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1 [The R.M.C. 803 session was called to order at 1304,  
2 11 December 2015.]

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

6 Please put Mr. Connell's slides back up. And we've  
7 also indicated they are 112J. Mr. Connell.

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

9 As the court knows, I'm more of a technical arguer  
10 than a grand orator, but I am going to make one sort of  
11 historical statement; and that is when I -- I think that when  
12 someone years from now goes back and studies this case, that  
13 they will identify today, 11 December 2015, as the beginning  
14 of the second phase of the case.

15 The reason why I think it's the second phase of the  
16 case is this is the first motion that we have heard that deals  
17 with the government's responsibility to turn over evidence  
18 relating to the rendition, detention, and interrogation  
19 program. It's something that the commission hears about a  
20 lot, but it's the -- it's now the time that we are beginning  
21 to frame the government's obligation, and this is the first in  
22 a series of motions that addresses that.

23 On the historical front, we know that torture as a

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1 judicial or prejudicial instrument has been used time  
2 immemorial. The Romans only allowed the testimony of slaves  
3 if it had been extracted under torture. We know of a number  
4 of other historical options -- the Inquisition, the Nazi  
5 medical experiments, the disappeared of Argentina and Chile --  
6 but the difference here and the significance of this motion is  
7 the legalistic nature of the American rendition, detention,  
8 and interrogation program.

9           This was not carried out by a rogue set of  
10 individuals or carried out in the dark of night with no  
11 information provided back to headquarters. Instead, this was  
12 a system well integrated into the American bureaucracy which  
13 involves lawyers, it involves security and interrogation  
14 professionals, it includes political leaders, and that's where  
15 this motion focuses.

16           In trying -- it was a little bit difficult to frame  
17 my argument today because, with all due respect, I have  
18 suggested that the government's response in its initial  
19 response and its pleading to this court were all not that  
20 helpful because they don't really frame the issue very well.  
21 So I'm going to frame the issue myself as best I can, and if  
22 the government has some other arguments, we'll deal with  
23 those.

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1 But on 10 January 2013, when the government made its  
2 initial pleading in the case, their response was, trust us, we  
3 know our responsibility under the law. And ----

4 MJ [COL POHL]: Their discovery responsibilities.

5 LDC [MR. CONNELL]: Their discovery responsibilities.

6 And we're going to provide this information. Trust  
7 us, we'll get to it.

8 30 months and one day later, we have received -- the  
9 al Baluchi team which signed the MOU in February of 2013, has  
10 received no -- repeat, no -- discovery responsive to this  
11 motion other than torture memos which were already released  
12 under the Freedom of Information Act and contain the same  
13 exact redactions that the public gets, which means that  
14 essentially the documents were just downloaded off of one of  
15 the many websites on which they're freely available and turned  
16 over to us. There has been no other responsive discovery to  
17 this motion provided.

18 So what exactly is the motion for? The request was  
19 for documents relating to White House or Department of Justice  
20 authority over the rendition, detention, and interrogation  
21 program, which -- and if I could, you know, point the court to  
22 Attachment B just for a moment, it was in excruciating detail,  
23 but it falls into four broad categories.

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1           The -- I'm not a big fan of the laundry list  
2 discovery request, so instead, we tried to give four broad  
3 categories which give us a level at which we can analyze. But  
4 in response to any sort of claim that we were being overbroad,  
5 we wanted to particularize as much as possible, so there are  
6 six or so pages of particularization contained in  
7 Attachment B.

8           The four requests boiled down to, however,  
9 information about White House organization of the authority  
10 for the rendition, detention, and interrogation program ----

11           Your Honor, if I could interrupt myself for a moment.  
12 My monitor here says "Operation Restricted." I just wanted to  
13 make sure that the interpreters can tell me to slow down when  
14 they need to. And now it says slow down.

15           MJ [COL POHL]: Thank you. If they fail ----

16           LDC [MR. CONNELL]: Apparently that's working well.

17           MJ [COL POHL]: Well, I've got the court reporters, and  
18 sometimes even I will tell you to slow down. Go ahead,  
19 Mr. Connell.

20           LDC [MR. CONNELL]: Thank you.

21           The second request is White House information --  
22 information about the White House claims for extraordinary  
23 powers to order rendition, detention, and interrogation; that

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1 is, extra-constitutional powers or powers which arise under  
2 the War Powers Act as opposed to its other authorities, which  
3 we will talk more about that later.

4 The third is Office of Legal Counsel analysis of  
5 rendition, detention, and interrogation, sometimes called the  
6 torture memoranda but, in fact, much broader than what have  
7 been released, with redactions, as the torture memoranda.

8 And fourth, the information the CIA provided to the  
9 Office of Legal Counsel or to the White House regarding the  
10 rendition, detention, and interrogation program.

11 As an overview, this is a cascading process in the  
12 rendition, detention, and interrogation program. It all began  
13 with a memorandum of notification issued by President Bush on  
14 17 September 2001, giving the CIA authority or at least some  
15 authority for the rendition, detention, and interrogation  
16 program.

17 That led to a great deal of CIA activity, some  
18 authorized, some unauthorized. But more important to this  
19 motion, it created feedback loops between the CIA on one hand  
20 and the Office of Legal Counsel, who was giving legal advice,  
21 and the National Security Council, who was giving political  
22 advice.

23 The nature of those feedback loops, the fact that

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1 this is not a linear process which moves from point A to  
2 point B, is the foundation of this motion because at each  
3 point in those feedback loops, the CIA would describe what it  
4 was doing or what it claimed to be doing, would receive either  
5 information -- approval or legal analysis back from one of the  
6 other two bodies, and then would carry on further.

7           The information that the government should provide  
8 under this motion gives us a window into the treatment of the  
9 defendants and it tells us what -- gives us information about  
10 what the CIA did, it gives us information about what the CIA  
11 claimed to do, and it gives us information about what the CIA  
12 was allowed to do.

13           The government's response was fairly generic. They  
14 didn't give any specific reasons why they wouldn't turn over  
15 most of this information, but they said it wasn't relevant or  
16 necessary, that the requests were overbroad, seems -- and that  
17 it wasn't material to the preparation of the defense. With  
18 respect to the second two categories, they said that they  
19 would turn over some information, but as of yet, 35 months  
20 later, they have not.

21           So let's talk about sort of the overall framework  
22 that this is going to fit within. The CIA interrogation --  
23 and this is a -- I'm showing on the screen part of AE 112,

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1 Attachment D declassified -- partially declassified memo from  
2 the Office of Medical Services, which is a portion of the  
3 CIA -- that the goal of the interrogation program was using  
4 both physical and psychological pressures in a comprehensive,  
5 systematic, and cumulative manner. The goal of the  
6 interrogation was to create a state of learned helplessness  
7 and dependence.

8           That framework, the learned helplessness framework,  
9 formed the foundation for the next three years of treatment of  
10 the defendants in this case and holds the answers to both what  
11 discovery is necessary, but also how many other legal  
12 questions we're going to work out, including the January 2007  
13 statements, which will eventually, in phase three of this  
14 case, be the subjects of motions to suppress.

15           The CIA laid out a three-step program, three phases  
16 to its interrogation program. The first of those was initial  
17 interrogation. We know from the -- from this SSCI report that  
18 Mr. al Baluchi, for example, his initial enhanced  
19 interrogation techniques were applied in May of 2003. The  
20 second phase in -- but we don't know how long that it lasted.

21           The second phase of the CIA interrogation program was  
22 sustained debriefing, that there would be a number of people  
23 who would come in and -- substantive debriefers who would

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1 participate in sustained debriefing of the defendants. We  
2 know for -- that -- or information has -- let me say this the  
3 right way. It is our proposition, and this proposition has  
4 been declassified, that there were approximately 150 people  
5 who interviewed Mr. al Baluchi during this CIA interrogation.

6           There is a third phase of the CIA program which is  
7 described in the declassified Office of Medical Services  
8 memorandum, but what that third phase is has not been  
9 declassified, so we don't actually know what the third phase  
10 was. These could be described as the breaking phase, the  
11 exploiting phase, and then the "we don't know what" phase. It  
12 is over this process that the feedback loops that I described  
13 earlier take place.

14           So let's move to the request itself. The first one  
15 is White House consideration of its powers over the rendition,  
16 detention, and interrogation program; or put more simply, as  
17 one of the other memoranda does, its power to order torture.  
18 There is a -- there were in Attachment C to AE 112, our  
19 request for whatever findings, precedential findings may exist  
20 and also whatever memoranda of notification may exist. That  
21 is the presidential authorization.

22           We know that the White House was directly involved  
23 because on 7 February of 2002, the White House issued a

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1 document called "Humane Treatment of Al Qaeda and Taliban  
2 Detainees," which is found at AE 112E, Attachment B. That  
3 document required the quote, Armed Forces, end quote, to treat  
4 detainees humanely and was widely read to exempt the CIA from  
5 the requirement of humane treatment on the principle that the  
6 Armed Forces were named and the CIA was not named.

7           When the Office of Professional Responsibility went  
8 back to review the OLC torture memoranda which were provided  
9 to the CIA on this point, their review addressed the question  
10 of humane treatment and the 7 February 2002 order but redacted  
11 the entire discussion, so we don't know what the OPR  
12 conclusion on this point was.

13           We do know, however, that President Bush and Vice  
14 President Cheney and Secretary Rice have all confirmed  
15 National Security Council consideration of the use of  
16 aggressive interrogation techniques. And that information is  
17 discussed at more length in the declaration -- the extremely  
18 lengthy and intensive -- fact-intensive declaration that we  
19 submitted in this document. For this particular point, I  
20 would direct the commission's attention to AE 112F,  
21 Attachment C, paragraphs 20 through 28.

22           The second request that's at issue here under the  
23 larger umbrella is the White House request for extraordinary

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1 powers. Now, this is the smallest of the four categories  
2 because we don't actually know if any requests for  
3 extraordinary powers were ever actually made. But we do know  
4 from a document which is attached to AE 112E, Attachment C, a  
5 memorandum on the standards of conduct for interrogation under  
6 18 U.S.C. Sections 2340 through 2340A which was in effect  
7 until June 2004, that the Office of Legal Counsel gave advice  
8 that attempts to limit the President's direction of treatment  
9 of detainees, law-of-war detainees, would be unconstitutional.  
10 That was later withdrawn, but its reasoning was resurrected in  
11 December of 2005 in a signing statement to the Detainee  
12 Treatment Act of 2005 construing it as limited by the  
13 Commander in Chief's power to protect against terror attacks.  
14           The question is: Did the President ever order  
15 interrogations of enemy combatants under this claimed power.  
16 That is a sort of extra -- extraconstitutional might be the  
17 right word, but authorization for the CIA's actions that is  
18 covered by this request.

19           MJ [COL POHL]: What would that -- how would that assist  
20 in your preparation of your defense?

21           LDC [MR. CONNELL]: Sure, I'm glad you asked that  
22 question, because this comes to exactly the framework that I  
23 was describing. So what essentially happened was after the

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1 September 18 memorandum and notification and after the CIA  
2 begins this program, then the CIA is trying to figure out what  
3 is it allowed to do, under what circumstances is it allowed to  
4 do it, and will it be prosecuted for those things.

5           So there is a question. And so questions flow back  
6 and forth between the CIA and the -- and the White House and  
7 the Office of Legal Counsel as to those questions. We --  
8 here's our proposed course of action, are we allowed to do it,  
9 yes and no. The request number two about direct presidential  
10 authorization is simply one small part of that authorization  
11 framework.

12           It may be that the CIA was authorized by the  
13 memorandum of notification itself to conduct a certain  
14 activity. It may be that the CIA was not authorized at all  
15 but did so without authorization. It may be that the CIA  
16 mistakenly thought that they had authorization. But a fourth  
17 category of authorization status, if you will, is if the  
18 President ordered something directly under his war powers  
19 authority as proffered was possible by the Office of Legal  
20 Counsel.

21           As I mentioned, this is a fairly small piece of the  
22 puzzle but it's analytically distinct from the others.

23           MJ [COL POHL]: My question then goes to the question --

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1 at the end of the day -- at the end of the day the issue is  
2 the circumstances around the interrogations, correct?

3 LDC [MR. CONNELL]: Eventually, yes.

4 MJ [COL POHL]: You want to know what happened, when it  
5 happened, and what happened timewise sequentially, and then we  
6 can go, right? Really, I mean, so does it really make any  
7 difference whether the President authorized it or not,  
8 depending -- does that make any difference as to the essential  
9 issue you're trying to develop of the facts and circumstances  
10 around individual interrogations?

11 For example, if the interrogations were conducted  
12 with White House approval or they weren't conducted with White  
13 House approval or they were conducted with any variation of  
14 that theme of authority, does it really make any difference?  
15 Because the only thing that matters is how they were actually  
16 conducted ----

17 LDC [MR. CONNELL]: Right.

18 MJ [COL POHL]: ---- as it impacts on your clients and,  
19 therefore, impacts on any statements taken from them.

20 LDC [MR. CONNELL]: I wanted to give you a direct answer.

21 MJ [COL POHL]: That's all a question. That's not a  
22 presupposed conclusion on my part.

23 LDC [MR. CONNELL]: No, no, I understand. It's exploring

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1 what is the framework here. And there's really two different  
2 answers to that question, both of which say that, yes, it  
3 matters, but I want to separate them for you.

4           The first one is factual. In the process that we  
5 have a window into from various partially declassified  
6 documents, including the executive summary of the SSCI torture  
7 report, what we know is it was -- there was -- it was never  
8 UCA may do X and NCA went and did X. Instead, it was UCA may  
9 do these things maybe under these circumstances, the CIA would  
10 go and find out and then report back, and then the OLC would  
11 change its mind and then there would be a policy shift. And  
12 the Presidential authorization may be one factor in that.

13           So it may be that the Office of Legal Counsel and --  
14 I'm not asserting this, I'm just hypothesizing -- that the  
15 Office of Legal Counsel said, no, you cannot use cold-water  
16 dousing as a technique under these circumstances; then the  
17 President said, oh, yes, you can use cold-water dousing under  
18 these circumstances. In which case it matters quite a lot  
19 what specific authorizations came from the White House because  
20 that's one of the parts of the authorization chain.

21           One of the things -- so really, from a factual  
22 matter, as part of the feedback that happened when the CIA  
23 would want to do something or would try to do something and

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1 then would report back either requesting permission or  
2 requesting forgiveness, the -- that the White House is just  
3 one part of that authorization chain.

4           So for the same reason that it matters what OLC  
5 thought and for that matter -- it's not part of this motion --  
6 what Congress thought, it matters what the White House  
7 thought. There's a completely separate -- that's the factual  
8 question. If we were to -- the reason why the White House is  
9 in here and if we would sever out the White House from this  
10 analysis, then we would leave a large gap in the -- in our  
11 understanding of what actually happened to the men -- as the  
12 military commission described it, the who, what, where, when  
13 and how -- because there's also the question of who allowed it  
14 and what did they allow. And if we were to cut one part of  
15 the allowing body out of it -- that is, the White House --  
16 then we would never know what the CIA actually could have done  
17 and probably what they actually did.

18           But moving to the second part of that, the legal  
19 question, this is also much smaller, but there is a  
20 fundamental legal reason why it matters what authorization  
21 took place. Because it may very well matter to a panel who is  
22 deciding on the question of an appropriate penalty whether the  
23 abuses which took place took place as a matter of official

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1 government policy, blessed by the White House, or whether they  
2 took place as the result of rogue agents acting completely on  
3 their own initiative.

4           And a military panel who is trying to decide the  
5 appropriate penalty in this case may very much want to know,  
6 was this official U.S. Government policy, or was this sort of  
7 an accident?

8           MJ [COL POHL]: Okay. I understand.

9           LDC [MR. CONNELL]: So moving on to the third request,  
10 which is the OLC analysis, sometimes described as torture  
11 memoranda, but those are only the ones we know and the parts  
12 that we've seen. The -- in the Office of Legal Counsel's  
13 analysis of the various requests for CIA authority -- and  
14 again, I want to be clear, this was not a question of there  
15 was an organized statement at the beginning of "these are your  
16 powers" and then there was a carrying out of, in an executive  
17 manner, those powers. Instead, the situation is a complex  
18 feedback loop where the CIA is trying to figure out what  
19 exactly they can do and the OLC is doing their best to bless  
20 whatever it is that the CIA comes up with; but even within  
21 that framework there are disputes which we are going to talk  
22 about in just a moment.

23           The general focus of the -- of the OLC, however, was

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1 on -- not on -- certainly not on morality, but not even on  
2 legality; rather it was on prosecutability, which is why we  
3 have analysis such as, well, you know, whether they could be  
4 convicted or not depends on their intent. And as long as we  
5 give them this legal opinion saying that they can abuse people  
6 in this particular -- or question people in this particular  
7 manner, then they would not have the intent to violate the  
8 law.

9           But one of the examples that I want to focus on, it's  
10 one of many examples that kind of describes the complexity of  
11 the feedback loop and the importance of the complete OLC  
12 memoranda on this topic, is the so-called bullet points  
13 controversy. The bullet points controversy came about in  
14 2003. And let me just walk you through it for just a moment.

15           In 2002, the Office of Legal Counsel determined that  
16 certain proposed CIA techniques were not prohibited, and there  
17 were ten techniques that they were allowed to use at that  
18 time.

19           In 2003, OLC attorneys and the CIA attorneys worked  
20 together to produce a document called the legal principles  
21 document or the bullet points document because it wasn't a  
22 fully developed legal memorandum; it was just bullet points,  
23 sketching out.

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1           And there were two important things about that. One  
2 is that it included six additional techniques which had not  
3 been analyzed by the OLC previously; and second, which is this  
4 quote which is on the screen, is that it allowed the use of  
5 comparable techniques, meaning that it opened up for the  
6 discretion of the CIA to use some techniques that were like  
7 the techniques -- 16 techniques which had been approved at  
8 that time but had not specifically been discussed.

9           And the CIA then relied on those bullet points. The  
10 CIA left that meeting thinking that they had -- that they had  
11 approval for these six additional techniques which are here on  
12 the screen as well, as well as comparable techniques of --  
13 comparable to the approved techniques. The CIA relied on that  
14 document to reassure the National Security Council of the  
15 legality of what it was doing.

16           So -- but didn't I just say that there was an Office  
17 of Legal Counsel focus on prosecutability, which is reflected  
18 here even in this bullet points memorandum? Yes, but not  
19 completely. Because in 2004, the CIA went back to the Office  
20 of Legal Counsel and said, hey, you know, we have been  
21 operating off of this bullet points document. Could you  
22 please reaffirm this bullet points document that this is what  
23 we're allowed to do? And the OLC walked away from the

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1 memorandum saying no, we never said that was official -- that  
2 was just, you know, a working document that we were talking  
3 about -- and switched at that point in 2004 to case-by-case  
4 approval of interrogation techniques, no longer giving a  
5 blanket comparability analysis.

6 I know that this is all, you know, an alphabet soup  
7 of agencies, but it goes to show the complexity of the  
8 feedback between the CIA and its other authorities. Because  
9 what happens then is the Office of the Inspector General of  
10 the CIA comes along, and they, in fact -- although it had been  
11 disavowed by the Office of Legal Counsel, they accept the  
12 bullet points by the Office of Legal Standards, although their  
13 conclusion in the Office of Inspector General report is itself  
14 redacted. The significance of all of this is there are a lot  
15 of players here, and to find out what was actually done and  
16 what the CIA thought it could do and what the CIA claimed it  
17 was doing, it's necessary to have each piece of the puzzle.

18 The reason why I mentioned the White House piece  
19 before is that the other two pieces, the Office of Legal  
20 Counsel and the CIA are critically important in understanding  
21 what's going on and you need both the approvers, possibly the  
22 White House but certainly the OLC, on the one hand as well as  
23 the CIA itself who is carrying out the program.

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1           So let's move to the fourth request. This is the  
2 largest one. That is the information that the CIA actually  
3 provided to the people who were conducting the approvals.  
4 Remember, I keep talking about this feedback loop and what I  
5 mean is that the CIA provided information back and requests  
6 for approval back to the NSC and to the OLC.

7           MJ [COL POHL]: When you say CIA representations, you're  
8 talking about back to, for want of a better term, Washington.

9           LDC [MR. CONNELL]: Yes, back to Washington. Yes, sir.

10          MJ [COL POHL]: They conducted their interrogations, and  
11 this was, as you say, the feedback loop back to Washington  
12 about how it worked.

13          LDC [MR. CONNELL]: Yes, Your Honor.

14          MJ [COL POHL]: How effective it was, safeguards and  
15 whatever else.

16          LDC [MR. CONNELL]: But also, here's what we did, here's  
17 how many times we did it. It's descriptions about who they  
18 did it to, what they did, whether it worked, and how they --  
19 and safeguards, as you say. It includes the actual  
20 interrogation techniques, enhanced and standard.

21                 And let me drop a footnote there, because standard  
22 interrogation techniques are just as important as enhanced  
23 interrogation techniques. Let me give you an example.

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1 Cold-water dousing in 2003 -- we think of today, cold-water  
2 dousing, pouring water on someone's face as a -- as enhanced  
3 interrogation technique. In 2003 when Mr. al Baluchi was  
4 captured, cold-water dousing was defined as a standard  
5 interrogation technique, not an enhanced interrogation  
6 technique.

7           So, you know, although we have come to think of  
8 enhanced interrogation -- at least on this side of the table  
9 and many members of the public have come to think of enhanced  
10 interrogation technique as the pseudonym for torture and  
11 standard interrogation technique to be a pseudonym for  
12 ordinary forms of interrogation, that's not in fact true. And  
13 many things that most people would accept as a form of abuse  
14 were at some points defined as standard interrogation  
15 technique. I say this because I am trying to dissuade the  
16 military commission from adopting the word enhanced  
17 interrogation technique as a code for the abuse which was  
18 visited on the prisoners because it, in fact, went beyond that  
19 to some standard interrogation techniques.

20           The CIA information includes operational guidance, it  
21 includes the involvement of medical personnel, it includes,  
22 most importantly -- maybe not most importantly, but extremely  
23 importantly what the conditions of confinement were.

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1           In the same way that the definitions of standard  
2 techniques and enhanced techniques shifted over time between  
3 2002 and 2006, what was a condition of confinement shifted at  
4 the same time. Let me give you a perfect example. Constant  
5 exposure to bright light and constant loud noise or music  
6 were, at the beginning of the program, defined as conditions  
7 of confinement. It was only later that they were redefined as  
8 interrogation techniques. And so to -- we can't let ourselves  
9 be -- you know, to lose the different parts of the triangle of  
10 standard/enhanced interrogation techniques and conditions of  
11 confinement because they all work together under the CIA  
12 whole-person approach to induce the learned helplessness that  
13 was on the first slide.

14           The -- this CIA information has been the focus of  
15 other investigations. The redacted executive summary of the  
16 SSCI report has two entire parts, parts 3 and part 5, which  
17 are addressed to this question about CIA representations.  
18 They make a number of claims that the CIA representations were  
19 false in some ways. The -- and -- but until we get the  
20 information, we don't know whether they were true or false.

21           So let's move from there to -- which is the discovery  
22 request itself, to the government's objections. The  
23 government made a number of objections to begin with. It's

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1 sort of retreated from a claim of overbreadth. It would be  
2 hard for -- I mean, overbreadth is an objection to civil  
3 discovery, not, in general, criminal discovery. Overbreadth  
4 is how much does it cost to comply with this request under a  
5 Rule 45 subpoena issued under the Federal Rules of Civil  
6 Procedure.

7           What I think they mean is -- they could mean one of  
8 two things. Overbreadth could mean one of two things. One  
9 could mean you haven't asked specifically enough for what you  
10 want. It's kind of a problem in this case because we don't  
11 really know what we don't know. But to the extent that we do  
12 know what we don't know, I have set out about 120 specific  
13 things that we don't know, it's specific documents of which  
14 there is a reference to in the attachment to AE 112. But the  
15 other thing that it could mean is simply the question of is  
16 what they're asking for material, which is sort of subsumed in  
17 the real question itself.

18           The government initially -- I think this might have  
19 been -- you know, this was early days. They made a claim that  
20 it was not necessary, but in their reply, they acknowledged  
21 that necessity is a standard only required under R.M.C. 703  
22 and not under 701. And they also made a claim about  
23 relevance, but relevance is also not a standard under

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1 R.M.C. 701, but rather a standard under R.M.C. 703.

2           So -- but at this stage, three and a half years into  
3 the case, I'm not trying to limit the government to, you know,  
4 what claims it made in January of 2013. Instead, I'm trying  
5 to move us forward to get the actual evidence changing hands  
6 so that we can -- so that we can begin the next phase of the  
7 case. And so that brings us to the question of materiality.

8           I think at this point, the question of why torture or  
9 other cruel, inhumane, and degrading treatment has been  
10 briefed in this case about 14 different pleadings, but this  
11 pleading is the grandfather of those. AE 112 is the first  
12 place that it was briefed. It was also the first of those  
13 motions that the government had -- that the military  
14 commission has brought up on the docket. So I do want to  
15 spend some time talking about those, but before I do so I want  
16 to talk a little bit about materiality.

17           Materiality is not just admissible evidence. It is  
18 evidence that might assist the defense in formulating a  
19 defense strategy or play an important role in uncovering  
20 additional admissible evidence. It can also matter in aiding  
21 witness preparation, corroborating testimony, or assisting  
22 impeachment or rebuttal.

23           So how could it help in -- how could this information

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1 help in an investigation? It may be that there's information  
2 out there and witnesses that the defendants themselves have  
3 never known about or that no one else outside the government  
4 has ever known about. The United States Government has gone  
5 to amazing lengths -- this case only reflects a tiny corner of  
6 the amazing lengths to which the government has gone to  
7 prevent information about this rendition, detention, and  
8 interrogation program from coming into public knowledge.

9           This could assist an investigation or corroboration  
10 of claims of torture by the defendants. And it could also  
11 assist in demonstrating due diligence when we are interviewing  
12 persons involved in taking the statements, in case we have to  
13 come to the military commission and explain why we aren't  
14 producing a certain witness or why we haven't done some  
15 particular thing, which would be required under  
16 M.C.R.E. (c)(3) [sic], which requires the defense to  
17 demonstrate due diligence in attempting to interview witnesses  
18 prior to filing motions to suppress which did not include  
19 details. So that -- that investigation aspect, that due  
20 diligence aspect is, in fact, baked into M.C.R.E. 304 itself.

21           So that brings us to sort of the heart of the matter,  
22 which is the statements of the defendants. But I do want to  
23 say it's also the statements of the witnesses because the --

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1 since the prosecution has entered at least one cooperation  
2 agreement with a detainee who was part of the rendition,  
3 detention, and interrogation program, Rule 304 includes  
4 provisions which we'll talk about for finding the degree of  
5 coercion involved in a statement of a witness.

6           So clearly statements obtained by torture and cruel  
7 and inhumane and degrading treatment themselves are excluded  
8 under the framework in M.C.R.E. 304 -- that's 304(a)(1) -- but  
9 there is also separately a statutory finding required that,  
10 quote, the totality of the circumstances renders the statement  
11 reliable and possessing sufficient probative value, under  
12 M.C.R.E. 304(a)(2)(A), and which is separate from the  
13 constitutional analysis. Then, of course, there's separately  
14 a statutory finding of voluntariness under the totality of the  
15 circumstances, including the relationship between the  
16 statements sought to be admitted and any prior questioning of  
17 the accused.

18           Now, that's critically important when the military  
19 commission comes to evaluate the statements allegedly given by  
20 the defendants in January of 2007 to interrogators from the  
21 FBI and from the Criminal Investigative Task Force, because  
22 one of the core issues of the case is what is the relationship  
23 between those statements given to the FBI and CITF and the

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1 prior abusive interrogations which had taken place five or  
2 more months before, prior to the transfer of these men to  
3 Guantanamo Bay.

4 Finally, those are just the statutory Military  
5 Commissions Act bases for receiving the information. There's  
6 also the constitutional attenuation analysis under  
7 Oregon v. Elstad found at 470 United States 298, 1995 case.  
8 And then finally there's an interest of justice analysis which  
9 is discretionary under M.C.R.E. 304(a)(5) where the judge has  
10 to exercise discretion as to the admissibility of statements.

11 There's one other thing which I should mention, which  
12 is that this information is important to the panel on this  
13 matter, even if the military commission hears the motions to  
14 suppress and denies them because of the framework under  
15 Crane v. Kentucky. And Crane v. Kentucky, which is found at  
16 476 U.S. 683, 1986 case, says that voluntariness of statements  
17 can be litigated at trial separate from any requirement that  
18 the -- separate from the motion to suppress. So even if  
19 these -- even if the military commission makes findings that  
20 these statements were voluntary, that can still be an issue  
21 which is presented to the panel.

22 MJ [COL POHL]: Just to be clear, your motion on 112 is  
23 not addressing production of these statements, the motion for

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1 112 is, for want of a better term, the background information  
2 of the four categories?

3 LDC [MR. CONNELL]: That's exactly right, sir.

4 MJ [COL POHL]: And this is your argument as to why it's  
5 material to the preparation of the defense, because of the  
6 relevance of the statements?

7 LDC [MR. CONNELL]: That's precisely right, sir.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: So just to go into a little bit more  
10 detail on that, we know what the -- how an ordinary law  
11 enforcement interrogation goes forward, and I think it  
12 demonstrates the linkage of the circumstances as you just  
13 described them to issues which are very much alive in the  
14 case, such as the admission of the January 2007 statements.

15 You know, agents who are involved in an investigation  
16 interrogate someone, they prepare reports. Someone else reads  
17 those reports, follows up on leads, and that leads to  
18 additional interrogation. It's not a static process. It's  
19 one that is iterative, in that it occurs multiple times and  
20 with feedback loops in it. The same situation obtains here --  
21 or a similar situation, I should say, with respect to the  
22 interrogations which took place in the CIA and then later at  
23 Guantanamo.

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1           Interrogation can -- and these three ideas are  
2 recognized as themes within the OLC memoranda -- interrogation  
3 can create triggers, it can create patterns, it can induce  
4 compliance, which is the fundamental goal of the learned  
5 helplessness strategy; and on some occasions it can cause  
6 injuries. And when someone else comes along later and  
7 conducts another interrogation, the patterns and triggers  
8 which are created, the injuries in some cases, and the  
9 compliance pattern come back into play.

10           There are other reasons why the -- this information  
11 that we're seeking in 112 is material to the preparation of  
12 the defense. There is -- the military commission has yet to  
13 address the framework of -- it hasn't been brought to the  
14 military commission, but there is a question about illegal  
15 pretrial punishment. Although Article 13 was not included in  
16 the Military Commissions Act, we argue in the brief and from  
17 the military court cases that there's a due process aspect to  
18 it, too. There's a claim of outrageous governmental conduct,  
19 sometimes known as the Toscanino exception to the Ker-Frisbie  
20 doctrine -- I can spell all of that later -- where there's a  
21 separate statutory analysis under 304 where the -- where  
22 coercion of -- the amount of coercion is disputed, the  
23 military judge must find statements of witnesses, as opposed

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1 to the defendants, to be reliable, probative and not obtained  
2 through torture or CIDT; and I mentioned Crane v. Kentucky  
3 before, and of course, the possibility of cross-examination of  
4 witnesses.

5           That brings us finally to the question that a panel  
6 may have to address in any possible sentencing hearing in the  
7 case, which is mitigation factors. One of those might be the  
8 nature and length of pretrial detention: Was it in a golf  
9 club or was it in a dark pit while naked and chained to the  
10 ceiling. It might be -- it might be the question -- the  
11 Skipper question. Maybe there was good behavior while  
12 incarcerated. Were they compliant? Did they provide  
13 information? Did they do what they were supposed to? Did  
14 they not threaten guards? That's classic Skipper mitigation,  
15 the issue of prior punishment which a panel can consider only  
16 if the military judge chooses not to consider illegal pretrial  
17 punishment.

18           And finally the issue that I mentioned -- one of the  
19 issues that I mentioned with respect to Presidential or White  
20 House authorization was a military panel could decide that,  
21 given the moral -- the weight of the moral issues in the case,  
22 that it would not be appropriate to vote for execution.

23           Your Honor, the -- this is just one of the many

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1 motions relating to the use of the rendition, detention, and  
2 interrogation program. We started with one that we thought  
3 was fairly at a broad level, since we're dealing with policy  
4 information, and I've laid out in some depth -- since this is  
5 the first time that we've addressed this, laid out in depth  
6 the reasons why this sort of information is not just material  
7 but critical to the preparation of the defense.

8 Thank you very much.

9 MJ [COL POHL]: Thank you, Mr. Connell.

10 Does any other defense counsel wish to be heard on  
11 112?

12 Mr. Nevin.

13 LDC [MR. NEVIN]: Thank you, Your Honor. These actually  
14 can stay up, depending on what the parties want.

15 LDC [MR. CONNELL]: Or you can cut the feed from Table 4.

16 MJ [COL POHL]: They can be distracting. Just cut the  
17 feed.

18 LDC [MR. NEVIN]: I'm not going to speak at length. I  
19 join all of the remarks that Mr. Connell made as well as the  
20 contents of the motions, and I mean the pleadings on this, on  
21 112.

22 I just want to say that -- make two additions. The  
23 first is that, in terms of -- in terms of what these materials

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1 might be important for, I think it's important for the  
2 military commission to bear in mind that the remedy of  
3 dismissal of charges or dismissal of the death penalty for  
4 outrageous governmental misconduct depends in part on the  
5 quantum of the misconduct that's at issue, and so -- and how  
6 far it goes. This is connected to the distinction between  
7 high-level government officials as opposed to rogue actors  
8 that Mr. Connell made. But it also relates to the argument of  
9 outrageous government behavior which, in turn, turns in part  
10 on the quantum, the amount, of the bad behavior that's at  
11 issue.

12           And the second is just to emphasize that, for  
13 purposes of mitigation, it isn't just a matter of categorical  
14 information. So I might imagine that the government would  
15 think that it would be enough to say, "Well, the defendants  
16 were tortured. Thank you," and move on.

17           We are entitled to present to the trier of fact and  
18 to the sentencer, if we get that far, every detail of the  
19 experience that these men had in the RDI program that would  
20 support the proposition that a lesser sentence, or a dismissal  
21 of the charges, if we were in a pretrial environment, would be  
22 appropriate.

23           And I have said to people on my team that the ideal

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1 thing, which is, of course, impossible, would be if the trier  
2 of fact could have been present during all of the events that  
3 took place so that the trier of fact could see for itself, or  
4 for themselves, the -- every aspect of -- the light, the  
5 humidity, the coldness or the warmth of the room, the length  
6 of time that went by, the smells, every aspect of it -- all of  
7 that is fair for the trier of fact to consider.

8           And so all of the details that flow out of these  
9 kinds of inquiries are important to us, not because we intend  
10 an endless, cumulative presentation but because it is these --  
11 it is these details where probative value is found. It is not  
12 categorical ideas that control outcomes like this; it's the  
13 experience of it and being able to convey that to the trier of  
14 fact, and we get that through details.

15           That's what we have a right to discover, in broad  
16 terms, and I think that's an additional reason to grant the  
17 motion. So thank you for hearing me on that.

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

19           Major Schwartz.

20           DDC [Maj SCHWARTZ]: Sir, we're adopting arguments of  
21 co-defendants' counsel. I just want to bring your attention  
22 to AE 275, which is Mr. Bin'Attash's ex parte theories of  
23 defense. Mr. Connell touched on the idea of -- it's sort of a

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1 pretrial punishment issue. If it's pretrial punishment under  
2 color of law, that might dictate one result from the panel.  
3 If it's by rogue agents, that might dictate another.

4 We go into great depth in that ex parte filing,  
5 describing the manner in which we would use evidence like  
6 this. So I'd just direct your attention to that series.

7 MJ [COL POHL]: Thank you.

8 Mr. Harrington.

9 LDC [MR. HARRINGTON]: Judge, I think the special  
10 circumstances of this case should cause the court to lean in  
11 its discretion as far toward the defense as it can. The  
12 reason I say that is, in an ordinary capital case, we may be  
13 restricted, for example, in getting internal police documents,  
14 that kind of thing, in the investigation of a case. But  
15 ordinarily in those kind of cases, we can do independent  
16 investigation of things that are important toward mitigation  
17 and important toward the actual defense of the case.

18 But this case is unique because the government has  
19 under its control much of what needs to be raised and which we  
20 have an obligation under the ABA Guidelines to raise to the  
21 commission and to a jury, and that the system is built in --  
22 has built into it the protections that classification needs,  
23 because information that needs to be protected can be

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1 protected. There are rules and procedures that are in place  
2 to do that. But that the -- I think the starting point should  
3 be that the commission should look at this issue in as broad a  
4 sense as it possibly can in terms of disclosing these things  
5 to us, because it's not only necessary and critical toward our  
6 obligation, but it's also fundamental to the fairness of the  
7 whole process and fundamental to the members of the panel.

8 Thank you.

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

10 Mr. Ruiz, do you have anything you wish to add?

11 LDC [MR. RUIZ]: Judge, on behalf of Mr. al Hawsawi, I  
12 adopt all arguments.

13 MJ [COL POHL]: Okay. Trial counsel?

14 General Martins.

15 CP [BG MARTINS]: Good afternoon, Your Honor.

16 MJ [COL POHL]: Good afternoon.

17 CP [BG MARTINS]: The government opposes this defense  
18 motion because granting this motion to compel or any other  
19 motion dealing with similar or overlapping material  
20 information in this context, that piecemeal granting would  
21 violate the classified information procedures of the Military  
22 Commissions Act.

23 Bottom line up front, we recommend that in February

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1 the commission comprehensively consider a status update of  
2 discovery, both provided and pending, that relates to the  
3 Central Intelligence Agency's former rendition, detention, and  
4 interrogation program. And then, thus informed, that you take  
5 up all of the -- we count more than 50 different requests and  
6 motions, many of them are pleadings now or filings for motion  
7 to compel dealing with this information. And on this docket  
8 alone, this goes to Appellate Exhibits 114, 114F, 190, 191,  
9 195, in addition to 112.

10 Certainly understand that, you know, 112 was the  
11 first in the order. It was filed late 2012, so we understand  
12 Mr. Connell's desire to litigate that first. But in all those  
13 many discovery requests, there is a lot of overlapping  
14 information and there's a need, really, to invoke Section 4 of  
15 the Classified Informations Procedures Act.

16 You have a declaration, a qualifying declaration  
17 already, from the protective order that you issued to protect  
18 classified information that suffices to have that standard of  
19 materiality kick in. So under Section 949p-4, the standard is  
20 that if we've properly invoked it and we've provided a  
21 declaration from a knowledgeable official stating the damage  
22 to national security that could result, that the commission  
23 would not order the access to or discovery unless it is

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1 relevant to a legally cognizable -- noncumulative and helpful  
2 to a legally cognizable defense rebuttal to the case for  
3 sentencing.

4 MJ [COL POHL]: Let me ask you about a couple things you  
5 have raised. First of all, the same pieces of information  
6 that's requested under discovery for two separate issues,  
7 would there not have to be two separate analyses of whether  
8 it's material to the preparation of the defense? So the fact  
9 that it's the same piece of information wouldn't control, it  
10 would be the basis for the request?

11 CP [BG MARTINS]: I'm following you. I mean, we have the  
12 first level is what is the fact of consequence to the  
13 determination of the action, and we -- you know, we have had  
14 several displayed here, and there was some interchange on  
15 those. We have to have that. It has to be noncumulative,  
16 relevant, and helpful.

17 MJ [COL POHL]: Okay. You started out by saying we  
18 allowed discovery requests ----

19 CP [BG MARTINS]: Right.

20 MJ [COL POHL]: ---- some of which deal with the same  
21 information, okay. But, again, it could be the same  
22 information but on different discovery requests, be a  
23 different basis, as you say, the facts and consequence.

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1 CP [BG MARTINS]: Well ----

2 MJ [COL POHL]: For example, it may be discoverable on  
3 motion A but not on motion B, but it's the same fact, right?

4 CP [BG MARTINS]: Right. We're not saying throw any of  
5 these requests away. What we need is a consolidated  
6 approach ----

7 MJ [COL POHL]: Okay.

8 CP [BG MARTINS]: ---- because noncumulative is essential  
9 to this.

10 MJ [COL POHL]: Well ----

11 CP [BG MARTINS]: I mean, this is where you get protection  
12 of important information that goes to ----

13 MJ [COL POHL]: Let me ask you another question. In your  
14 pleadings in this case, was this the argument in your  
15 pleadings?

16 CP [BG MARTINS]: It was. I mean, it's there in the fact  
17 that we are going to produce discovery under the Military  
18 Commissions Act and the Manual for Military Commissions. This  
19 was a ----

20 MJ [COL POHL]: You would have to -- well, maybe you don't  
21 have to agree with me, nobody has to agree with me, but let me  
22 say this anyway: Is your initial response was simply -- your  
23 respond -- you comply with your discovery obligations, which

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1 is a response.

2 CP [BG MARTINS]: We do -- well, we all do this a lot.

3 MJ [COL POHL]: But it's ----

4 CP [BG MARTINS]: We expect you to know the law and you  
5 say that a lot to us, too, that you know the law.

6 MJ [COL POHL]: I know. I know. But I'm just saying  
7 is -- but there wasn't much of a particularized response on  
8 these particular issues, was there?

9 CP [BG MARTINS]: Your Honor, this is December 2012.

10 MJ [COL POHL]: Okay.

11 CP [BG MARTINS]: I mean, it was only two months ago that  
12 we had all five teams -- remember all five teams are joined at  
13 112.

14 MJ [COL POHL]: Okay.

15 CP [BG MARTINS]: That you could have teams that could  
16 even receive classified information.

17 MJ [COL POHL]: Let me go back to your initial point.

18 CP [BG MARTINS]: Right.

19 MJ [COL POHL]: As I understand it, we're really not  
20 addressing necessarily 112 itself. You want a, for want of a  
21 better term, a consolidated CIA discovery approach based on  
22 all current pleadings.

23 CP [BG MARTINS]: Correct.

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1 MJ [COL POHL]: Okay. Now, I can't address discovery  
2 requests for which I have no pleading; would you agree with  
3 that?

4 CP [BG MARTINS]: I do agree with that, and you do.

5 MJ [COL POHL]: Okay.

6 CP [BG MARTINS]: But you do have a lot of them.

7 MJ [COL POHL]: Oh, I know I do, but you talk about  
8 another group of stuff out there.

9 CP [BG MARTINS]: Oh.

10 MJ [COL POHL]: So what I'm saying is -- and now let me go  
11 back to what we're talking about here just on 112. Is the  
12 contents of the 112 classified? What they're asking for, is  
13 that classified?

14 CP [BG MARTINS]: Depends on the specific piece. There's  
15 a lot of particularized pieces there, and, in fact, there is  
16 some material that they've got either through release of the  
17 Senate study executive summary or things we provided, redacted  
18 copies of memos and things.

19 MJ [COL POHL]: But if I ----

20 CP [BG MARTINS]: The devil is in the details.

21 MJ [COL POHL]: Yeah. Okay.

22 If I said -- okay. You always add something that  
23 causes me another question. So let me get to my first

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1 question and I will get to the one you just added to me.

2 If I said, Mr. Connell, your motion is granted in  
3 toto, would that entail discovery or release of classified  
4 information? Understand, there's a procedure if it does. I'm  
5 just asking you ----

6 CP [BG MARTINS]: Yes. I mean, we would submit you  
7 don't -- you can't do that because of the declaration we  
8 filed.

9 MJ [COL POHL]: Okay.

10 CP [BG MARTINS]: So ----

11 MJ [COL POHL]: Well, I know what I can and can't do. I'm  
12 just asking. I'm just asking.

13 LDC [MR. CONNELL]: Your Honor, could we get a record cite  
14 on this declaration? I'm not familiar with the declaration  
15 that counsel is arguing.

16 MJ [COL POHL]: We'll come back to that. You say the  
17 devil's in the details. Let me ask you this: Is it clear  
18 from your perspective exactly what documents he's asking for?  
19 Because it appears to me that part of your response, and I  
20 know it was three years ago, seems to -- when you use the term  
21 overly -- overbreadth, I think it was really lack of  
22 specificity is what was meant.

23 And my question really is, before we can do anything

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1 on a discovery request, both sides have to know what's being  
2 asked for. And so my question to you is, do you -- are you  
3 confident that you know what Mr. Connell is asking for in this  
4 request?

5 CP [BG MARTINS]: He does give particularity on certain  
6 portions, sometimes they're less clear to figure out.

7 MJ [COL POHL]: No. But if I said to you, I said, okay --  
8 and understand I'm not saying it's going to happen -- I said,  
9 okay, I'll review all of this in camera and decide what's  
10 releasable and what's not -- again, it's really not the  
11 procedure -- would you know what to hand me?

12 CP [BG MARTINS]: Your Honor, this may be a disappointing  
13 answer.

14 MJ [COL POHL]: Okay.

15 CP [BG MARTINS]: On some of the paragraphs.

16 MJ [COL POHL]: Okay.

17 CP [BG MARTINS]: Your Honor, it might be helpful if I  
18 actually go -- just to demonstrate how this is no prejudice to  
19 any of the teams, I'd like to go to a motion they've all  
20 joined that is styled a consolidated discovery request. Might  
21 I do that as part of my oral argument here?

22 MJ [COL POHL]: Sure, as long as we're not going to  
23 talk -- we're just using that as an example of something.

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1           Mr. Connell, you will have an opportunity to respond.

2           Go ahead, General Martins.

3           CP [BG MARTINS]: What I'd like to do is -- it's of  
4 record. I'm not asking you to rule on this motion.

5           MJ [COL POHL]: No, I know.

6           CP [BG MARTINS]: I want to point to one of the multiple  
7 discovery requests and motions to compel that is overlapping,  
8 just to illustrate this point.

9           MJ [COL POHL]: Go ahead.

10          CP [BG MARTINS]: I'm just going to be referring to  
11 Attachment C of Appellate Exhibit 308. Can you please pass  
12 out copies just so everyone has got a convenient copy? And,  
13 Your Honor, may I approach the bench?

14          LDC [MR. CONNELL]: I have a copy, Your Honor. It's my  
15 pleading.

16          MJ [COL POHL]: You may.

17          CP [BG MARTINS]: I have turned your copy, Your Honor, to  
18 Attachment C.

19          MJ [COL POHL]: Okay.

20          CP [BG MARTINS]: Now, this is 308, which was filed much  
21 more recently, and after, you know, we have -- Mr. Connell has  
22 dutifully looked through what we have provided, and he has  
23 long been subject to the MOU. This is now a mid 2004 pleading

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1 in 308.

2 LDC [MS. BORMANN]: Judge, I'm sorry. I'm going to  
3 object. I don't have AE 308 in front of me. We didn't plan  
4 on ----

5 CP [BG MARTINS]: I just provided it to you.

6 LDC [MS. BORMANN]: No. I have a copy of a discovery  
7 request. I don't have the actual pleading. So if we're going  
8 to refer to it, I'd ask for time to get it.

9 LDC [MR. RUIZ]: Judge, we'd like a moment as well. We're  
10 trying to locate it.

11 MJ [COL POHL]: Okay. General Martins, is it fair to say  
12 you're only referring not to the pleading, but to the 16 April  
13 2014 request?

14 CP [BG MARTINS]: That's all I'll be referring to.

15 MJ [COL POHL]: Everybody ----

16 CP [BG MARTINS]: It has matured into a motion to compel.

17 MJ [COL POHL]: Just talk about the request, and if we  
18 need to ----

19 CP [BG MARTINS]: That's all I'll talk about, Your Honor.

20 MJ [COL POHL]: We're not litigating the substance of this  
21 motion, it's simply an example, and then I will give  
22 everybody -- defense, you will have an opportunity to respond  
23 if you need to. Go ahead.

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1 DDC [Maj SCHWARTZ]: The issue Your Honor, is that the  
2 request is not consolidated. The motion would be -- it's not  
3 here. We're trying to pull it up, but the request isn't even  
4 ours.

5 MJ [COL POHL]: I understand. It's being offered as an  
6 example. It's got all of the limitations inherent to the  
7 example. I got it. Go ahead.

8 CP [BG MARTINS]: Can you please pull it up on the ELM0,  
9 so my own team and counsel can follow as well?

10 So, Your Honor, this is an April 2014 request. I'm  
11 on the -- are you changing the function here?

12 MJ [COL POHL]: For the record, it's from Colonel Thomas  
13 on behalf of Mr. al Baluchi.

14 CP [BG MARTINS]: It's from the Ali Abdul Aziz Ali team.

15 MJ [COL POHL]: Got it.

16 CP [BG MARTINS]: So it's a request of 14 April for -- I'm  
17 seeing it now in the -- at the podium. Can you please bring  
18 it up on the -- this was previously given to the court  
19 security officer.

20 So this is a 2014 request. And if you can see, I  
21 mean, right there in the subject line, it's styled  
22 "Consolidated," and that's what we're asking you to do,  
23 Your Honor. It's better to think of these things together.

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1           And then what I'd like to do is turn to the second  
2 page. You've got -- you've got in this, on this second page,  
3 a listing of categories that are coming from another case at  
4 the time, and that gets later referred to. But the important  
5 point here is if you see footnote 1, which is referring to a  
6 category of RDI discovery, it specifically says that it's  
7 incorporating or overlapping information that is before you  
8 right now. And that goes with a lot of these different ones.

9           And if the -- there's an acknowledgement that all of  
10 this material can overlap. We believe the "noncumulative"  
11 word in the statute requires that we consider them together.

12          MJ [COL POHL]: Okay. Let me just see if I understand.  
13 You're really not to the merits of AE 112. What you want to  
14 do is file a pleading listing all the CIA-related discovery,  
15 and we'll address it all at one time with previously filed  
16 motions?

17          CP [BG MARTINS]: That's what I -- and we will provide you  
18 at the time an update. Right now, the update is we've  
19 provided over 300,000 pages of discovery ----

20          MJ [COL POHL]: I got it. I got it.

21          CP [BG MARTINS]: ---- over 12,000 of that classified. We  
22 would give you an update of that nature, and it would allow us  
23 all to be cross-leveled, if you will, on the key information,

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1 so you can ----

2 MJ [COL POHL]: Okay.

3 CP [BG MARTINS]: ---- manage the time, place, and manner  
4 of discovery.

5 MJ [COL POHL]: And I suspect a lot of this will be  
6 classified.

7 CP [BG MARTINS]: A portion of it will have to be. I  
8 mean ----

9 MJ [COL POHL]: Okay. Okay.

10 So what you want to do is, rather than ruling on  
11 112 -- now, let me ask you this: When you say CIA-related  
12 documents, just so we're precise in the language here, would  
13 that include any information by other government entities, the  
14 White House, the Department of Justice as it relates to CIA  
15 activities, included but not limited to the RDI program?

16 CP [BG MARTINS]: Your Honor, I would follow the process  
17 of what are the facts of consequence to the determination of  
18 the action that make these things relevant and then would be  
19 part of the materiality analysis, too.

20 MJ [COL POHL]: No, but you're getting -- I'm talking  
21 about procedurally here. What you want to do -- what I'm  
22 hearing you tell me is I want to do all of the outstanding CIA  
23 things at one time so we can address, more than anything else,

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1 cumulative issues.

2           My only question is I want to know what size of box  
3 we're talking about here. Would it include -- I mean,  
4 obviously there are CIA documents which clearly is what you're  
5 talking about, about the RDI program. What I'm saying is in  
6 this one in front of me, there's non-CIA documents that relate  
7 to the program; White House, DoJ documents. So would that be  
8 included in your rubric of addressing all the CIA documents at  
9 one time? I'm not saying they're going to be released. I'm  
10 not saying they're going to be discoverable. I just want to  
11 address them.

12       CP [BG MARTINS]: Absolutely. I mean, we would provide  
13 you a list of the -- and we have the tracker that's got all of  
14 the different requests and all of the requests where the --  
15 there would be a damage to national security to provide what  
16 was originally requested and we're invoking the national  
17 security privilege, we would list all of that and ask that you  
18 consider it.

19           I mean, Mr. Connell mentioned over 100 items. So, I  
20 mean, as an -- that he sees connected to this. We have got to  
21 get our arms around it all, Your Honor.

22       MJ [COL POHL]: Okay. I'm with you. Okay. You're really  
23 talking about a process here more than anything else.

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1 CP [BG MARTINS]: I am. But I'm invoking the one  
2 operative piece of the law here, which was missing from the  
3 prior presentation, which is, you know ----

4 LDC [MR. CONNELL]: May I ask again for that invocation to  
5 be identified for the record?

6 CP [BG MARTINS]: It is a declaration submitted with  
7 regard to your protective order.

8 LDC [MR. CONNELL]: And can we have a record cite or a  
9 copy?

10 MJ [COL POHL]: Just a second. Just a second. Okay.  
11 Okay.

12 Because I think, at least in my mind, and I'm not --  
13 maybe not following it as well as I should be, so if it's my  
14 fault, so be it. But I need to understand where we're at,  
15 because I think you've mentioned different things.

16 One is there's classified information that you want  
17 to apply the CIPA procedure to.

18 CP [BG MARTINS]: Correct.

19 MJ [COL POHL]: Understand we're dealing with variations  
20 of CIPA -- just for shorthand I'm going to call it CIPA  
21 procedure too -- part of it based on the declaration which the  
22 protective order of AE 013 is based on, and you want to  
23 consolidate and do all of the outstanding CIA-related

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1 discovery at one time, which would entail probably a 505(h)  
2 hearing, and then we go from there. That's what you're --  
3 now, that being said, is that a fair summary of what -- the  
4 way ahead, as you see it?

5 CP [BG MARTINS]: Your Honor, CIPA is called the  
6 Classified Information Procedures Act, so, I mean, I'm -- I'm  
7 talking the substance, which is a procedure. And I would  
8 follow the sequence that's in the law ----

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

10 CP [BG MARTINS]: ---- which is ----

11 MJ [COL POHL]: ---- I'm not -- I'm saying -- I was just  
12 trying to summarize the way ahead as you see it. Was I  
13 accurate?

14 CP [BG MARTINS]: Well, I'm following Section 4 of CIPA,  
15 which is you've invoked it. The slight difference is ----

16 MJ [COL POHL]: Okay.

17 CP [BG MARTINS]: ---- it all starts from a specific  
18 assessment by you of whether you've got something that's  
19 relevant.

20 MJ [COL POHL]: I got it.

21 CP [BG MARTINS]: And if we launch off into things that  
22 are -- we haven't identified the fact of consequence, it can  
23 get unanchored from the case.

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1           So that ----

2           MJ [COL POHL]: General Martins, you and I are talking  
3 across each other. You are talking about the substance of the  
4 way ahead. I'm simply talking about what I hear you telling  
5 me to do procedurally in the sense of ----

6           CP [BG MARTINS]: Okay.

7           MJ [COL POHL]: ---- you want to address all of the  
8 CIA-related discovery at one time.

9           CP [BG MARTINS]: Absolutely. If that's all you're  
10 saying, yes.

11          MJ [COL POHL]: Which would implicate CIPA for the  
12 discovery process. I'm not saying I'm not going to -- and  
13 then we could do it all at one time and you want to file a  
14 pleading that will identify all of the documents we're talking  
15 about, and we go forward in ----

16          CP [BG MARTINS]: Update.

17          MJ [COL POHL]: ---- go forward in February to do where  
18 we're at on the discovery. That's all I'm -- that's what I  
19 was asking you I wasn't saying ----

20          CP [BG MARTINS]: Okay. I mean ----

21          MJ [COL POHL]: ---- I'm not going to follow.

22          CP [BG MARTINS]: You did start talking about releasing a  
23 bunch of things hypothetically.

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1 MJ [COL POHL]: Oh, no, that was just simply designed to  
2 see ----

3 CP [BG MARTINS]: Hypothetically.

4 MJ [COL POHL]: ---- for one reason only, and it may be  
5 conflated concepts to make sure ----

6 CP [BG MARTINS]: Okay.

7 MJ [COL POHL]: ---- to know whether or not I know exactly  
8 what we're talking about here. And you're telling me kind of  
9 yes and kind of no. That's to the exact information  
10 requested.

11 CP [BG MARTINS]: Yes.

12 MJ [COL POHL]: Please say yes. Okay. Good. Because we  
13 can move on. Okay.

14 Mr. Connell.

15 You can have a seat there, General Martins, and I  
16 will see what Mr. Connell is going to say, and you will have  
17 an opportunity to speak again, if you want.

18 LDC [MR. CONNELL]: From the beginning, the prosecution's  
19 approach to discovery has been delay, deny, and degrade. This  
20 is the third dodge that the prosecution has tried to make on  
21 the CIA discovery. In January of 2013, the prosecution's  
22 position was, we know what our responsibility is and we will  
23 provide the documents responsive to Category 3 and Category 4

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1 of the information requested in AE 112. They did not do so.  
2 The -- their position was that everything else was irrelevant  
3 and immaterial and, as I recall, not necessary.

4 The following month, February of 2013, Colonel Thomas  
5 and I and all of our team signed the memorandum of  
6 understanding. We endured numerous claims from the  
7 prosecution that, if only anyone had signed the memorandum of  
8 understanding, we would be providing discovery, and waited in  
9 vain for discovery related to AE 112 or the other discovery  
10 requests. We continued to send discovery requests, and as  
11 they ripened into denials, we continued to send motions to  
12 compel, filed motions to compel with the court.

13 In the first part of 2014, the military commission in  
14 the al Nashiri case issued -- took 70 -- excuse me -- 82  
15 separate items that were requested by Mr. al Nashiri in a  
16 laundry list discovery request and did its best to consolidate  
17 those 82 specific items into ten specific categories which  
18 ripened into the order which is AE 120 and ultimately AE 120AA  
19 in the al Nashiri case, which are attached as exhibits to  
20 AE 308 which General Martins just referenced; in fact,  
21 specifically they are Attachment B to that motion.

22 Having gone for a year and a half with absolute  
23 silence from the prosecution on the CIA torture discovery and

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1 AE 112 and related motions, we sent a discovery motion -- we  
2 sent a discovery request to the prosecution saying, well, if  
3 you're not -- why don't -- why don't you just send us those  
4 ten limited categories out of that one motion consolidating  
5 the 82 down to 10? We got an answer, we know what our  
6 discovery responsibilities are, and we'll get it to you.

7           The -- in AE 308A, filed by the prosecution on  
8 14 July of 2014, the prosecution took the position that no, we  
9 want to provide discovery, but we want to limit it to the ten  
10 categories that are out of one specific motion from another  
11 case, we want -- we think we like those ten categories but we  
12 think that should be all that we should provide.

13           And as the military commission has already observed,  
14 just AE 112 itself, not to mention the other motions to compel  
15 that we have provided, goes outside the box established by the  
16 al Nashiri case in AE 120AA in that case.

17           What the prosecution says today, however, in its  
18 third iteration of an attempt to not provide this discovery,  
19 is that now it wants to do one big bucket of all CIA discovery  
20 defined by itself under who knows what categories and then  
21 present that to the military commission in February.

22           My answer to that, with all due respect to my  
23 colleagues across the aisle, is that it is too late to take

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1 such an approach. They could have at any time submitted any  
2 of this evidence to the military commission under the 505  
3 procedure under 505(f) for a determination as to whether  
4 whatever redaction, summaries, et cetera, it wanted to make,  
5 to provide to the defense in discovery would allow the defense  
6 to make substantially the same defense as it would otherwise.  
7 It has chosen not to do so.

8 I respectfully suggest that the appropriate way  
9 forward is to grant AE 112. The prosecution offered no  
10 reasons, either in its pleadings or today, not to grant  
11 AE 112. It doesn't argue that the information does not exist.  
12 It doesn't argue that the information is not material. It  
13 doesn't argue that the information is not helpful under the  
14 United States v. Yunis standard out of the D.C. Circuit which  
15 governs classified information and is incorporated into  
16 505(f). It offers no reason whatsoever why the military  
17 commission should not proceed in light of its own dilatory  
18 tactics on this sort of discovery.

19 MJ [COL POHL]: Would that remedy also apply to the  
20 classified portions of your request?

21 LDC [MR. CONNELL]: Yes, certainly. So what the process  
22 should be, since my colleague offered what he thought the  
23 process should be, the -- what I think the process should be

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1 is that the military commission should grant AE 112 as I said,  
2 in toto, and then the prosecution can exercise its rights  
3 under 505(f) to submit what it believes should be appropriate  
4 redactions and substitutions to the military commission in an  
5 attempt to satisfy the order to compel in AE 112, what I hope  
6 would become AE 112K.

7 MJ [COL POHL]: There would be no need to have a 505(h)  
8 hearing.

9 LDC [MR. CONNELL]: No, sir. That's for use, relevance  
10 and admissibility in court. The 505(f) process, I would love  
11 to have a hearing on. In fact, I filed about 20  
12 responses ----

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

14 LDC [MR. CONNELL]: ---- identically saying there should  
15 be a hearing under 505(f). But the way I understand it's  
16 working from AE 076 and AE 143, is that the prosecution  
17 submits ex parte its proposed redactions and summaries to the  
18 military judge and that you either send them back for  
19 additional changes or you approve them and then the discovery  
20 comes to us. That's the way that the process works under  
21 505(f). The 505(h) hearing only matters for when, having the  
22 discovery, we try to come and use it in court.

23 MJ [COL POHL]: Okay. I understand. It was my confusion.

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1 Okay.

2 LDC [MR. CONNELL]: That's all right, sir.

3 MJ [COL POHL]: Okay.

4 LDC [MR. NEVIN]: Your Honor, we join those remarks.

5 Thank you.

6 MJ [COL POHL]: Okay.

7 LDC [MR. CONNELL]: Excuse me, sir.

8 MJ [COL POHL]: Sure. I had to check because I know 949p  
9 series and 505 better than I know the references to the  
10 Classified Information Procedures Act, which applies in  
11 civilian court. But counsel just this moment sought to --  
12 sought to invoke Section 4 of CIPA, which is discovery of  
13 classified information by defendants. And all Section 4  
14 allows is the court on a sufficient showing -- I didn't want  
15 to talk too fast here -- to authorize the United States to  
16 make deletions or substitutions of discovery.

17 That's the same process with perhaps some minor  
18 wording violations -- excuse me, variations that occurs in the  
19 505(f) that I just described.

20 If the prosecution wants to invoke Section 4, it may  
21 do so at any time by submitting a draft order under the  
22 Regulation for Trial by Military Commission along with  
23 proposed redactions and substitutions to the military

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1 commission. The military commission doesn't have anything  
2 like that under 505(f) before it. What it does have before it  
3 is AE 112, a motion to compel, and no reasons not to grant the  
4 motion to compel.

5 [Pause.]

6 MJ [COL POHL]: One moment.

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

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

9 General Martins.

10 CP [BG MARTINS]: Thank you, Your Honor. I won't be much  
11 longer. I do want to take exception to the dodge  
12 characterization. We have been working seven days a week  
13 trying to produce this. We still have more to review, which  
14 is why the report that I would give you in February would be  
15 provided discovery and pending, and we would seek to have you  
16 look at substitutions and other relief and request that  
17 through the process.

18 Counsel omitted, again, the standard for access in  
19 discovery in this context is going to be, you know, whether  
20 you've determined it's noncumulative, relevant, helpful to a  
21 legally cognizable defense, the prosecution's case, rebuttal  
22 to that case, or sentencing.

23 So that standard has to be applied, and we would need

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1 to get into the specifics of materiality.

2 MJ [COL POHL]: What -- I hear you both arguing, but you  
3 appear to be applying different standards. Okay. Mr. Connell  
4 talks about material to the preparation of the defense, and  
5 you're talking about relevance and necessity.

6 CP [BG MARTINS]: I'm talking -- I mean, 701 -- counsel  
7 said before mistakenly that Rule 701, our basic discovery  
8 rule ----

9 MJ [COL POHL]: Right.

10 CP [BG MARTINS]: ---- doesn't have the concept of  
11 relevance in it; and yet in 701(c), material to the  
12 preparation of the defense, is noted in the discussion to  
13 invoke Yunis, so it's completely consistent with Section 4.  
14 When I say Section 4, I'm talking 949p-4 ----

15 MJ [COL POHL]: Right.

16 CP [BG MARTINS]: ---- our classified information  
17 procedures.

18 MJ [COL POHL]: Okay. Let me just make sure we're  
19 applying the thing. Material to the preparation of the  
20 defense, one would argue when you say material there's a  
21 relevance component to it; but again, when we are talking  
22 about material to the preparation of the defense, it does not  
23 mean it has to be admissible evidence, correct? Or do you

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1 believe it has to be?

2 CP [BG MARTINS]: I'm not saying that it's bound by what's  
3 admissible, no.

4 MJ [COL POHL]: Okay.

5 CP [BG MARTINS]: No, that's not the discovery standard.  
6 And you -- courts dance around materiality and relevance and  
7 what the terms mean.

8 MJ [COL POHL]: Sure.

9 CP [BG MARTINS]: I'm saying relevance, you know,  
10 Rule 401, 402, does it make a fact of consequence to the  
11 determination of the action more or less probable ----

12 MJ [COL POHL]: Now we're ----

13 CP [BG MARTINS]: ---- that have been suggested here.  
14 Voluntariness of subsequent statements, we would acknowledge  
15 that's a theory of relevance, and we would want to get into a  
16 discussion of what we're talking about here. Other ones that  
17 were mentioned, in so-called Skipper evidence -- of course,  
18 Skipper contemplates the prosecution is going to use future  
19 dangerousness but related concepts of relevance. There's a  
20 fact of consequence, whether someone's going to be dangerous  
21 in the future, that may cause something to be relevant.

22 MJ [COL POHL]: But let's come back. You started out  
23 talking about a macro approach to the CIA discovery request.

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1 We started with one particular request for four, for want of a  
2 better term, categories of information. Okay?

3 CP [BG MARTINS]: That's right, Your Honor. You're  
4 speaking now of Mr. Connell's request?

5 MJ [COL POHL]: I'm speaking of 112, kind of where we  
6 started.

7 CP [BG MARTINS]: Uh-huh.

8 MJ [COL POHL]: Are you just not going to -- you don't  
9 want to address if we -- 112 at all then as far as the four  
10 things he's asked for?

11 CP [BG MARTINS]: I don't. I want to do this in a way  
12 that protects appropriately, as the law says we must protect,  
13 and use that word "cumulative" and apply that process. And,  
14 Your Honor, there's no prejudice here. You know, the -- in  
15 his own motion -- and, again, I'm not litigating 308; he  
16 started referring to it, so I think I'm on fair ground here --  
17 there are ten categories of information that we've  
18 acknowledged in our response to that motion that we see -- we  
19 adopted, and, in fact, that's been guiding us as we anticipate  
20 the more requests we're going to get and try to deal with all  
21 of the more than 50 requests we have gotten. So we've adopted  
22 that.

23 You would, I hope, take cognizance of that, if we go

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1 this route, our response in 308A -- because I think there's a  
2 lot of ground here we don't have to litigate. And then we  
3 decide what's still out there. That's what motions to compel  
4 ought to be for, not for the stuff we agree upon.

5           So that's an approach that I would submit makes a lot  
6 of sense, and we -- I'm not merely saying we know our  
7 discovery obligations. We know them and we're going to turn  
8 over a lot of stuff. But we've got to understand and be  
9 guided and we submit the judge, of course, has the obligation  
10 and power to regulate the time, place, and manner of  
11 discovery. This is exactly the case we need it.

12       MJ [COL POHL]: Okay. Of these discovery requests you've  
13 already gotten that there are subsequent motions to compel,  
14 has there been some discovery that has been satisfied in those  
15 motions to compel which makes the motion or at least some  
16 parts of it moot?

17       CP [BG MARTINS]: I would have to go down the spreadsheet  
18 and look at it. I mean, we have provided things subsequent to  
19 112 that in part moot 112, and I think Mr. Connell was sort of  
20 acknowledging having received some DoJ memos and things, but I  
21 don't -- we would -- using that ten-category construct that's  
22 in 308, again not litigating that ahead of time, but if  
23 counsel were to look at that and sees how that's not embraced

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1 by either the ten categories or something they have  
2 outstanding and get those requests in, then we can litigate it  
3 and try to come up with a comprehensive framework, that  
4 framework can do a lot of work and can be helpful, and then we  
5 can then seek the substitutions and other relief as we go  
6 through that process of Section 4, Your Honor.

7 As to the 505(h), agree completely, that has to do  
8 with hearings.

9 MJ [COL POHL]: Right.

10 CP [BG MARTINS]: I thought you were speaking of how we  
11 would do February in court vis-a-vis ----

12 MJ [COL POHL]: No. I'm with you there. I've got the (h)  
13 and the (f) straight, at least now. Okay.

14 Then not to bring up another variation of this theme,  
15 but since we are, we have also kind of -- and this is your  
16 motion, Mr. Connell, 387. Yep. I know. I know.

17 CP [BG MARTINS]: Are we still on 112, Your Honor?

18 MJ [COL POHL]: We're on the -- yeah, 387. And the only  
19 reason I mention that, because it's the motion where  
20 Mr. Connell was talking about 505(h) hearings for everything  
21 that's still out there. Does that ring a bell with you,  
22 Mr. Connell?

23 LDC [MR. CONNELL]: Yes, sir. 387A, yes, sir.

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1 MJ [COL POHL]: And the only reason I bring it up is that  
2 it seems to me it's kind of also a variation of Mr. -- or  
3 General Martins' request for some consolidated approach to all  
4 of the 505(h) -- this is 505(h) stuff, 505(g) notices. Is  
5 that accurate?

6 LDC [MR. CONNELL]: No.

7 387A is simply a request for 505(h) hearings.  
8 Whether those -- you could do those -- one massive one like we  
9 did in December of 2013 -- and opinions vary on whether that  
10 was helpful or not -- or we could do them one at a time or a  
11 small group at a time like we did this week, which I did think  
12 was helpful ----

13 MJ [COL POHL]: I'm just kind of looking at your listing  
14 of -- I believe they're probably your notices ----

15 LDC [MR. CONNELL]: Yes, that's right.

16 MJ [COL POHL]: ---- in that motion.

17 LDC [MR. CONNELL]: There are a lot of notices. A lot of  
18 classified. But what I understood the military commission's  
19 question to be, is it a request for one mega 505(h), and no, I  
20 don't think that's necessarily the most effective approach.  
21 It could be. If the military commission tells us to do it  
22 that way, we will. But I think that's a separate and distinct  
23 issue from are we going to abandon the usual motion framework

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1 of all of the motions to compel which exist in the hope of a  
2 hypothetical mega-solution to the CIA discovery.

3 MJ [COL POHL]: Okay. Anything else?

4 LDC [MR. CONNELL]: Yes, sir. To the extent that the  
5 government and I are arguing different standards, mine is  
6 correct. It is found in 701(c), material to the preparation  
7 of the defense. It is true, the notes refer to Yunis. Yunis  
8 adds the idea of helpfulness to that analysis and what I did  
9 between 1300 and 1345 is explain why this information that  
10 we -- these four categories of information which we're seeking  
11 in 112 would be helpful to the defense.

12 The -- at least three of the -- I mean, three and  
13 arguably four of those categories don't really overlap with  
14 the ten categories which were ordered in Nashiri, which I'm  
15 not sure that was ever intended to be the end-all, be-all as  
16 opposed to a consolidation of an order with respect to a  
17 particular ----

18 MJ [COL POHL]: You'd have to ask the judge in Nashiri  
19 about that.

20 LDC [MR. CONNELL]: I would have to ask him, yes,  
21 Your Honor.

22 MJ [COL POHL]: Not this judge.

23 LDC [MR. CONNELL]: I'm not responsible for the Nashiri

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1 framework. I didn't articulate it, I'm not defending it. The  
2 only reason why we filed that motion, that discovery request  
3 was, well, maybe here's a path forward to getting some kind of  
4 discovery so that we can move forward to the other motions  
5 that have to happen in the case.

6 But I will be clear. I think the appropriate  
7 framework is for the military commission to rule on AE 112 and  
8 whatever other motions get argued.

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

10 LDC [MR. CONNELL]: Thank you.

11 MJ [COL POHL]: General Martins, you have a final word you  
12 wish to add?

13 CP [BG MARTINS]: Yes, Your Honor. So we oppose the  
14 motion as styled. We have provided what we believe is an  
15 appropriate remedy that does not cause prejudice that protects  
16 the information consistent with Section 4.

17 MJ [COL POHL]: Just so I'm clear, okay, is your intent to  
18 file a pleading with the commission and to the defense with a  
19 list, in your view, of all outstanding CIA-related discovery  
20 motions? So if I let you do that, that when we come back in  
21 February, we'll be prepared to argue every one of those? And  
22 if 112 is on that list, I'll get a substantive government  
23 argument of why it's not discoverable, or a concession it is

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1 discoverable?

2 CP [BG MARTINS]: Correct.

3 MJ [COL POHL]: Because I have yet to hear that because  
4 you don't want to do that. Okay. But that's your idea to do,  
5 and then we need to do -- any 505(g) notices or 505(h)  
6 hearings. I know there's 505(f), too, but that -- we have got  
7 that out there, too. We'll address all of that stuff at one  
8 time in February and then develop a construct for this case of  
9 categories of information.

10 CP [BG MARTINS]: Correct, for this case. Although, you  
11 know, it's not out of the experience of this case to refer to  
12 that ten-category construct.

13 MJ [COL POHL]: I understand.

14 CP [BG MARTINS]: The defense brought that up first.  
15 We're trying to find common ground, Your Honor.

16 Nothing further. Thank you.

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

18 [Pause.]

19 MJ [COL POHL]: The government motion to defer  
20 consideration of AE 112 for today is granted. You are to  
21 provide that pleading within two weeks to the defense. We  
22 will address all of these issues in February. And if the  
23 government chooses not to contest any further discovery, then

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1 I'll consider that a concession, that the discovery is to be  
2 granted.

3 Understand?

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

5 MJ [COL POHL]: Okay. Now, Mr. Connell, you -- 194?

6 LDC [MR. CONNELL]: Your Honor, nothing would give me  
7 greater pleasure than to argue 194, but it falls under the  
8 exact same category.

9 MJ [COL POHL]: Well, does it, Trial Counsel?

10 MTC [MR. TRIVETT]: Yes, sir. Under 308, we've committed  
11 to providing the statements that are the subject of the  
12 defense discovery request. So at this point, it's probably  
13 not ripe because we've agreed to do it, we just haven't done  
14 it yet. And we're going to get it through the process under  
15 505, all of the statements.

16 MJ [COL POHL]: Okay. When we discussed 194 -- I don't  
17 know why you say 308, because I said 194 -- is I was told that  
18 there was no need -- there was a 505(g) notice. There was no  
19 need for a 505(h) hearing because all these statements were  
20 not classified. Are my notes wrong there, Mr. Connell?

21 LDC [MR. CONNELL]: Yes, sir. It's not that all of the  
22 underlying statements are not classified, it's that all of the  
23 arguments involved in 194 are not classified. It is that

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1 nothing needs to be said in open court that is classified.

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: That is a separate question from  
4 whether the underlying statements which might be ordered  
5 produced are classified or not.

6 MJ [COL POHL]: Okay. And so my question -- so if I  
7 understood you correct, Mr. Trivett, you intend to give all of  
8 the statements requested in AE 194 to the defense after  
9 they've gone through whatever process needs to do of either  
10 give them the classified versions or do some type of a  
11 substitute process?

12 MTC [MR. TRIVETT]: That's correct.

13 MJ [COL POHL]: And when will that be done?

14 MTC [MR. TRIVETT]: We're in the process of putting them  
15 together to provide to the judge.

16 MJ [COL POHL]: Okay. Let me ask you something else. A  
17 lot of the discovery in this case -- just many times I have  
18 heard, "When they sign the MOU, they'll get the discovery."  
19 I'm not going to replot that ground. That problem has been  
20 addressed.

21 But just so we have some type of idea, is when does  
22 the government envision that it will be able to provide all  
23 the discovery that you believe the defense is entitled to?

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1 I'm not talking about contested discovery here. I'm simply --  
2 discovery that you think they're entitled to now that they  
3 have all signed the MOUs.

4 MTC [MR. TRIVETT]: One second?

5 MJ [COL POHL]: Sure.

6 [Pause.]

7 MJ [COL POHL]: Just let me tell you, the reason I ask  
8 that question is twofold. One is a timing issue, but also  
9 secondary issue is that if they get the stuff, the defense  
10 gets the stuff, they may not have to file motions to compel or  
11 discovery requests itself because they may already have it. I  
12 understand in October when they signed the MOUs, so I'm not --  
13 I'm not asking whether you backed up a truck to the defense  
14 and dropped the stuff off. I'm simply asking, going forward,  
15 how much and how long to what you believe you have to give  
16 them without it being litigated?

17 MTC [MR. TRIVETT]: Understood. And we're going to be  
18 providing that on a rolling basis, with our goal of having it  
19 complete by 30 September 2016, with that being either in the  
20 defense's hands or with the judge for a request for approval  
21 of an appropriate summary.

22 MJ [COL POHL]: I'm not going to ask why, so don't worry  
23 about that. I'm not going to ask why, if you're going to ask

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1 for judicial review of it, that's not already been done, so  
2 I'm not going to ask that. I am going to ask you: How much  
3 do you anticipate will be provided for judicial review?  
4 Because as you know, that's a time-intensive process.

5 MTC [MR. TRIVETT]: Oh, yes, sir. Yes, sir. It's an  
6 intensive process on our end and at the judicial end.

7 MJ [COL POHL]: Yes. I suspect you have more people  
8 working on it on your end than the one judge on this end. So  
9 my question is how much.

10 MTC [MR. TRIVETT]: It would be a majority of the  
11 information that falls within the ten categories, including  
12 all of the statements, which is the most voluminous part.

13 MJ [COL POHL]: Okay. Ballpark me how many pages.

14 MTC [MR. TRIVETT]: I know that there's approximately 87  
15 binders full of the statements from all five accused.

16 MJ [COL POHL]: Are these in the -- these are prior to the  
17 summaries being prepared?

18 MTC [MR. TRIVETT]: Correct. They would be ----

19 MJ [COL POHL]: So you're saying ----

20 MTC [MR. TRIVETT]: They would be provided in almost  
21 a ----

22 MJ [COL POHL]: No, I'm talking about -- because when you  
23 do the summaries, one piece of paper becomes three.

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

2 MJ [COL POHL]: So, okay. So I'm not asking for one.

3 You're saying there's 87 binders of statements that have got  
4 to be culled and then summaries provided for substitution.

5 MTC [MR. TRIVETT]: No. The binders of information will  
6 be identical to the binders of information provided, or very  
7 similar to the binders of information provided for the 9/11  
8 statements that were already approved a couple of years ago.  
9 Same process.

10 MJ [COL POHL]: Okay. The sooner you get them ----

11 MTC [MR. TRIVETT]: And 87 incorporates all of the  
12 statements for all five accused of the non-9/11-related  
13 statements. That's the most voluminous of the material.

14 MJ [COL POHL]: Okay.

15 MTC [MR. TRIVETT]: And that includes the proposed  
16 summary, just like in the notebook. Sorry if I'm not clear.

17 MJ [COL POHL]: That's okay. That's okay.

18 And then you have -- when you say "the most," that  
19 tells me there's more of that.

20 MTC [MR. TRIVETT]: The statements fall under  
21 paragraph (h) of AE 120, which we've adopted in 308. The  
22 statements are the most voluminous of the ten categories of  
23 information.

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1 MJ [COL POHL]: Okay. But there's additional information  
2 you're going to want to be reviewed?

3 MTC [MR. TRIVETT]: Correct. Falling under those other  
4 nine categories, yes, sir.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: Your Honor, may I comment on that?

7 MJ [COL POHL]: Sure. Mr. Connell.

8 LDC [MR. CONNELL]: On 14 June of 2013 when the  
9 prosecution filed its AE 175, it wrote that "This case is  
10 entering a new phase, as the prosecution's anticipated  
11 discovery is nearly complete."

12 MJ [COL POHL]: What was the date of that, please?

13 LDC [MR. CONNELL]: I'm sorry?

14 MJ [COL POHL]: The date again, please?

15 LDC [MR. CONNELL]: 14 June 2013.

16 The significance of that is that obviously conditions  
17 change. I understand that. I get that completely. They  
18 change in response to discovery requests. They change in  
19 response to large U.S. Government policy changes. They change  
20 in response to information which was not earlier found is now  
21 found. I get all that.

22 But what I -- the significance of that is that the  
23 ongoing nature of prosecution discovery production is not a

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1 good reason not to move forward with the motions to compel,  
2 because the prosecution would have -- the prosecution is  
3 apparently acting under the idea that the ten categories from  
4 the Nashiri trial define the universe of what it has to  
5 produce. That may or may not turn out to be true in this  
6 case.

7           And the -- it would be useful for the military judge  
8 to rule on motions to compel in the ordinary course so that it  
9 would define the obligations of the prosecution; otherwise,  
10 you know, let's say a year from now at the October hearing  
11 after the bulk of discovery is complete, at the October 2016  
12 hearing, when the next motion to compel comes up, there's  
13 going to be a whole different -- if it's granted, there's  
14 going to be a whole different set of obligations defined for  
15 the prosecution.

16           So what I'm saying is that it makes sense not to sign  
17 on to this ten-category construct or it's going to de facto  
18 become the operation of the prosecution, which makes more  
19 sense to address the motions to compel in ordinary course.

20           MJ [COL POHL]: Perhaps I didn't make myself as clear as I  
21 could have. Okay.

22           This approach on 112 by the government of I don't  
23 want to talk about the -- quite frankly, the substance of our

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1 objections because I want to do this in a different manner in  
2 February, which is really what we've done and I said okay, you  
3 can do that, okay, this time, okay. And what I said, the more  
4 discovery they give you, hopefully, that would limit the  
5 motions to compel and discovery requests themselves.

6 LDC [MR. CONNELL]: Sure.

7 MJ [COL POHL]: Both those being said, also their  
8 embracement, embracing of a construct from the other case is  
9 their current position. That's fine. It doesn't mean I'm  
10 adopting it for this case. Okay? Different cases, different  
11 facts. Okay.

12 Also, when I said that by giving the discovery that  
13 could lessen the need for motions to compel, I did not mean to  
14 imply that, therefore, no motions to compel will be done until  
15 after September. Okay. Because I know exactly what you are  
16 saying is your view of what discovery you're entitled to is  
17 different from their view. I wouldn't have motions to compel  
18 otherwise.

19 LDC [MR. CONNELL]: Right.

20 MJ [COL POHL]: So the way ahead is we will litigate  
21 motions to compel in the normal course of business, as we  
22 have, quite frankly, done up to this point; although 112  
23 again, they wanted to try it. We'll see if that works. I

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1 think they also -- it appears they want to know their  
2 construct, but it certainly does not mean that I'm going to  
3 wait until September or October to start doing any new motions  
4 to compel.

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

6 MJ [COL POHL]: I think that was your concern. Was that  
7 one of them?

8 LDC [MR. CONNELL]: You encompassed all of my concerns in  
9 your statement.

10 MJ [COL POHL]: Okay. Good.

11 Okay. That being said, when we discuss about 194,  
12 what I heard the government say is they're going to give them  
13 to you, Mr. Connell, after the 505 review. Is that what you  
14 heard him say?

15 LDC [MR. CONNELL]: As I said earlier, Your Honor, hope  
16 springs eternal.

17 MJ [COL POHL]: I know. I'm not dealing with hope right  
18 now, I'm just dealing with hearing. Is that what you heard  
19 him say?

20 LDC [MR. CONNELL]: Yes. I heard "granted."

21 MJ [COL POHL]: Okay. Okay. So I'm going to consider  
22 that. I'm going to carry that motion as granted, with the  
23 understanding that, as I'm sure you will tell me, if you never

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1 see these things or you don't get them, you want to renew it,  
2 do it. But I'm going to take it off the docket as being  
3 granted, okay?

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

5 MJ [COL POHL]: I just wanted to make sure there's no  
6 confusion on that.

7 That leaves 195, but let me skip over that one for  
8 right now. 161. Mr. Connell?

9 LDC [MR. CONNELL]: Yes. Would you like that to be argued  
10 now?

11 MJ [COL POHL]: Yeah. Let's make use of the time we have.

12 CP [BG MARTINS]: Your Honor, before we move on to 161,  
13 can we reflect then just from -- since we're looking at the  
14 docket ----

15 MJ [COL POHL]: Yeah.

16 CP [BG MARTINS]: ---- can we put in the same status as --  
17 not 194, because you've reflected it as granted subject to the  
18 process. But 190, 195, we -- these are going to be part of  
19 our pleading -- I'm sorry.

20 MJ [COL POHL]: Okay. Let me back up.

21 CP [BG MARTINS]: 195 ----

22 MJ [COL POHL]: 190 and 191 dealt with the same or similar  
23 issues we were talking about before and we weren't going to

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1 address them this session because they were connected with  
2 other things.

3 195, as I recall, had -- the most of it was  
4 unclassified, with a classified component.

5 LDC [MR. CONNELL]: Yes, but I think what the prosecution  
6 is saying is that 195 also deals with CIA, both DoD and CIA  
7 information.

8 MJ [COL POHL]: Okay. So you want 190, 191, and 195, to  
9 be placed in, for want of a better term, the CIA bucket for  
10 February?

11 CP [BG MARTINS]: February bucket. I mean, to the extent  
12 there's overlap, it will be part of that CIA piece.

13 MJ [COL POHL]: Mr. Connell?

14 LDC [MR. CONNELL]: I object to the whole process, but  
15 separate from that ----

16 MJ [COL POHL]: I got it.

17 LDC [MR. CONNELL]: The -- I can't say it in open court,  
18 but 190 and 191 relate to a very special topic that we covered  
19 on Monday, which is not necessarily the same as this bucket  
20 that the prosecution has ----

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: ---- referred to earlier.

23 MJ [COL POHL]: But just to be clear, when we discussed

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1 190 and 191 on Monday, actually, I think we discussed it at  
2 the 505(h) hearing of why we can't get to it this session.

3 LDC [MR. CONNELL]: Yes, that's correct. 190 and 191 had  
4 to be in a classified -- in a closed session for the  
5 prosecution.

6 MJ [COL POHL]: Okay. We will revisit both of those in  
7 the February session, whether in that bucket or in whatever  
8 bucket you want to put them in, okay?

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

10 MJ [COL POHL]: Okay. So what we'll finish with today,  
11 then, will be the 190 -- 161 and 182H.

12 So, Mr. Connell, are you on 161?

13 I mean, Government, those two, those would be the  
14 last two we'll do for this session. Go ahead.

15 LDC [MR. CONNELL]: Thank you, Your Honor. Can I pass out  
16 my exhibit?

17 MJ [COL POHL]: Sure.

18 LDC [MR. CONNELL]: May I approach and have this exhibit  
19 marked?

20 MJ [COL POHL]: I'm sorry?

21 LDC [MR. CONNELL]: May I approach and have this exhibit  
22 marked, Your Honor?

23 MJ [COL POHL]: Go ahead.

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1 LDC [MR. CONNELL]: Your Honor, 161 requests the  
2 prosecution to follow the requirements of M.C.R.E. 506  
3 regarding unclassified information. This motion, I want to be  
4 clear, has no relationship to 505(f) substitutions or  
5 deletions. We are only talking about unclassified information  
6 with respect to AE 161. The factual basis for 161 has changed  
7 because -- for reasons that I'll explain in just a moment.  
8 But the heart of AE 161 is that the prosecution should not be  
9 able to unilaterally redact information from unclassified  
10 discovery that it provides to the defense. The -- it should  
11 instead have to follow the requirements of Protective Order  
12 Number 2 which set out the appropriate framework for dealing  
13 with unclassified but for some reason sensitive information.

14 MJ [COL POHL]: Let me ask you a question, Mr. Connell.  
15 If I have a piece of paper, the government gives you discovery  
16 and the top piece of the paper has writing on it, and the  
17 bottom piece of the paper is redacted. Okay? And if  
18 they're -- if the bottom piece of paper is redacted because  
19 it's not -- doesn't have anything to do with you or your -- or  
20 this case at all, okay, just totally unrelated to this case,  
21 okay, but it happens to be the same piece of paper that  
22 related information is -- okay. Does there need to be any  
23 type of review of that redaction?

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1 LDC [MR. CONNELL]: The redaction -- the -- I just want to  
2 make sure that I understand the hypothetical and then I'll  
3 give you a straight answer.

4 The hypothetical is the top half of the paper is  
5 about Mr. al Baluchi. The bottom half of the paper is their  
6 grocery list, right? Has nothing to do with this case or  
7 maybe any other case.

8 MJ [COL POHL]: Totally unrelated, right.

9 LDC [MR. CONNELL]: Totally unrelated. In that situation,  
10 the prosecution can do a redaction and should produce a log,  
11 some kind of privilege log or whatever explanation for why  
12 it's doing so.

13 If, on the other hand ----

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: ---- the bottom half of the page is  
16 force sensitive, the first half is about Mr. al Baluchi and  
17 the bottom information is about -- information about when the  
18 shift changes ----

19 MJ [COL POHL]: Right.

20 LDC [MR. CONNELL]: ---- in the detention facility, in  
21 that situation it should be designated as sensitive discovery  
22 under Protective Order Number 2 and dealt with in that  
23 fashion.

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1 MJ [COL POHL]: Back to my hypothetical. You say there  
2 has to be some log of why it was redacted?

3 LDC [MR. CONNELL]: Well, that's the way that -- I mean,  
4 your hypothetical is a very unusual one. The more -- the time  
5 when that situation usually comes up is when the information  
6 is privileged in some way. Say there's a piece of paper, and  
7 it's the person's notes of what I did on a certain day.

8 MJ [COL POHL]: But what ----

9 LDC [MR. CONNELL]: So I'm really drawing from -- to use  
10 your fairly extreme hypothetical, I'm drawing from the  
11 privilege log idea. If you have four telephone conversations  
12 on a day, one through three were discoverable, number four was  
13 with your lawyer, you produce it and redact it with your  
14 privilege log.

15 MJ [COL POHL]: I understand. I'm saying the other  
16 information is related to another detainee totally unrelated  
17 to this case. We are talking about FBI forms. The first one  
18 talked about Mr. al Baluchi. The second one talks about ----

19 LDC [MR. CONNELL]: George Jones.

20 MJ [COL POHL]: ---- George Jones, totally unrelated, so  
21 the government says this is not related to this case at all,  
22 therefore, we don't give unrelated discovery to the defense.

23 Are we now done with that?

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1 LDC [MR. CONNELL]: Theoretically, yes.

2 MJ [COL POHL]: Let me follow up the reason why I say  
3 that.

4 LDC [MR. CONNELL]: Theoretically, yes. Obviously there  
5 is a question of why is someone keeping notes. It could be  
6 relevant. Why is someone -- why is this FBI agent keeping  
7 notes about two different people on the same piece of paper.  
8 Did they get confused? Could be used for cross-examination.

9 MJ [COL POHL]: Got it. But the reason why I raise this  
10 is that if you have two pieces of paper, one with the  
11 discoverable material and the other with nondiscoverable  
12 material, you would have no right -- there would be no review,  
13 nobody would look at what they don't give you, right?

14 LDC [MR. CONNELL]: In general, that is true. There are  
15 certain circumstances where it has to be ----

16 MJ [COL POHL]: There is. There's certain circumstances,  
17 and I can think of one. But as a general rule ----

18 LDC [MR. CONNELL]: General rule, yes.

19 MJ [COL POHL]: ---- what discovery that the government  
20 does not give you is based on their good faith.

21 LDC [MR. CONNELL]: That's right, does not get reviewed.

22 MJ [COL POHL]: Nobody reviews it, I don't look at it, no  
23 judge. Now back to where you are at, though.

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1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: Your issue here is this is not totally  
3 irrelevant discovery, it is LES or some type of 506  
4 redactions.

5 LDC [MR. CONNELL]: Right. That's right. What is  
6 happening is that the prosecution is unilaterally making the  
7 kind of deletions that they would make in classified evidence.  
8 But in classified, of course, 505 requires them to -- 505(f)  
9 requires them to submit that to the judge. The prosecution is  
10 unilaterally making those redactions on unclassified  
11 information for -- without any review, which means that it  
12 doesn't fall into the hypothetical category. It falls into  
13 the category of -- of force protection or sensitive. And I  
14 chose more or less at random an example, and if I could  
15 approach, I will hand up 161D (AAA), which is just a random  
16 unclassified piece of discovery.

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: So the -- let me approach one moment  
19 and I'll get another piece of -- may I approach, Your Honor?

20 So on 161D, we have the entire left-hand column  
21 redacted, but on 161E, we have the same sort of DIMS document  
22 but with the left-hand unredacted. The significance of that  
23 is you know what's under the redaction, which is the dates on

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1 which the recorded information took place. So if you look at  
2 161E on the left-hand side, it shows a series of dates. If  
3 you look at 161D on the left-hand side, it shows a redaction.

4 Now, why did that occur? Why did the government  
5 start that particular redaction? And I'll tell you why.  
6 Because we objected to the government not providing us all of  
7 the medical records. And when -- the way that we were able to  
8 prove that the government hadn't given us all of the medical  
9 records is that the DIMS records say when Mr. al Baluchi was  
10 taken to medical.

11 So we were able to match up in -- in a spreadsheet  
12 the distinction between when DIMS said he was taken to medical  
13 and what medical records the prosecution had given us. Once  
14 we started doing that, then the prosecution purely, out of  
15 strategic interest, started redacting all of the dates out of  
16 the DIMS records.

17 This is only one fairly egregious example, but the  
18 proper approach for this is that, unless there is the radical  
19 situation that the court posited as a hypothetical, the  
20 prosecution needs to turn over unclassified discovery in an  
21 unredacted format or follow the 506 process, which is to make  
22 an invocation of government information privilege and to seek  
23 some redaction or substitution based on whatever their

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1 government information privilege is.

2 But to be -- the best way is to handle this under  
3 Protective Order Number 2. Because way back in 2012, the  
4 military commission dealt with this problem of force  
5 protection or otherwise sensitive information by saying, all  
6 right, it can be designated as sensitive discovery under  
7 Protective Order Number 2, and when that happens, then the  
8 defense has to handle it in a special way.

9 This unclassified information should not be  
10 unilaterally redacted to the advantage of the government just  
11 because they don't want us to have certain information.

12 MJ [COL POHL]: Okay. Thank you. We're going to take a  
13 20-minute recess, and we'll reconvene at 1520. Commission is  
14 in recess.

15 [The R.M.C. 803 session recessed at 1502, 11 December 2015.]

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