinement and
20 what the conditions of that confinement is and whether lesser forms
21 of confinement apply?

22 DTC [COL BEARDEN]: In that particular instance, I mean,
23 that's segregating it into a UCMJ courts-martial proceeding. Whereas

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1 if you were to look at an Article III proceeding, quite frankly,
2 you're not going to get to a pretrial sentencing phase or mitigation
3 phase or an aggravation phase until you've actually had a conviction
4 or a plea or a Rule 11 hearing or a jury verdict, shall I say.

5 And at that point in time, the factors -- typically it's
6 going to be, at least in that instance, what we call 3553 factors.
7 You know, what is the -- there are a number of factors that can be
8 considered, you know, nature and circumstances of the offense. What
9 are the -- what's the criminal history and the impact and what's
10 actually been committed by the accused? What's the public policy
11 involved?

12 That's more akin to, I think, how these proceedings would
13 look as opposed to -- it's not the UCMJ. It's not a courts-martial.

14 MJ [Col McCALL]: I understand that. But -- so are you saying
15 that in an Article III court, that if a prisoner was being held in
16 conditions where they thought it amounted to torture, they -- or
17 whatever the conditions were, that they couldn't raise it with that
18 Article III judge until sentencing?

19 DTC [COL BEARDEN]: I'm not saying that, certainly.

20 MJ [Col McCALL]: Okay.

21 DTC [COL BEARDEN]: And I don't think that's -- I mean, that's
22 a little bit of a theoretical ----

23 MJ [Col McCALL]: Understood.

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1 DTC [COL BEARDEN]: ---- distinction from what's being said
2 here. I think in this instance, it's -- you know, it certainly has
3 been raised. We have raised -- I mean, that's what we're doing now,
4 as a matter of fact. It's been raised in a variety of motions, not
5 necessarily this one, but ----

6 MJ [Col McCALL]: Sure. Well ----

7 DTC [COL BEARDEN]: It's one of those things that a federal
8 judge would obviously entertain an allegation of torture in an
9 Article III court.

10 And -- but for purposes of sentencing, the factors that are
11 associated in sentencing with a United States federal district court
12 judge is going to fall under that rubric of 3553 factors and they
13 would have an opportunity to have a presentence investigation report
14 and the accused in this instance would have an opportunity to put
15 forth mitigation or aggravation for the government, and they would
16 have an opportunity to object as to what those factors were in the
17 report. And then the judge would make a sentence based on what the
18 Guidelines say.

19 MJ [Col McCALL]: Sure. And I can appreciate that.

20 All right. So walk me through this. So I believe
21 CAAF -- and again, so the reason I fall back on to some of the
22 military cases is, one, that's what I have the most familiarity
23 with ----

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1 DTC [COL BEARDEN]: Sure.

2 MJ [Col McCALL]: ---- but then it also seems like, I
3 mean ----

4 DTC [COL BEARDEN]: Well, I'm cheating, too, Your Honor,
5 because my experience is more in Article III, so I'm falling back on
6 more of that but ----

7 MJ [Col McCALL]: No, I appreciate it. I know that all the
8 parties have to work through this hybrid structure that we have.

9 All right. So walk me through this. So, I mean, Hamdan, if
10 I'm reading it correctly, am I incorrect that the Supreme Court said
11 that basically the UCMJ procedures should apply as long as
12 it's -- you know, if there's any doubt on whether or not the MCA is
13 providing all required judicial guarantees? I mean, I know
14 I'm -- I'm not quoting directly, but, I mean, is that the gist of it?

15 DTC [COL BEARDEN]: That's some of the gist. And obviously it
16 predated the implementation of the 2009 Act which addressed a number
17 of things that were supposedly of concern in the Hamdan case and
18 addressed that this was, in fact, the appropriate judicial response
19 to an alien unprivileged enemy belligerent.

20 MJ [Col McCALL]: Right. So, again -- and so that's why I'm
21 falling back on the UCMJ to look how things are handled in that realm
22 to see, then, if I have the same authorities in the -- under the
23 military commission, and if so, then what the procedure should be.

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1 So let's -- let me ask you this: If we're talking about
2 remedies such as dismissing charges, which is what the defense has
3 asked, I mean, would it make sense to wait until after trial and
4 there has actually been a conviction and we're in the presentencing
5 phase to say, hey, there was -- the nature of the -- and the -- the
6 nature and the extent of the confinement was so long and so egregious
7 that I'm going to dismiss charges? Would it make sense to wait until
8 that stage to render that kind of remedy?

9 DTC [COL BEARDEN]: Absolutely, if it was looked at from the
10 perspective of sentencing. I mean, you're looking -- there's two
11 different ways of looking at it. I mean ----

12 MJ [Col McCALL]: Well, that's my question, though. I mean,
13 because it sounds like the only authority that the government
14 believes I have is in the realm of sentencing, which is 1001. And I
15 read the -- the language in 1001, and it does -- it's a presentencing
16 phase. It's after a conviction.

17 But does that make sense if that remedy is on the table, of
18 dismissing charges?

19 DTC [COL BEARDEN]: The government is of the position that the
20 best and most appropriate way for this to be a ripe issue is at
21 sentencing.

22 Now, obviously, this commission has the ability, based on
23 the facts, to entertain a motion to dismiss up front, which is

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1 certainly within your purview.

2 But when we're looking at it from a potential factor of
3 sentencing, whether or not a specific sentence should be adjudged,
4 that's an entirely different question and I think only becomes ripe
5 when you get past a plea or you get past a guilty verdict.

6 MJ [Col McCALL]: But hasn't --

7 DTC [COL BEARDEN]: But I don't think you're limited from your
8 ability to rule on a motion to dismiss charges based on a variety of
9 things.

10 MJ [Col McCALL]: Sure. All right. All right. And so -- but
11 that motion to dismiss would still have to be based on something,
12 whether you want to call it outrageous government conduct or, in this
13 case, unlawful pretrial punishment. I guess that's my question is:
14 Are you saying for -- for unlawful pretrial punishment, does the
15 commission have the authority to dismiss the case?

16 DTC [COL BEARDEN]: Well, I mean, I think we've rolled that
17 into an outrageous -- hasn't it already been rolled into an
18 outrageous government conduct motion to begin with? Isn't that
19 before the commission already?

20 MJ [Col McCALL]: Well, I mean, it -- it seems like that's a
21 different argument asking for the same remedy. And again, I guess it
22 depends on how you're looking at it. Let's -- yeah, I don't
23 want -- and I'm not inviting argument on outrageous government

1 conduct.

2 DTC [COL BEARDEN]: No.

3 MJ [Col McCALL]: I believe we've already argued that.

4 But, no, I guess what I'm getting at is I look at CAAF's
5 decisions and, in particular, U.S. v. Fulton. That's 55 M.J. 88.
6 It's a 2001 CAAF case where CAAF said where no other remedy is
7 appropriate, the military judge may in the interest of justice
8 dismiss charges because of unlawful pretrial punishment.

9 So it seems there that that's a pretty important right of
10 the accused. And I'm trying to figure out where if -- that's based
11 on Article 13, I believe, and if Article 13 is not written into the
12 MCA, then is that a Hamdan problem that we don't have that protection
13 for these accused?

14 DTC [COL BEARDEN]: Well, the position of the government is
15 certainly that the UCMJ and Article 13 apply to certain personnel,
16 which only include military members and not the AUEBs.

17 Now, the extent that this commission has the ability to
18 entertain that motion, I don't know that that question has
19 necessarily been settled. But it certainly, in this instance, with
20 respect to allegations of this type of conduct, I think certainly
21 would fall within the realm of mitigation at sentencing.

22 Now, whether or not that's -- you know, you've -- you've
23 previously stated that you have the ability to entertain outrageous

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1 government conduct and other motions. I certainly think that's
2 within your realm. I don't think anything has precluded you from
3 doing that.

4 The question before this commission in this particular
5 instance is the pretrial confinement credit phase of things and a
6 complete dismissal of the death penalty, which certainly implicate
7 sentencing measures that I'm not sure is afforded to this commission
8 by 1001(g).

9 MJ [Col McCALL]: Okay.

10 DTC [COL BEARDEN]: It's complicated for sure.

11 MJ [Col McCALL]: No, I ----

12 DTC [COL BEARDEN]: It's not fun being behind the lectern here
13 trying to sort it out necessarily, but I think that it's an issue
14 that -- the government's position most certainly is it becomes a ripe
15 matter for sentencing the moment that an individual either pleads
16 guilty or there's a determination of guilt by the members.

17 And harkening back to that ripeness standard that we talked
18 about in Abbott Laboratories, the fitness of the issues for judicial
19 decision and -- it's a conjunctive -- the hardship to the parties
20 that are sufficient and immediate, and we're not there yet, Your
21 Honor.

22 MJ [Col McCALL]: All right. All right. Thank you,
23 Colonel Bearden.

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1 DTC [COL BEARDEN]: Thank you, Your Honor.

2 MJ [Col McCALL]: Defense?

3 DTC [COL BEARDEN]: Your Honor, if I may.

4 MJ [Col McCALL]: Go ahead, Colonel Bearden.

5 DTC [COL BEARDEN]: Yeah. Something was brought to my
6 attention that I think might actually be relevant as an alternative.

7 MJ [Col McCALL]: Sure.

8 And you can remain at the podium, Mr. Gleason, so you don't
9 have the long walk.

10 DTC [COL BEARDEN]: Apologies.

11 When you're up here, oftentimes there's a number of remedies
12 that don't necessarily flash to your mind. It's just the nature of
13 the business. But that also belies the fact that the accused in this
14 case have the opportunity to file habeas petitions that challenge the
15 conduct that they're so alleging, and I neglected to mention that.

16 MJ [Col McCALL]: Okay. I appreciate that.

17 Mr. Gleason.

18 DC [MR. GLEASON]: Your Honor, just to address my colleague
19 Colonel Bearden's analogy about the Titanic, that's a really good
20 analogy for the government's case. You know, they are driving this
21 case towards trial, but they hit an iceberg, and that iceberg is
22 torture and cruel and inhuman and degrading treatment. And because
23 of that iceberg, their case is sunk, and they know it's sunk.

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1 That's why this case is not in an Article III federal court,
2 because they know that if they brought this case into an Article III
3 court, the judge would have dismissed the case with prejudice many
4 years ago. Their only hope of salvaging their sinking ship is to
5 bring it before a military commission, to make up their own rules,
6 and to hope that they get a judge who will not apply the
7 Constitution.

8 Now, they did not get a military judge that followed their
9 game plan in Jawad. Judge Henley said he was going to rule and grant
10 credit for pretrial punishment.

11 They did not get a military judge in Khan's case to follow
12 their plan. Judge Watkins ruled that he was going to, you know, have
13 a hearing and find for pretrial punishment credit. And that's what
14 we ask the court to do in this case.

15 Now, to address the court's point about ripeness, I think
16 the issue is ripe to decide now and not wait until sentencing.

17 One of my colleagues pointed out the Supreme Court case of
18 Langford v. Idaho, which holds that the defendant -- the defense
19 case, they must know what the rules are before they can go into a
20 trial to make informed decisions about plea negotiations and to make
21 decisions about trial strategy.

22 And if I heard Colonel Bearden right, the government wants
23 to hang the death penalty over the head of Mr. Hawsawi as a

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1 negotiating leverage in pretrial negotiations. They want him -- to
2 coerce him into pleading guilty so that they can remove that death
3 penalty.

4 And that's not due process of law, Your Honor, and that's
5 not something the commission should endorse or support.

6 The one thing I would also mention about the ripeness issue
7 is Mr. Hawsawi is, as Colonel Bearden mentioned, he's under the
8 constant threat of the death penalty. And to delay ruling on
9 pretrial punishment, to drag that out for several more years, is to
10 continue to punish him. This is no different from the interrogators
11 putting a gun to his head with no bullets in a mock execution.

12 So we think -- or actually, I think the law holds that the
13 issues before the commission: The commission cannot tolerate ongoing
14 pretrial punishment. The commission has an obligation under the due
15 process clause and under the inherent authority, as Judge Watkins
16 ruled, to issue a remedy.

17 As the commission stated, the commission has no authority to
18 change the conditions of confinement. The government wants to
19 continue torturing Mr. Hawsawi, that's their prerogative. What the
20 commission can do is issue a remedy for that. And we ask that in
21 this case that the remedy either be a dismissal of the case with
22 prejudice or the remedy be that the confinement could be no greater
23 than no punishment or time served. We believe that's important for

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1 pretrial negotiations.

2 Right now, we -- you know, as a defense counsel, we can't
3 advise Mr. Hawsawi what -- on entering a pretrial agreement or not
4 because, you know, one of the big -- a couple of the big things that
5 are out there is are you going to get Allen credit for confinement
6 already served? And are you going to get pretrial confinement
7 remedy? And I think we'd be ineffective to have him sign a pretrial
8 agreement without having those questions addressed, sir.

9 And I would also point out, sir, I just wanted to -- I know
10 my colleague, Ms. Pradhan, has some great arguments, but we disagree
11 on when the pretrial confinement started. I know she mentioned
12 September '06.

13 We know based on the fact that Mr. Hawsawi's pretrial
14 confinement started at the time of his arrest in March of 2003. We
15 know that he was one of the few people that was identified before his
16 arrest as being a co-conspirator in the 9/11 attacks, and that was
17 the purpose for his initial arrest and detention. So we believe that
18 pretrial confinement started at the time of his arrest and has
19 continued since then.

20 Colonel Bearden mentioned 1001(g). I didn't go into the
21 argument about retroactive application ex post facto because we
22 raised that argument during the Allen credit motion, but the same
23 would apply. 1001(g) does not, cannot cut off pretrial confinement

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1 credit. And what Judge Watkins ruled was it didn't apply at all to
2 pretrial punishment credit, it only applied to Allen credit.

3 Just a moment, Your Honor.

4 MJ [Col McCALL]: Take your time.

5 **[Pause.]**

6 DC [MR. GLEASON]: Another argument that Colonel Bearden
7 raised is the law of war argument, which the government, as
8 we've -- many counsel have argued before, wants to have it both ways.
9 They want to say these guys are law of war detainees, therefore the,
10 you know, rules don't apply to them.

11 We know that's not true. We know that law of war detainees
12 are protected even more than federal pretrial prisoners or detainees.
13 We know that because of DoD instructions on the law of war. Law of
14 war detainees are to be held in the most minimum confinement
15 necessary to ensure that they do not escape or return to the
16 battlefield.

17 So to argue that they're law of war detainees, therefore we
18 can torture them, just doesn't hold water, sir.

19 The other argument that doesn't hold water is that we can
20 torture them because of the seriousness of the 9/11 attacks.
21 Colonel Bearden argued that since 3,000 people died, it was okay to
22 torture them and it's okay to continue to torture Mr. Hawsawi.

23 That is a clear violation ----

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1 DTC [COL BEARDEN]: Objection, Your Honor. That's a
2 mischaracterization of what I said.

3 MJ [Col McCALL]: Objection overruled. It's argument. But I
4 understand what you said, Colonel Bearden.

5 Go ahead, Mr. Gleason.

6 DC [MR. GLEASON]: It's a clear violation of due process, sir,
7 to punish somebody pretrial for that very reason. He's presumed
8 innocent. He's not been convicted. He's not had the opportunity to
9 confront the government's evidence against him.

10 And for them to front load the punishment, that is a clear
11 violation of law, sir, and one which the commission has an obligation
12 to remedy and remedy now and not wait years later until a trial
13 occurs.

14 And what the law says is that the relief must be meaningful.
15 And to have any type of meaningful relief in a death penalty case,
16 obviously the death penalty has to be removed, sir.

17 Now, if you order Mr. Hawsawi 100 years' confinement credit
18 but the members award him the death penalty, then he gets the death
19 penalty and that credit has no meaningful effect.

20 Therefore, sir, we think it's important for the commission
21 to rule now, especially since you've heard the evidence and you're
22 familiar with the facts instead of putting this onto a new judge.

23 We think the appropriate -- the appropriate remedy is

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1 dismissal with prejudice, which is what a federal judge would have
2 done with this case. But if the commission doesn't want to go there
3 because the alternative is to issue a remedy of no additional
4 punishment, then the 21 years that Mr. Hawsawi has been tortured and
5 subject to punishment.

6 Just one moment, Your Honor.

7 MJ [Col McCALL]: Take your time.

8 DC [MR. GLEASON]: That's all I have, Your Honor. Thank you.

9 MJ [Col McCALL]: All right. Thank you, Mr. Gleason.

10 Ms. Pradhan?

11 ADC [MS. PRADHAN]: Thank you, sir.

12 So first I want to clarify our position on pretrial
13 confinement. It is, in fact, our position that Mr. al Baluchi's
14 pretrial confinement began in April 2003 when he was initially
15 captured.

16 My point in raising the distinction between his CIA custody
17 and his arrival at Guantanamo Bay is to point out the straight
18 illegality of his detention between April 2003 and September 2006,
19 which actually rolls right into the couple of reasons why you should
20 disregard the government's ripeness argument.

21 First, it is still astonishing to hear at least those three
22 to four years of CIA detention described as law of war detention. As
23 Mr. Gleason pointed out, there is simply no way to legally argue that

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1 CIA custody equaled law of war custody.

2 It is not military custody. There were none of the
3 guarantees that are offered to law of war detainees in CIA custody.
4 There was no determination.

5 I heard the phrase AUEB, alien unprivileged enemy
6 belligerent, thrown around a couple of times by the government.
7 There was no determination of that until much later in their custody.
8 Certainly not while they were in CIA custody. And to this day, our
9 position is Mr. al Baluchi still has no valid status determination
10 that he is or is not an AUEB for reasons that we have previously
11 elucidated before the commission.

12 And so this is what is universally acknowledged, including
13 by former U.S. Government officials, to have been straight illegal,
14 arbitrary detention unconnected to the laws of war or any other laws.
15 So that's the first point.

16 The second, I heard Colonel Bearden attack ripeness before
17 the guilt of the defendants was established. I mean, you know, it's
18 a slightly backwards argument, because the entire purpose of their
19 detention initially -- at least in the initial years was the
20 assumption that they were, in fact, guilty. That's why they were
21 held for several years by the CIA. That's -- that was the
22 assumption. That's why they were interrogated. Dr. Mitchell
23 testified at length about that.

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1 And so, you know, those are the facts. And I would argue
2 that, honestly, the testimony of Colonel Jemmott last fall spoke to
3 the fact that they are still in certain ways being treated as if they
4 are guilty and this is post-conviction rather than pretrial.

5 So it just doesn't hold water that ripeness has
6 to -- ripeness only occurs once guilt is established and they have
7 been convicted at some point in the distant future when the harm is
8 occurring now and has occurred for 21 years.

9 The -- I was also surprised to hear habeas offered as a
10 remedy. And this is perhaps a minor point, but I am one of
11 Mr. al Baluchi's habeas attorneys and it cannot have escaped the
12 government's notice because I believe we've had this conversation,
13 Mr. al Baluchi's habeas petition has been suspended for a number of
14 years pending the completion of military commission proceedings.

15 He does not have a remedy in habeas. In fact, the only
16 opportunity he has in habeas is to address conditions of confinement.
17 But we have to prove that it is something that cannot be raised
18 before the military commission first, and that is a fight that we
19 have been having for several years now. And so habeas is simply not
20 a feasible remedy for this sort of -- of violation.

21 Finally, Colonel Bearden mentioned AE 057C, and that ruling
22 was issued on January 15th -- or, excuse me, that was issued
23 January 15th, 2013. It was 11 years ago, almost 11 and a half years

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1 ago.

2 Here we are in 2024 having the government arguing about
3 Article III decisions and the constitutional issues, both here and in
4 federal court.

5 I know the military commission is familiar with the al Hilah
6 litigation -- right? -- which is just one of the cases that deal with
7 whether or not the Constitution applies at Guantanamo Bay.

8 Because of that 11 years of postponement, there's not only a
9 judicial economy issue here, but it's also -- you know, the impact or
10 the hardship on the parties has to be taken into account. It should
11 be a consideration here.

12 That's all I have, sir.

13 MJ [Col McCALL]: All right. Thank you, Ms. Pradhan.

14 ADC [MS. PRADHAN]: Thank you.

15 MJ [Col McCALL]: All right. It's almost 1140. I don't think
16 it makes sense to start the next AE right -- and then have to break
17 in about 20 minutes. So I'm inclined to go ahead and ----

18 Go ahead, Mr. Sowards.

19 LDC [MR. SOWARDS]: Thank you, Your Honor. Before you -- if
20 you're going to break, before you do that, we need to take something
21 up with the commission of some urgency, sir.

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

23 LDC [MR. SOWARDS]: Okay.

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1 MJ [Col McCALL]: What do you have, Mr. Sowards?

2 LDC [MR. SOWARDS]: Yes, Your Honor. I should have noted to
3 you at the beginning of the post-break session that Ms. McQuade is
4 not currently in the commission now. She is actually back at our
5 offices.

6 And the reason for that is, at the break we were approached
7 by our tech sergeant paralegal and informed that while we were in
8 here, she was working at the back of our offices near the supply room
9 when she heard voices at the front of the office and proceeded to
10 investigate and found that two individuals who identified themselves
11 as being with Washington Headquarters Services -- they didn't go on
12 to explain whether they were with the OSS specifically, but there
13 were from WHS -- had obviously let themselves into the office and
14 initially said they were there to inspect the tiles by the front of
15 the office, which as the commission may remember, we had something of
16 a mushroom crop growing in the offices last time.

17 But while they were there, they said they also wanted to
18 inspect the office for, I believe they're called PEDs or personal
19 electronic devices. These are the things that are supposed to be
20 picked up at the Washington gate, which we now use exclusively so
21 that we can go through fairly rigorous double scanning, wandling, and
22 various procedures.

23 They asked the paralegal, not the lawyer -- because we were

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1 all in here, which they should have reasonably known -- whether they
2 could look around the office for that. Being caught unawares and
3 not -- you know, being a dutiful military person, she didn't object.

4 She said, well -- she said, "I don't know what this is
5 about, but I guess. Okay. I don't know." I think she was, frankly,
6 importune to allow them to proceed. And then they proceeded to go
7 desk by desk and search around the desk areas looking for what they
8 thought might be some sort of prohibited device.

9 In one case, they searched behind boxes or items on
10 the -- on the individual's desk and found some rolled-up headphones
11 which didn't appear to be illegal or unauthorized, but the point was
12 that the detail and the extent of the search was to move papers and
13 objects and effects, to dig those out from -- from the back.

14 And then after they did each of these surface and fairly
15 in-depth inspections, they left the office. And then she came
16 to -- here to see us because we were breaking, saying that she had to
17 bring the client mail PRT information in for processing and was torn
18 whether she should remain in the office in case anyone entered there
19 or whether she could go. And that's when we told her to go on with
20 the other important client communication duties she had, and
21 Ms. McQuade went to that office.

22 I bring this to the commission's attention because, as you
23 can imagine, you know, even if this weren't week five of a five-week

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1 hearing, when some of us are running low on reserves of
2 stress-resistant hormones and whatnot, that everyone knows that the
3 absence of an order from this commission has created a vacuum in
4 which WHS is showing us exactly how open they are to try to work
5 things out behind the scenes.

6 We know that the commission, Your Honor, controls what goes
7 on at least at ELC. We know that in the absence of an order
8 protecting our workspaces in the NCR, that our option is simply to
9 stay out of them and keep as much confidential information out of
10 them and work someplace else.

11 We don't have that option here. And I certainly don't want
12 to be, you know, rattling sabers about some sort of dramatic action
13 on my part about what to do about this, but I'm frankly out of
14 options that would allow me to remain participating in these
15 proceedings with that kind of stuff going on.

16 So what I would ask the commission to do is to -- again,
17 either abate and let us not have to work under these conditions until
18 we can get this stuff sorted out, or at least issue some sort of
19 interim order that says until we have some clarification about, you
20 know, what the boundaries are and what kind of procedures perhaps
21 even WHS would like to work out with us in good faith -- until that
22 happens, people stay out of our office until they knock on the door,
23 tell somebody in authority why they're there, and are given

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1 admittance.

2 The idea that somehow they can come in under these
3 circumstances and conduct these kinds of searches when the most
4 they're looking for is some kind of headphone.

5 And I understand -- we understand all the rigmarole they
6 have about protecting their torture evidence, that they don't want
7 somebody with an unauthorized headphone plug into an outlet and
8 listen to something while they're trying to work. They want to have,
9 you know, only certified ones. But they have, like, several levels
10 and ranges of information to weed those things out.

11 And if those have somehow failed and people with security
12 clearance and jobs on the line, they think, are doing something
13 improper, I think that's too attenuated or extreme a risk to warrant
14 this kind of activity. This is absolutely not only professionally
15 insulting, but actually, you know, anathema to any kind of
16 professional representation, particularly in a capital case.

17 So I bring that to your attention, Your Honor, and
18 hope -- you know, we had a -- we had a plea -- pleadings that we
19 entered at 940 series. I am literally pleading with the commission
20 to let us either do our work or relieve us from the conflicted
21 situation that this imposes if this is allowed to go on.

22 MJ [Col McCALL]: Thank you for bringing it to my attention,
23 Mr. Sowards.

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1 Government, we're going to go ahead and take a break. Find
2 out what's going on with WHS on this. I'd like some information on,
3 you know, what's going on with this most recent entry into the
4 defense workspaces.

5 Understood?

6 I see some nods. All right.

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

8 MJ [Col McCALL]: All right. We're going to go ahead and
9 recess. Let's be back at 1330. At that point we're still going to
10 be in an open session. We'll move into AE 877. And then once
11 argument is held on that, I intend to have the closed session this
12 afternoon to handle 692 and 878 and also the closed portion of 874.

13 I see Mr. Ruiz standing, or Ms. Lachelier. Is this -- are
14 we good?

15 Okay. Just getting a head start on the recess. Understood.

16 All right. The commission is in recess.

17 **[The R.M.C. 803 session recessed at 1146, 14 May 2024.]**

18 **[The R.M.C. 803 session was called to order at 1337, 14 May 2024.]**

19 MJ [Col McCALL]: The commission is called to order.

20 The parties are present. The accused are absent.

21 All right. Mr. Trivett, or whoever is going to speak for
22 the government, did you get any further information during the
23 recess?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DMTC [MR. DYKSTRA]: Your Honor, I could get as much as I
2 could ----

3 MJ [Col McCALL]: Okay.

4 DMTC [MR. DYKSTRA]: ---- over a period of 90 minutes.

5 So what I can proffer -- and I'll hand this to Your Honor.
6 It's just being handed out to counsel.

7 I just handed you what has previously been marked as
8 Appellate Exhibit 940F (Gov). This is an e-mail from WHS OSS down
9 here in Guantanamo sent today at 0906 alerting MCDO staff, or at
10 least the on-island liaisons, Ms. Dyer and Ms. Richardson, that these
11 inspections were going to occur.

12 What I also can proffer is WHS staff first knocked on the
13 door at some point in time without receiving any sort of indication
14 that anyone was present. They did swipe in. They were met by a
15 member of the KSM team upon entry.

16 And what I can proffer is at that point in time, according
17 to them, the -- that team member then consented to the inspection.
18 During that inspection, a -- personal headphones were found during
19 the inspection, which they are not allowed within any SCIF space, DoD
20 SCIF space. These inspections occurred of all the defense spaces
21 while the SSO was here on island.

22 If Your Honor wants additional details or a declaration of
23 some sort, I can certainly arrange that. We just were not able to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 get that within the 90-minute period of time, so...

2 MJ [Col McCALL]: Sure. And so it looks like this e-mail went
3 out. But was there a response?

4 DMTC [MR. DYKSTRA]: Your Honor, we have no indication that
5 there was a response to the e-mail. And what I can tell you, in
6 speaking with WHS counsel, they are aware of the -- obviously the
7 concerns that were brought up to Your Honor before in the 940
8 litigation.

9 It would be their preference not to -- it would have been
10 their preference to provide additional notice as well as at least
11 obtain a response from MCD0. They will be speaking with their
12 personnel down here on island about that issue, and they are tracking
13 that they should provide additional notice beyond what's contained
14 within this e-mail.

15 MJ [Col McCALL]: All right. Let's do this. I mean, I think
16 this is serious enough that we need a little more information.

17 So I appreciate that you were able to run this down in 90
18 minutes, but let's get some more information. So I'd like to -- if
19 you can get a declaration from OSS just explaining what this policy
20 is and what procedures they're going to put in place.

21 Because, again, you know, I know we had the 940 motion
22 pending, but -- yeah. This gives me some concern.

23 DMTC [MR. DYKSTRA]: Yes, Your Honor. And certainly as

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1 we -- my colleague stated during the oral argument, WHS OSS takes
2 very seriously the concerns of attorney-client privilege or
3 otherwise.

4 In fact, when I went to speak with the personnel involved
5 with -- here, I was actively blocked from speaking with them because
6 they want to protect whatever privileged information that they may
7 have encountered during that inspection.

8 That's why they were preparing a memorandum for record, and
9 that was going to be funneled through their general counsel to see if
10 there was any privileged information before it would be provided to
11 us.

12 And that's why, additionally, with this e-mail, that went
13 through the same process to ensure that we were not getting any
14 attorney-client or defense privileged information.

15 MJ [Col McCALL]: All right. Well, so what we're going to do
16 is we're going to stop for the rest of today at least, and we will
17 start back up tomorrow morning at 0900 and give me an update on what
18 more information you've been able to gather.

19 DMTC [MR. DYKSTRA]: Absolutely, Your Honor.

20 MJ [Col McCALL]: And we'll see where we're at at that point.

21 DMTC [MR. DYKSTRA]: Absolutely, Your Honor.

22 MJ [Col McCALL]: All right. The commission's in recess.

23 **[The R.M.C. 803 session recessed at 1342, 14 May 2024.]**