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1 [The R.M.C. 803 session was called to order at 0903,
2 16 October 2017.]

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

4 General Martins, who is here on behalf of the United
5 States?

6 CP [BG MARTINS]: Good morning, Your Honor. Present for
7 the United States, Brigadier General Mark Martins, Mr. Robert
8 Swann, Mr. Edward Ryan, Mr. Clayton Trivett, Ms. Nicole Tate,
9 Major Christopher Dykstra, paralegals Mr. Dale Cox, Sergeant
10 Jesus Banks; and present in the back of the courtroom, Mary
11 Needham and Alicia Dorman of the Federal Bureau of
12 Investigation.

13 MJ [COL POHL]: And are these proceedings being close
14 circuit TV'ed?

15 CP [BG MARTINS]: Your Honor, these proceedings are being
16 transmitted by closed-circuit television to locations in the
17 Continental United States pursuant to your order.

18 MJ [COL POHL]: Mr. Nevin, who is here on behalf of
19 Mr. Mohammad, please?

20 LDC [MR. NEVIN]: Your Honor, David Nevin on behalf of
21 Mr. Mohammad. Lieutenant Colonel Poteet, Ms. Leboeuf,
22 Mr. Sowards and Ms. Radostitz and Mr. Mohammad is present.

23 MJ [COL POHL]: Thank you. I will note for the record

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1 that all five detainees are present. Ms. Bormann, who is here
2 on behalf of Mr. Binalshibh?

3 LDC [MS. BORMANN]: On behalf of Mr. Binalshibh, myself,
4 Mr. Edwin Perry, Captain Brian Brady, Major Matthew Seeger.

5 MJ [COL POHL]: Mr. Harrington, for Mr. Binalshibh.

6 LDC [MR. HARRINGTON]: Judge, in addition to me, Alaina
7 Wichner, Major Jarrod Stuard, and Major Christopher Lanks.
8 And our interpreter, Judge.

9 MJ [COL POHL]: Mr. Connell for Mr. Ali.

10 LDC [MR. CONNELL]: On behalf of Mr. Ali, myself, James
11 Connell; Alka Pradhan; Major Jason Wareham. Lieutenant
12 Colonel Sterling Thomas is absent with permission of the
13 military commission.

14 MJ [COL POHL]: Mr. Ruiz for Mr. Hawsawi.

15 LDC [MR. RUIZ]: Your Honor, Ms. Suzanne Lachelier,
16 Lieutenant Colonel Jennifer Williams, Mr. Sean Gleason, and
17 myself are present on behalf of Mr. al Hawsawi.

18 MJ [COL POHL]: Thank you. I don't believe there is any
19 new defense counsel; is that correct? Apparently so.

20 As is the practice, I will begin by explaining the
21 detainees' right to be present and, if they so choose, the
22 right to waive said presence.

23 Mr. Mohammad, Mr. Bin'Attash, Mr. Binalshibh,

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Ali, and Mr. Hawsawi, you have the right to be present
2 during all sessions of the commission. If you request to
3 absent yourself from any session, such absence must be
4 voluntarily -- voluntary and of your own free will. Your
5 voluntary absence from any session of the commission is an
6 unequivocal waiver of the right to be present during that
7 session.

8 Your absence from any session may negatively affect
9 the presentation of the defense in your case. Your failure to
10 meet with and cooperate with your defense counsel may also
11 negatively affect the presentation of your case.

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

22 You will be informed of the time and date of each
23 commission session prior to the session to afford you the

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1 opportunity to decide whether you wish to attend that session.

2 Mr. Mohammad, do you understand what I just explained
3 to you?

4 ACC [MR. MOHAMMAD]: Yes.

5 MJ [COL POHL]: Mr. Bin'Attash, do you understand what I
6 just explained to you?

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

8 MJ [COL POHL]: Mr. Binalshibh, do you understand what I
9 just explained to you?

10 ACC [MR. BINALSHIBH]: Yes.

11 MJ [COL POHL]: Mr. Ali, do you understand what I just
12 explained to you?

13 ACC [MR. AZIZ ALI]: Yes.

14 MJ [COL POHL]: And Mr. Hawsawi, do you understand what I
15 just explained to you?

16 ACC [MR. AL HAWSAWI]: Yes.

17 MJ [COL POHL]: Okay. That brings us to today's docket,
18 and that begins with 133RR.

19 DDC [Maj WAREHAM]: Good morning, Your Honor. Major
20 Wareham for Mr. al Baluchi.

21 MJ [COL POHL]: Good morning.

22 DDC [Maj WAREHAM]: As far as 133RR is concerned, if the
23 military commission recalls, at the last hearing the

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1 government invited, as a measure to possibly resolve the
2 issue, an inspection of attorney-client meeting spaces to
3 determine whether any monitoring equipment was being utilized.

4 Since that time, Mr. al Baluchi has submitted an ex
5 parte request for technical countermeasures to the convening
6 authority. This request has currently been submitted today
7 and is AE 133XX. It is currently pending and we would ask to
8 defer further argument until we are able to obtain an expert
9 in TSCM, technical surveillance countermeasures, and conduct a
10 thorough reinspection of our meeting spaces.

11 Additionally, I would ask to submit 133WW, which has
12 just been distributed as well. It is an ethics opinion
13 endorsed by Mr. Kammen and the Chief Defense Counsel of the
14 Military Commissions Defense Organization. This is submitted
15 to support the potential prejudice that could result in this
16 case if the attorneys are not satisfied as to the monitoring
17 existence and to demonstrate to the court what could possibly
18 occur if this issue is unfavorably resolved. With that we
19 would ask to defer the substantive argument until we can
20 determine whether or not these capabilities exist.

21 MJ [COL POHL]: Since you raised the issue -- first of
22 all, has this gone through security review?

23 DDC [Maj WAREHAM]: Not yet, Your Honor.

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1 MJ [COL POHL]: Okay. Because there is apparently a
2 submission made, which I believe is 527.

3 DDC [Maj WAREHAM]: Okay. Your Honor.

4 MJ [COL POHL]: And it's in the -- and I think it was
5 actually rejected by my staff for administrative issues. But
6 be that as it may, I'm being told that there is a classified
7 document attached to it in an unclassified -- I don't know
8 whether you guys have been told that or not.

9 DDC [Maj WAREHAM]: I am unaware of it at this time, but I
10 will take you at your word, Your Honor.

11 MJ [COL POHL]: It's the e-mail from General Baker.
12 That's the attachment to it. So I merely point out to you
13 that rather than going through the spill process that we have
14 talked about before, make sure this goes through some type of
15 security review, at least by your CISO, before we spread it
16 out on computers that need later on to be wiped.

17 And then, you know, for what it's worth, I have no
18 idea the factual predicate of what happened in Nashiri.

19 DDC [Maj WAREHAM]: Understood, Your Honor.

20 MJ [COL POHL]: Okay? I have no idea whether it is
21 relevant to this case or not, and I have no idea of
22 General Baker's authority to essentially dismiss a case. But
23 none of those issues are before me. So if you want me to just

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1 do this for my light reading I will take a look at it, but
2 again, I am not sure the purpose of it for this hearing.

3 DDC [Maj WAREHAM]: The purpose for this hearing goes to
4 the potential scope of prejudice, and so if used in argument
5 in the future would demonstrate the potential prejudice,
6 should we have facts that give rise and are sufficiently
7 similar to Nashiri's.

8 MJ [COL POHL]: I usually do things in the other order. I
9 look at the facts and then we talk about the argument. You
10 submitted it, I'll give it -- at this point it's in the record
11 and, I guess, for what it's worth, okay?

12 DDC [Maj WAREHAM]: Thank you, Your Honor.

13 MJ [COL POHL]: But you want to defer further argument on
14 133 until you get the expert consultant request?

15 DDC [Maj WAREHAM]: Yes, Your Honor.

16 MJ [COL POHL]: Trial Counsel, do you have any objection
17 to that?

18 TC [MR. RYAN]: Your Honor, we have no objection to
19 deferring argument on 133. We reserve the right to object to
20 what I believe are supplements that have just been filed
21 without a motion asking for leave of the court to do so.

22 MJ [COL POHL]: Response?

23 DDC [Maj WAREHAM]: These are submitted as additional

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1 evidence.

2 MJ [COL POHL]: Isn't that a supplement?

3 DDC [Maj WAREHAM]: Well, there is no additional
4 supplement argument, and we are allowed to present evidence in
5 court. And this is evidence being presented in court that has
6 been developed since such time.

7 MJ [COL POHL]: What's the difference between submitting
8 newly discovered evidence in court and submitting a pleading
9 based on newly discovered evidence?

10 DDC [Maj WAREHAM]: Well, the difference would
11 effectively, I guess, be leave of court. If the judge would
12 accept these, then they are accepted and are distributed.
13 There is not an additional argument being submitted at this
14 time that would clarify what these documents be or additional
15 analysis that needs to be done on these documents.

16 MJ [COL POHL]: This comes back to my other argument -- or
17 other point is this is really just premature. What you are
18 doing is you are saying here is a stack of papers, Judge, that
19 may not be relevant. We are not doing it to supplement our
20 pleading, okay? It's something, I am not sure what it is
21 because, again, it has nothing to do with this particular
22 case.

23 DDC [Maj WAREHAM]: Understood.

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1 MJ [COL POHL]: So if you wish to argue facts in it, that
2 would require a supplement.

3 DDC [Maj WAREHAM]: Understood, Your Honor.

4 MJ [COL POHL]: Okay. But for now, because I can see the
5 government is under no prejudice since the supplement, or
6 whatever the materials, are not going to be argued, that they
7 are on notice of it. And normally you would be granted the
8 authority to supplement it this way. But just keep in mind,
9 if you want to introduce evidence to support a pleading that's
10 already been filed that's new, it should be a supplement, not
11 just thrown on -- rephrase that, not just simply presented to
12 the court in the course of the argument.

13 DDC [Maj WAREHAM]: Yes, Your Honor. Absolutely.

14 MJ [COL POHL]: Okay.

15 LDC [MR. NEVIN]: May I be heard on it?

16 MJ [COL POHL]: Sure.

17 LDC [MR. NEVIN]: I just wanted to advise the military
18 commission, lest you be surprised by it, that we have a couple
19 of motions in the works I expect that will deal with aspects
20 of 133RR. And these would be a motion for secure meeting
21 spaces during the course of this week, and also a request that
22 you freeze the present status quo of the spaces where we meet
23 at Echo II.

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1 Just quickly, I will tell you that we, and I am
2 mindful of the particular aspects of this that are classified,
3 but we learned some of the details after the 802 on Saturday
4 about these developments. And it raised in our minds the
5 possibility that we -- that our meeting spaces were not
6 secure.

7 MJ [COL POHL]: Just to be clear, again, we are talking
8 about 527 and it has actually not been filed yet on a
9 technical perspective, but you are talking about the apparent
10 change in policy more than anything else?

11 LDC [MR. NEVIN]: Yes, exactly. And all of these things
12 coming at once, the developments with Mr. Kammen and the
13 inferences that that might raise with respect to our meeting
14 spaces and the determination on the part of JTF-GTMO that we
15 wouldn't be allowed to be in Echo II during the week raised
16 with us concerns, and we intend to ask you to direct JTF-GTMO
17 to freeze the status quo at Echo II.

18 MJ [COL POHL]: Were you given any reason why they had
19 this change in policy?

20 LDC [MR. NEVIN]: I believe we -- just this morning an
21 oral remark was made by counsel to Ms. Bormann. I was not
22 part of that conversation, so I won't speak to it, but I
23 believe some explanation was offered. But my understanding at

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1 least is that no explanation was offered when we were notified
2 of this earlier in the week.

3 MJ [COL POHL]: No, I don't like to take things out of the
4 regular order of business, you know that.

5 LDC [MR. NEVIN]: Yes, sir.

6 MJ [COL POHL]: Just kind of the nature of this type of
7 problem. Do you generally meet with your clients in Echo II
8 when we are in session?

9 LDC [MR. NEVIN]: Yes. Yes. It frequently happens that
10 it's closed session or it's something that our client -- or,
11 you know, for a variety of reasons, our client may not come to
12 the hearing that day, hearing room that day.

13 MJ [COL POHL]: And other parts of your team would ----

14 LDC [MR. NEVIN]: Exactly.

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

16 LDC [MR. NEVIN]: I didn't want to argue it now, but I
17 didn't want you to say, Wait a minute, Mr. Nevin, why didn't
18 you mention that when we were talking about 133? But the idea
19 would be please hold everything right there, freeze it until
20 we deal with the matter that Major Wareham was just talking to
21 you about.

22 MJ [COL POHL]: But if you -- if I understand what they
23 are asking now is that let's say we have a closed session, we

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1 anticipate to have at least one this week, maybe two, and if
2 you want to talk to your client or your defense team wants to
3 talk to your client, of people not in court, mitigation
4 specialists, whomever ----

5 LDC [MR. NEVIN]: Yes.

6 MJ [COL POHL]: ---- they are going to say the only way to
7 do that is to bring them here to the holding cells.

8 LDC [MR. NEVIN]: Yes.

9 MJ [COL POHL]: So they want to transport them all the way
10 over here -- close everything up -- to the holding cells ----

11 LDC [MR. NEVIN]: I hear Mr. Swann saying no, so what you
12 are saying now may be incorrect.

13 MJ [COL POHL]: I'm operating from imperfect information.

14 LDC [MR. NEVIN]: Yeah.

15 MJ [COL POHL]: Again, I know the pleading has not been
16 filed; that's just my understanding of it.

17 LDC [MR. NEVIN]: We were told they would be transferred
18 here to the ----

19 MJ [COL POHL]: Holding cells.

20 LDC [MR. NEVIN]: ---- to the holding cells, correct.

21 MJ [COL POHL]: Rather than staying there and going to
22 Echo II.

23 LDC [MR. NEVIN]: Going to Echo II, correct.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Mr. Swann, would you enlighten me on this?
2 And again, generally I don't do these things out of order like
3 this, but it does seem to impact the way we proceed this week.

4 TC [MR. SWANN]: First of all, it's only for this week and
5 this week alone. It's a logistical issue dealing with
6 resources. That's it. So assume we don't meet tomorrow in
7 open session, they can meet with their clients at Echo II on
8 Tuesday. Any day we are not in open session this week, they
9 can get to meet with their clients in Echo II. We don't do
10 anything on Friday, for instance, it will be Echo II. They
11 won't be coming to this courtroom. If we are in an open
12 session this week, because of resource constraints, then we
13 have offered that we will bring the client here, assuming he
14 doesn't want to come into the courtroom, and they can meet
15 with the client in the back.

16 That way, we don't have resources going from one
17 location to another location throughout the week. It is a
18 one-week thing because of other considerations that just
19 presented itself.

20 MJ [COL POHL]: Okay. So, Mr. Swann, it would be
21 helpful -- I don't know what was communicated, but when it is
22 presented that way, it's much different than the way at least
23 the pleadings said it was presented.

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1 TC [MR. SWANN]: Well, a part of it is this: One, the
2 first we got wind of it was at 4:02 on Friday night by an
3 e-mail. At that point in time we reached out. I knew
4 something about this because the Bin'Attash team had asked for
5 an exception to policy last week regarding the meeting with
6 their client. None of them could be on island. And the SOP
7 states that in order to meet with your client, it has to be
8 more than just an interpreter; it has to be someone for the
9 defense team ----

10 LDC [MS. BORMANN]: Judge, I am going to object. This
11 isn't relevant to this issue ----

12 MJ [COL POHL]: Ms. Bormann, we are trying to resolve this
13 now. I got it.

14 Go ahead, Mr. Swann.

15 TC [MR. SWANN]: And so the camp reached out and said they
16 would create an exception to policy to allow the interpreter
17 to meet with Mr. Bin'Attash rather than having to go through
18 having another paralegal on island.

19 MJ [COL POHL]: Let's cut to the chase here. The bottom
20 line is this, as I understand it: Due to a one-time resource
21 constraint, a one-time resource constraint this week, it is
22 that if any detainee is here and any other counsel wants to
23 meet with the detainee, or part of the defense team here, they

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 would have to meet them in the holding cells.

2 TC [MR. SWANN]: One time, that's right.

3 MJ [COL POHL]: But if no detainee is here, then they can
4 meet them in Echo II?

5 TC [MR. SWANN]: The answer is yes. I have to look to the
6 folks that control the operations.

7 MJ [COL POHL]: I know, and that's of course ----

8 TC [MR. SWANN]: The answer is yes.

9 MJ [COL POHL]: The problem here of course, Mr. Swann,
10 this issue, as many issues, there are a lot of people who make
11 decisions that don't necessarily report to other people who
12 have to stand up and tell me what the decision is.

13 TC [MR. SWANN]: But I understand there is really only one
14 person that makes the decision, meaning you, sir. Well, but
15 that is a one-time issue this week. If Friday we are not in
16 session, they can go Friday and meet with Echo II. Tomorrow
17 if we are not in session, Echo II. It's only when we are in
18 session this week that it can only happen ----

19 MJ [COL POHL]: And at least one detainee is here.

20 TC [MR. SWANN]: And at least one detainee is here, yes.

21 MJ [COL POHL]: But if all five detainees waive their
22 presence in an open session, then Echo II is available.

23 TC [MR. SWANN]: Echo II is available.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So there is no confusion here.

2 TC [MR. SWANN]: There is no confusion here.

3 MJ [COL POHL]: Okay. Thank you, Mr. Swann.

4 LDC [MR. NEVIN]: Well, that's the -- that's the procedure
5 to which we object, because these -- for general
6 attorney-client meetings, as opposed to five minutes before we
7 come into court here in the morning, those meeting spaces are
8 inadequate. So I think you will have, or you already have, a
9 motion on this subject asking you to order that that's
10 insufficient.

11 But again, the coming together of all these
12 circumstances at once raises a question. We ask that the
13 status quo be frozen until you have ruled on 133RR and the
14 request for an expert and until that process has a chance to
15 work its way through to its completion. So a motion to that
16 effect will be forthcoming.

17 MJ [COL POHL]: No, I understand. But what I am hearing,
18 and of course, it's not like I have any evidence of it, but
19 what I am hearing is this is simply a resource issue.

20 LDC [MR. NEVIN]: I heard that, Judge.

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

22 LDC [MR. NEVIN]: And I would say ----

23 MJ [COL POHL]: I don't know what the resource issue is.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Let's do this: Mr. Swann, today we are going to be
2 in an open session. Tomorrow I anticipate, if we don't do it
3 today, we will be in a closed session. I would like to have
4 evidence of what the resource issue is to see whether it's a
5 reasonable one-time, one-time change of policy or whether it's
6 just, it's done for some other arbitrary reason.

7 So bottom line is this: Get me a witness who will
8 tell me what the resource issue is. If it is classified
9 information, we will have to do it in a closed session.

10 TC [MR. SWANN]: When would you like the witness, Judge?
11 Wednesday?

12 MJ [COL POHL]: I would like them this afternoon after
13 lunch. But again, I don't know whether it deals with
14 classified information or not. And basically, just to know --
15 what I want to know is what's changed for this particular week
16 that results in this particular change of policy. That way we
17 have got some evidence on the record and I can make a decision
18 whether it's a reasonable accommodation for one week or
19 whether it's an unreasonable arbitrary change based on
20 something else.

21 TC [MR. SWANN]: All right, Your Honor.

22 MJ [COL POHL]: Got it? Thank you.

23 But back to your basic point, Mr. Nevin, it is 133RR

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 is still on the docket. And if you have things you wish to
2 add to it, you certainly will be allowed to do that.

3 LDC [MR. NEVIN]: A motion to that effect will be filed.

4 MJ [COL POHL]: Yes, I got it.

5 Ms. Bormann.

6 LDC [MS. BORMANN]: A couple of points of clarification.
7 When you were talking to Major Wareham, you indicated that
8 there might be a possible spill on filing in 527. I am asking
9 leave to file a communication between the head of the WH staff
10 here, OSS security staff, between General Martins and General
11 Baker, dated June 19, referring to the memo that you are --
12 have concerns about, which is Attachment F to 527. It is
13 unclassified, and I just wanted to let your security staff
14 know that ----

15 MJ [COL POHL]: Okay.

16 LDC [MS. BORMANN]: ---- and so you don't have to know
17 about that. We dotted our i's and crossed our t's ----

18 MJ [COL POHL]: Oh, I worry about it, Ms. Bormann. But I
19 defer to the experts.

20 LDC [MS. BORMANN]: So you have a memo in your hands right
21 now, and your court staff has the memo, and, of course,
22 General Martins already had the memo and all of defense
23 counsel now have the memo.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: But it has not gone through any security
2 review except through the CISO?

3 LDC [MS. BORMANN]: It went through all of WHS. The memo
4 is from Mr. Bumpus, who is the head of OSS here.

5 MJ [COL POHL]: Okay.

6 LDC [MS. BORMANN]: Pardon? I haven't had it marked yet.
7 So I am asking to have it marked with a number so we can
8 introduce it.

9 MJ [COL POHL]: What's it related to?

10 LDC [MS. BORMANN]: It is related to AE 527,
11 Attachment F ----

12 MJ [COL POHL]: Okay.

13 LDC [MS. BORMANN]: ---- which is the memo you were
14 referring to earlier in your colloquy with Major Wareham, with
15 concerns that it might have classified information.

16 MJ [COL POHL]: I only do what people tell me the document
17 has.

18 LDC [MS. BORMANN]: I know.

19 MJ [COL POHL]: First of all, 527 has not been accepted
20 for filing anyway. So if you wish to add something to it,
21 it's not ----

22 LDC [MS. BORMANN]: Right.

23 MJ [COL POHL]: ---- so it's been rejected for

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 administrative purposes. So what you are telling me, when it
2 comes back again it will have an additional thing on it, but
3 it's all good to go.

4 LDC [MS. BORMANN]: It didn't strike us that we had to
5 file something that said it's unclassified, since it's been
6 determined to be unclassified. But if you would like us to
7 attach something that says an attachment is unclassified, we
8 are happy to do that.

9 MJ [COL POHL]: Just so it is clear, and again, I am just
10 doing what the security people tell me the concerns are. I
11 believe it was Attachment D from an e-mail from General Baker.

12 LDC [MS. BORMANN]: No, that's Attachment F.

13 MJ [COL POHL]: Is that Attachment F? From General
14 Baker ----

15 LDC [MS. BORMANN]: Yes. It's a June 7 -- June 14 e-mail.

16 MJ [COL POHL]: With a lot of redactions on it?

17 LDC [MS. BORMANN]: Yes.

18 MJ [COL POHL]: Okay. That's the one.

19 LDC [MS. BORMANN]: That's the memo that -- the e-mail
20 between -- the communication between ----

21 MJ [COL POHL]: You don't need to give me that OSS -- or
22 the review; give that to the security folks.

23 LDC [MS. BORMANN]: I assume the security folks had it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 since it's from a security folk.

2 MJ [COL POHL]: You assume they marry things up.

3 LDC [MS. BORMANN]: I mean, I -- you know, I ----

4 MJ [COL POHL]: I will have my CISO track it down and see.
5 There is no need to attach it. If it turns out it is not
6 classified, I got it.

7 LDC [MS. BORMANN]: I just wanted to make it clear on the
8 record that we did our due diligence on this. There is paper
9 from WHS saying this is not classified. And so whatever we
10 need to do to avoid a spill so we don't have to shut down the
11 proceedings, we are happy to do, and that's why you have it.

12 Now I want to comment a little bit about your order,
13 which I appreciate somebody put on the record what the reason
14 is, but I do want to point out this is not a one-time resource
15 constraint. There are a series of filings in AE 254 where
16 Mr. Bin'Attash was denied meetings with his counsel because of
17 resource constraints. So the idea that this is a one-time
18 resource constraint is frankly not supported by the evidence;
19 it's happened over and over again.

20 And I'm going to remind you the first time we filed
21 AE -- a motion, because it was in AE 254, a motion asking you
22 to intervene to provide meeting space was when Mr. al Nashiri
23 was being arraigned. You were, of course, the military judge

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1 at that arraignment. And at that time, on that date, we were
2 denied the ability to meet with Mr. Bin'Attash. I was on this
3 island because there was a hearing in Mr. al Nashiri's case.
4 So they denied our ability to meet with our client.

5 And so this is not a one-time constraint, this is a
6 continuing constraint, and I wanted to put that on the record.

7 MJ [COL POHL]: Ms. Bormann, is there a written SOP about
8 attorney-client visits -- I am using the attorney to include
9 the defense team -- in Echo II?

10 LDC [MS. BORMANN]: An SOP from?

11 MJ [COL POHL]: JTF.

12 LDC [MS. BORMANN]: Well, there were a series of memos.
13 But now your order in AE 018 is really the superseding
14 document.

15 MJ [COL POHL]: Okay. Okay.

16 LDC [MS. BORMANN]: It doesn't -- with respect to JTF's
17 SOPs, I mean, they have a series of SOPs about how people are
18 transported, so it obviously contemplates that the meetings
19 are going to happen there.

20 MJ [COL POHL]: I got it.

21 LDC [MS. BORMANN]: It never contemplates that they are
22 going to happen in a place where there is a bed and a toilet
23 basically. So that's completely unsuitable.

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1 MJ [COL POHL]: I got it.

2 LDC [MS. BORMANN]: So we are stuck here. So I appreciate
3 your order and I am hoping that we can make this situation go
4 away. Thank you.

5 LDC [MR. RUIZ]: Judge, may I approach?

6 MJ [COL POHL]: Sure.

7 LDC [MR. RUIZ]: Judge, my experience has taught that
8 attempting to deal with these issues without bringing them to
9 the attention of the court sometimes is not the best way to go
10 about it. But I do want to affirm what Ms. Bormann has said,
11 that this is not a one-time issue. The issue of resourcing
12 attorney-client meetings continues to be an issue that, while
13 it has not bubbled up to the surface completely, is simmering
14 beneath, and it is one that I certainly have been addressing.

15 I know that JTF has been, in fact, reaching out to
16 our office a number of times indicating that they do not have
17 the resources to provide attorney-client meetings and, in
18 fact, asking our office, meaning the Office of the Chief
19 Defense Counsel, to intervene to attempt to prioritize the
20 meetings of the capital clients in this case; certainly a
21 procedure that I am opposed to, because we simply need the
22 access the capital defendants require in this case, Judge.

23 This week I was informed that one of the visits I had

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1 with Mr. Hawsawi was canceled. And again, the issue that
2 was -- the reason that was given was a resourcing issue, a
3 manning-power issue. I had a discussion with the Staff Judge
4 Advocate about it. I said you do not have enough huts or you
5 do not have enough manpower? The answer at the time was that
6 they did not have enough manpower.

7 My response was simply you chose to have the case
8 here; the United States Government chose to have the case
9 here. We have capital defendants. We travel from Washington,
10 D.C. to meet with them. We have limited time and resources on
11 our team specifically. We come a week ahead of every hearing
12 to make sure we get the business of the case done before the
13 case begins. When we don't have that access, it is a problem.
14 They were able to give us the access in the afternoon. They
15 made an exception.

16 I don't know exactly how that goes about. It is
17 certainly something I would like to inquire. But I would like
18 to make it clear, Judge, that this is an issue that is
19 simmering beneath the surface. The JTF does continue to reach
20 out to our office in an attempt to deconflict attorney-client
21 meetings when we requested a number of meetings that they
22 cannot support and that is unsupportable in a capital case.
23 We are attempting to resolve it.

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1 Our position is clear. We have capital cases that
2 are tried here. We have meetings that need to take place and
3 they need to resource that with the appropriate manpower to
4 provide access within normal meeting hours. We are not
5 requesting access that is outside the normal meeting hours,
6 which is midnight, or whatever the hours are. We are
7 requesting access during the normal meeting hours that have
8 been set forth for the conduct of this case. And that is
9 something that ought to be appropriately resourced. And if
10 they have issues with that, then certainly they need to
11 resolve those. Thank you.

12 MJ [COL POHL]: Thank you. That brings us to 152000.
13 Mr. Harrington, is that ripe now, or the unclassified portion
14 of it?

15 LDC [MR. HARRINGTON]: I think we can do the unclassified
16 portion, Judge.

17 MJ [COL POHL]: Please proceed.

18 LDC [MR. HARRINGTON]: As the court knows, there is a
19 classified and an unclassified portion. And the reason that I
20 hesitate a bit is because it deals with the -- this is the
21 issue about the book written by James Mitchell, *Enhanced*
22 *Interrogation*, and a request to compel some discovery
23 regarding that. And Mr. Mitchell obviously was able to obtain

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1 declassification for the things that he wanted to write about,
2 some of which were I to stand here and say would be
3 classified.

4 So I am sure I can comment on the things that are in
5 the book. I am ready to do that, Judge. If the court -- we
6 can resolve the classified part of the argument this week, and
7 if the court wants to do it all at the same time ----

8 MJ [COL POHL]: Your reference to the book, you are just
9 saying this is what the book says.

10 LDC [MR. HARRINGTON]: Correct.

11 MJ [COL POHL]: And you are going to say this is what the
12 book says and this part of the book is unclassified and you
13 are making no representations of any independent knowledge you
14 may have about this being classified or unclassified?

15 LDC [MR. HARRINGTON]: Correct.

16 MJ [COL POHL]: Okay. Trial Counsel, do you have any
17 objection to him, as long as he references that as a source?

18 MTC [MR. TRIVETT]: No objection, sir.

19 MJ [COL POHL]: You understand the box here,
20 Mr. Harrington?

21 LDC [MR. HARRINGTON]: I understand, Judge. I don't
22 intend to offer evidence outside of what the book is.

23 MJ [COL POHL]: And I hate to put a disclaimer before you

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1 say something, but the bottom line is your references here are
2 based only on what's in the unclassified book and not based on
3 any other sources of knowledge you may have as the attorney in
4 this case?

5 LDC [MR. HARRINGTON]: That's correct.

6 MJ [COL POHL]: Okay. Proceed.

7 LDC [MR. HARRINGTON]: Judge, obviously you are familiar
8 with the history of this particular issue, and it goes back to
9 March of 2013 when the first pleading was filed on 152. And
10 you have heard the complaints we have made on behalf of our
11 client regarding noises and vibrations and other conduct that
12 he has alleged happened at the camp. And the prosecution, on
13 behalf of the camp and the JTF, have vigorously denied that
14 any of those things have happened. And there has been
15 testimony by Mr. Binalshibh and Mr. Gouled and by other
16 persons in classified settings with respect to the issue here
17 at the camp.

18 In Mr. Mitchell's book, there is one -- there are two
19 passages regarding Mr. Binalshibh, but only one of them which
20 is really, I think, pertinent for this particular motion. And
21 the court, I would suspect, is going to say, What's the
22 relevance of that? We are talking about an incident that
23 happened years and years ago, somewhere between 11 and 16

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1 years ago to this particular thing.

2 And there are a number of connections in the
3 incidents that we have alleged happened here and the incident
4 that's related in the book. And that commonality or unity
5 comes in obviously the person of Mr. Binalshibh being involved
6 in each, the commonality of government agencies alleged by us
7 to be the cause of the problem, the allegations with respect
8 to the conduct that happened toward Mr. Binalshibh being the
9 same, the response from Mr. Mitchell in his book and from the
10 government on behalf of the JTF and the guard that this is a
11 delusion on his part.

12 There is a commonality in the investigations that
13 were done, and whether those were significant or properly
14 done, significantly done with lack of experts. There is --
15 and also a kind of an indifference on the part of the
16 prosecution here to what these -- these complaints are and how
17 far they will go with respect to it, to the investigation of
18 it or what needs to be done.

19 And so Mr. Mitchell relates in his book that he was
20 called to a place to meet with Mr. Binalshibh. And he said he
21 was called there to help with the interrogators, who were
22 having difficulties with Mr. Binalshibh. He came and he lied
23 to Mr. Binalshibh and said he had been sent there by his

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1 headquarters to assist Mr. Binalshibh in the complaints that
2 he was making. And the complaints related to vibrations and
3 shaking in his cell and causing him sleep deprivation and loss
4 of balance and other -- and other problems.

5 And Mr. Mitchell said, I came there thinking that
6 Mr. Binalshibh was delusional. And, in fact, he made the
7 comment that he thought he was so crazy. And he
8 euphemistically, for a serious situation of somebody who has
9 been in this situation in part as a result of Mr. Mitchell's
10 involvement in this whole thing, to say that he was thinking
11 about maybe what he needed was a tin foil hat.

12 He then said that he used a technique on
13 Mr. Binalshibh which he calls critical incident analysis in
14 that he -- what this is is you take something that's related
15 to you by your patient, which you believe is not possible or
16 that the person is delusional about it, and you go through the
17 actual problem that it is with the patient. So that you walk
18 them through step by step where they describe it and how it
19 happens. And so that's what he was going to do with his
20 partner.

21 So they took Mr. Binalshibh to his cell. And
22 according to Mr. Mitchell, his partner laid down on
23 Mr. Binalshibh's bed and was surprised because he felt

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1 vibrations and a humming, and he had Mr. -- and Mr. Mitchell
2 then did the same thing, and they were surprised about it.
3 And as it happened, what he refers to as the COB, which would
4 be like I assume the camp commander, was outside watching this
5 on a video monitor. And they came out and they decided they
6 would try to investigate it.

7 And according to Mitchell, they found that there was
8 some engineering problem associated with a machine that caused
9 exactly what Mr. Binalshibh had complained about in vibration
10 in the cell. And, as a result of that, they moved
11 Mr. Binalshibh to a different cell, and that was their remedy
12 for it. But what he described in this is the same kind of
13 thing that Mr. Binalshibh complained about there and
14 complained about experiencing here.

15 MJ [COL POHL]: Mr. Harrington, in the book when they
16 moved Mr. Binalshibh to the new cell, did the new cell have
17 the same problem?

18 LDC [MR. HARRINGTON]: Mr. Mitchell said no. He does not
19 say whether they turned the machine on, did anything
20 whatsoever to do anything further to investigate whether the
21 machine, as it was, affected the other cell or not. There is
22 nothing further about it; they just said they moved him and
23 that that cell did not have the same thing. We don't know how

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1 he came to that conclusion. He gives us no information, which
2 is part of what we are trying to find out, as to what the
3 extent of what this was, because it obviously has a critical
4 bearing on this.

5 Because if their response to this is to move
6 somebody, which is what they have done to Mr. Binalshibh here,
7 but the problem continues, that's one thing. If there the
8 same thing happened, right, and I can't make comments about
9 anything else I know about it, then it's another issue. But
10 it helps the court, I think, to deal with this issue of -- in
11 this case that everybody does -- of skepticism about the
12 complaints of Mr. Binalshibh.

13 Now, the government again, in their responding
14 papers, talk about Mr. Binalshibh is delusional, right? And
15 obviously our position is that's not the case. Our position
16 is that somebody is doing these kind of things. And the fact
17 that it has happened before, in the government control, with
18 an agency who is relevant to this is certainly, I think,
19 pertinent and relevant to what we ask.

20 And, Judge, the government responds that we ask for
21 everything about the RDI. And so based upon what they say
22 they have, it is just based upon this general -- apparently
23 this general request from the CIA that they provide everything

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1 about the RDI. We have no response that they asked anything
2 further about things related to this particular incident.
3 They say that there was a check and they could not find out
4 who the CBO was; they could not find out when this happened or
5 the place that it was. But as far as I know, that's the only
6 inquiry and I don't know what inquiry was made.

7 They don't indicate that they contacted Mr. Mitchell.
8 In fact, they say they have had no communications with
9 Mr. Mitchell. One of the requests we made was to be able to
10 communicate with Mr. Mitchell. And they went through the CIA
11 counsel, and Mr. Mitchell's attorneys declined to speak with
12 us. We understand that. But there is nothing in there to
13 indicate whether they did anything to follow up on these
14 things.

15 And part of the history of our case here supports our
16 skepticism, Judge, because we have had representations made
17 many times. And the incident you were talking about earlier
18 today from the places where we meet with our clients here is
19 another representation that has been made by the prosecution
20 that there are no problems.

21 Earlier this year there was a problem at a place
22 totally unrelated to us. And we got a response from the
23 prosecution that just applied to that place, no other place.

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1 The next thing we know now there is a problem in the
2 Nashiri case, and Nashiri got the same representation. And we
3 have had representations that when we started this hearing
4 that no one else had control to the security light that you
5 have here. The next thing you know, somebody did. We have
6 had representations about nobody being able to listen to us in
7 Echo II where we meet with our clients, and we went through
8 the long process about the supposed smoke detectors.

9 So there is reason to believe here that the inquiry
10 by the prosecution and the responses that they get may well
11 not be -- not be accurate and may not well be -- be complete.

12 Judge, one of the specific requests that I would ask
13 the court to look at is we made a request for a Brady
14 disclosure. And we got a curious response from the
15 prosecution in this. After denying that everything we asked
16 for was relevant with respect to this book and with respect to
17 Mitchell, they responded at our request for Brady by saying
18 that you have, or will be getting, information with respect to
19 the RDI program, and there are things in there that are
20 relevant to you.

21 And after you have got that you can make a motion --
22 after you have received it and assimilated it you can make a
23 motion to come back to the court and ask for further --

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1 further discovery or further information. Which means that in
2 the response they are saying there is relevant information
3 that potentially could be Brady material, but they are going
4 to make us go searching for it.

5 And they tell us with respect to photographs that we
6 are asking for that we should show what we have, to the extent
7 that we can, to our client and our client should identify
8 things. That's not the purpose of discovery. The purpose of
9 discovery is to answer a particular discovery request. And
10 especially with Brady, when a Brady request is made, you are
11 supposed to address the Brady requirement. It doesn't mean
12 you have to reprint things or redo things, but you certainly
13 make reference, if you know there is Brady material, to where
14 it might be in discovery that is coming to you, so that you
15 can target on that.

16 And, Judge, with respect to the photographs, we made
17 a discovery request back in December of this past year with
18 respect to photographs that we received, to make some sort of
19 identification of them. We got a response in March '17 that
20 that's engaged in due diligence. And we have heard nothing
21 further. And we are at the point now of having to do a motion
22 to compel.

23 But that particular issue spills over into this

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1 particular issue, and it just -- it indicates to the court
2 that the difficulty and the frustration that we have in terms
3 of trying to get information, and information which is
4 certainly relevant to us and pertinent.

5 And, Judge, I started by talking about the skepticism
6 that this could even happen and that Mr. Binalshibh supposedly
7 is delusional. And Mitchell's finding shows that regardless
8 of the source of that, whether that was intentional,
9 accidental, whatever it was, it shows that he was certainly
10 not delusional on that point.

11 But we now have a situation in which we are looking
12 into and may have to be supplemented, where people in Cuba,
13 United States citizens, are claiming the same type of thing
14 happening to them with injuries to them. And the response of
15 the United States Government is not the same as the response
16 here, that you are crazy. They don't say those people are
17 crazy. The happening of those things is just as difficult to
18 wrap your head around as it is with our client.

19 But they don't respond to it that way. They say we
20 are looking into it. We have the FBI looking into this. We
21 have forensic people. So when it benefits the government,
22 they do it one way; when it doesn't benefit them, they do it a
23 different way, which is the same as giving clearance to

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1 Mitchell to write a book, which is self-serving for him, an
2 attempt to salvage his reputation, and self-serving for the
3 CIA.

4 Thank you.

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

6 Trial Counsel, do you wish to respond?

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

8 MJ [COL POHL]: Good morning.

9 MTC [MR. TRIVETT]: I just wanted to point the commission
10 to a couple of Dr. Mitchell's words on that second page that I
11 think are important to the inquiry on whether or not any other
12 discovery is required on this issue. Quote, we know no one
13 was deliberately messing with him. We assured him we were
14 not. We tested the new bed. The whole context of him
15 describing the story was so he could show the great lengths to
16 which the CIA personnel went to address detainee concerns.

17 Nothing in this book changes any of the positions
18 that the U.S. Government has taken in regard to this
19 litigation, and it hasn't changed the fact that it is still
20 the government's position that this is not happening at
21 Guantanamo Bay and that no one has ever intentionally vibrated
22 his cell. By all indications, his bed was shaking at some
23 point due to what was described by Dr. Mitchell as an

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1 engineering problem localized to that cell, and only when a
2 large piece of equipment was situated nearby.

3 Counsel seemed to express frustration over how we are
4 handling what are voluminous discovery obligations. But in
5 the end, I can tell you and represent to you that all of the
6 conditions of confinement that were ordered as discovery under
7 397 have been provided -- or will-have-been-provided piece of
8 it isn't an attempt for us to hide what was going on. We
9 obviously have no obligation to create discovery; we have no
10 obligation to spoon feed the defense the discovery. But had
11 there been any information specific to this, we would have
12 provided it and we would have noted it for the defense.

13 We did review the prepublication review. And I want
14 to clarify, it is not accurate to say that he received
15 declassification approval. What happens is under his
16 nondisclosure agreement, he was required to submit the book
17 for prepublication review to ensure that if anything was
18 classified, there would be ways for the CIA to protect that
19 information before it was published. So it's not accurate to
20 say that he actually requests declassification. It's
21 prepublication review. But we did review it.

22 And there is nothing in any of the documents that he
23 put in for prepublication review that -- on this issue that

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1 indicates anything different than the fact that it was an
2 engineering problem. It is not as if the prepublication
3 review identified the specific piece of equipment or that he
4 originally wanted to put more detail into the book on this one
5 issue and was told not to. All of the indications, from
6 everything that we reviewed, is that portion is the same. And
7 if that portion is the same, then the defense has that
8 information that they need in the book; and to the extent they
9 have it in the book, then the discovery motion should be
10 denied.

11 Mr. Harrington also brought up a current event
12 regarding the sonic attacks on embassy personnel of the United
13 States. And I'm glad he did, because it really does
14 demonstrate what we are dealing with in a way, I suspect, he
15 did not intend. We are not dealing with 30 people, or every
16 high-value detainee in Camp VII, complaining of this. We have
17 one person complaining of this over and over and over again,
18 despite six or seven different company guards that have come
19 in and looked into the issue.

20 If every single detainee was complaining about this,
21 I would agree, we would be skeptical too, but that's not the
22 case. And by all accounts, it's not happening and it's only
23 in the mind of one person that it is happening. The fact that

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1 it happened over 11 years ago and that it wasn't intentional
2 really doesn't change the government's position on this.

3 And subject to your questions, sir, that's all my
4 argument.

5 MJ [COL POHL]: I have none. Thank you.

6 Mr. Harrington, anything further?

7 LDC [MR. HARRINGTON]: Judge, Mr. Trivett just brought up
8 to you a quote by Mr. Mitchell with respect to he knew the
9 allegations of Mr. Binalshibh were not true, which he claimed
10 he knew before he went and looked to see what happened, and he
11 also tried to say what great pains the CIA went to accommodate
12 or take care of difficulties that the detainees might have.
13 And I submit to the court it's very difficult to accept that.

14 If the court put Mr. Mitchell's book down next to the
15 Senate Select Committee Report on Torture, the summary of it,
16 and looked at what is related by records of the CIA concerning
17 the treatment of Mr. Binalshibh, I think that you would
18 certainly see that Mr. Mitchell's comments are not correct.

19 And I obviously can't go into the facts with respect
20 to this engineering problem, or whatever it is, but that's
21 just a comment from Mr. Mitchell. There is nothing in there
22 that supports how he knew that.

23 And with respect to Mr. Trivett's talking about

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1 providing everything, my comments were not meant to be an
2 attack on Mr. Trivett or anybody else on the prosecution team.
3 My comments were, they are constrained, like we are, by the
4 representations of the agency that they request information
5 from. And I suspect to the court that -- I suspect that
6 that's not something that anyone can control other than that
7 agency.

8 And with respect to the current things that are
9 happening here, there are a number of people who have had this
10 problem there, according to the news reports, but there are
11 many people who didn't have it. And there is also news
12 articles all the time about people being next door to each
13 other in a hotel or next door to each other in another
14 building who did not experience the same things that the
15 person right next door to them had. And I think that helps us
16 rather than hurts us.

17 Thank you.

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

19 Anything further, Mr. Trivett?

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

21 MJ [COL POHL]: That brings us to 200MM.

22 DC [MS. PRADHAN]: Good morning, Your Honor.

23 MJ [COL POHL]: Good morning.

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1 DC [MS. PRADHAN]: Your Honor, the clerk has marked our
2 slides as AE 200PP. They have been provided to and reviewed
3 by the court security officer, and we are providing a copy to
4 the government and to all co-counsel. May I please have
5 permission to display to the gallery?

6 MJ [COL POHL]: Sure.

7 DC [MS. PRADHAN]: Thank you. When you have a chance,
8 could I please have the feed from Table 4. Thank you.

9 Your Honor ----

10 MJ [COL POHL]: Do you have a copy? Can I see it? Thank
11 you. Go ahead.

12 DC [MS. PRADHAN]: Your Honor, 200MM asks the military
13 commission to reconsider AE 200II in light of the conflict
14 between the military commission's order in AE 018U with
15 customary international law implemented by the United States,
16 and particularly the customary international law prohibiting
17 torture, which includes a specific right to be heard on
18 torture, a right to seek legal remedy, and the right to
19 rehabilitation.

20 So I want to start by looking at 018U, and I want to
21 emphasize that this motion is based on our reading of 018U in
22 an effort to ensure that we either clarify Mr. al Baluchi's
23 right to continue sharing unclassified information about his

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1 torture or that we raise our objection to the new violation of
2 his rights.

3 What happened last year is the government stood up
4 and asked the military commission to establish a bright line
5 test, a rule rather, that no, quote, legal mail from the
6 defendants go to third parties, meaning anyone outside of
7 their defense teams.

8 What we got in 018U is this language, and I am
9 looking at part B here, Your Honor, that says, Defense counsel
10 may not send, communicate or otherwise distribute defendant's
11 mail, or any portion of its contents, legal or otherwise, to
12 third parties.

13 And then below that there is Clause I. And Clause I
14 says defense counsel may disseminate the contents of the
15 accused -- the defendant's unclassified conversations to third
16 parties for the sole purpose of preparing their defense for
17 commission proceedings.

18 So I would like to start by putting before the
19 military commission the following questions. The first is
20 does the military commission include in its prohibition on
21 dissemination to third parties of defendants' mail, quote,
22 legal or otherwise, the statements that have been deemed to be
23 unclassified through a government classification review

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1 process?

2 The second is, what is the difference between
3 Mr. al Baluchi's unclassified mail, again legal or otherwise,
4 and his, quote, unclassified conversations that may be
5 disseminated for the purpose of preparing his defense.

6 And the third is Mr. al Baluchi's, and I will go into
7 this in some detail later, Your Honor, but Mr. al Baluchi's
8 current use of his unclassified statements on CIA torture are
9 for the following three purposes: They are to compel
10 international adjudication or pronouncements on his -- on his
11 torture, and his ongoing torture here at Guantanamo, to
12 leverage NGO or independent organizations' investigative
13 capacities, and to seek potential incarceration alternatives.

14 And my question, then, is what is the military
15 commission's interpretation of "for the sole purpose of
16 preparing his defense"? And with your permission, I would
17 like to explain our position on that last question in the
18 context of his rights as a torture victim under customary
19 international law.

20 And this brings me to a brief recap of the AE 200
21 series, which began in 2013, and then I will discuss the
22 change in law that allows the commission to reconsider 200II.

23 Mr. al Baluchi's initial motion in this series, AE

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1 200, dealt with the juxtaposition of Protective Order Number 1
2 with customary international law, specifically that one
3 provision in Protective Order Number 1 labeling the
4 defendant's, quote, observations and experiences as
5 classified. And our argument was that actually violated the
6 customary prohibition on torture. The commission found in AE
7 200II in 2013 that the prohibition on torture was a jus cogens
8 norm constituting customary international law, but that
9 customary international law was not part of domestic law.

10 Nevertheless, the one provision that we had objected
11 to in the protective order was eventually lost. In the
12 intervening years -- can I have some water, please? Thank
13 you.

14 In the intervening years, and aided in part by the
15 release of the redacted executive summary of the SSCI report,
16 we have memorialized -- or Mr. al Baluchi has memorialized
17 his -- a number of his observations -- thank you, a number of
18 his observations and experiences of his own torture. And we
19 have placed several of those memorialized statements through
20 classification review process.

21 Now, as I understand it, a number of the documents go
22 to the original classification authorities, the OCAs, which I
23 understand would include the DoD entities and would also

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1 likely include the CIA. That review, as you are aware, Your
2 Honor, because we have talked about it many times, that review
3 sometimes takes months or years. I currently have a document
4 in classification review that has been there since December
5 2016 that we are still waiting on.

6 If they come out of that process marked UNCLASSIFIED,
7 stamped UNCLASSIFIED, and I have samples to show later, we
8 have taken that to mean that we may share them, that they are
9 unclassified. We have then disseminated the statements, in
10 whole or in part, with the media or with advocacy groups. And
11 last year, as I mentioned, the government objected to our use
12 of those unclassified statements and proposed a number of
13 ideas that culminated in their proposal of this bright line
14 test. And then in June we received 018U, which seemed to
15 adopt elements of that bright line test, but included some of
16 the ambiguities that I mentioned, or at least we perceived to
17 be ambiguities.

18 So we are operating under the assumption that 018U
19 does actually bar us from sharing Mr. al Baluchi 's
20 unclassified statements with the public, which we believe
21 constitutes a violation of customary international law.

22 It's worth recalling, as we argued in 2013, that the
23 definition of customary international law provides that only

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1 those principles that gain wide acceptance and practice by
2 states, due to a sense of obligation, rise to the level of
3 custom. Which is why customary international law is
4 considered, including by the United States, to be binding on
5 all states regardless of explicit domestic interpretation.

6 The commission ruled in AE 200II that it cannot
7 consider customary international law to be part of domestic
8 law. And so articles from, for example, the Convention
9 Against Torture that are considered by many countries to
10 reflect binding custom did not create rights for the
11 defendants.

12 Now, the rights of torture victims under
13 international law are actually universally recognized,
14 including by the United States. And this was belatedly
15 confirmed 12 years too late by the United States in November
16 2014, about a year after the military commission's decision in
17 AE 200II. In November 2014, an official delegation from the
18 United States traveled to Geneva to present -- to present our
19 periodic report to the Committee Against Torture, which is the
20 authoritative body -- excuse me, the authoritative body of
21 experts who interpret and monitor compliance with the
22 Convention Against Torture.

23 The committee has recognized Articles 1 through 16 of

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1 the Convention Against Torture to be reflective of customary
2 international law, and so did the United States on November
3 12, 2014. So this is the official statement -- this is one of
4 the official statements of the United States November 2014 at
5 the United Nations. And this is a representative from the
6 legal advisor's office who said, The prohibition against
7 torture is customary international law binding on all nations
8 everywhere at all times. Articles 2 and 16 of this convention
9 require prevention of both torture and cruel and inhumane or
10 degrading treatment or punishment in territory under U.S.
11 jurisdiction. These prohibitions bind the United States and
12 its officials at all times everywhere.

13 She then went on to say that this language clearly
14 covers the sovereign territory of the United States. In
15 addition, we believe that it covers other places the United
16 States controls as a governmental authority, to include the
17 U.S. Naval Station at Guantanamo Bay, Cuba, and over all
18 proceedings conducted there.

19 Brigadier General Richard Gross of the Department of
20 Defense, who was always a member of the delegation, reiterated
21 these points. He said, I would like to reaffirm the
22 Department of Defense's commitments to the United States'
23 clear position that torture and cruel and inhumane treatment

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1 are categorically prohibited under domestic and international
2 law everywhere at all times.

3 The government would like to focus our attentions on
4 the Convention Against Torture as a treaty rather than the
5 customary law prohibitions in arguing that the treaty, the
6 Convention Against Torture is non-self-executing. This is a
7 red herring, and let me explain why. Brigadier General Gross
8 did not make specific reference to the Convention Against
9 Torture in his statement and neither did, actually, most of
10 the other members of that delegation in their statements,
11 because the treaty is not what binds the United States on
12 torture and CIDT prevention. What binds the United States on
13 torture and on the obligation to provide Mr. al Baluchi with
14 the ability to be heard publicly about his torture is
15 customary international law.

16 United States agencies actually recognized that
17 Mr. al Baluchi's understanding of his rights under customary
18 international law was the right interpretation as early as
19 January 2013. In a confidential memo that was later released,
20 not in time, of course, for the military commission to
21 consider it in AE 200II, State Department legal advisor Harold
22 Koh wrote in a memorandum that, "I conclude the conv -- the
23 Convention Against Torture is best understood as establishing

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1 and reflecting the following principles regarding extra
2 territoriality: First, the convention built upon and
3 incorporated a preexisting geographically comprehensive
4 background prohibition against torture and cruel and inhumane
5 or degrading treatment that was already established as a
6 matter of both treaty and customary international law."

7 He then went on to say that certain fundamental human
8 rights obligations apply to all government action in all
9 places as a matter of customary international law. He then
10 goes through the list. It's a very short list, Your Honor.
11 And at the top of that list is the prohibitions against
12 torture, cruel, inhumane or degrading treatment, or
13 punishment.

14 He then says contrary to the assumptions of some, the
15 conventions against torture was not adopted for the purpose of
16 prohibiting torture. Torture and CIDT were already
17 comprehensively prohibited by both treaties and customary
18 international law at the time the CAT was adopted, as the
19 United States had recognized at length in its amicus brief in
20 Ayala. Finally, Professor Koh stated that the convention was
21 adopted to make more effective the existing international
22 obligation on torture and CIDT by codifying certain state
23 obligations to prevent, prosecute, and remedy violations.

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1 Professor Koh, who left the State Department in 2013,
2 actually noted after the United States presentation in
3 November 2014 that the United States delegation, quote, did
4 not go so far as to say that torture and CIDT is prohibited at
5 all times and all places because of the torture convention.
6 The delegation decided simply to state that torture and cruel
7 treatment are comprehensively barred by international and
8 domestic law.

9 The fact that Articles 2 to 16 of the CAT codify
10 preexisting jus cogens means those prohibitions fall into that
11 very narrow category of binding law that exists separately
12 from treaties which are subject to ratification or legislative
13 implementation, as the government has pointed out.

14 So then what is the relationship between custom and
15 domestic law? The CMCR recently stated that current
16 international law is part of the law of the United States and
17 supplies a rule of decision when no contrary domestic law
18 exists. As we set forth in AE 20000, even though this
19 decision was rightly vacated by the D.C. Circuit on other
20 grounds, the D.C. Circuit has also held that certain reasoning
21 of vacated opinions may be considered persuasive and the
22 military commission should consider the CMCR opinion in this
23 regard to be persuasive authority in reconsidering the

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1 decision in AE 200II.

2 And this is partially because the CMCR's decision
3 tracks with our long-held argument argued in a number of
4 motions, including AE 251, and argued by the government as
5 well, that the following is the relationship between
6 custom ----

7 MJ [COL POHL]: Wasn't your argument on that particular
8 issue that it wasn't customary international law that
9 controlled, it was the UCMJ statute of limitations controlled?

10 DC [MS. PRADHAN]: Yes, Your Honor. And that's precisely
11 because where there is no contrary law, customary
12 international law controls. So in AE 251, yes, we gave you a
13 number of domestic law examples, including, for example, that
14 at the War Crimes Act under custom, there is considered to be
15 no statute of limitations for ----

16 MJ [COL POHL]: Do I give any weight to the fact that the
17 United States didn't sign the Convention Against Torture?

18 DC [MS. PRADHAN]: United States has signed and ratified
19 the Convention Against Torture.

20 MJ [COL POHL]: I am talking about the parts that they did
21 not buy in on.

22 DC [MS. PRADHAN]: Well, Your Honor, I think you are
23 referring to the reservations and understandings that the

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1 United States issued to the Convention Against Torture. And
2 they did say that the treaty itself is non-self-executing.
3 But what the delegations said in November 2014 is that our
4 understanding is that the treaty reflects the prohibitions on
5 torture, Articles 2 through 16 ----

6 MJ [COL POHL]: Well, just -- when it says it is
7 non-self-executing, that would require Senate approval, right?

8 DC [MS. PRADHAN]: That would mean the specific -- like
9 the specific ways in which things are worded in the articles,
10 right, that provides very specific remedies for things, right,
11 so those would be required to be implemented, right. But the
12 general prohibition on torture and its attendant obligations
13 to prevent torture are not subject to treaty ratification.

14 MJ [COL POHL]: But the part you are talking about here is
15 not necessarily the prohibition against torture, it's the
16 ability for your client to communicate with materials he has
17 gathered in his defense ----

18 DC [MS. PRADHAN]: Yes.

19 MJ [COL POHL]: ---- to enforce -- to go to third parties,
20 for want of a better term, to somehow -- and that's your
21 connection.

22 DC [MS. PRADHAN]: I understand your question, Your Honor,
23 and I'm happy to talk about that. Because we did refer to --

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1 we are referring to specifically Articles 13 and 14 of the
2 Convention Against Torture. And this is because
3 Mr. al Baluchi, as we have said many times in this court and
4 elsewhere, is a torture victim; he is named 153 times in the
5 SSCI executive summary. And regardless of those specific
6 Articles, 13 and 14 of the CAT, which I will talk through with
7 your permission, Your Honor, the government has advanced sort
8 of a vague argument that I understand to be saying that
9 perhaps just the commission of torture violates customary
10 international law, not these other obligations of prevention
11 that are found in, that are codified in the Convention Against
12 Torture, and that's just not the case.

13 So Article 13 of the CAT states that state parties
14 shall ensure that any individual who alleges that he has been
15 subjected to torture in any territory under its jurisdiction
16 has the right to complain to and have his case promptly and
17 impartially examined by competent authorities.

18 This is an issue where the government is getting hung
19 up on the actual language of Article 13 without considering
20 the prevention, excuse me, the obligation to prevent under
21 customary international law, which is what we are arguing. So
22 the government has read this particular provision to mean that
23 torture victims may only complain to the state authorities, in

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this case apparently the government that tortured them, but
2 they are wrong.

3 The purpose of Article 13 is found in its
4 relationship to Article 14, because the two, the rights of --
5 excuse me, the obligations of prevention are to be taken
6 together. And the committee against torture has actually made
7 this clear in their interpretation of those articles where
8 they talk about the customary prohibition underlying those
9 articles.

10 And what they say is that Articles 13 and 14 mandate
11 redress and rehabilitation in the form of, and I quote from
12 them here, effective measures aimed at the cessation of
13 continuing violations, verification of the facts, and full and
14 public disclosure of the truth.

15 So that phrase, full and public disclosure of the
16 truth, means that Mr. al Baluchi's right to be heard on the
17 ways in which the CIA tortured him doesn't end in a back
18 office at Langley somewhere, or at the Pentagon, for that
19 matter. He has the right to be heard publicly within the
20 limits of classification. We recognize that.

21 This was also actually fairly well explained by
22 former U.N. Professor Juan Mendez, who said that the
23 prohibition against torture, and he was not talking about the

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 treaty, Your Honor, he was talking about the customary
2 prohibition against torture. And this was in a report that he
3 submitted to the Human Rights Council and to the General
4 Assembly in April 2014, he said the prohibition against
5 torture or punishment requires states not merely to refrain
6 from authorizing or conniving at torture or other ill
7 treatment, but also to suppress, prevent, and discourage such
8 practices.

9 He went on to say that the obligations to take
10 preventative measures transcends the items enumerated
11 specifically in the convention. Article 2, paragraph 1
12 provides authority to build upon subsequent articles. In
13 parenthesis he puts Articles 3 to 15 of the convention,
14 referring to specific measures known to prevent acts of
15 torture and other ill treatment and to expand the scope of
16 measures required for such prevention. So he says states must
17 take effective preventative measures, including by good faith
18 interpretation of the existing provisions, to eradicate
19 torture and ill treatment.

20 So this places -- excuse me, Your Honor -- this
21 places the obligation of Articles 13 and 14 squarely in the
22 category of obligations that constitute the customary
23 prohibition on torture and CIDT. I want to be clear again and

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1 I want to remind the military commission periodically through
2 this argument that we are talking specifically and narrowly
3 about unclassified statements that the CIA and other agencies
4 have found to be unclassified, and I would like to look at a
5 few examples of those statements.

6 This is a statement written by Mr. al Baluchi in his
7 handwriting. It is marked UNCLASSIFIED, and it is called the
8 Aftermath of Torture and Deliberate Denial of Redress. And he
9 states here, As long as the victims of U.S. Government
10 state-sponsored torture programs are kept outside of the USA,
11 the chances of accountability of higher government officials
12 are almost none. I can't say that he is wrong.

13 The second statement is called, The Classification of
14 My Suffering and Pain From Torture. Here he says the
15 U.S. Government went to employ extreme measures to
16 overclassify everything, which ironically proved, in bold,
17 that the torture program was state sponsored up to the
18 President and Vice President, Executive Branch, and other
19 branches of the U.S. Government.

20 The third statement, the third and fourth statements
21 deal specifically with the details of his torture. And here
22 he says -- you will notice, Your Honor, that he actually
23 self-redacts the document because he knows and we know what is

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 classified and unclassified, not that it's left to our
2 discretion, but he self-redacted this document and says in one
3 of the black sites the U.S. Government had both my hands tied
4 together by tight handcuffs for about 120 days straight. When
5 my torturers decided to move me to another black site, they
6 had to cut the handcuffs by bolt cutter because the handcuffs
7 got so rusted they wouldn't open with keys.

8 During that time, half my body, either left side or
9 the right, would go numb because I couldn't move my arms away
10 from each other. Until this day -- and literally until this
11 day, today, I am suffering from these symptoms, along with
12 multiple neurological pains all over my body, as handcuffs and
13 restraints are still being used on me on a daily basis at
14 least once every 24 hours.

15 And then the last statement is called, Misdefining
16 the Torture Techniques. And I think this statement really
17 shows the importance of Mr. al Baluchi -- of sharing
18 Mr. al Baluchi's statements about his torture with the rest of
19 the world. Because here he talks about misdefining this
20 torture techniques. He says, "Unfortunately, the torture
21 techniques are still not understood because they're renamed in
22 benign or water-downed -- benign or watered-down definitions
23 which are completely misleading."

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1 For example, when they say walling, and he is
2 referring to the government which has provided now in
3 nonclassified memos definitions of walling that make it seem,
4 in fact, quite benign. He says, for example, when they say
5 walling, it's in reality head smashing, where they tie
6 something around my neck to gain full control of my head in
7 order to smash it and hit it against the wall repeatedly for
8 the dozens and dozens of times. Mr. al Baluchi has -- does
9 show symptoms of having suffered a traumatic brain injury
10 because of walling. And this is the kind of thing that is
11 crucial for us to be able to share with outside experts.

12 If these don't constitute full and public disclosure
13 of the truth as per the obligations under customary
14 international law, I don't know what does. But maybe that's
15 what the government is afraid of. So that brings me to that
16 third question, Your Honor, which is what does the military
17 commission define as preparing for Mr. al Baluchi's defense.

18 Before the military commission's issuance of 018U,
19 these unclassified statements, the four that I just showed you
20 and a literal handful of others, were used for three primary
21 purposes: The first was obtaining international adjudications
22 or resolutions or pronouncements regarding torture and CIDT
23 committed against Mr. al Baluchi, including currently; the

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 second was leveraging nongovernmental or outside independent
2 investigative capacity; and the third was to seek
3 incarceration alternatives for use in the mitigation phase or
4 plea negotiations.

5 Now we believe if 018U stands as amended, all of
6 these purposes ought to satisfy the military commission's
7 requirement of being for the purposes of preparing
8 Mr. al Baluchi's defense. And I would like to give you the
9 following examples. With regards to the first category,
10 international adjudication or pronouncements, since early 2016
11 and early 2017 respectively, we have worked with Professor
12 Juan Mendez, who was the former U.N. special rapporteur on
13 torture, and Professor Nils Melzer, who is the current
14 rapporteur on torture. Mr. al Baluchi's unclassified
15 statements have been a used by officials, again prior to the
16 order in June of this year, they were sent to both officials
17 and have been used by both officials to craft advocacy
18 strategies to raise awareness of Mr. al Baluchi's medical
19 deterioration due to the failure of the Department of Defense
20 to provide him with adequate torture treatment, as well as the
21 failure of the United States really to investigate or
22 prosecute acts of torture committed against Mr. al Baluchi.

23 Excuse me. This advocacy affects commission

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 proceedings because Mr. al Baluchi's medical deterioration
2 seriously threatens his continuing ability to participate in
3 these proceedings.

4 MJ [COL POHL]: How does telling that to third parties
5 promote that goal?

6 DC [MS. PRADHAN]: Because, Your Honor, in several ways.
7 If we are able to share these statements with, for example,
8 independent medical experts, then they can suggest to us ways
9 in which we can suggest therapies for Mr. al Baluchi that he
10 can do himself, basically self-therapy; we can attempt to
11 apply to the convening authority for additional resources for
12 him, as we have done with the request for his MRI; we can
13 attempt to speak to the Department of Defense or speak to
14 other decision-makers -- and we will get to the panoply of
15 decision-makers that impact commission proceedings, but speak
16 to people who may be able to affect the conditions of
17 confinement in relating to Mr. al Baluchi's symptoms.

18 So there's a number of ways in which sharing these
19 statements in his own words is really crucially important.
20 You know, as his attorney, I can get up and use all my SAT
21 words to describe what he's suffering through, but it doesn't
22 have the same effect and, frankly, is not as accurate as when
23 he describes it in his own terms.

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1 MJ [COL POHL]: When this whole discussion began, one of
2 the questions I had then is the same question I am going to
3 have now: If under your definition it was defense related,
4 what's not defense related?

5 DC [MS. PRADHAN]: Very little, Your Honor. This is a
6 capital case.

7 MJ [COL POHL]: Okay.

8 DC [MS. PRADHAN]: Very little. And again ----

9 MJ [COL POHL]: That's my question, and you have answered
10 it.

11 DC [MS. PRADHAN]: Absolutely. Absolutely. Again, we
12 understand the national security concerns fully. This is why
13 we put -- we don't want to rely -- we don't want to
14 self-censor under, you know, that first clause in 018U that
15 says ----

16 MJ [COL POHL]: I understand that, and I'm not going to go
17 on with the discussion of, well, if it's classified does it
18 change the analysis. Let's move that to the side.

19 DC [MS. PRADHAN]: Absolutely.

20 MJ [COL POHL]: My question really was, because this is
21 how this started, as I recall, of the defense position is
22 basically everything is defense related, therefore, we can
23 communicate with anybody we feel like on the outside directly

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1 from Mr. al Baluchi to these third parties.

2 DC [MS. PRADHAN]: Well, certainly Your Ex -- I am used to
3 judging the Jessup competition, Your Honor, in which we call
4 the judges "Your Excellency."

5 MJ [COL POHL]: You don't have to do that.

6 DC [MS. PRADHAN]: I am not going to do that again
7 hopefully.

8 No. When we talk about advocacy before international
9 organizations like the United Nations, when we talk about
10 foreign government officials, when we're talking about
11 independent medical experts, certainly that's all relevant to
12 commission proceedings.

13 Mr. al Baluchi is continuing to deteriorate from the
14 effects of his torture. We have documented, I think as
15 voluminously as we can given the limited medical records we
16 have, the fact that he continues to deteriorate. We are five
17 years -- more than five years in pretrial motions here and
18 we're -- we don't know yet, I'm sure we will talk about, you
19 know, whether we get to trial when we get to trial. In the
20 meantime, he suffers from symptoms that bother him on a daily
21 basis that affect whether or not he can engage with his legal
22 team.

23 That's a real concern for us and it is a real concern

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 for him. So yes, we have to -- we have gotten really nowhere
2 with JTF or with the Department of Defense so far, but -- so
3 where we may not be able to succeed, maybe independent medical
4 experts can succeed, maybe Physicians For Human Rights can
5 succeed, maybe United Nations Secretary General can succeed.
6 Mr. Connell just made a presentation before the Secretary
7 General last week which I encourage everyone to find online.

8 These are the issues that we talk about and they do
9 directly affect commissions proceedings because, Your Honor,
10 if he can't participate we don't have commissions proceedings,
11 I think. We will find out.

12 I want to give you a couple more examples, if I can,
13 just to flesh this out a little bit, because we are not
14 talking about, at first we are not talking about a large
15 volume of information. We are talking about -- I think we
16 have something about 11 unclassified statements that we have
17 been able to get out of classification review; and secondly,
18 we are not talking about taking those 11 unclassified
19 statements and standing on a tower and throwing them to the
20 four winds. This is targeted advocacy, and we do things very,
21 very carefully.

22 The second ----

23 MJ [COL POHL]: What's to prevent third parties from

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1 throwing them to the wind?

2 DC [MS. PRADHAN]: Excuse me?

3 MJ [COL POHL]: You give information to a third party.
4 What is to prevent them from doing what they want with it?

5 DC [MS. PRADHAN]: Nothing, Your Honor. And if something
6 is marked UNCLASSIFIED and has a big red UNCLASSIFIED stamp on
7 it, we assume that ----

8 MJ [COL POHL]: Your comment earlier that somehow you are
9 going to target who gets this information is really not
10 totally accurate, in the sense that you may start out
11 targeting an individual but then once it gets into their
12 hands, whatever. So eventually could one not assume, or at
13 least -- assume may be the wrong word -- but there is a strong
14 likelihood that anything going to a third party could then go
15 anywhere in the information world, for want of a better term?

16 DC [MS. PRADHAN]: Yes, Your Honor, I get your point. And
17 that is true, we do target our advocacy. But again, we are
18 very careful with what we hand out. We only hand out things
19 that are only marked UNCLASSIFIED, that the whole panoply of
20 U.S. Government agencies have marked UNCLASSIFIED, and as we
21 have shown you details from Mr. al Baluchi about his own
22 torture. I mean, even without having a litigation purpose or
23 a purpose of getting him treatment, that goes to just his

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1 right to full and public disclosure of what happened to him.

2 Let me touch upon, really fast, the second and
3 third -- the second and third primary purposes.

4 LDC [MR. NEVIN]: Excuse me, Your Honor, could I request a
5 comfort break?

6 MJ [COL POHL]: How much longer do you have, Ms. Pradhan?

7 DC [MS. PRADHAN]: Less than five minutes.

8 MJ [COL POHL]: Based on that representation, we will take
9 a comfort break as soon as she is finished.

10 DC [MS. PRADHAN]: I'll talk as fast as they'll let me.

11 MJ [COL POHL]: Don't talk too fast. You've got other
12 problems with that. Go ahead.

13 DC [MS. PRADHAN]: Okay. Let me touch briefly on the
14 second and third purposes, if I may. I won't go into the
15 privilege details of the defense investigation, but before the
16 14th of June we shared the unclassified statements with
17 several organizations or entities operating overseas, and we
18 have used the statements to encourage investigation by the
19 media in torture issues, the results of which will eventually
20 be introduced before the military commission. And that
21 advocacy would have been much less effective without
22 Mr. al Baluchi's descriptions of his own torture which often
23 differ from the government's descriptions of his torture.

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1 And the last is, you know, we have the right to seek
2 incarceration alternatives, especially in mitigation for
3 Mr. al Baluchi, which has proven successful in several
4 previous Guantanamo cases. In our briefs we talk about the
5 cases of Mr. Al Darbi and Mr. Khadr, and those statements
6 would be vital in foreign government negotiations as
7 Mr. Khadr's and Mr. Darbi's were to them.

8 We also worked closely with Amnesty International,
9 and you see the poster here, on a lengthy campaign to remove
10 the death penalty and seek advice on his torture, and we
11 shared his unclassified statements with Amnesty International
12 Secretariat. That partnership resulted in several high-level
13 meetings between counsel, between ourselves and foreign
14 government officials, including the presentation that I
15 mentioned a minute ago by Mr. Connell before the Secretary
16 General. In this sort of advocacy, nothing is as effective as
17 Mr. al Baluchi's own words or voice about his own torture.

18 And I can stop there, Your Honor, subject to your
19 questions.

20 MJ [COL POHL]: No. Thank you very much. We will recess
21 for 15 minutes. Just for the way ahead, we will take our
22 lunch break at 1245 until 1400. The commission is recessed
23 for 15 minutes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

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1 [The R.M.C. 803 session recessed at 1031, 16 October 2017.]

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