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1 [The R.M.C. 803 session was called to order at 1407,
2 12 October 2016.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present that were present when commission
5 recessed. I will note -- I should have noted at the time that
6 Mr. Ryan did rejoin us last time prior to the recess, and he
7 is back with us now.

8 So let's continue with 419.

9 [Conferred with courtroom personnel]

10 Ma'am.

11 ADDC [LTC WILLIAMS]: Good afternoon, Your Honor.

12 MJ [COL POHL]: Good afternoon.

13 ADDC [LTC WILLIAMS]: Before I get into what has been
14 marked as 419E, which I'm going to use as an example to show
15 you perhaps why summaries are insufficient in this case, I did
16 want to go over a few other details about why, in fact, in
17 this case the medical records, the complete unredacted reports
18 are necessary and, in fact, why summaries in this case are
19 insufficient.

20 The timeline is very important as well because in
21 addition to the fact that records and reports that one would
22 not consider normally to be of a classified nature, like
23 laboratory reports or CAT scans or X-rays or anything of that

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1 nature, and in addition to the fact that 95 percent of the
2 originally classified summaries are unclassified, the fact
3 that of the matter is that, Your Honor, the process in this
4 instance was not even followed to ensure that before you made
5 your decision that the summaries that were provided in April
6 of 2014 were in fact sufficient. And to do that, I'm just
7 going to go over a brief timeline.

8 In the government's filing in AE 419A, they go
9 through the timeline of what they provided to you, and that
10 is, on 23 April of 2013, the government petitioned you to be
11 able to provide summaries of information and requested
12 permission to do so. It wasn't until August of 2013 that we
13 then requested the medical records at issue. And on 29 April
14 of 2014, you indicated -- or the government indicates in their
15 filing that you completed your review of the summaries that
16 they provided.

17 It wasn't until 2 May of 2014 that we provided you
18 something that you had asked for and something that was within
19 the timeline of providing this information to you, which was
20 the theory of the defense in this case.

21 You indicated that prior to making a decision about
22 whether or not any summaries were sufficient, that you wanted
23 to make sure you were fully informed of the defense theories

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1 in this case, and provided us that opportunity.
2 Unfortunately, this slipped through the cracks somehow, and
3 the summaries for specific medical records were in fact given
4 to the government on 29 April, just a few days before we
5 provided you with our theory of the defense.

6 So even the very process by which you -- that you set
7 up to ensure that you were fully informed of the theories of
8 defense before making a determination about whether or not any
9 summaries that you were provided were sufficient, in fact
10 according to the government's filing, you were not given that
11 opportunity in this instance, and it did not take place.

12 So I think that that is one issue that is very
13 important. You provided us that opportunity, and although we
14 did provide you that information, it was not until after this
15 decision was made.

16 The other thing that I think is very important to
17 review is the fact that, again, I want to emphasize the
18 material that we have available to us about injuries, specific
19 injuries that Mr. al Hawsawi sustained in CIA custody,
20 injuries such as a rectal prolapse, fissures or tears of the
21 anus, these injuries and the association of these injuries
22 with his treatment during the period of time of 2003 and 2006
23 that he was in CIA custody -- this information was not, again,

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1 provided to us by the government.

2 So what they felt was relevant and material
3 information in any of the discovery they provided us up until
4 2014, they simply did not mention this, even after the SSCI
5 report. They did not provide us with any information that
6 would give us an indication that injuries that he suffered
7 during this period of time that we are seeking his unredacted
8 full medical reports were relevant and material. They simply
9 were not provided to us.

10 So at no time did the government give us any
11 information for us to be able to have additional knowledge and
12 to understand the full need and the full value of the complete
13 and unredacted medical records and the fact that it could in
14 fact document injuries that were caused by his torture in CIA
15 custody.

16 The information that we have simply also indicates
17 that we don't have and that you didn't have all of the
18 information that is likely available out there, Your Honor. I
19 asked before the lunch break to have an exhibit marked, and,
20 again, this is an exhibit not provided by the government in
21 discovery, but this is an exhibit that was found by our
22 analyst on the CIA reading room website. It is very pertinent
23 to his treatment between 2003 and 2006. This document that is

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1 22 pages long references Mr. al Hawsawi's name 75 times.

2 One of the things that is important and that we can
3 learn from this document, on page 13 this document,
4 paragraph 41, talks about a specific instance. It indicates
5 on 6 April of 2003 that Mr. al Hawsawi was subjected to
6 torture lasting 14 hours nonstop; that he was confronted with
7 continuous sessions of water dousing, walling, attention
8 grasps, facial holds, cramped confinement, and psychological
9 pressures for 14 nonstop hours.

10 In the medical records that you received to look at
11 to see if the summary was sufficient and the summaries that we
12 were provided by the government which are now unclassified,
13 there is no medical record for 6 April 2013. There's no
14 medical record for 7 April -- or not 2013 -- 2003. There is
15 no record for 8 April 2003.

16 And on the medical record for 9 April 2003, there is
17 no mention of 14 hours of nonstop torture and what effect that
18 had on his physical being. There is no mention of this being
19 something that happened to him.

20 MJ [COL POHL]: How do you know it would be in the medical
21 records?

22 ADDC [LTC WILLIAMS]: What we know from open-source
23 material is that medical physicians at times were in place

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1 when these techniques were being done and when the torture was
2 being committed.

3 MJ [COL POHL]: No. But I understand the process, but I'm
4 simply saying is that you say that the summaries are
5 inadequate because a piece of information is not in there.

6 ADDC [LTC WILLIAMS]: Correct.

7 MJ [COL POHL]: And there's no -- having not -- the reason
8 that information may not be in the summaries is it isn't in
9 the source document to begin with, and you're assuming that
10 because this document refers to something that happened on the
11 4th of April, that, therefore, there should be a corresponding
12 medical report on the 4th of April.

13 ADDC [LTC WILLIAMS]: Yes, Your Honor. It's the 6th of
14 April and ----

15 MJ [COL POHL]: Or 6th of April.

16 ADDC [LTC WILLIAMS]: And I do believe that that ----

17 MJ [COL POHL]: Sorry.

18 ADDC [LTC WILLIAMS]: ---- would be a reasonable
19 conclusion to draw. I'm just indicating that we see no
20 reference to any indication that his health was monitored, and
21 perhaps if it is true, that there is a complete absence of
22 medical records after a 14-hour torture session, definitively
23 being able to say that by seeing his unredacted complete

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1 medical reports would give us the additional information we
2 need to show just how truly brutal this torture was to
3 Mr. al Hawsawi. There is no medical record. No one took --
4 was there when he was walled and when he was water doused and
5 when he was psychologically tortured for these 14 hours
6 continuous.

7 So I can tell you that in the records that you
8 received that are now unclassified and the summaries that you
9 received, there is something else that's curious to me, which
10 gives an indication -- again, I ask that perhaps you draw a
11 reasonable conclusion from this.

12 There's a medical record from 19 June of 2003 which
13 indicates that Mr. al Hawsawi's weight is 60 kilograms. The
14 next medical record from either 9 or 10 July of 2003, which is
15 in the summaries that you were provided that are now
16 unclassified, indicates Mr. al Hawsawi's weight was
17 50 kilograms. Now, I wasn't that good with the conversion,
18 and essentially had to look it up, but that is more than a
19 pound a day would have been lost. 22 pounds in 21 days were
20 lost, and yet there's no medical record to show a medical
21 condition or cause for this drastic weight loss within a
22 three-week period of time.

23 Again, Your Honor, the information that we have, I

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1 find it hard to believe that if we had the complete,
2 unredacted medical records that there would not be additional
3 information that would show us what his physical condition was
4 during that three-week period of time where he is indicated to
5 have lost 22 pounds. There's no blood pressure. There's no
6 heart rate. There's no -- any indication of what happened.

7 And, again, if truly there are no underlying medical
8 records for that period of time, again, that is information
9 that is necessary for the defense to be able to show the --
10 how truly callously he was treated during this period of time,
11 and how, if you are tortured to the extent where you lose
12 22 pounds in three weeks and we're not even going to do so
13 much as take your blood pressure, I think that that would be a
14 statement in and of itself.

15 Again, Your Honor, the open record of released
16 information says that medical exams were conducted before and
17 after enhanced interrogation techniques or torture techniques
18 such as those that are indicated on 6 April 2013, that they
19 were in fact done, and yet we have no record and no summary of
20 any such medical examination being conducted either before or
21 after what is now a known and unclassified session of torture
22 of Mr. al Hawsawi on that day.

23 I beg the court's indulgence.

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1 MJ [COL POHL]: Take your time.

2 [Pause.]

3 ADDC [LTC WILLIAMS]: And, Your Honor, in summation, I
4 just want to say that, again, what we are stating and what we
5 are asking for is we are not indicating that these summaries
6 are inadequate.

7 We are stating that we should receive the complete,
8 unredacted medical records, that the summaries that were
9 provided we don't feel complied with the process that you put
10 into place to begin with, and that is the process of allowing
11 us to be able to submit to you a theory of defense before any
12 summaries were submitted to you to be reviewed and determined
13 to be adequate.

14 And we don't feel -- and we feel that open-source
15 information supports the proposition and the premise that the
16 government in this case has not exercised its due diligence in
17 ensuring that all of the information that you would have
18 needed to have been provided was provided to you when those
19 summaries were provided to you with the underlying records.

20 It seems clear that open-source information
21 indicating medical examples were done before and after
22 enhanced interrogation techniques, that any such medical
23 records and reports were not provided to us, were not provided

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1 to you.

2 It is clear that there is a three-week period of time
3 where medical summaries that you have that show -- or that you
4 review show a 22-pound weight loss in a three-week period of
5 time, that there should be additional medical records and
6 information that have not been provided and was not provided
7 to you.

8 So it's not about the adequacy of the summaries. The
9 process was not followed. We do not believe that the
10 government has used its due diligence. And certainly when the
11 SSCI report was released and additional information became
12 unclassified, at that time the government should have, on
13 their own, made a determination that these medical records and
14 reports should be reviewed.

15 And we are asking you to compel them to give us the
16 complete, unredacted medical records and reports for this
17 period of time, March of 2013 [sic] to September of 2006.

18 MJ [COL POHL]: Thank you.

19 Trial Counsel, do you wish to be heard? Mr. Swann.

20 DC [MS. PRADHAN]: Your Honor, I'd like to be heard on
21 behalf of Mr. al Baluchi, please.

22 MJ [COL POHL]: The motion before me deals with
23 Mr. Hawsawi's medical records. Is there a motion related to

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1 Mr. al Baluchi's medical records?

2 DC [MS. PRADHAN]: Yes, Your Honor. As well as AE 419, my
3 argument pertains to AE 330.

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

5 DC [MS. PRADHAN]: Which Your Honor mentioned yesterday in
6 connection with AE 419.

7 MJ [COL POHL]: Go ahead.

8 DC [MS. PRADHAN]: We are distributing slides and an
9 exhibit that are marked 419C and D, Charlie and Delta. The
10 slides have been approved by the court security officer. May
11 I have permission to display to the gallery?

12 MJ [COL POHL]: I need to see a copy of them.

13 DC [MS. PRADHAN]: May I have the feed from Table 4?

14 MJ [COL POHL]: Don't put anything up yet. Hold the
15 phone.

16 DC [MS. PRADHAN]: I believe it was marked this morning.

17 MJ [COL POHL]: What do you want to -- okay.

18 [Conferred with courtroom personnel]

19 You want to display what?

20 DC [MS. PRADHAN]: Both the slides, Your Honor, and the
21 exhibit, which should be marked 419C.

22 MJ [COL POHL]: Okay.

23 [Conferred with courtroom personnel]

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1 Was the exhibit given to the court security officer
2 to review?

3 DC [MS. PRADHAN]: I believe so, yes.

4 MJ [COL POHL]: Sure.

5 DC [MS. PRADHAN]: Okay, Your Honor. We'll stick to the
6 slides.

7 MJ [COL POHL]: Okay. No problem. I mean, it can still
8 be an exhibit. It just can't be displayed.

9 DC [MS. PRADHAN]: Understood. So, Your Honor, let me
10 give you, if I may, a brief status update on where we are on
11 330, after which the rest of my argument coexists with that
12 with 419.

13 Your Honor issued an order an April 28 of this year
14 for the government to provide an update on their rolling
15 discovery no later than May 6. On May 4th, the government
16 provided that status update, such as it was, stating that they
17 have provided 5,389 pages of discovery to counsel, which, in
18 their words, generally only contained redactions to the
19 identities of medical care providers as a force protection
20 measure.

21 Our position is that the numbers provided by the
22 government are deeply misleading, out of context. Almost all
23 of what we had originally requested has yet to be provided.

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1 MJ [COL POHL]: Just a second, please.

2 Go ahead.

3 DC [MS. PRADHAN]: Thank you. Every single name or set of
4 initials of personnel who have treated Mr. al Baluchi has been
5 redacted from every record. There are no X-ray films or CT
6 scans included. The only images are colonoscopy photographs.
7 And the dates and pages are completely out of order, and we're
8 still missing entire sets of medical records.

9 Now, Mr. Connell spoke about some of this yesterday
10 in connection with AE 336 and AE 161I, so I will not reread
11 all of that ground, just some of it.

12 Your Honor, may I have permission to display to the
13 gallery?

14 MJ [COL POHL]: Sure. The slides? Fine. Go ahead, you
15 can put them up.

16 DC [MS. PRADHAN]: Your Honor, there is a saying among
17 doctors that if it's not written on the medical record, it
18 didn't happen. There are entire treatises about how medical
19 providers should, in the interest of avoiding medical practice
20 litigation, rigorously keep complete medical records.

21 Stedman's Medical Dictionary defines a medical record
22 as a chronological written account of a patient's examination
23 and treatment that includes the patient's medical history and

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1 complaints, the physician's physical findings, the results of
2 diagnostic tests and procedures and medications and
3 therapeutic procedures.

4 So in this case, a complete medical record would
5 therefore include dates of appointments, care or procedures,
6 patient statements, information about environment, or in this
7 case conditions of confinement, which should include evidence
8 of the actual recordkeeping, and caregiver or witness names.

9 Your Honor, what we have bears very little
10 resemblance to what medical providers define as a proper
11 medical record. We've identified two broad problems after
12 requesting Mr. al Baluchi's medical records: The
13 incompleteness of the records that were produced by the
14 government and the large, gaping holes in terms of what was
15 not produced.

16 So, Your Honor, again, this is what the defense has
17 received. These are -- we've received records out of
18 chronological order. We have received records with pages
19 missing which we have been able to somewhat identify by the
20 actual page numbers or by cross-reference with other
21 documents. There are records with, as we discussed yesterday,
22 nonjudicially approved redactions. There are no X-rays or CT
23 scans for our client, who suffered traumatic brain injury.

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1 And then we have the typed-up classified summaries of
2 actual records with countless details omitted, including,
3 again, dates and the names of caregivers who may eventually
4 become witnesses for us.

5 Now, clearly, redactions of this sort are
6 unacceptable, and you saw these two slides yesterday, Your
7 Honor, with regards to 161I. These are examples of the
8 redactions we have seen in the medical records that came from
9 post-2006 custody of Mr. al Baluchi.

10 These medical records, as you can see, the redactions
11 are of the initials of the caregivers. They provide no
12 information that's actually responsive to the discovery
13 request, but it allows the government to argue that they've
14 fulfilled discovery obligations when, in fact, they've
15 provided very little of actual value, and certainly haven't
16 come close to meeting their Brady obligations.

17 Now, speaking of meeting obligations, for comparison
18 purposes, let's go over again what we have not received from
19 post-2006 detention.

20 Significant conditions of confinement information,
21 most likely many statements of Mr. al Baluchi about his
22 conditions and how they were triggered; all caregiver and
23 witness names.

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1 Entire sets of post-2006 records are missing, and not
2 only are the records not chronological, which is so important
3 again that it's listed in the professional dictionary
4 definition for a medical record, but many of the records don't
5 have dates at all. So this is particularly true for the
6 documents that were released that pertain to pre-2006 medical
7 care.

8 And I honestly can't, in good conscience, call them
9 records because they are not records, Your Honor. They are,
10 as I believe Mr. al Hawsawi's counsel referred to them in
11 their brief, unclassified and classified snippets of summaries
12 of medical records from CIA custody without dates, names of
13 providers, conditions of confinement or any other context
14 without which the summaries are essentially useless. Those
15 are the years from which most of his current medical
16 conditions stem, and those records are crucial.

17 Now, Your Honor, let me give you an example of a
18 snippet received from Mr. al Baluchi's years in CIA custody.
19 And for the record, I'm reading from the government's
20 discovery production of June 5th, 2015, with MEA
21 number 10018-00002951.

22 At the top it says, quote, In report number three
23 from late 2003, the following information was documented.

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1 Halfway down the page, it says, mid 2003, Ali Abdul Aziz Ali,
2 examined after prolonged standing, approximately 82 hours,
3 while receiving water and Ensure for nutrition. Your Honor,
4 that's it. That's the snippet. It's one sentence. The page
5 is full of these very short essentially non sequiturs like
6 this. And here are the problems with just this one example.
7 The page starts by saying it's a report from late 2003. Then
8 this snippet starts by saying it's mid 2003. Mr. al Baluchi
9 entered CIA custody sometime in May 2003.

10 When was this? When was this 82 hours of prolonged
11 standing? Was it immediately after he entered CIA custody?
12 Was it sometime later? Had he been tortured by the CIA for
13 weeks or months before this one sentence was written? Why had
14 he been standing for 82 hours? Who had been observing him
15 stand for 82 hours? Was he monitored by a doctor during the
16 entire time he was standing for 82 hours?

17 Where was he standing for 82 hours, in his cell?
18 What were the conditions in his cell while he was standing for
19 82 hours, if that was the case? What was the temperature in
20 his cell during those 82 hours? Was he wearing clothes during
21 those 82 hours. Was he shackled while standing for 82 hours?
22 Where on his body were the shackles while he was standing for
23 82 hours? Was he being interrogated while he was standing for

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1 82 hours? If so, who was interrogating him while he stood for
2 82 hours?

3 Were his statements recorded during those 82 hours?
4 Did he protest at any point? Was he in pain? Who
5 administered the water and Ensure to him during those
6 82 hours? How were the fluids administered? Who examined him
7 after those 82 hours?

8 And perhaps most egregiously, Your Honor, this
9 snippet provides no information as to what the conclusion was
10 of the medical provider who examined Mr. al Baluchi after he
11 was forced to stand for 82 hours. Did he have any swelling?
12 Did he have any pain? Did he faint? It's not a record, Your
13 Honor, it's frankly a whitewash by the government, and it's
14 not very well done.

15 Even on the records where there is more information,
16 there is a glaring lack of specific detail that would open up
17 any actual medical provider to malpractice suits. Okay. He
18 was checked out. Here are his vitals. What happened before
19 and after? In what conditions was he being held? Was it the
20 same medical provider throughout, who would be a very valuable
21 witness? Did it change from day to day, in which case we'd
22 like all of them?

23 As we discussed yesterday, we need to know the

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1 identity of the people who examined him, of the people who
2 were in the room. And there is no reason why security-cleared
3 counsel should not have access to those names to be able to
4 call them as witnesses.

5 I also don't want to dance around the real issue, and
6 I don't think I have so far, but I don't want to dance around
7 the real issue in the pre-2006 records, which is the torture.
8 We know from the unclassified redacted summary of the Senate
9 Intel Committee's report that the defendants were subjected to
10 torture.

11 We know from Zero Dark Thirty, the CIA propaganda
12 film, that Mr. al Baluchi was specifically subjected to water
13 torture and beatings and we see only oblique reference a
14 handful of times in the snippets that the government has given
15 us to the torture techniques. I saw one reference to sleep
16 deprivation, no details for how long and what conditions, and
17 one reference to the prolonged standing.

18 In the Guantanamo records, those records lacked the
19 crucial information to follow that torture and the other
20 medical conditions through the chronology that we have said is
21 so important to be able to paint a true picture of
22 Mr. al Baluchi's custody from 2003 and onwards.

23 In short, we want the full medical records from CIA

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1 custody so that we can start piecing together how the CIA
2 tortured these men, which of their current medical conditions
3 are the result of that torture, what the appropriate
4 treatments might be, which is a treaty obligation under the
5 Convention Against Torture; and more broadly, how that
6 should -- how that has to impact the case in chief.

7 The government would like to summarily execute our
8 clients without giving us or them the ability to defend
9 against these factual allegations or mitigate any potential
10 sentence. I would think the government would want to showcase
11 their commitment to our justice system.

12 As we keep hammering, Your Honor, capital cases
13 provide the broadest possible discovery rights for evidence
14 relating to either guilt or punishment. Mr. al Baluchi's
15 complete records provide exculpatory evidence by establishing
16 his mental and physical state during his interrogation by the
17 FBI and the Department of Defense.

18 And as we know, R.M.C. 701 incorporates the Brady
19 protections and compel production of a complete and unredacted
20 medical record.

21 MJ [COL POHL]: Ma'am, slow down, please.

22 DC [MS. PRADHAN]: I apologize. I tend to have the same
23 problem Mr. Connell has.

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1 MJ [COL POHL]: Yeah. That's okay. Go ahead.

2 DC [MS. PRADHAN]: Thank you.

3 Even in, Your Honor, the less protective habeas
4 system, the D.C. Circuit has established that the government
5 may not unilaterally decide that material information is not
6 discoverable. In the present case, the commission has already
7 ordered discovery of the identities of medical personnel who
8 provided care to Mr. Mohammad in -- I believe it was AE 200CC.
9 I'm still working on the military phonetic alphabet, but I
10 understand ----

11 MJ [COL POHL]: You're right so far.

12 DC [MS. PRADHAN]: Thank you. So we've discussed the
13 Brady standard. We've discussed the military commission rule
14 that applies here. But the fact is, the way we see it,
15 Mr. al Baluchi doesn't even need a reason to access his own
16 medical records.

17 Under the Health Insurance Portability and
18 Accountability Act, or HIPAA, for the translators, as we call
19 it in the United States, and the privacy rule, which are the
20 set of regulations meant to implement the privacy provisions
21 in HIPAA, an individual has the right of access to inspect and
22 obtain a copy of protected health information about the
23 individual that is held or transmitted by a, quote, covered

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1 entity.

2 So there are a couple of terms to explore here. The
3 first is individual. Now, the privacy rule does not say
4 individuals who are U.S. citizens only. The privacy rule
5 doesn't say individuals except for Guantanamo Bay detainees or
6 individuals except for noncitizen Muslim males. It says
7 individuals, as in all individuals.

8 Protected health information is information that
9 relates to an individual's past, present or future physical
10 and mental health conditions, or to the provision of health
11 care to the individual and that identifies the individual.
12 Here, those are the medical records that we seek.

13 And covered entities are any provider of medical or
14 health services who transmits any health information in
15 electronic form. Now, we know that JTF-GTMO keeps and
16 transmits health information in electronic form, and we can
17 conclude, I think, from the little snippets that we have from
18 CIA custody that the CIA is also a covered entity for the
19 purposes of HIPAA.

20 In short, Your Honor, this is a continuing
21 conversation that I -- that will, I'm afraid, keep going in
22 circles until both Your Honor exercises in camera review of
23 the nondisinterested redactions being made by the government

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1 and re-reviews the CIA summaries.

2 At the end of the day, the government really can't
3 have it both ways. Either they abide by the unequivocal
4 standards of discovery in a capital case, or they don't get to
5 have a capital case. Thank you.

6 MJ [COL POHL]: Thank you.

7 Any other defense counsel have something to add?
8 Ms. Bormann.

9 LDC [MS. BORMANN]: Bear with me, I'm moving a little
10 slowly. I had surgery in August, so my surgeon is cringing
11 right now.

12 At any rate, I just wanted to comment briefly on
13 something that Lieutenant Colonel Williams talked about, and
14 she talked about -- you asked her, actually, what happens if
15 the records just aren't there.

16 So here's my question to you, Judge, and something to
17 think about. What happens if the records were there, but the
18 government, in what it claims is its sole discretion,
19 determined they were cumulative and so they didn't provide
20 them to you to compare with their substitutions? And let me
21 give you one very poignant example on something that
22 Lieutenant Colonel Williams talked about.

23 In a 22-day period, Mr. al Hawsawi lost 21 pounds.

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1 It works out to about 1.1 pound per day. What if on day one
2 the medical record said Mr. al Hawsawi lost 1.1 pound, and on
3 day two the medical record said Mr. al Hawsawi lost 1 pound,
4 and on day three the medical record said Mr. al Hawsawi lost
5 1 pound, and on day four the medical record said
6 Mr. al Hawsawi lost 1 pound? You get my point. You would
7 have 21 identical entries.

8 Now, each one, when compared to the other one, over
9 21 days, might be considered cumulative by a prosecution that
10 clearly doesn't want to provide us with the details that we
11 need to litigate our case; however, when taken in their
12 entirety, they indicate without more -- so let's assume that's
13 all the medical record says. On day one he lost 1 pound, on
14 day two he lost 1 pound, and so forth and so on, and that's
15 all the physician says happened.

16 You've never seen that, so you don't even know it
17 exists because you've allowed the government to make a
18 cumulative determination before you even get the
19 substitutions. The defense never gets to the fact that
20 21 pounds were lost -- 22 pounds were lost in 21 days. They
21 don't understand why.

22 You don't see that it was being written down, but
23 most importantly, the absolute callous disregard of the

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1 medical health of Mr. al Hawsawi as indicated by a failure of
2 the medical personnel to note why it was happening, to ask any
3 questions about why it was happening. That's the thing that
4 Mr. al Hawsawi is missing, you might be missing. And it
5 struck me as odd that you would say that, what happens if the
6 records don't exist?

7 Well, we don't know that the records don't exist, and
8 you don't either, because you've permitted the government to
9 take the position that they get to decide what you see. And
10 unless you can be sure that you're seeing everything, then you
11 actually don't know if those records exist or not, because
12 they may have made a determination that it's cumulative,
13 because each one says the same thing.

14 Now ----

15 MJ [COL POHL]: Let me take issue about you saying I
16 permitted them to do that, but if you want to take that
17 position, go ahead.

18 LDC [MS. BORMANN]: Well, you've certainly not stopped
19 them from doing that. They've made clear ----

20 MJ [COL POHL]: Ms. Bormann, we've had this discussion
21 before again and again. It's, at the end of the day, the
22 government's good faith of what they decide to reveal to me or
23 to you or to anybody else. There's no way to know what they

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1 don't give us.

2 Now, if you got a way that I can be clairvoyant and
3 figure that out, knock yourself out, but to sit there and say
4 that somehow I'm permitting the government to withhold things
5 from me that I need, I think that's not accurate.

6 LDC [MS. BORMANN]: Okay. So let me make the following
7 suggestion to you then.

8 My suggestion, so that I never, ever make that
9 mistake again, would be an order directing the government that
10 you, as the determiner about what substitutions, redactions
11 and deletions are adequate substitutes, make the determination
12 about what is cumulative, because then I can never make that
13 argument again.

14 Moving on, though, what is missing in the medical
15 records with respect to Mr. al Hawsawi -- let's assume for
16 argument sake that there were no medical records for the
17 21 days where Mr. al Hawsawi lost 22 pounds. That fact in and
18 of itself, argued before panel members, is proof that is
19 relevant in mitigation. It is proof of the disregard of a
20 detainee's very basic medical needs. It indicates some form
21 of starvation.

22 If Mr. al Hawsawi is not permitted to argue that,
23 he's -- you're not permitting him to argue something in

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1 mitigation. And quite honestly, at this point he can't argue
2 it because he has no evidence of it.

3 Right now, what Lieutenant Colonel Williams was
4 arguing is inference. Inference isn't proof. For all of us
5 standing here, we need the actual evidence, the medical
6 records which give us the reasons to argue for our clients'
7 lives. And when we're missing 21 days, it should stand out to
8 this court, and it certainly stands out to the counsel on this
9 side of the room that something is terribly amiss.

10 MJ [COL POHL]: Mr. Swann.

11 TC [MR. SWANN]: Your Honor, as luck would have it I have
12 got both 419 and 330, so I can do it in one dose.

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

14 TC [MR. SWANN]: Let me just take what Ms. Bormann just
15 said. First of all, I did the review of the Hawsawi medical
16 records in this case, and there was no cumulative
17 determinations being made. I can't tell you why some document
18 says that he might have lost 10 kilograms in a 30-day period,
19 but they can sure ask their counsel -- their client why that
20 happened, if it's true, or maybe that's just a typographical
21 error when someone was sitting down and writing these things.

22 Let me address a couple of other things that Colonel
23 Williams said first. Her client is in this room for the

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1 murder of 2,976 men, women, and children ----

2 MJ [COL POHL]: Actually, he's absent today, but ----

3 TC [MR. SWANN]: ---- some just learning to walk. He's in
4 the room because their client participated in the summary
5 execution of all of them.

6 ADDC [LTC WILLIAMS]: Sorry.

7 TC [MR. SWANN]: Her client is in this room for his
8 actions that led to the deaths of more than 400
9 firefighters ----

10 ADDC [LTC WILLIAMS]: Your Honor, I would object to
11 relevance.

12 MJ [COL POHL]: Objection sustained. Mr. Swann, get to
13 the issue before me. I know what the charges are. I got it.

14 TC [MR. SWANN]: But, sir, they're allowed to come in here
15 and tell you things about torture. The real people in this
16 case ----

17 MJ [COL POHL]: Torture is related to the medical records.

18 TC [MR. SWANN]: ---- are the ones sitting in the back of
19 the room here ----

20 MJ [COL POHL]: Mr. Swann, we're talking about the medical
21 records, and that's related to the torture issue.

22 TC [MR. SWANN]: All right, sir.

23 MJ [COL POHL]: Okay.

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1 TC [MR. SWANN]: Got it.

2 MJ [COL POHL]: I understand your point, but again it's
3 not relevant as to what we're talking about. Come back to 330
4 and 419.

5 TC [MR. SWANN]: In this motion the defense seeks
6 unredacted records for Hawsawi for three and a half year
7 period of time. These records were created by medical
8 personnel. They are classified. Now, we searched, and in
9 this instance I searched, and have continued to do searches.
10 And you might even see a couple more documents in the recent
11 thousands of documents that have been provided to the court
12 with respect to 397, the ten-category construct.

13 Some medical records, they don't look like what we
14 are accustomed to seeing in our medical records.
15 Nevertheless, the search -- we searched for anything that
16 might be medical or simple as giving of a vaccine. Now, we
17 provided those documents to you.

18 The documents were provided to you pursuant to the
19 Military Commissions Act of 2009, specifically providing for
20 ex parte submissions to a judge to the extent necessary to
21 protect classified information in accordance with the practice
22 in federal courts and under the Classified Information
23 Procedures Act.

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1 Now before the government may request, delete,
2 withhold or otherwise obtain other relief with respect to the
3 discovery or the access of any classified information, we must
4 provide the commission with a declaration invoking the United
5 States classified information procedures or privileges and set
6 out the damage to the national security that the discovery of
7 or access to such information reasonably could be expected to
8 cause. The declaration must be signed, and in this instance
9 is signed, by a knowledgeable United States official
10 possessing authority to classified information.

11 The Manual for Military Commissions further empowers
12 the military judge to authorize the government, one, to delete
13 or withhold specified items of classified information; two, to
14 provide a summary for classified information; or three, to
15 substitute a statement admitting relevant facts that the
16 classified information and material would tend to prove.

17 Now, these procedures for protecting classified
18 information in military commissions are similar to the
19 procedures for courts-martial and federal courts pursuant to
20 the Classified Information Procedures Act.

21 The Act also requires the commission to grant the
22 government's request to substitute a summary of a statement
23 admitting relevant facts if the military judge finds that the

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1 summary statement or other relief would provide the accused
2 with substantially the same ability to make a defense as would
3 discovery of or access to the classified information.

4 Now, in this instance we provided you with roughly
5 190 or so pages of medical reports. When we provide these to
6 you, you see the entire report. We then propose summaries.
7 You either agree with our summary or not. And only when you
8 are satisfied that each of the accused are put in a position
9 to be able to protect their interests, then will the
10 information be further disseminated.

11 Now, in this instance there's a couple of things that
12 we should note: One, these similar summaries were presented
13 to another military judge back in 2008, and he approved them.
14 When we provided them to you, you approved them. We wanted to
15 give the defense the classified information, but no, we were
16 in that "I haven't signed the MOU quite yet."

17 So during that period of time, and I believe you
18 approved these summaries right around the end of April of
19 2014. When we were preparing to provide the summaries to the
20 defense, they hadn't signed the MOU.

21 About six months later, the Senate subcommittee
22 issued its report, and on our own initiative, wanting to at
23 least get this information to the defense, we sent the

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1 summaries back for a further classification review and learned
2 that 163 of the 171 documents, in light of the Senate
3 subcommittee release, were no longer classified. We turned
4 those over to the defense.

5 Eight documents came back and remained classified.
6 When the defense finally got around to signing the MOU, three
7 and a half years or three years after the fact, we provided
8 those eight remaining documents, classified, to the defense,
9 and I believe that occurred in December of 2015.

10 We have completed our discovery with respect to the
11 medical records for Mr. Hawsawi that are in the CIA's
12 holdings. Now, there might be a few more that were identified
13 subsequent to that, and, sir, you will be -- you have those in
14 your possession right now.

15 Now, much of what these folks have talked about this
16 morning also include items that are found in the other ten
17 categories or nine categories of the construct that appears in
18 AE 397.

19 I've heard a lot about the torture, specifically the
20 14 hours that Mr. Hawsawi was subjected to and the total of
21 82 hours of standing that Ammar al Baluchi was subjected to.
22 It is nice to know that instead of being tortured for three
23 and a half years in the agency's custody, we're now down to

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1 reality of what mistreatment might have existed for the
2 14 hours for Mr. Hawsawi, and the 82 hours for Mr. al Baluchi,
3 because it specifically provides in the Senate subcommittee
4 report that Mr. al Baluchi was subjected to enhanced
5 interrogation techniques, not for three and a half years, but
6 for three days in May of 2003.

7 Now, the defense wants an awful lot, and I fully
8 expect that what they're going to get is quite a bit in the
9 next few weeks and months. Specifically with respect to that
10 report that you were shown, the FOIA report regarding the
11 water dousing incident with the accused Hawsawi, the defense
12 is getting the IG report, subject to a few minor redactions
13 that might include true names and things. So they're going to
14 have the full version of that. They're going to have the full
15 version of quite a few OIG reports where the OIG investigated
16 the program himself.

17 I guess my point is this: There's nothing more that
18 we can give the defense with respect to medical records in the
19 CIA's possession other than what they have been provided and
20 what few others may come from your further evaluation over the
21 next coming weeks and months.

22 Subject to your questions on 419, sir, that's all I
23 have on it.

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1 MJ [COL POHL]: Okay. What about 330?

2 TC [MR. SWANN]: 330. 330 deals with medical records
3 while the accused have been here at Guantanamo Bay, Cuba.

4 Now, first off, HIPAA doesn't apply. We litigated
5 this back in 2008, and there is a provision in HIPAA that
6 specifically says it doesn't apply to overseas detainees. So
7 HIPAA doesn't apply.

8 The medical records that are maintained for the
9 accused in this case are not unlike the medical records that
10 you and I had when we were -- when I was on active duty and
11 while you're on active duty now.

12 When medical records are compiled, your oldest piece
13 of paper goes into the file first, and as each doctor sees you
14 over the years, your most recent one will be on the top. When
15 we photograph these things, scan them in and provide them to
16 the defense, they are in that order. So this notion that
17 somehow they're disorganized and out of order -- no, they're
18 not. They're in the order that they are presented to us, and
19 then we in turn Bates stamp those items and give them to the
20 defense.

21 Now, over the last year or so I noticed that we have
22 tried to cure that problem. We have tried to put them in a
23 chronological order. These particular medical records are

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1 broken down into six tabs.

2 Every three months -- and that's been our practice
3 for the last, I guess, about four or five years with medical
4 records. Every three months, we ask Guantanamo to provide us
5 the most recent records from the last date that they provided
6 them to us, and we in turn then send them through a
7 classification review. We do remove all true names, and we
8 remove initials of the person, if it is a true name.

9 I notice you saw that medication report yesterday.
10 It had that line across. That was the corpsman's initials.

11 MJ [COL POHL]: What's your basis for doing that?

12 TC [MR. SWANN]: Our basis for doing that is Protective
13 Order Number 2 talks about true names and force protection
14 issues.

15 Now, remember now -- here's what I'm going to tell
16 you. What we do with the medical records, there's only one
17 version that is created. The version that is created for the
18 defense counsel and for the accused is the same version. He
19 gets to see everything but the true name of the doctors.

20 Now, if they ever -- but if they ever really want to
21 talk to a doctor, they've got the incident, they've got the
22 redaction right there. I want to talk to the guy behind that
23 redaction on May 3, 2016.

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1 MJ [COL POHL]: And since you have the unredacted copy,
2 that would be no problem finding who that doctor is?

3 TC [MR. SWANN]: Not a problem, sir.

4 One of the counsel mentioned AE 200. In that
5 instance Mr. Mohammad asked for 12 doctors, and you directed
6 us to provide that information to them after a proper process.
7 The proper process being the 701/703 analysis, okay? They
8 make a request. We determine the relevancy. In that instance
9 you decided that 12 of them were relevant, and we in turn then
10 provided a basis for them to be able to get in contact with
11 these people, assuming that they would want to talk to the
12 defense at that point in time.

13 So that's the way it's supposed to work, not some
14 blanket list of ever doctor that's ever seen these people for
15 the last ten years. They have to make a showing of relevance.
16 They have to make a showing that -- and then we go through the
17 process, just like a request for witness under 703.

18 Now, thus far, with respect to Mr. Connell's client,
19 we have provided 5,549 pages through 5 October of 2016. These
20 pages are both DIMS and medical. And despite what the brief
21 says or what I might have heard today, I can tell the court
22 that on 5 October 2016, all of his medical records through the
23 end of May of 2016 have been provided to them.

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1 Now, with respect to them saying that there are
2 missing records, we have been back to the camp on at least two
3 occasions saying, are there any additional records for this
4 particular accused? We have been informed that there are no
5 additional records. But if Mr. Connell is wanting to send us
6 back a third time, I'm willing to make the trip.

7 MJ [COL POHL]: Do you tell them that?

8 TC [MR. SWANN]: Yes, we have told them that.

9 MJ [COL POHL]: Okay.

10 TC [MR. SWANN]: Now, I notice that also with respect to
11 330 there was some indication that there was a missing CT
12 scan. We have told them that there is a missing CT scan. I
13 went looking for the thing myself. I did find the report and
14 the report did not indicate that there was any injury,
15 or nothing abnormal. So they have the report. They don't
16 have the CT scan in this particular instance.

17 They have plenty of documents that reflect blood work
18 and other things of that nature over time. They have
19 medication reports for practically every day for the last six
20 years. They have psychiatric reports. They have DSMP, if in
21 fact he has attended, that particular document.

22 We are not holding back on any documents in this
23 particular case. And I can only think of one document that

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1 might possibly have been classified because of a -- there was
2 a classified issue in the document, and that particular
3 document was redacted, but -- through the process. Okay.

4 So we understand our Brady obligations. We
5 understand, quite frankly, our discovery obligations. I don't
6 think any one of us sitting over there, with little more than
7 100 years of practice in law, and myself with little more than
8 28 years on active duty and four or five years behind the
9 bench, I don't think any of us are holding back on anything,
10 nor would we even contemplate doing that. And any time I hear
11 that nonsense in the room, I've got to say it is nonsense.

12 That, sir, subject to your questions.

13 MJ [COL POHL]: I have no further questions. Thank you.

14 Colonel Williams, do you have anything you wish to
15 add?

16 ADDC [LTC WILLIAMS]: Your Honor, I would like to rely on
17 Mr. Swann's representation that he has turned over absolutely
18 everything that they have; however, I find it hard to do that
19 when there is something available on a CIA reading room site
20 that has not been turned over to us in any form, classified or
21 unclassified, clearly having to do with Mr. al Hawsawi.

22 We should not have to be finding information from
23 open-source documents about his torture while he was in CIA

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1 custody, something that is clearly relevant and material to
2 this case. We all are fallible, but clearly, we are not
3 receiving all of the information that's out there.

4 MJ [COL POHL]: Colonel Williams, we're talking about the
5 medical records here.

6 ADDC [LTC WILLIAMS]: Yes, sir.

7 MJ [COL POHL]: And Mr. Swann stands up and says we've
8 given them all of the medical records. The redactions I'm
9 going to put as a side issue, okay. And you say, well, I
10 don't think they have. So what do you want me to do?

11 ADDC [LTC WILLIAMS]: Your Honor, in this particular case,
12 the records we are asking you for and asking you to compel are
13 the complete, unredacted medical records from the time that
14 Mr. al Hawsawi was in CIA custody from 2003 to 2006. What I
15 would ask Your Honor to do is to order them to produce all of
16 the CIA medical records to Your Honor, all of them. Order the
17 government to produce them so that at that point you can take
18 a look at it.

19 You know, there are many issues with how this summary
20 was produced, and one of them is that the process wasn't
21 followed to begin with. But the second is I am happy to hear
22 that the government on their own accord put through the
23 summaries for review on whether or not they could be

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1 classified. I do not think that obviates their responsibility
2 to put these medical records back through a classification
3 review and to give Your Honor perhaps new summaries now that
4 we know that there is information that is unclassified now,
5 that even when it was classified we should have had, but we
6 certainly should have access to it. And I would ask you to do
7 that.

8 You do have a right to order them, to compel them to
9 give you all of the CIA medical records, period, and then you
10 can make that assessment as to whether or not older
11 summaries -- older summaries, 95 percent of which are now
12 unclassified, and the underlying medical records, whether or
13 not they in fact would be -- whether or not they would be
14 sufficient.

15 Our argument is we don't feel that those summaries
16 are. We don't feel that the process was followed. We
17 certainly don't believe that perhaps you had access to all of
18 the information that you needed. And in any case, the fact
19 that such a large percentage of the summaries have been
20 unclassified gives us a good indication that medical records
21 would be available for provision to the defense, and we are
22 asking again for complete, unredacted medical records.

23 Mr. al Hawsawi -- or I'm sorry, Mr. Swann mentioned

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1 that the -- you know, we have everything, and perhaps it was
2 just a mistake that the summary said Mr. al Hawsawi dropped
3 22 pounds in 21 days. Perhaps that was a mistake. Well, Your
4 Honor, you know what would clear that up? The actual medical
5 records. Because perhaps it was a mistake when they
6 summarized it, but if we had the complete, unredacted medical
7 records, it would certainly give us the opportunity to see,
8 could this have been a mistake? Was it a typographical error
9 in the production of the summary?

10 I also want to acknowledge that counsel for Mr. Ali
11 indicated -- or Aziz indicated that he -- they received
12 information about a torture incident, albeit very vague, from
13 mid 2003 of this 82-hour prolonged standing.

14 Again, what we have is a complete absence of a
15 medical record from one of the times that Mr. al Hawsawi was
16 tortured, one that we have an IG report that was available on
17 the CIA reading room website. So we don't even have that.

18 So this report that is highlighted for you and is
19 Exhibit 419C gives us another indication that there would be a
20 medical record after an enhanced interrogation technique. As
21 open-source material tells us, there would be a medical
22 examination after that was done, and yet there is no mention
23 of it in Mr. al Hawsawi's medical reports.

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1 I understand that at the time they gave you the
2 summaries, they gave you an indication or there was a -- there
3 was something that indicated this material could damage
4 national security at the time in April of 2014, but right now,
5 regarding the torture, that cat is out of the bag.

6 MJ [COL POHL]: Didn't I issue an order ----

7 ADDC [LTC WILLIAMS]: It has been a long time. I'm sorry,
8 sir.

9 MJ [COL POHL]: Colonel Williams, didn't I issue an order
10 after the Senate report came out that the government was to
11 revisit the classification of previously provided stuff?

12 ADDC [LTC WILLIAMS]: And, Your Honor, you did issue that
13 order, and it appears that the government did, for these
14 summaries, go through that process, but not for the underlying
15 medical records.

16 MJ [COL POHL]: But if the underlying medical records were
17 no longer classified after the SSCI report was released, then
18 what you're telling me is that they kept them classified
19 anyway?

20 ADDC [LTC WILLIAMS]: Your Honor, the government did not
21 indicate in any of their pleadings and Mr. Swann made no
22 representation that that type of review took place.

23 So in their answer to our pleading in 419A, the

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1 government did not indicate to you that that happened. And
2 Mr. Swann has not made the representation that all of the CIA
3 medical records have indeed gone through that.

4 So I would indicate to you, sir, we don't have any
5 evidence of that. And in this particular instance, what we do
6 have, at least the government at their own word is that
7 95 percent of previously summarized classified information,
8 some previous snippets that they gave us about his treatment
9 were -- in fact can now be unclassified.

10 So again ----

11 MJ [COL POHL]: Do we then infer that the underlying
12 documents are now unclassified, too?

13 ADDC [LTC WILLIAMS]: If 95 percent of the summaries were,
14 Your Honor, I would say to you -- I would at least ask Your
15 Honor to request the full records and to do a review -- well,
16 actually, I'd ask the government to put the actual records
17 back through and to give you an opportunity to look at the
18 actual medical records and make a determination. Because if
19 in fact they are unclassified, this won't be an issue, and
20 perhaps you won't have to be looking at those documents again.
21 And they can give us the information.

22 MJ [COL POHL]: If they're unclassified -- if they're
23 unclassified, you don't use summaries on them, right?

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1 ADDC [LTC WILLIAMS]: Yes, sir. That's absolutely true.

2 MJ [COL POHL]: They may have a 506 issue with them, but
3 if the underlying medical records are no longer classified --
4 I just don't know if they are or not. I suspect even though
5 the summaries may be unclassified, that does not mean the
6 source document is unclassified.

7 ADDC [LTC WILLIAMS]: Yes, sir, Your Honor. I understand
8 your concern. Again, we don't have an indication that that
9 was done. Our motion was originally for the actual unredacted
10 medical records and reports, and that is still what we are
11 seeking.

12 MJ [COL POHL]: Uh-huh.

13 ADDC [LTC WILLIAMS]: We do believe that there is an
14 indication here that the process in this case was not
15 followed. We do think that we have shown the materiality and
16 the relevance of the actual medical records and reports in an
17 unredacted fashion to be delivered to cleared counsel who have
18 signed the MOU and are charged with defending Mr. al Hawsawi
19 in this capital case where his life is on the line.

20 So again, Your Honor, we are asking you to provide
21 that, and in this particular case regarding what may -- may be
22 out there, we are asking you, sir, to take an actual look to
23 seek that the government provide you and request and order the

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1 government provide you with all of the CIA medical records for
2 Mr. al Hawsawi during the time he was in custody from 2003 to
3 2006 so that a determination can be made.

4 And, again, if -- once they go through a review, if
5 they are unclassified, then, sir, you may not even have to be
6 involved in that process. But we don't believe that the
7 summaries that were generated in April of 2014, before the
8 release of the SSCI report, that were generated without the
9 benefit of the process that you put in place so that you could
10 be more informed by the position of the parties and to know
11 the theory of defense before making a determination of the
12 summary, we do not think that they are sufficient.

13 The fact that the snippets and the summaries that
14 they have produced have now been -- 95 percent of them have
15 been unclassified I think gives us a very good indication that
16 other records may well be unclassified.

17 In addition, Your Honor, as counsel for Mr. Aziz
18 pointed out, the -- certain things that are referenced in
19 these medical summaries that we have, such as laboratory
20 reports, X-rays or CAT scans, again, I would ask Your Honor if
21 you are presented with that, for summary, that you consider
22 the fact that the classified nature of that, and see if that
23 can be produced to us in some unclassified manner, because I

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1 can see no indication as to why anything such as this that, a
2 laboratory report, an X-ray, a CAT scan would in fact even
3 require you to be -- to have to consider a summary.

4 And we have not gotten one piece of evidence like
5 that from the government, just as we have no evidence from the
6 government in discovery about the actual torture that happened
7 to Mr. al Hawsawi.

8 MJ [COL POHL]: Thank you.

9 ADDC [LTC WILLIAMS]: Thank you.

10 LDC [MR. RUIZ]: Judge, can we have a moment to confer
11 before we cede our turn?

12 MJ [COL POHL]: But keep in mind your second argument is
13 not designed to repeat your first one. It's to rebut what the
14 government said.

15 LDC [MR. RUIZ]: Yes.

16 **[Pause.]**

17 MJ [COL POHL]: Ma'am.

18 ADDC [LTC WILLIAMS]: And, Your Honor, just briefly, again
19 in mentioning the fact that perhaps these records have this
20 classification or perhaps they have gone through some review,
21 I would ask that you ask the government again to have these
22 records produced to you. If in fact that you may not want to
23 do that, at least if the government contends that in fact all

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1 of the records, the actual medical CIA records have been put
2 back through for a declassification procedure, that they be
3 asked to provide you with an affirmative statement that that
4 in fact has been done.

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

6 Ms. Pradhan, do you wish to be heard any more?

7 DC [MS. PRADHAN]: Yes, sir.

8 MJ [COL POHL]: I hope I didn't mispronounce your name.

9 DC [MS. PRADHAN]: Not too much.

10 MJ [COL POHL]: As you talk to others, I'm not very good
11 at pronouncing names. But go ahead.

12 DC [MS. PRADHAN]: Not a problem, Your Honor. It's
13 actually Pradhan.

14 MJ [COL POHL]: Pradhan. I'll try to remember that.

15 DC [MS. PRADHAN]: No problem. Just a few quick points.

16 First, it sounds from the conversation as if
17 classical -- excuse me, classified medical records actually
18 get more deference than unclassified medical records in the
19 sense that, for classified records, Your Honor gets to review
20 the summaries, you get to review whether the summary's an
21 accurate summary of the underlying information. For
22 unclassified records, the government basically just releases
23 it and then gets to say trust us, there's nothing else, which

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1 is, as Your Honor can tell, wholly unacceptable to defense
2 counsel.

3 The second point regards the government's invocation
4 of Protective Order Number 2. Now, I have Protective Order
5 Number 2 in front of me, and that is, I believe, AE 014H, and
6 at part 6 it says, "Sensitive discovery materials includes
7 only force protection measures in effect at the detention
8 facility." We heard the government say that if they designate
9 material as sensitive due to force protection, that justifies
10 redactions.

11 Your Honor, part 7 talks about how sensitive
12 discovery materials should be treated, and nowhere does it say
13 that sensitive discovery materials can be redacted. What
14 part 7 says is that sensitive discovery materials shall not be
15 further disseminated by defense counsel to the defendants or
16 any individuals, organizations, outside entities. It does not
17 give the government the right to redact those materials on a
18 force protection basis, certainly.

19 Third, Your Honor, the government would, I think,
20 love to limit torture to the one example I provided of
21 82 hours. That was one instance. We know that Mr. al Baluchi
22 was subjected to water torture, beatings, sleep deprivation,
23 forced nudity and walling. And on top of that, he was held

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1 incommunicado for over three years.

2 Now, the Special Rapporteur on Torture, Juan Mendez,
3 who himself is a torture survivor has said specifically that
4 incommunicado detention ----

5 TC [MR. SWANN]: Your Honor, I'm going to object to this.
6 This is precisely the thing that they consistently do in this
7 room. They bring us the word torture without us being able to
8 explain ----

9 MJ [COL POHL]: What's your objection? I know -- I don't
10 go for speaking objections. What is your objection?

11 TC [MR. SWANN]: Sir, relevance.

12 MJ [COL POHL]: What's the relevance of this?

13 DC [MS. PRADHAN]: The relevance, Your Honor, is that
14 Mr. Swann said that the torture of Mr. al Baluchi was limited
15 to 82 -- one instance of 82 hours and was not, as we have
16 said, over three years. So I am showing Your Honor and I'm
17 illustrating the fact that incommunicado detention is, in
18 fact, under international law held to be -- held to constitute
19 torture.

20 MJ [COL POHL]: Okay. Okay. But again, argue facts and
21 evidence.

22 DC [MS. PRADHAN]: Understood.

23 MJ [COL POHL]: I'll buy that as a fact in evidence, so in

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1 that sense that's an objection overruled. As far as what
2 Mr. Mendez may say in another situation and another motion,
3 that's not before me. Go ahead.

4 DC [MS. PRADHAN]: I understand, Your Honor.

5 Finally, the government has said this yesterday as
6 well, but they have said now several times that if there is
7 missing information, we should ask our clients about it. If
8 there is missing information -- if there's missing information
9 about why Mr. al Hawsawi lost 10 kilograms we should ask him
10 why.

11 Your Honor, I can't remember what e-mails I sent when
12 I had the flu. I think that that sort of response by the
13 government, asking our clients to tell us what their medical
14 records -- reconstitute their medical records from periods of
15 time when they were being tortured for a period of over three
16 years, if you don't count detention at Guantanamo Bay is,
17 frankly, ludicrous.

18 Thank you.

19 MJ [COL POHL]: Thank you, Ms. Pradhan.

20 Ms. Bormann, do you have anything further to add?
21 Ma'am.

22 LDC [MS. BORMANN]: I think I have a bit of an
23 understanding now as to what's occurring.

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1 So Mr. Swann in his argument and his objections has
2 stated that Mr. al Baluchi was tortured on one instance for
3 82 days. If that is what the government considers torture and
4 they don't consider anything else, so incommunicado detention
5 or, you know, isolation or standing up in his cell for hours
6 at a time, or whatever it is, then you're not going to see
7 evidence of it.

8 So if Mr. Swann is doing all of the analysis and he
9 says to you with a straight face the only evidence of torture
10 of Mr. al Baluchi is 82 days ----

11 MJ [COL POHL]: It was 82 hours.

12 LDC [MS. BORMANN]: 82 hours, I'm sorry.

13 And that's his determination of what's material,
14 helpful and noncumulative, and that's all he's giving you,
15 then you have no basis from which to determine whether or not
16 there are adequate substitutions, deletions, et cetera. That
17 is the very nature of the problem here. And so maybe the good
18 faith of the government might not necessarily be good faith.
19 Maybe it's just that they're not capable of understanding what
20 the defense is.

21 So what I'm going to ask Your Honor to do, and we'll
22 be filing a separate motion on this, but it's related to this,
23 is to do two things: One, order the government to put the

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1 medical records through a classification review, because --
2 I'm going to take a different position than Ms. Pradhan, which
3 is this: Unclassified material is not subject to redaction,
4 deletion, or substitution, period. There's no doubt -- in any
5 case I've ever had, the medical records of the defendant are
6 always material to the defense, so there would be no basis for
7 even putting them through a substitution process. They would
8 be just simply given to us.

9 Second, that the government not make determinations
10 that torture is only, you know, a certain thing. The period
11 of all of the records during the time of torture, because
12 torture isn't just, you know, physically flogging someone.
13 Torture is the very essence of how they are confined over a
14 long period of time.

15 You should be getting all of that, and if you're not
16 getting it, you don't know you're not getting it, and we're
17 not getting it either. I'll be filing a motion on that.

18 Thank you.

19 MJ [COL POHL]: Thank you, Ms. Bormann.

20 Mr. Swann, last word.

21 TC [MR. SWANN]: Couple of things, Your Honor. And I
22 don't want to leave anyone in this room that doesn't
23 understand the process with the wrong assumptions.

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1 One, if it's a medical record, if it's a document, we
2 do no redactions to it. It is classified, we do no summary to
3 it. We prepare what we think is a summary of the document.
4 You get to see the entire document, and if our summary is not
5 adequate, then you tell us it's not adequate and go back and
6 put this particular information in the document. So you have
7 seen the actual documents. You're going to see a whole host
8 of other documents.

9 MJ [COL POHL]: Have I seen all of the CIA medical
10 documents?

11 TC [MR. SWANN]: Sir, I can't tell you for absolutely
12 certain, but I think you have seen all of the CIA documents
13 that certainly relate to Mr. Hawsawi. There may be -- and I
14 heard it said yesterday in this room where Mr. Connell said,
15 well, you don't have medical records with two or three people
16 on the documents. Well, you might have medical records with
17 two or three people on the document.

18 And then what we've got to do is go through that
19 document and present it to you with the four people on it ----

20 MJ [COL POHL]: Just so I'm clear, although you can't say
21 with certainty, you say that the government intends that I
22 would see every CIA medical document.

23 TC [MR. SWANN]: It's not that we intend. We're obligated

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1 to provide you all of those documents.

2 MJ [COL POHL]: Well, I was giving you a little wiggle
3 room there, Mr. Swann.

4 TC [MR. SWANN]: I don't need it.

5 MJ [COL POHL]: My first question was going to be, have
6 you given them all to me? And you said I think so. So that's
7 what I said ----

8 TC [MR. SWANN]: Medical records.

9 MJ [COL POHL]: ---- I think so. Have you -- okay. Let's
10 make it easier.

11 Have you given me all of the CIA medical records to
12 review, or do you think there's some I will still get?

13 TC [MR. SWANN]: No. You've got them all. You've got --
14 397 has been complied with. The ten categories has been
15 complied with, and in fact ----

16 MJ [COL POHL]: So I've seen all -- again, you've
17 delivered them all to me. Whether I have seen them all or
18 not, that's a separate issue.

19 TC [MR. SWANN]: Yeah, that's a separate issue.

20 MJ [COL POHL]: I got that. Okay.

21 TC [MR. SWANN]: Some of these other things they're
22 talking about are also included in the ten-paragraph
23 construct.

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1 MJ [COL POHL]: While we're discussing this concept here,
2 I'm hearing again and again about this 95 percent of these
3 things are now unclassified. Now, does that mean the
4 underlying document is unclassified?

5 TC [MR. SWANN]: No. It doesn't mean that at all. It
6 means that when they went back and looked at them that, in
7 light of that particular report, they said the summaries that
8 were prepared, they were no longer classified in that
9 particular format.

10 MJ [COL POHL]: Okay. But the documents, the underlying
11 medical documents that -- what they're asking for is the
12 unredacted -- again, I'm talking about 419 now.

13 TC [MR. SWANN]: Right.

14 MJ [COL POHL]: Talking about the CIA -- that is 419.
15 Yeah, 419.

16 TC [MR. SWANN]: That's 419.

17 MJ [COL POHL]: The CIA medical records, the raw, the
18 unredacted records themselves remain classified.

19 TC [MR. SWANN]: Unredacted records. It's 191 pages.

20 MJ [COL POHL]: For all five.

21 TC [MR. SWANN]: No, just for Hawsawi alone.

22 MJ [COL POHL]: For just Hawsawi.

23 ADDC [LTC WILLIAMS]: Your Honor, that is the summaries.

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1 MJ [COL POHL]: No, I'm -- it's not your turn.

2 TC [MR. SWANN]: For the -- for all of the documents ----

3 MJ [COL POHL]: I mean, we've got summaries. I'm just
4 trying to be clear, you got the summary -- and again, we have
5 gone back and forth about them. The other question, the
6 summaries are based on the underlying documents.

7 TC [MR. SWANN]: That's right.

8 MJ [COL POHL]: I'm asking you about the underlying
9 documents. The unredacted, unsummarized underlying CIA
10 medical reports for Mr. Hawsawi from '03 to '06, are those
11 still classified?

12 TC [MR. SWANN]: I can say with certainty that at least
13 eight of them remain classified because they went back through
14 a subsequent review and they still came out classified, even
15 after the Senate subcommittee report came out.

16 MJ [COL POHL]: So among the other questions they asked
17 was whether or not they had been resubmitted after the SSCI
18 report came out, and you're saying they were? Or you're not?
19 I thought you just said they were.

20 TC [MR. SWANN]: Yeah. No, I -- yeah. There's
21 information in the source document that remains classified,
22 the one that you saw. So that remains classified. Now, some
23 of the information in that source -- in that document has now

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1 been further summarized in another part of the ten categories,
2 and I think I know what -- I think you understand what I'm
3 talking about when it makes reference back and forth to
4 various documents and things.

5 So we're not holding back on any information. I can
6 tell you that they will get all of the information regarding
7 any EIT that any of these accused were subjected to. That's
8 what you have in front of you right now. I know you've
9 approved at least two of the paragraphs of the ten-paragraph
10 construct, and we have taken that and provided that
11 information to the defense.

12 I have no further -- nothing further, sir.

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

14 That brings us to 409. I believe this is a
15 Mr. Bin'Attash motion.

16 **[Conferred with courtroom personnel]**

17 Mr. Perry.

18 DC [MR. PERRY]: Good afternoon, Your Honor.

19 MJ [COL POHL]: Good afternoon.

20 DC [MR. PERRY]: Your Honor, this motion to compel
21 piggybacks a lot of the arguments that you've just heard, so
22 I'll try not to be too repetitive, but it is important to know
23 that in this universe of documents that we're requesting,

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1 there is a finite universe here. And we know that because the
2 government has confirmed that they've -- that they're aware of
3 this finite universe and they have reviewed all of that
4 universe.

5 And it entails something over 1 million documents and
6 files that were found and seized on May 2, 2011, during the
7 bin Laden raid in Abbottabad. And this is according to press
8 reports, we get that figure of more than 1 million documents
9 and files that were captured.

10 So the discovery request references that. The
11 government acknowledges that that universe of documents and
12 files exists and they have stated in their discovery response
13 that they intend to produce some of them.

14 Now here's where we get into the argument that
15 piggybacks what Your Honor just heard before. This universe
16 must be provided in toto to the defense, and here's why.
17 Evidence that is material to either guilt or punishment under
18 Brady must be provided, and so when you have a raid that
19 seizes documents that are clearly material to the preparation
20 of the defense, they ----

21 MJ [COL POHL]: How do you know that all 1 million are
22 material to the preparation of the defense?

23 DC [MR. PERRY]: Because if even just one percent is

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1 inculpatory toward Mr. Bin'Attash, the 99 percent that is
2 exculpatory is material to the preparation of the defense
3 because it demonstrates the absence of evidence of guilt or
4 punishment for Mr. Bin'Attash.

5 MJ [COL POHL]: Okay. Let's say -- let's bring them down
6 to real figures here.

7 DC [MR. PERRY]: Sure.

8 MJ [COL POHL]: Let's say that there was, for an example,
9 a history book or encyclopedias or something that's included
10 in the 1 million. Does that have any relevance one way or the
11 other? I mean, when you are talking about -- again, this was
12 not a deliberate search with a lot of time. I mean, the
13 circumstances of this seizure of the evidence, you know,
14 according to your own pleading -- and, quite frankly, they
15 went in and they did their business and they left, but they
16 didn't hang around very long.

17 So they sweep all of this stuff up, and you say all
18 million pieces of evidence, if it's a million or whatever it
19 is.

20 DC [MR. PERRY]: All right. That could be tangible pieces
21 of evidence, too.

22 MJ [COL POHL]: Okay. But, I mean, it's your view that
23 you have to see all million of these things because it was at

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1 his house? That's basically what you are saying?

2 DC [MR. PERRY]: It's not just anyone's house.

3 MJ [COL POHL]: No, I know whose house it was at. I got
4 that.

5 DC [MR. PERRY]: It's because of that, that's what makes
6 it eminently material. If it were just some raid in some part
7 of Afghanistan ----

8 MJ [COL POHL]: No, I got that.

9 DC [MR. PERRY]: Right.

10 MJ [COL POHL]: But if a person lives in a location for a
11 long time, there would be all sorts of things that are swept
12 up.

13 DC [MR. PERRY]: And if that person is, according to the
14 charge sheet ----

15 MJ [COL POHL]: Yeah.

16 DC [MR. PERRY]: ---- an uncharged conspirator ----

17 MJ [COL POHL]: But you believe that every piece of
18 evidence ----

19 DC [MR. PERRY]: ----- the leader of al Qaeda.

20 MJ [COL POHL]: ---- every piece of toilet paper that was
21 picked up, as it's picked up, you want to see it.

22 DC [MR. PERRY]: Used or ----

23 MJ [COL POHL]: Unused. You know, there's -- the

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1 government is saying, wait to see what we give you, I mean,
2 that's their response, and then see where we're at.

3 DC [MR. PERRY]: Right. And this -- their response was
4 filed in March of -- March 7, 2016, as of today we have still
5 not received anything.

6 MJ [COL POHL]: I'll ask them when they're going to give
7 it to you, when they get their turn.

8 DC [MR. PERRY]: Right. They did mention that they intend
9 to file something under 505, so that anticipates that they're
10 going to be submitting some summaries, is what I take from
11 that.

12 So similar to what Ms. Bormann said with respect to
13 the medical records, perhaps the best move is for them to
14 submit everything to Your Honor and then submit proposed
15 summaries or substitutions to the extent they think that's
16 appropriate, and then at least Your Honor can be aware of what
17 the complete universe is, keeping in mind our theories of
18 defense that we've presented to Your Honor, and with the
19 perspective in mind that the absence of evidence linking
20 Mr. Bin'Attash to this material is just as material to the
21 preparation of the defense as an actual document that has
22 Mr. Bin'Attash's name on it.

23 Are you with me, Your Honor?

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1 MJ [COL POHL]: I'm trying to get with you there,
2 Mr. Perry, but I'm trying to figure out the absence of
3 evidence. I understand the theory the absence of evidence is
4 evidence of perhaps a less ----

5 DC [MR. PERRY]: Less ----

6 MJ [COL POHL]: ---- not much of a connection. I got that
7 part of it. But the presence of the absence of evidence is
8 what they don't give you.

9 DC [MR. PERRY]: Well ----

10 MJ [COL POHL]: You say you want them to give you
11 irrelevant evidence to show that there's an absence of
12 evidence, as I'm kind of getting the drift here.

13 DC [MR. PERRY]: Right. But also, Your Honor, at some
14 point that absence of evidence has to be demonstrated, and so
15 you can't demonstrate that by showing nothing. You have to
16 demonstrate that absence of evidence by showing what was
17 recovered and what isn't present in that recovery.

18 Do you follow that, Your Honor?

19 MJ [COL POHL]: Yeah. I'm afraid we're getting
20 metaphysical here about the presence and absence of evidence;
21 and to prove the absence of something, you have to have
22 something. I think I got you, go ahead.

23 DC [MR. PERRY]: So ultimately, Your Honor, the United

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1 States is going to submit something that this is the
2 noncumulative, relevant, helpful material. And what I would
3 suggest to Your Honor to keep in mind is there is no
4 cumulative prohibition or restriction on Brady material. It's
5 what -- all evidence that is material to guilt or punishment
6 must be disclosed, and that can also be the absence of
7 evidence.

8 MJ [COL POHL]: Thank you.

9 DC [MR. PERRY]: Thank you very much. That's all I have.

10 MJ [COL POHL]: Any other defense counsel want to be heard
11 on this?

12 DC [MR. PERRY]: I think if I can have a moment to confer
13 with counsel?

14 DC [MS. PRADHAN]: Mr. al Baluchi, Your Honor ----

15 MJ [COL POHL]: Sure. Let's see if Mr. Perry is done
16 first.

17 [Pause.]

18 DC [MR. PERRY]: Your Honor, I think I'm going to try this
19 one more time, to give you an example of what I was trying to
20 do before and ----

21 MJ [COL POHL]: Okay. I think I got what you were saying,
22 but if you want to try again, that's fine.

23 DC [MR. PERRY]: Okay. Phone records example, all right?

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1 There's a potential motion down the road about phone records
2 as well. But say one of the pieces of evidence that was
3 recovered in this raid is phone records -- we don't know, but
4 let's just say that there were -- and there's 500,000 phone
5 records; but only one record has a call pertaining to
6 Mr. Bin'Attash, and so that is the one record that the
7 government provides to Mr. Bin'Attash and his counsel.

8 MJ [COL POHL]: Okay.

9 DC [MR. PERRY]: All right. It's -- the evidence is also
10 that there was 499,999 other calls related to that site that
11 didn't involve Mr. Bin'Attash, and so that is the relative
12 culpability, relative punishment that would go ----

13 MJ [COL POHL]: I understand. I understand. But if --
14 and I don't have the exact dates, but the date that
15 Mr. Bin'Attash was apprehended, would phone calls to other
16 people have after that date be relevant? I mean, I suspect he
17 was difficult to call.

18 I mean, I'm not being flippant here. I mean, in your
19 example, I understand if at the time Mr. Bin'Attash was
20 contactable, but if you have phone records from the previous
21 five years, Mr. Bin'Attash wasn't available.

22 DC [MR. PERRY]: Right.

23 MJ [COL POHL]: That's what I'm saying, did not -- would

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1 that be -- have to be provided to you also?

2 DC [MR. PERRY]: Well, Mr. Bin'Attash was arrested in
3 April of 2003 ----

4 MJ [COL POHL]: Okay.

5 DC [MR. PERRY]: What I'm saying is phone records after
6 that. Let's make the example, 500,000 records are found in
7 the Abbottabad raid, and the 500,000 records are all from
8 April 2002 to April 2003. So ----

9 MJ [COL POHL]: I got that.

10 DC [MR. PERRY]: If it's the time period that would
11 fit ----

12 MJ [COL POHL]: Right.

13 DC [MR. PERRY]: ---- then, yes.

14 MJ [COL POHL]: But the phone records that are on -- after
15 April of 2003, would not be ----

16 DC [MR. PERRY]: We would submit they would still be
17 necessary. They would still be material, especially when
18 the ----

19 MJ [COL POHL]: To show what?

20 DC [MR. PERRY]: Relative -- it's all based on material
21 that would be -- that would go to ----

22 MJ [COL POHL]: I don't want you to disclose your whole
23 theory of defense here. I'm just saying that a 2010 phone

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1 record ----

2 DC [MR. PERRY]: Yeah.

3 MJ [COL POHL]: ---- that didn't go to Mr. Bin'Attash, and
4 somehow that would have been material to the preparation of
5 the defense?

6 DC [MR. PERRY]: If the ultimate question is relative
7 culpability and punishment down the road, right?

8 MJ [COL POHL]: I'm with you.

9 DC [MR. PERRY]: Then all of the evidence under Brady must
10 be disclosed that goes to those two points, and that can
11 be ----

12 MJ [COL POHL]: I agree with everything you're saying.

13 DC [MR. PERRY]: ---- that can be documents or files that
14 are found after arrest.

15 MJ [COL POHL]: I agree with that, too. You've said
16 nothing I disagree with.

17 DC [MR. PERRY]: Okay.

18 MJ [COL POHL]: But I'm just saying is that -- is that
19 there could be -- very well be items that were found during
20 that raid that are not material to the preparation of the
21 defense under the most generous standard.

22 DC [MR. PERRY]: Right. And what we'd ask Your Honor to
23 do is similar to what Ms. Bormann suggested.

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1 MJ [COL POHL]: You want me to look through them all.

2 DC [MR. PERRY]: Yeah.

3 MJ [COL POHL]: Okay. Understand.

4 DC [MR. PERRY]: That's the only way we can be ----

5 MJ [COL POHL]: Got it. Got it. I'm not rejecting it out
6 of hand. I'm not embracing it, given the volume of it, but if
7 that needs to be done, that's okay. I get paid to do that.
8 That's fine.

9 DC [MR. PERRY]: Thank you, Your Honor.

10 MJ [COL POHL]: Thank you.

11 Ms. Pradhan.

12 DC [MS. PRADHAN]: I'm fine, Your Honor.

13 MJ [COL POHL]: You're fine. Anybody else wish to be
14 heard? Apparently not.

15 Trial Counsel.

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

17 MJ [COL POHL]: Good afternoon, Mr. Trivett.

18 MTC [MR. TRIVETT]: So some time references are important
19 for the record on this issue. Based on the charge sheet and
20 what we've alleged from the five accused, the last accused
21 became part of the plot in April 2001, based on our
22 allegations. That's a full decade removed from when Usama bin
23 Laden was killed and information was seized from a home in

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1 Abbottabad in May of 2011.

2 Now, we undertook a review of the information -- and
3 it's possible that Mr. Perry isn't fully aware of all of the
4 discovery that we've disclosed on this issue -- but in
5 March 17 of 2015, we turned over testimony of an FBI agent who
6 took custody of the materials in Afghanistan from a case where
7 he testified in, and some of these materials were used in
8 federal district court in New York.

9 And then on September 16, we actually turned over
10 312 pages. They're all classified. I'm not going to get
11 into, right now, detail as to what they are, other than to say
12 that there are 17 separate documents and one video that we
13 determined was discoverable. For the record, we turned this
14 over. And Bates stamps are MEA-ABB, which stands for
15 Abbottabad, numbers 15 through 326.

16 So what the defense counsel is asking you to do is
17 really our job, and we have done it, and we take it seriously
18 and we've reviewed the materials. We are going to seek to
19 have them declassified and we intend to use them at trial.
20 But clearly, they're not entitled to the total number of
21 things that were seized.

22 MJ [COL POHL]: Back up. You're going to use what at
23 trial?

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1 MTC [MR. TRIVETT]: We intend to use the evidence that
2 we've provided to the defense at trial.

3 MJ [COL POHL]: Okay. Okay. You have completed your
4 review of all of the material?

5 MTC [MR. TRIVETT]: We have.

6 MJ [COL POHL]: Is there any review, any material coming
7 my way?

8 MTC [MR. TRIVETT]: Yes, but when we ask for substitutes
9 regarding raids, it's not for you to substitute any of the
10 physical items that we've seen. The physical items, whether
11 it's a document or a video, isn't something we're seeking to
12 substitute. Generally we're protecting sources and methods
13 from which we obtained the information.

14 MJ [COL POHL]: When I see it, I'll -- okay. So you're
15 saying there's -- your reply said there's more to come.

16 MTC [MR. TRIVETT]: That reply predated our disclosure.

17 MJ [COL POHL]: Okay. And so the bulk of the disclosure
18 has been made.

19 MTC [MR. TRIVETT]: Correct.

20 MJ [COL POHL]: When could I expect to see the rest of it?

21 MTC [MR. TRIVETT]: As far as the 505 filing, you mean,
22 sir?

23 MJ [COL POHL]: Is that what you're talking about?

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1 MTC [MR. TRIVETT]: No, two different things. The 505 is
2 going to protect sources and methods from which we obtained
3 the information.

4 MJ [COL POHL]: I understand that.

5 MTC [MR. TRIVETT]: All right.

6 MJ [COL POHL]: What I'm saying is what I took you to say
7 is you've given them some stuff already.

8 MTC [MR. TRIVETT]: Correct.

9 MJ [COL POHL]: There's other stuff you want to go to the
10 505 substitution process before you give it to them. Is that
11 accurate, or I misunderstood you?

12 MTC [MR. TRIVETT]: Correct. But that piece of it will
13 really deal with, for lack of a better term, a substituted
14 evidentiary foundation. That won't be the substantive
15 evidence we're intending to use. Two separate issues, right?

16 MJ [COL POHL]: Okay.

17 MTC [MR. TRIVETT]: One is the evidence we intend to put
18 in, and one is the foundation under the rules.

19 MJ [COL POHL]: I think I understand what you're saying,
20 but what you're telling me is you're going to make an ex parte
21 presentation, request me to look ex parte to see if there's a
22 substitution.

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

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1 MJ [COL POHL]: Okay. I'll cross that bridge when I get
2 to it.

3 MTC [MR. TRIVETT]: Understood. Subject to your
4 questions, sir.

5 MJ [COL POHL]: Okay. I have no further questions.

6 MTC [MR. TRIVETT]: Thank you.

7 MJ [COL POHL]: So, Mr. Perry, as I understand it, you've
8 gotten some stuff. You've heard the government response.

9 [Pause.]

10 DC [MR. PERRY]: Thank you for the court's patience.

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

12 DC [MR. PERRY]: Speaking with Mr. Mr. Trivett, on the
13 17th of September, we were provided with approximately 325,
14 roughly, Bates-stamped pages of classified discovery, which,
15 of course, our position would be -- nowhere near entails the
16 1 million-plus documents and files. So it doesn't change our
17 position, but that -- according to the government, that will
18 entail their response. That will be their response, absent an
19 order from the court otherwise.

20 MJ [COL POHL]: Okay. I was looking at their reply.
21 There is also potential 505 materials that may be coming your
22 way.

23 DC [MR. PERRY]: Correct.

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1 MJ [COL POHL]: Also looking at their response, they also
2 said go look at the website to your ----

3 DC [MR. PERRY]: So ----

4 MJ [COL POHL]: I mean, is there -- just as a -- I mean,
5 there's a continuing theme here, and I'm not taking sides on
6 it, that the government says we give you everything and the
7 defense says, no, they don't, and again puts me in the
8 position of trying to figure out what they don't give you.

9 Have you identified anything from an ----

10 DC [MR. PERRY]: Open?

11 MJ [COL POHL]: ---- from an open source that you believe
12 you should have gotten in discovery and didn't?

13 DC [MR. PERRY]: No. At this time, Your Honor, I couldn't
14 give you an example, but that's something that we could look
15 into and get back to Your Honor about.

16 MJ [COL POHL]: Well, let me -- we run into the issue --
17 over and over it comes up, that the government says we have
18 complied with the discovery obligations. Defense says no,
19 they don't, and without me looking at every piece of paper
20 that they don't give you, which is a universe much greater
21 than one million pieces of paper, there's no way to be sure.

22 DC [MR. PERRY]: Right. No, I understand, Your Honor. I
23 understand Your Honor's concern, and we will try to locate

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1 that for you.

2 MJ [COL POHL]: But I understand your motion. Got it.

3 Thank you.

4 DC [MR. PERRY]: Thank you.

5 DC [MS. PRADHAN]: Your Honor, may I speak very briefly
6 about the narrow points that you just raised about the open
7 source material?

8 MJ [COL POHL]: Yes.

9 Just to be clear, when I talked about open-source
10 material, I'm talking about open-source material that's
11 properly open-source material. There's another category of
12 open-source material that was -- has not been declassified,
13 but it's still -- so the only reason I actually quite mention
14 it is I noticed in the government answer to the defense
15 pleading was you can go look at the website of ----

16 DC [MS. PRADHAN]: DNI.

17 MJ [COL POHL]: ---- the bin Laden Bookshelf website,
18 which I didn't know existed, but I guess I do now. So I'm
19 talking open source. Make sure we're talking about authorized
20 open source.

21 DC [MS. PRADHAN]: Absolutely.

22 MJ [COL POHL]: Not WikiLeaks or -- go ahead, ma'am.

23 DC [MS. PRADHAN]: Just on that very specific point on the

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1 government, the government as a courtesy, as they say in their
2 brief, did point us to the -- a quick point, Your Honor, I
3 pronounce it Abbottabad, because that is the local
4 pronunciation of the town.

5 MJ [COL POHL]: I'm not going to try to pronounce it one
6 way or the other. So I would defer to you of the proper
7 pronunciation.

8 DC [MS. PRADHAN]: I was speaking to my co-counsel
9 yesterday about this. It was named for a general, James
10 Abbott, who was the British Governor of the province is
11 Abbottabad. It's pronounced Abbottabad in Pakistan.

12 About the documents that have been declassified and
13 publicly posted on the bin Laden bookshelf are a total of 216
14 documents, 216 over the -- over -- out of the over 1 million
15 documents that came out of the Abbottabad raid.

16 And so we do have a slide for this. It is marked
17 AE 409B, I believe, that we can hand out. Your Honor, do I
18 have permission to display to the gallery?

19 MJ [COL POHL]: Did you get it reviewed by the court
20 information security officer?

21 DC [MS. PRADHAN]: We did, Your Honor.

22 MJ [COL POHL]: Okay. Let me see it. Go ahead.

23 DC [MS. PRADHAN]: Thank you. Your Honor, may I have the

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1 feed from Table 4?

2 MJ [COL POHL]: Uh-huh.

3 DC [MS. PRADHAN]: This is the slide that I was referring
4 to. So this shows the over 1 million documents and files that
5 came out of the Abbottabad raid, and can see at the very
6 bottom, if you squint, the documents that were declassified by
7 the director of national intelligence -- by the Office of the
8 Director of National Intelligence on May 20, 2015, and then a
9 second tranche that was released on March 1, 2016, I believe
10 the total is 216, 113 in the second tranche and 103 in the
11 first.

12 We have completed review of those documents very
13 shortly after the group was released, and we would still
14 appreciate either classified or unclassified production of the
15 rest of the documents by the government.

16 MJ [COL POHL]: Okay.

17 DC [MS. PRADHAN]: Thank you.

18 MJ [COL POHL]: We have a little more time left. Let's
19 start 432.

20 LDC [MR. CONNELL]: Sir, we submit 432 on the briefs.

21 MJ [COL POHL]: Okay. 335.

22 MTC [MR. TRIVETT]: Sir, in regard to 335, that was one
23 that I had requested could possibly be argued but it does have

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1 an ex parte filing. I don't know that it is appropriate to
2 deal with that now.

3 MJ [COL POHL]: Okay. 434.

4 DDC [LtCol GLEASON]: Your Honor, good afternoon.

5 MJ [COL POHL]: Good afternoon.

6 DDC [LtCol GLEASON]: In AE 434 the defense is asking this
7 commission to order the government to produce documents
8 concerning Muhammad al Qahtani who is an alleged
9 co-conspirator in this case and who was originally one of the
10 co-accused in this case.

11 The facts of Mr. al Qahtani's case are these, Your
12 Honor. In December 2001, U.S. forces took custody of him in
13 Afghanistan. He was subsequently transferred to Guantanamo in
14 February 2002, where he was interrogated by members of Joint
15 Task Force 170, which was the predecessor to Joint Task
16 Force-Guantanamo. He was also interrogated by members of the
17 prosecution's Criminal Investigative Task Force and the FBI.

18 In the summer of 2002, Mr. al Qahtani was identified
19 as the possible 20th hijacker for the 9/11 attack. He was
20 questioned by the FBI from July 2002 to September 2002
21 regarding this attack, and he was subsequently interrogated by
22 Joint Task Force-Guantanamo personnel from November 2002
23 onward, in an effort to quote/unquote break the detainee and

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1 establish his role in the attacks of September 11, 2001.

2 The government issued an official press release in
3 2005 alleging that Mr. al Qahtani is believed to be the
4 identified 20th hijacker of the 9/11 attack. Additionally, on
5 February 11, 2008, the prosecution initially charged six
6 persons in this case: The five accused that are currently on
7 trial facing the death penalty and Mr. al Qahtani. The
8 convening authority at that time ultimately dismissed the
9 charges against Mr. al Qahtani pre-referral due to the fact
10 that he had been tortured while he was in DoD custody.

11 In October of 2015, in discovery we requested two
12 categories of discovery from the prosecution regarding
13 Mr. al Qahtani's case. The first category was we wanted
14 copies of the transcripts, statements, interrogation
15 summaries, interrogation notes and audio and video recordings
16 of Mr. al Qahtani's interrogations. The second category was
17 we asked for documents related to his torture and the
18 dismissal of his charges.

19 The prosecution response was AE 434A. They agreed to
20 provide all relevant material, statements of Mr. al Qahtani,
21 whether in written, audio, or video form. And since they have
22 agreed to provide that, Your Honor, we ask that you order the
23 production of those items.

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1 MJ [COL POHL]: Why don't I just wait until they provide
2 it? They said they were going to give it to you.

3 DDC [LtCol GLEASON]: Well, we've seen time and time
4 again, Your Honor, they say they are going to provide things
5 and they don't provide it and we come back and relitigate the
6 issue again.

7 MJ [COL POHL]: Did they give you a date by which they
8 would provide it?

9 DDC [LtCol GLEASON]: They have not, Your Honor. And to
10 date, I can tell you that we have received some discovery on
11 22 September, three weeks ago, which consisted of only
12 56 pages, covering only 13 days of Mr. al Qahtani's
13 interrogations.

14 MJ [COL POHL]: Okay.

15 DDC [LtCol GLEASON]: The other category that the
16 prosecution agreed to provide was the referral binder that was
17 presented to the convening authority. We have yet to receive
18 that, and we ask that you order the production of that as
19 well, the referral binder pertaining to Mr. al Qahtani's case.

20 MJ [COL POHL]: Got it.

21 DDC [LtCol GLEASON]: We've received information regarding
22 the five accused in this case, but we have never received the
23 referral information regarding Mr. al Qahtani.

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1 Now, the final category that the prosecution has
2 refused to produce was information regarding Mr. al Qahtani's
3 torture, the transcripts of his interrogations, interrogation
4 summaries and the interrogator notes.

5 The applicable rule in this case is R.C.M. 701, which
6 states that the government shall permit the defense counsel to
7 examine any books, paper, documents, photographs, tangible
8 objects, buildings and places so long as they are under
9 control of the government and material to the preparation of
10 the defense, or intended by use and evidence in the
11 prosecution's case in chief.

12 Another applicable rule is Brady v. Maryland, which
13 held that the due process clause required the government to
14 disclose all evidence favorable to the accused upon request
15 where the evidence is either material to guilt or punishment.

16 Now, we submit that the evidence regarding
17 Mr. Qahtani's torture and his subsequent -- the convening
18 authority's subsequent action of dismissing charges against
19 him are material to the preparation of our defense.

20 The U.S. Supreme Court has recognized that the
21 different treatment of a co-defendant or accomplice is a
22 nonstatutory mitigating factor in a capital case, Your Honor,
23 and a nonstatutory mitigating factor in this case is whether

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1 another culpable 9/11 accused is not going to be punished at
2 all. His charges are dismissed. He's not going to face any
3 type of justice in this case?

4 MJ [COL POHL]: I don't have a charge sheet in front of
5 me. Is Mr. Qahtani a charged co-conspirator?

6 DDC [LtCol GLEASON]: He was in the charges in 2008, Your
7 Honor.

8 MJ [COL POHL]: But not currently.

9 DDC [LtCol GLEASON]: Not currently, Your Honor.

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

11 DDC [LtCol GLEASON]: The initial go-round he was charged,
12 the convening authority was Susan Crawford. She made a
13 decision not to refer his charges based on the fact that he
14 had been tortured, and subsequently his charges were dismissed
15 and not referred.

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

17 DDC [LtCol GLEASON]: Now, Your Honor, as the court held
18 in United States v. bin Laden, they said in that case it is
19 appropriate for jurors to consider questions of
20 proportionality and equity when they are evaluating whether a
21 death sentence is appropriate, as it provides the jurors with
22 the means of improving the likelihood that the death penalty
23 would not be administered in an arbitrary or random manner.

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1 It's going to be the role when we get to sentencing of this
2 case, if we get there, for the members to decide relative
3 culpability and punishment.

4 Mr. al Hawsawi is entitled under Brady to the
5 production of any evidence in the government's possession
6 which relates to Mr. Qahtani, the disposition of his case, and
7 the reasons why his case was not referred capital because this
8 is a likelihood that this could affect the ultimate verdict of
9 the jury or the members. Your Honor, may I have a moment?

10 MJ [COL POHL]: Sure.

11 DDC [LtCol GLEASON]: Your Honor, subject to your
12 questions, I have nothing further.

13 MJ [COL POHL]: I have nothing further. Thank you,
14 Colonel Gleason.

15 Other defense counsel want to be heard on this?
16 Sure, Mr. Nevin.

17 LDC [MR. NEVIN]: Your Honor, I agree with the remarks you
18 just heard. I point out that it is a well-recognized
19 mitigating factor in federal criminal case -- federal capital
20 cases that a similarly situated defendant received a lesser
21 punishment, and that's essentially what the U.S. Supreme Court
22 is saying in Parker v. Dugger, which I assume is the case that
23 Major Gleason [sic] was just quoting for you.

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1 I just want to point out to the military commission
2 that there's just one additional wrinkle to the argument with
3 respect to Mr. Qahtani, and that is that it's been reported in
4 open-source materials that the reason the convening authority
5 decided not to -- not only not refer capitally, but not refer
6 at all with respect to Mr. Qahtani is that he was tortured.
7 And this is something, of course, we know that is true of
8 Mr. Mohammad as well.

9 So we are not talking here solely about the idea that
10 someone who is similarly situated received a lesser
11 punishment, we're talking about also the fact that someone who
12 was similarly situated for a reason that applies to
13 Mr. Mohammad as well was not prosecuted.

14 And that is clearly something that we have a right at
15 least to know, whether the argument can be supported to the
16 members or perhaps to the military commission before trial or
17 before sentencing begins, to make an argument with respect to
18 whether the death penalty is appropriate as a matter of law.
19 Whether it's a matter of fact or as a matter of law, this is
20 an area that is doubly relevant to the mitigation case with
21 respect to Mr. Mohammad.

22 Thank you.

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

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1 Anybody else wish to add something?

2 LDC [MS. BORMANN]: Judge, just briefly, we have a
3 discovery request that is slightly different with respect to
4 Mr. al Qahtani's materials, which is in the government's
5 possession as we speak. So although part of Mr. al Hawsawi's
6 counsel's argument pertains to us, we will, if our discovery
7 request is not complied with, be filing a separate and
8 slightly different motion.

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

10 Trial Counsel, do you wish to be heard on this?

11 MTC [MR. TRIVETT]: All right. As an initial matter, the
12 government concedes that Mr. Qahtani had a role and is one of
13 the known unnamed co-conspirators in the case. I wanted to
14 address a couple of issues.

15 First of all, what we did provide. On 22 September
16 2016 we provided 56 pages of Mr. Qahtani's statements
17 regarding the 9/11 attacks ----

18 MJ [COL POHL]: Mr. Trivett, why don't we just cut to the
19 chase. Tell me what you didn't give them.

20 MTC [MR. TRIVETT]: I don't know that there's ----

21 MJ [COL POHL]: I read your pleading.

22 MTC [MR. TRIVETT]: Well, we have ten statements in the
23 505 process that they haven't gotten yet, ten of his

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1 statements.

2 MJ [COL POHL]: Now, when you say in the 505 process, do I
3 have them yet?

4 MTC [MR. TRIVETT]: I believe so, yes. Yes, sir.

5 MJ [COL POHL]: Okay.

6 MTC [MR. TRIVETT]: On 16 September, we filed that.

7 MJ [COL POHL]: Just make it clear, you file a lot of
8 stuff.

9 MTC [MR. TRIVETT]: I understand.

10 MJ [COL POHL]: Okay. So when you say you filed it on
11 16 December and there's ten pages, there's also about 60,000
12 other pages that you dropped off, too.

13 MTC [MR. TRIVETT]: No, no, I understand, sir. And quite
14 frankly I'm not even suggesting that the filing is only that
15 amount of pages.

16 MJ [COL POHL]: I'm just telling you there's a process to
17 do it, but go ahead.

18 MTC [MR. TRIVETT]: Yes, sir. So I want to take the
19 issues raised by the defense one for one here. All right.
20 There's no information that was provided to Ms. Crawford
21 regarding Mr. Qahtani's treatment by the prosecution. When we
22 filed the referral binder back in 2007 before the case was
23 first referred, there was no information provided by the

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1 government to Ms. Crawford. To the extent that she had
2 information, it was information that was not provided by the
3 prosecution and it's not in our possession. So that's the
4 first issue.

5 MJ [COL POHL]: Is it in the convening authority's
6 possession? You're telling me Ms. Crawford or Judge Crawford
7 on her own decided that Mr. Qahtani was treated to such a
8 degree that he shouldn't even be held -- shouldn't even face
9 this trial and she did this on her own with no paper trail?

10 MTC [MR. TRIVETT]: I -- certainly -- as far as their
11 requests for what we provide in the referral binder, none of
12 that information is there. Where she got the information,
13 what she did with it and how she got it, prosecution doesn't
14 know and we never knew. We were as surprised as anybody when
15 the decision came out. So we don't have that information in
16 our possession.

17 If you want me to go to the convening authority and
18 ask if there's anything in addition, we can do that.

19 MJ [COL POHL]: Basically, I'm asking you a fundamental
20 question.

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

22 MJ [COL POHL]: When you say it's not in your possession,
23 does that mean that you don't look at the convening

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1 authority's office?

2 MTC [MR. TRIVETT]: Right. The convening authority is a
3 separate agency from the prosecution, so generally, unless
4 it's something specific to the convening authority, we
5 wouldn't -- we wouldn't as a matter of course ask them for
6 information ----

7 MJ [COL POHL]: But ----

8 MTC [MR. TRIVETT]: ---- like we did for D008 and all of
9 those things that implicate their equity.

10 MJ [COL POHL]: But on this type of issue where they're
11 asking about what information did the convening authority at
12 the time rely upon, you've not asked them whether they have
13 any documents in addition to what you provided in the referral
14 binder?

15 MTC [MR. TRIVETT]: We haven't because I think the request
16 was for the referral binder, and we've provided the referral
17 binder -- at least in regard to Ms. Lachelier and
18 Commander Ruiz, the 2008 referral binder was provided to them.

19 The current referral binder isn't substantially
20 different. If they'd like us to re-disclose the old referral
21 binder, the 2008 one, we're happy to do that.

22 MJ [COL POHL]: When you say the current referral binder,
23 what are you referring to?

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1 MTC [MR. TRIVETT]: 2008 referral binder that included
2 Mr. Qahtani.

3 MJ [COL POHL]: All right.

4 MTC [MR. TRIVETT]: And then the 2011 referral binder for
5 the current case.

6 MJ [COL POHL]: Well, you've given them that, right?

7 MTC [MR. TRIVETT]: Correct. So they have substantially
8 the same information, and at least in regard to, I think ----

9 MJ [COL POHL]: Well, they don't have the information on
10 Mr. Qahtani in the 2011 referral binder, correct?

11 MTC [MR. TRIVETT]: Correct, but they have the old
12 referral binder.

13 MJ [COL POHL]: You have no -- you've given them that.

14 MTC [MR. TRIVETT]: Correct. And if they want us to
15 provide it again, we're happy to do that because there may be
16 some counsel who don't have that.

17 MJ [COL POHL]: Okay.

18 MTC [MR. TRIVETT]: But what I'm saying is none of the
19 information they seek is in that referral binder. The
20 information about Mr. Qahtani's conditions of confinement by
21 DoD aren't in that referral binder.

22 We'll certainly go back to the convening authority.

23 We'll ask if there's anything in the convening authority's

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1 possession, additional information about that. If there is,
2 we're happy to provide it. I doubt that there is, but we'll
3 ask.

4 MJ [COL POHL]: Do you take issue with the defense
5 position here that Mr. al Qahtani's disposition could
6 potentially be relevant on their mitigation case?

7 MTC [MR. TRIVETT]: I think it can be ----

8 MJ [COL POHL]: Understanding I'm not saying it is, I'm
9 saying there is potentially.

10 MTC [MR. TRIVETT]: I think there's the potential for it,
11 but I think they have what they have. They have the
12 statements of Ms. Crawford and she decided what she decided
13 for whatever reason she decided it. But they have that
14 information. They have the fact that she, in fact, did not
15 refer the case based on, I think, comments she made to the
16 *Washington Post*. So they have the information they need to be
17 able to make that mitigation argument should they so choose to
18 do so.

19 MJ [COL POHL]: In your reply to the motion to compel, do
20 you tell me everything that you've already given them or ----

21 MTC [MR. TRIVETT]: No, we wouldn't have because that
22 would have, again, predated our disclosures.

23 MJ [COL POHL]: I want you to supplement your pleading. I

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1 want you to go back to the convening authority and supplement
2 your pleading and tell me exactly what you've given them and
3 then, I guess, what you haven't given to them, at least by
4 category. Okay. So I have at least an idea of what the
5 battlefield is, and this will be particularly helpful from the
6 fact that you have no other discovery request coming from
7 Mr. Qahtani from Ms. Bormann.

8 MTC [MR. TRIVETT]: Okay. Do you want to address now the
9 refusal to disclose all of the notes, interrogation summaries,
10 and the treatment of Mr. Qahtani? Because we do oppose that.

11 MJ [COL POHL]: What's your basis for opposing that?

12 MTC [MR. TRIVETT]: The basis for opposing that, he was
13 not a witness of ours. He was in the CIA's RDI program, so
14 whatever treatment may have occurred to him -- obviously if
15 the convening authority has some information that she looked
16 at to make a decision, we'll provide that, if they have it.
17 Like I said, I doubt they have it, but we'll ask.

18 But going through every piece of material that the
19 Department of Defense may have on the treatment of al Qahtani
20 is irrelevant to this case. If he were a witness, we would
21 have Giglio obligations, we would have Jencks obligations. We
22 would understand that, and we would comply with that.

23 But he's not going to be a witness in this case, so

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1 the treatment of Mr. Qahtani at the hands of the Department of
2 Defense should have no relevance or bearing to the current
3 case in issue.

4 MJ [COL POHL]: Hold that thought for a second.

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

6 MJ [COL POHL]: If a statement was taken from
7 Mr. al Qahtani where his will was overborne and it led to
8 other statements, other evidence in this case, would that be
9 relevant to the defense?

10 MTC [MR. TRIVETT]: Your Honor, we don't intend to use any
11 of Mr. Qahtani's statements.

12 MJ [COL POHL]: No, what I'm saying is -- because this has
13 come up in other trials.

14 MTC [MR. TRIVETT]: Okay.

15 MJ [COL POHL]: Okay. If Mr. al Qahtani gave a statement
16 under duress that led to evidence that incriminates these
17 accused, would that be relevant to their defense that that
18 evidence should not be used?

19 Not making any ruling on this. You understand ----

20 MTC [MR. TRIVETT]: I'd like the opportunity to brief that
21 more fully, because there's questions of standing. There's
22 questions of timing. There's a bunch of issues that could
23 impact ----

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1 MJ [COL POHL]: Okay. Go ahead. Take your time on it.
2 I'm just saying, reading from the hearsay rule here, before
3 they talk about the statement itself, the client's will was
4 overborne and the question becomes where does that trail start
5 and where does that trail end?

6 And what I'm saying is if Mr. al Qahtani made a
7 statement under duress that led to something else that you may
8 want to use against these accused -- I'm not making any ruling
9 or anything. I'm just saying I could see where that's a
10 potential issue; where your blanket statement of his treatment
11 is irrelevant, I'm not sure I would agree with that.

12 MTC [MR. TRIVETT]: Okay. If we could have the
13 opportunity to brief it, we'll ----

14 MJ [COL POHL]: Yeah, I understand. Okay. But just give
15 me an update of what you have given them and what you haven't
16 given them, and we'll go from there.

17 MTC [MR. TRIVETT]: Yes, sir. Thanks.

18 MJ [COL POHL]: Okay. Mr. Nevin, you were standing first.

19 LDC [MR. NEVIN]: Well, Your Honor, it won't surprise you
20 to hear me say that this is the kind of thing that keeps us up
21 at night.

22 If you listen to what Mr. Trivett just told you, you
23 have a motion that is putting everyone on notice of the

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1 general theory here that Mr. Qahtani's nonprosecution and
2 noncapital prosecution is potentially relevant to sentence, if
3 we get to that point.

4 And what Mr. Trivett tells you is that there may be
5 stuff in the possession of the convening authority that bears
6 on this. He doesn't know. There may be stuff in the
7 possession of other government agencies that bears on this.
8 He doesn't know and has not -- nothing that's been provided so
9 far in discovery would touch those kinds of materials because
10 it's not in their possession. I think that's close to the
11 words that he used.

12 But we've briefed this in other settings. I believe
13 the military commission has ruled on this. If I'm wrong about
14 that, I request the opportunity to brief it again. The cases
15 are legion. The one that always comes to my mind is the
16 Timothy McVeigh case because Judge Matsch said it so plainly
17 and so clearly, that the government in a criminal case in the
18 United States of America has an obligation to go to every
19 agency in the government that might have information that's
20 responsive to its discovery obligations.

21 And I believe I remember making an argument to Your
22 Honor in which I set up the idea of something that clearly was
23 not relevant, like -- that would be in the possession of the

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1 government but that clearly was not relevant. And I think my
2 example was the names of all of the people who worked for the
3 Social Security in Omaha, Nebraska. Just making that up.
4 Obviously, that's in the possession of the government, but
5 they don't have an obligation to present that to you or make a
6 decision themselves about that.

7 But when you're talking about something that we have
8 pointed the government to and that is fairly patent and
9 obvious in this case, it's not enough for them to just say --
10 look around the office and say, well, we don't seem to have
11 anything that relates to Mr. al Qahtani, so let's turn over
12 56 pages that came from somewhere and call it good.

13 They have an obligation to reach out to whoever the
14 people who tortured Mr. al Qahtani were and provide
15 information that relates to that.

16 Again, there's definitely the derivative evidence
17 issue that Your Honor raised. That's clearly sitting here in
18 this, because I've understood the government to be saying that
19 they would not -- not only use -- not use evidence that was
20 obtained as a result of torture, but also that was derived
21 from evidence that was obtained as a result of torture. And
22 if I'm -- if I'm wrong about that, then we have a fundamental
23 misunderstanding about what the government has stated

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1 publicly, what I've heard the prosecution state publicly about
2 their approach to evidence of torture.

3 But more fundamentally, the argument is not -- the
4 argument here, at least in the context of this motion to
5 compel discovery is not about -- about that issue. The
6 argument here is that a co-defendant, an alleged
7 co-conspirator, an unindicted, uncharged co-conspirator who
8 stood in a similar position was not charged, and he was not
9 charged because he was treated in a way that was at least
10 similar and probably less severe and harsh than the way
11 Mr. Mohammad was treated.

12 Doesn't make any difference who did it to him so long
13 as it was someone within the United States Government, and
14 someone within the United States Government imposed that kind
15 of treatment on Mr. Qahtani. My understanding is it was the
16 Department of Defense as opposed to the CIA in the RDI
17 program. But nonetheless, the government, agents of the
18 government imposed that treatment on Mr. Qahtani. He didn't
19 get charged. He didn't even get charged.

20 We're entitled to know what it was that was done to
21 him and who did it and when and why and how and all the
22 details of that in order to make the argument that I'm making
23 to you here. And it is -- I know the military commission

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1 doesn't like to have us stand here and say -- point fingers at
2 the government and say, look, you're not fulfilling your
3 discovery obligations and so on. But honestly, when counsel
4 tells you that they haven't looked beyond their own office for
5 evidence that's clearly responsive in this way, that's the
6 kind of thing that drives that attitude on our part.

7 MJ [COL POHL]: I understand.

8 LDC [MR. NEVIN]: Thank you for hearing me, Your Honor.

9 DDC [LtCol GLEASON]: Your Honor, we have no additional
10 argument.

11 MJ [COL POHL]: Mr. Trivett, do you want to be heard some
12 more?

13 MTC [MR. TRIVETT]: Very briefly, sir.

14 We certainly take exception to this concept that
15 somehow I said we don't look beyond our office. We obviously
16 have our discovery obligations. It extends through the
17 Executive Branch of the government, with any branch that's
18 aligned with the prosecution. DoD would be part of that.

19 The convening authority is a little bit of a
20 different issue, not unlike the judiciary. So because you're
21 not aligned with the prosecution -- the convening authority
22 isn't aligned with the prosecution, we wouldn't otherwise go
23 unless there was a specific issue. Like I said, if there's a

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1 specific issue, if they want to find out, we'll now go and ask
2 them. We're happy to do it, and we'll provide whatever is
3 there. But I don't want anyone to be left with this
4 impression that I just look around the four corners of my
5 office and decide what's discoverable within there, because it
6 does a great disservice to the great work that our office has
7 been doing over the last six, seven years on this case. Thank
8 you.

9 MJ [COL POHL]: Mr. Trivett, I want your update in two
10 weeks, by 28 October, okay?

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

12 MJ [COL POHL]: Okay. On my list, we've covered
13 everything unclassified that we could cover this session. I'm
14 certain if there's others that I've missed, let me know. That
15 leaves a 505(h) hearing, which I'd like to do tomorrow, for
16 255, 328 and 404. Okay. As such, that will be a closed
17 session to the public, and there will be no requirement for
18 the accused.

19 Also, Mr. Ruiz, you indicated one time you had an 018
20 505 issue you wanted to piggyback on PP. You were going to
21 think about whether you still needed that. Do you still need
22 it?

23 LDC [MR. RUIZ]: Can I have a moment, Judge?

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1 MJ [COL POHL]: Sure. While he's thinking, Ms. Bormann,
2 do you want to be heard?

3 LDC [MS. BORMANN]: The microphone in the back of the room
4 is not working.

5 On 284, the motion to compel that Mr. Schwartz was
6 working on and we realized it was because of a change in the
7 situation between the time of filing and now, the government
8 disclosed to us some classified information that bears on the
9 argument.

10 We filed a 505(g) notice over lunch, but our server
11 is down and our e-mails were not going through, and I don't
12 know if your people received it.

13 MJ [COL POHL]: Okay. I'll tell you what I'll do on the
14 284 issue. If the notice has been provided to the government
15 in such a way that they're prepared to respond to it ----

16 LDC [MS. BORMANN]: It's one sentence. So I can't imagine
17 they won't be.

18 MJ [COL POHL]: We'll put it on the calendar and then
19 we'll catch up on the AE process.

20 LDC [MS. BORMANN]: That's what I was going to ask.

21 Can somebody -- here's the problem that we have. We
22 don't know when you don't get something. All we know is that
23 we're not getting it, and we're on a separate server now. So

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1 it was filed ----

2 MJ [COL POHL]: I'll look for it when I get back.

3 LDC [MS. BORMANN]: ---- during lunch. If somebody could
4 respond back to us and just let us know that you received it,
5 that would be great. Thank you.

6 MJ [COL POHL]: Mr. Ruiz. While they're talking, General
7 Martins?

8 CP [BG MARTINS]: Your Honor, is your concept that we
9 wouldn't be back in open session then this week?

10 MJ [COL POHL]: Not unless -- I don't have anything on my
11 list of things that people are prepared to argue. If we've
12 got anything, we certainly can.

13 CP [BG MARTINS]: We just noticed on the overall list of
14 stuff ----

15 MJ [COL POHL]: I mean, there's a whole bunch of things.
16 No, I'm certainly -- we're going to be down here, I certainly
17 don't mind ----

18 CP [BG MARTINS]: Well, just a couple of things. We saw
19 266, 359, 413, 425 ----

20 MJ [COL POHL]: 425's not ready.

21 CP [BG MARTINS]: Okay. We thought there was a motion to
22 compel discovery. Well, okay, that's if the defense wanted
23 to -- we have a reply. 266. Is that what you are saying?

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1 266, that was going to be a -- potentially a supplement from
2 Ms. Bormann at some point.

3 MJ [COL POHL]: Hold the phone. Okay.

4 What were the ones that you said were ready there,
5 General Martins? 266?

6 CP [BG MARTINS]: 266, 359, 413. You noted that 425
7 wasn't ready.

8 MJ [COL POHL]: It's not ready. There's another issue out
9 there.

10 CP [BG MARTINS]: Okay. There's also 180000.

11 MJ [COL POHL]: Okay.

12 CP [BG MARTINS]: We also have 367.

13 MJ [COL POHL]: Okay. Those are all unclassified?

14 CP [BG MARTINS]: There's a 505(g) notice on 367, but the
15 others have unclassified argument.

16 MJ [COL POHL]: All right. Okay. Let's do this ----

17 CP [BG MARTINS]: I just -- on that, I just wanted to say
18 that if there is some possibility for an open session ----

19 MJ [COL POHL]: Yeah.

20 CP [BG MARTINS]: ---- we'd just note that we don't yet
21 have an acknowledgement from Mr. Binalshibh.

22 MJ [COL POHL]: No, I know. I got it. Yeah, but it
23 strikes to me is if we do a 505(h) tomorrow and then go back

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1 into open session on Friday, that way we conclude the
2 arguments on some of these things, including 284.

3 And also, Mr. Ruiz, on 018?

4 LDC [MR. RUIZ]: Judge, are you referring to 018PP?

5 MJ [COL POHL]: Yeah. I don't know what your notice was.
6 You indicated that you had a 505(g) notice on it.

7 LDC [MR. RUIZ]: We have a -- yes, it's 018MMM (MAH).
8 Yes, that's correct.

9 MJ [COL POHL]: You still want to explore that?

10 LDC [MR. RUIZ]: I think so, yes.

11 MJ [COL POHL]: Go ahead.

12 LDC [MR. RUIZ]: We also have 018000 (MAH) which,
13 according to my records, has not been heard.

14 MJ [COL POHL]: Okay.

15 LDC [MR. RUIZ]: We have AE 333B (MAH), and then we
16 have -- 333B. We also have a series on 367, a 367D (MAH),
17 367E (MAH), 367F, and 367G. According to my records, you
18 deferred ----

19 MJ [COL POHL]: Okay.

20 LDC [MR. RUIZ]: ---- ruling on 367D (MAH).

21 MJ [COL POHL]: Okay. Okay. Here's what we're going to
22 do.

23 LDC [MR. RUIZ]: And one more, Judge.

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1 MJ [COL POHL]: Oh.

2 LDC [MR. RUIZ]: 442B (MAH) is also one that, according to
3 my records, has not been heard.

4 MJ [COL POHL]: Okay.

5 LDC [MR. RUIZ]: That's pertaining to our motion for
6 appropriate relief for interference with the right to
7 participate in his defense due to torture injuries.

8 MJ [COL POHL]: What we're going to do tomorrow is a
9 505(h) session. That's the closed, classified session, and
10 that will be on 255, 328, 404, 284 assuming the notice issue
11 is resolved, 018MMM, 367, 018000, 333, 367D, E, F, and G, and
12 442 (MAH).

13 When we're done with those, we'll decide whether or
14 not we're going to have an open session on Friday or not,
15 because we may have -- we may change to an 806 closed session
16 on Friday. If we do go on Friday in open session plan on
17 018000, 266, 359, 413 and 367. Again, we'll make that
18 decision -- I'll make that decision tomorrow once we conclude
19 the classified portion of the proceeding.

20 So tomorrow there will be no detainees here. I know
21 we've gone late past their prayer. And then we will make a
22 decision on -- I will make a decision tomorrow afternoon of
23 whether or not we will need the detainees here on Friday or

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1 not, depending on what we're going to do on Friday.

2 LDC [MR. NEVIN]: [Microphone button not pushed; no
3 audio.]

4 MJ [COL POHL]: No, tomorrow will be a closed, classified
5 session -- you want the numbers again?

6 LDC [MR. NEVIN]: I'm sorry, Your Honor.

7 MJ [COL POHL]: That's okay. That's okay. 255, 328, 404,
8 284, 018MMM, 367, 018000, 333, 367D, E, F and G, and
9 442 (MAH). And then we'll adjust fire accordingly on Friday.
10 General Martins.

11 LDC [MR. RUIZ]: Judge, did you say 018000 as well?

12 MJ [COL POHL]: Yes.

13 CP [BG MARTINS]: Forgive me, Your Honor, if you weren't
14 going to wrap it up, but we did want to just make clear that
15 Mr. Binalshibh would need to come on Friday unless ----

16 MJ [COL POHL]: No, no. Exactly. Unless -- okay, I
17 wasn't going to -- I mean, the default -- he's going to be
18 here unless, Mr. Harrington, we want to go over anything with
19 your client.

20 LDC [MR. HARRINGTON]: We're in default, Judge.

21 MJ [COL POHL]: Okay. If we have an open session on
22 Monday -- or on Friday, all people that are required to be
23 here will be here.

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1 Commission's in recess.

2 [The R.M.C. 803 session recessed at 1634, 12 October 2016.]

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