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1 [The R.M.C. 803 session was called to order at 1335,
2 16 May 2017.]

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

6 Before we get to the next issue, Mr. Ruiz, I have got
7 some questions for you. You were drafting the order on 396.
8 If you recall, this is the pending classification review
9 issue.

10 LDC [MR. RUIZ]: Yes.

11 MJ [COL POHL]: Just to make it clear, because we were
12 reviewing the transcript, I want to make sure we understand
13 kind of where we are at. Did all five accused get the same
14 documents, or are there five different sets of documents in
15 play?

16 LDC [MR. RUIZ]: Let me have one second, Judge.

17 MJ [COL POHL]: If somebody else has that answer, I will
18 take it from them.

19 LDC [MR. CONNELL]: As I understand, it was only
20 Mr. al Hawsawi's team that submitted the documents.

21 MJ [COL POHL]: That would appear to answer that. Okay.
22 Since nobody else -- okay. Are there any additional documents
23 since the issue first came up?

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1 LDC [MR. RUIZ]: Not on that particular one, Judge, no.

2 MJ [COL POHL]: When did you submit them for review, if
3 you recall?

4 LDC [MR. RUIZ]: Judge, my DSO informs me it was between
5 October and December of last year. We can get you more
6 precise dates if you like, Judge.

7 MJ [COL POHL]: October-December '16?

8 LDC [MR. RUIZ]: Correct.

9 MJ [COL POHL]: And have you gotten anything back?

10 LDC [MR. RUIZ]: I'm sorry, Judge, December '15. 2015.

11 MJ [COL POHL]: December of '15, okay. And have you
12 gotten anything back or any response?

13 LDC [MR. RUIZ]: No, Judge.

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

15 LDC [MS. BORMANN]: Judge, I have a question on that.

16 MJ [COL POHL]: Yes, ma'am.

17 LDC [MS. BORMANN]: So on 396 the issue was the parties'
18 position on that marking of Pending Classification Review, but
19 it's unclear to me what exactly, what materials you are
20 addressing Mr. Ruiz on. We have several pieces of material
21 that have been ----

22 MJ [COL POHL]: Well, I believe in that particular motion,
23 Mr. Ruiz had a stack of, were they DIMS records? What were

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1 they?

2 LDC [MR. RUIZ]: I'm not sure I can identify that, Judge.

3 MJ [COL POHL]: Okay. It's a stack of records of about
4 8,000 pages that were -- I know what they are, that were
5 stacked Pending Classification Review.

6 LDC [MS. BORMANN]: I know what they are.

7 MJ [COL POHL]: Okay.

8 LDC [MS. BORMANN]: That they apply to all of us, those
9 records.

10 MJ [COL POHL]: I got it. I am just addressing some
11 housekeeping on 396.

12 Mr. Harrington.

13 LDC [MR. HARRINGTON]: Judge, there has been a request by
14 several people that the temperature be raised a little bit,
15 and apparently it can't be done without your order. That's
16 what the sign says back there.

17 MJ [COL POHL]: Okay. I am a powerful guy. Okay. Go
18 ahead and raise the temperature a couple of degrees.

19 LDC [MR. HARRINGTON]: Judge, secondly, you had indicated
20 the other day that before Mr. Abu Zubaydah testified you
21 wanted to have a discussion with Mr. Ryan and me about the
22 parameters of his testimony.

23 MJ [COL POHL]: Yes, we can do that now. Mr. Ryan, you

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1 submitted a number of documents that you wanted to publish.
2 There were documents and a video? Okay. They have gone
3 through the review process now. I just want to -- maybe I
4 better start with Mr. Harrington before I come back to you.

5 Mr. Harrington, as I understand Mr. Zubaydah's
6 testimony, it is to relay his view of the conditions of
7 Mr. Binalshibh's confinement here at GTMO; is that correct?

8 LDC [MR. HARRINGTON]: That's correct, Judge.

9 MJ [COL POHL]: So he is limited to that?

10 LDC [MR. HARRINGTON]: Yes.

11 MJ [COL POHL]: Okay. Do you anticipate going into any
12 background information of how -- of pre-GTMO treatment of
13 Mr. Zubaydah?

14 LDC [MR. HARRINGTON]: Not extensively, Judge, only
15 because it may affect your evaluation of his testimony because
16 of some medical and other health problems that you should know
17 about, but nothing in great detail.

18 MJ [COL POHL]: Okay. Just to be clear, is that to avoid
19 a classified, to go into closed session, which I want to try
20 to avoid, I am going to give you some leeway to lead him,
21 particularly when you go into those areas that may raise those
22 issues, okay?

23 LDC [MR. HARRINGTON]: Okay.

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1 MJ [COL POHL]: But at this point, you don't intend to go
2 into any classified information. You have provided no 505(g)
3 information; is that correct?

4 LDC [MR. HARRINGTON]: That's correct, Judge.

5 MJ [COL POHL]: Okay. Mr. Ryan.

6 TC [MR. RYAN]: Yes, sir.

7 MJ [COL POHL]: Now, of the seven documents and the video,
8 and -- what would be their purpose, or does it depend on the
9 testimony?

10 TC [MR. RYAN]: As we explained, Judge, back when we were
11 arguing about the immunity issue, the witness' bias is always
12 at issue. In this case, bias goes far beyond the garden
13 variety level. What we intend to show is: A, he has got
14 intense bias towards the accused, and specifically Binalshibh;
15 B, he has extreme bias against the United States of America;
16 and C, that bias extends to the point of intent and desire to
17 do great physical harm to citizens of the United States. So
18 bias is my first area.

19 Second, his participation as part of an organized
20 criminal group is a valid area of cross-examination,
21 independent even of bias, and that was in at least one case
22 that we cited in our immunity pleading.

23 Finally, Judge, in at least one area that's made

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1 mention of in the documents that we submitted for review,
2 Mr. Zubaydah talks about things he has done in the past that
3 go to his credibility, propensity for truthfulness, et cetera,
4 which we think is also -- which is absolutely fertile ground
5 for cross.

6 MJ [COL POHL]: And what's the purpose of putting them on
7 the overhead?

8 TC [MR. RYAN]: I want the witness to see them, I want
9 Your Honor to see them, and I want to move them into evidence
10 because the written word, in my opinion, is more powerful than
11 just the spoken word. And in the case of the video, the
12 spoken word is coming from him in a close-up video. By the
13 way, Judge, that was a video that lasted about 30 minutes.
14 What I am interested in playing is down to about five to be
15 entered into evidence in the military commission.

16 MJ [COL POHL]: The one you submitted was about six
17 minutes.

18 TC [MR. RYAN]: Six minutes. I stand corrected.

19 MJ [COL POHL]: I just want to make it clear that
20 Mr. Zubaydah is not on trial. He is not a defendant.

21 TC [MR. RYAN]: Yes, sir.

22 MJ [COL POHL]: You are absolutely right that you have the
23 option to inquire bias here, but I don't want to turn this

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1 into a mini-trial of Mr. Zubaydah and all his activity. So I
2 understand what you want to do, but you also understand where
3 we are at in this thing. I don't want to turn this into
4 something that it is not appropriate to be.

5 Also, as I talked to Mr. Harrington, and of course I
6 would say the same thing to you, that going too far afield
7 here raises the risk for a responsive answer that goes into
8 classified area. So I'm telling you, Mr. Ryan, I got all the
9 stuff you put in.

10 TC [MR. RYAN]: Yeah.

11 MJ [COL POHL]: That doesn't necessarily mean I am going
12 to permit everything to come into that, because again, I don't
13 want this to turn into a United States v. Al Zubaydah [sic]
14 case. That's not the issue. Bias is a perfectly appropriate
15 thing and if you want to introduce evidence of bias other than
16 through the witness, I know how the rule reads, but I just
17 want you to tread cautiously on it to make sure we don't ----

18 TC [MR. RYAN]: I think I well understand the commission's
19 thinking. Obviously we have been through the testimony of
20 Binalshibh and Gouled, so I know where Your Honor has
21 cautioned us, restricted us. I have tried to do that already
22 in the sense that the pages you have up there are part of
23 many, many more, and I have cut it down to about six, six

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1 little -- six or seven small snippets that I want to ask him
2 about, the kind of cream of the crop, the greatest hits. And
3 as I said, as to the video, I have cut that down to a few
4 minutes as well. I believe I have been judicious in terms of
5 what I want to go after. I understand Your Honor's caution
6 and I will do my best to live by that.

7 MJ [COL POHL]: Okay.

8 LDC [MR. HARRINGTON]: Judge, may I be heard on that?

9 MJ [COL POHL]: Sure, Mr. Harrington. That's kind of why
10 I wanted to discuss it now before we get into it.

11 LDC [MR. HARRINGTON]: Judge, I think it's helpful if I
12 preview some of the objections that I would have. First of
13 all, if Mr. Al Zubaydah [sic] admits the things that Mr. Ryan
14 wants to bring out, there is no need to cross-examine him.
15 The court can make whatever conclusion it makes.

16 MJ [COL POHL]: No, no, if he admits it during
17 cross-examination.

18 LDC [MR. HARRINGTON]: On direct examination.

19 MJ [COL POHL]: On direct examination.

20 LDC [MR. HARRINGTON]: If he admits that he is biased in
21 favor of my client, that doesn't mean you can't consider his
22 testimony, it just means that it's a factor that you consider
23 with it. Suppose he admits the things Mr. Ryan wants to go

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1 into; that doesn't open the door to him, it's not a
2 contradiction to anything he testifies to.

3 MJ [COL POHL]: I understand your position.

4 LDC [MR. HARRINGTON]: Lastly, on cross-examination
5 normally you wouldn't be able to submit videos into evidence
6 or anything else like that. That's not what the purpose of
7 cross-examination is, nor the public display of them. I mean,
8 Mr. Ryan clearly wants to turn this into a trial of Mr. Abu
9 Zubaydah. I don't think there is any question about that.

10 Then lastly, Judge, I would ask that I be given a
11 copy of whatever it is he is going to present. I asked him
12 the other day and he gave me the typical federal prosecutor's
13 response, you have got it in discovery. Well, I got a lot of
14 things in discovery. And he said there is a few snippets of
15 what it is, and it would certainly be helpful if I got a copy
16 before two minutes before the testimony takes place.

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

18 Mr. Ryan, anything further?

19 TC [MR. RYAN]: No, sir.

20 MJ [COL POHL]: Mr. Ryan, I want you to give him a copy of
21 everything -- of what you submitted to the court.

22 TC [MR. RYAN]: Understood, Judge. And as long as we are
23 giving the typical federal prosecutor response, it is true

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1 that I turned it over in discovery. It is there. He has got
2 it.

3 MJ [COL POHL]: I know it is there, but just give him more
4 specificity.

5 TC [MR. RYAN]: Yes, sir.

6 MJ [COL POHL]: Okay.

7 LDC [MR. RUIZ]: Judge.

8 MJ [COL POHL]: Mr. Ruiz.

9 LDC [MR. RUIZ]: If you are ready to move on, I have some
10 information for you.

11 MJ [COL POHL]: I am ready to move on.

12 LDC [MR. RUIZ]: Judge, this is just more specific
13 information on the question you asked me earlier.

14 MJ [COL POHL]: Thank you.

15 LDC [MR. RUIZ]: On 22 December 2015, we submitted 8,002
16 pages for classification review. On 14 March 2016, 314 pages.

17 MJ [COL POHL]: Okay.

18 LDC [MR. RUIZ]: On 28 April 2016, we submitted 9,600
19 pages.

20 MJ [COL POHL]: Okay.

21 TC [MR. RYAN]: And then on 21 October 2016, we submitted
22 1,110 pages.

23 MJ [COL POHL]: 1,110?

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1 LDC [MR. RUIZ]: Right. And we have not received any
2 reply on any of those submissions.

3 MJ [COL POHL]: Any status reply or anything like that?

4 LDC [MR. RUIZ]: The status, when we have inquired, which
5 has been periodically, the reply has been "it's ongoing."
6 That's the status, but nothing more specific than that.

7 MJ [COL POHL]: So approximately almost 19,000 pages, plus
8 or minus?

9 LDC [MR. RUIZ]: Yes. That's accurate.

10 MJ [COL POHL]: Thank you.

11 LDC [MR. RUIZ]: One other matter. You asked in regards
12 to AE 442, that motion, we were having some difficulties
13 getting the supplement filed. We filed it maybe 15 minutes
14 prior to coming into court. I have talked to Major Dykstra.
15 I understand he has not had enough time to review it. And we
16 are amenable to, of course, allowing the prosecution to have
17 enough time to review it and be able to answer that.

18 So in accordance with your scheduling, we are willing
19 to address that tomorrow or the day after or Friday. The
20 prosecution can be heard on that, but I think given the
21 circumstances, it's fair.

22 MJ [COL POHL]: No, my thinking would be it would be
23 Friday makes the most sense. I don't think Mr. Al Zubaydah

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1 will take all day.

2 LDC [MR. RUIZ]: Very well.

3 MJ [COL POHL]: I hope not, or if we can get to it today
4 we will see, but -- okay. How about 444 and 375?

5 LDC [MR. RUIZ]: We are ready to proceed on both of those.

6 MJ [COL POHL]: Trial Counsel, are you ready to proceed on
7 both of those?

8 TC [MR. SWANN]: Yes, sir.

9 MJ [COL POHL]: What's the status of 494?

10 TC [MR. RYAN]: Ready to be argued, sir.

11 MJ [COL POHL]: Okay. Okay. Let's do 494. Mr. Perry.

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

13 MJ [COL POHL]: Good afternoon, Mr. Perry.

14 DC [MR. PERRY]: This motion to compel, the genesis of
15 it -- I hope I am not getting the cold that everybody else is,
16 but it seems that way.

17 The genesis of this motion to compel, Your Honor, is
18 the 28 pages of the Joint Committee -- the joint congressional
19 inquiry into intelligence committee activities before and
20 after the terrorist attacks of September 11, 2001. They
21 released a report in December of 2002. After then it was
22 allowed to get a classification review. In the middle of 2003
23 then the entire chapter was completely redacted, and this

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1 became the mythical -- captured the public attention because
2 out of that joint committee report. This was the one chapter
3 that just had complete redactions.

4 Fast forward to our case. We submitted a discovery
5 request for an unredacted copy of those 28 pages, that chapter
6 4, because the subject matter of that chapter -- and now we
7 can get into it because parts of it has now been declassified
8 and unredacted -- is the involvement of Saudi Arabia and other
9 intelligence officers and officials in the support and --
10 logistical and financial support of the 19 September 11
11 hijackers.

12 So this obviously captured a lot of attention. And
13 for the longest time, nobody knew exactly what the content of
14 these pages were. But then once that the Obama Administration
15 released a second version of it, and this is after our
16 discovery request -- our discovery request is on 18 April 2016
17 where we are asking for a complete, unredacted copy of the 28
18 pages, and all source documents from those 28 pages.

19 And we know that there is a lot of source documents
20 behind these 28 pages because during the interim there was
21 FOIA litigation about this. And in the FOIA litigation, some
22 80,000 documents were provided to the court in camera by the
23 FBI. That's reported in our reply in 494E. So there is a lot

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1 of documents that go into what became the 28 pages. The 28
2 pages are a summary of the investigations of FBI agents and
3 that were also based on CIA memoranda and a lot of different
4 information that was distilled into 28 pages.

5 So there is a lot that we are asking for beyond the
6 28 pages. But on 3 May 2016, the government responds. The
7 prosecution says we are aware of it, we are looking into it,
8 we are going to determine whether anything is discoverable
9 based on a 505 calculation and we will get back to you.

10 Well, a couple of months later, on 15 July 2016, the
11 Obama Administration sends a declassified version of the 28
12 pages to Congress. So now we have a new version that is not
13 fully redacted and it was posted on the House Intelligence
14 Committee's website that day. So the unredacted portions
15 finally tell the public at large, and counsel now, what
16 exactly is contained in there without obviously telling us
17 what's really in there. It just gives us a sketch; it gives
18 us an idea.

19 And of course the big -- the big lead in this news
20 article that would come out is that they allege -- or they at
21 least provide information that would lead one to conduct
22 further inquiry into assistance by the Saudi government,
23 including two Saudi intelligence officers, and even members of

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1 the Saudi royal family providing large sums of money, fake
2 passports and other information to people in the United States
3 that had verifiable, documented contact with 19 -- with
4 members that were of the 19 hijackers.

5 So in light of that, in light of that declassified 28
6 pages, we now know what the subject matter is exactly, what
7 the scope of the investigation was by the FBI right after 9/11
8 into these individuals. But of course we don't know exactly
9 who these individuals are or what the follow-up was of any of
10 that investigation, because we have a narrative. The
11 prosecution and the Government writ large, big G, has a
12 narrative that these 19 hijackers are part of a stateless
13 organization, terrorist organization that orchestrated
14 largely, without any assistance by any state, attacks on 9/11.

15 Any information that would go against that narrative
16 obviously is not something that they are terribly interested
17 in. So instead of a 505 process, instead of the prosecution
18 going through a 505 process to determine what relevant and
19 necessary information, according to them, we should get out of
20 the 28 pages and its source documents, we get a response
21 ultimately from the government, such as -- may I have the
22 document camera? This is from 494B, page 8.

23 MJ [COL POHL]: Go ahead. You can put it on the overhead.

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1 DC [MR. PERRY]: At the end of the day, the prosecution
2 says the defense has already been provided the relevant
3 information. And the prosecution has gone to an FBI case
4 agent who has reviewed the 28 pages in its unredacted form and
5 has concluded that nothing in the FBI criminal investigation
6 indicates that any of the incidents mentioned in the 28 pages
7 actually occurred and that the averments in the 28 pages are
8 either otherwise unprovable or would require the proving of a
9 negative.

10 So we will step back and take that in for a moment.
11 The prosecution, the government, is saying we asked the FBI
12 case agent to look into this, for the FBI case agent to review
13 the 28 pages. And the FBI case agent said none of this is
14 provable, none of this happened, nothing to see here, instead
15 of what should occur, which is that the prosecution review the
16 28 pages, the prosecution review the underlying documents, and
17 the prosecution determine what is discoverable.

18 This is not something that they can delegate,
19 Your Honor. They can't just go to an FBI case agent and say
20 tell me what you think, and if the FBI case agent says I don't
21 think there is anything there, that's the end of the story. I
22 mean, if that were the case, every time we had a case where
23 there would be people giving multiple versions of an event,

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1 the FBI would just pick and choose which one they believe and
2 wouldn't tell the defense about any of the other versions
3 because they didn't believe those guys.

4 Now, Judge Friedman in the District of Columbia,
5 United States District Court for the District of Columbia,
6 often characterizes the government and the defense having --
7 lacking a common understanding of what Brady means; that they
8 are two ships passing in the night and they lack a common
9 understanding of what Brady is.

10 This is a situation where their ship isn't even in
11 the ocean. They are not even remotely interested in providing
12 what Brady requires. And what Brady requires in this instance
13 is a wide net. It's the wide net that is whatever is material
14 and favorable to the defense, both to guilt and innocence
15 and/or sentencing, that there are individuals that are
16 directly involved in logistics and financial support of the
17 attacks on 9/11 that were investigated and documented and
18 verified by FBI agents. That is material and favorable to the
19 defense if that shows that someone else is potentially behind
20 this, and it also goes into relative culpability.

21 Mr. Trivett yesterday said something to the effect of
22 these five individuals here are the most legally responsible
23 for 9/11. Based on this investigation, based on these leads

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1 that were either not followed up or were purposefully
2 dead-ended because it didn't fit the narrative, that's not
3 necessarily so, and we are entitled to explore that.

4 Maybe ultimately at the end of the day we come to the
5 same conclusion as that FBI case agent; there is nothing to
6 see here. But based on the information that we do now have
7 and the 28 pages, I would suspect that's not going to be the
8 case.

9 Now, let's just take a look at some of those pages.
10 This is Attachment D to 494.

11 MJ [COL POHL]: Go ahead. You may publish it.

12 DC [MR. PERRY]: All right. Let's just start with the
13 finding. While in the United States, some of the September 11
14 hijackers were in contact with and received support or
15 assistance from individuals who may be connected to the Saudi
16 government. There is information, primarily from FBI sources,
17 that at least two of these individuals were alleged by some to
18 be Saudi intelligence officers. The joint inquiry's review
19 confirmed that the intelligence community also has
20 information, much of which has yet to be independently
21 verified, indicating that individuals associated with the
22 Saudi government in the United States may have other ties to
23 al Qaeda and other terrorist groups. That's how the 28 pages

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1 begins.

2 When we go into the actual documents, the underlying
3 documents that formed what became the 28 pages, we see a
4 glimpse of what is out there that could be discoverable and we
5 submit is discoverable. We see -- this is on page 419 of the
6 28 pages. We see memoranda. The committee is particularly
7 concerned about the serious nature of allegations contained in
8 the CIA memorandum found by the joint inquiry staff in the
9 files of the FBI San Diego Field Office.

10 All right. So we have an underlying document here.
11 We have a CIA memorandum that was provided to the joint
12 inquiry, right, that was also in the files of the FBI. So
13 there is FBI potentially 302s that were generated as a result
14 of this CIA memorandum. So we have multiple documents here,
15 but for sure one.

16 That memorandum, which discusses alleged financial
17 connections between the September 11 hijackers, Saudi
18 government officials, and members of the Saudi royal family,
19 was drafted by, CIA officer redacted, while relying primarily
20 on information from FBI files. So this is an instance where
21 the government again, talking to their FBI case agent, they
22 are getting a response from the FBI case agent, there is
23 nothing to see here; and if there is something there, we don't

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1 believe it or I don't believe it. They are saying case agent
2 singular, not a group of FBI agents, even though we know there
3 is a large group of FBI agents that were involved in this
4 because that's also on page 1.

5 They developed a task force that looked into this,
6 because everyone obviously was concerned how did this happen,
7 what kind of intelligence ties do any of these individuals
8 that were involved in the hijacking have.

9 Then obviously it came to a certain point and it just
10 went to a dead end. Now, that dead end could be because there
11 is nothing there, but we would submit it's because it doesn't
12 fit the government's narrative that they have put forward.

13 MJ [COL POHL]: How many redactions are there in the most
14 recent version?

15 DC [MR. PERRY]: Every page has redactions.

16 MJ [COL POHL]: Other than CIA officers' names, what are
17 the other redactions?

18 DC [MR. PERRY]: They redact the squad, the squad of FBI
19 agents from the FBI's Washington Field Office. This is
20 page 415 of the 28 pages.

21 MJ [COL POHL]: Okay. Just to be clear, were these given
22 to the court security officer before you put them up?

23 DC [MR. PERRY]: They are part of the Attachment D.

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1 MJ [COL POHL]: I didn't ask you that.

2 DC [MR. PERRY]: It's public -- yes, it went through the
3 normal review.

4 MJ [COL POHL]: I didn't ask you that. I said did you
5 give the court security officer before you put them on the
6 overhead?

7 DC [MR. PERRY]: No, because in the normal course if it's
8 a filing and it goes through security review and it is
9 releasable to all, then -- I have always looked at that that's
10 fine. But if there is something wrong with that, I can stop.

11 MJ [COL POHL]: One moment. The rule requires that
12 anything published goes through the court security officer. I
13 am not saying -- I apply it to everybody else, I will apply it
14 to you. You can argue from it, you just can't publish it.

15 DC [MR. PERRY]: I understand. I think Your Honor,
16 Your Honor has a copy ----

17 MJ [COL POHL]: It's in the pleading. I got it.

18 DC [MR. PERRY]: You can follow along.

19 MJ [COL POHL]: Just to make sure, we do that to both
20 sides in an abundance of caution, because once it is
21 published, if a mistake was done in the first classification
22 review, as we have in the past, we have created a problem that
23 can't be unrung by simply a 40-second delay. Go on with your

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1 argument, Mr. Perry.

2 DC [MR. PERRY]: In each instance of those redactions as
3 you read through them on Attachment D, you will see they point
4 to documents, memoranda, leads that, if taken or if provided
5 to the defense, would provide favorable evidence that could be
6 used both on the guilt-innocence phase or potentially -- or to
7 mitigate sentence. Because at the end of the day, the
8 government is alleging that Mr. Bin'Attash, and all five of
9 the codefendants, had such critical roles in the al Qaeda
10 organization that they are responsible and should be held
11 accountable for the attacks on 9/11 and should be put to
12 death.

13 Now, if that information, these leads, these
14 individuals, this memoranda provides information that
15 identifies other individuals more responsible than
16 Mr. Bin'Attash, and provides information that Mr. Bin'Attash
17 is not found on any of these documents, then that is material
18 and helpful to Mr. Bin'Attash's defense.

19 On the issue of mitigation, if we can show that other
20 individuals were substantially more culpable, more involved,
21 more crucial to the planning and execution of the attacks on
22 9/11, then that goes to mitigation of the sentence. All we
23 need to do is convince one individual to not vote for death,

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1 and that could be enough to convince one individual that
2 Mr. Bin'Attash should not be executed for his involvement in
3 this case if he is found guilty.

4 The government has the burden and the duty to provide
5 this. They can't simply go to their FBI case agent and get
6 this response. So we ask at a minimum, Your Honor, you do
7 similarly to what you did with the SSCI report: You order the
8 government to provide you an unredacted copy. They say they
9 can't do that because it is a congressional document. But for
10 the same reason that they couldn't do the SSCI report, it's
11 the same situation here. This is a document that has passed
12 back and forth between Congress and the Executive Branch
13 several times. The Obama Administration just recently did a
14 classification review of the document and provided a redacted
15 but not fully redacted portion for Congress to publish.

16 MJ [COL POHL]: Does the fact that the Executive Branch
17 does a classification review make it an Executive Branch
18 document?

19 DC [MR. PERRY]: No, but they can tell you that they have
20 a copy of it. I think it would be crazy to believe that ----

21 MJ [COL POHL]: To make it clear, the SSCI, I simply said
22 preserve the copy.

23 DC [MR. PERRY]: Right.

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1 MJ [COL POHL]: But in that case we had a letter from
2 Congress sending it to DoD, among other agencies.

3 DC [MR. PERRY]: Right.

4 MJ [COL POHL]: Is there any copy outside of Congress in
5 this that you are aware of?

6 DC [MR. PERRY]: We don't have a letter from Congress
7 saying Department of Defense or Department of Justice, keep a
8 copy of this, no.

9 MJ [COL POHL]: Okay.

10 DC [MR. PERRY]: But if the Obama Administration in the
11 summer of 2016 is reviewing the 28 pages and then making a new
12 version of it by -- instead of making it fully redacted but
13 making it substantially redacted, then they have a copy that
14 then they send to Congress for Congress to publish.

15 MJ [COL POHL]: Doesn't the Executive Branch -- I think
16 maybe I just misunderstood. You are conflating two concepts.
17 Doesn't the Executive Branch do the review even if it is a
18 legislative branch document?

19 DC [MR. PERRY]: Yes, of course.

20 MJ [COL POHL]: So who else would do the declassification
21 redactions except the Executive Branch?

22 DC [MR. PERRY]: No one else.

23 MJ [COL POHL]: You seem to say that makes it an Executive

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1 Branch document?

2 DC [MR. PERRY]: I guess what I am trying to tell

3 Your Honor is that if the government comes up here next and
4 says they can't provide this because it is a congressional
5 document ----

6 MJ [COL POHL]: That's what they say in their pleading.

7 DC [MR. PERRY]: Right. That doesn't necessarily mean
8 that the Executive Branch doesn't have access to a copy of it.
9 All right?

10 MJ [COL POHL]: No, I understand what you are saying,
11 Mr. Perry.

12 DC [MR. PERRY]: If they have access ----

13 MJ [COL POHL]: Apparently the FBI has access to it if
14 they can do a review of it, right?

15 DC [MR. PERRY]: Exactly. If an FBI case agent is taking
16 a look at the unredacted copy, they are sitting somewhere in
17 an Executive Branch building, right?

18 MJ [COL POHL]: We will see what the government has to say
19 about that.

20 DC [MR. PERRY]: We'll see. At a minimum I think
21 Your Honor can ask them to preserve a copy. That's what you
22 ultimately ordered in the SSCI report, that DoD not destroy
23 its copy.

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1 And then we can litigate about whether it should be
2 provided to us. Ultimately, like, they are not even saying
3 they are going to do a 505 review at this point. So it's
4 going to be put in your hands, Your Honor, strictly based on
5 our argument are these redactions sufficient and are we
6 entitled to the underlying documents, because the underlying
7 documents is really, you know, that's the game.

8 The 28 pages tells a story. It's a summary of an
9 investigation that is based on, I would submit, tens, if not
10 hundreds of FBI 302s and CIA memoranda, that those could be
11 potentially put through a 505 process, right? Those 80,000
12 underlying documents that the FBI provided in the FOIA
13 litigation, that could be your judge's order, that before we
14 say absolutely nothing goes to the defense, let's actually put
15 the underlying documents through a 505(h) process.

16 If the government ultimately comes back and says you
17 know what, we want to assert the privilege, we don't want to
18 give them anything related to this investigation, that's fine.
19 But if they do that, then there is a remedy for that. Right?
20 And we can talk about that when the time comes. But to just
21 go to the case agent and say I don't buy it, there is nothing
22 there, that's not the process that this court should endorse.

23 If I could have one moment, Your Honor.

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1 MJ [COL POHL]: Sure.

2 DC [MR. PERRY]: And I'll just end on this, Your Honor,
3 it's something I have said several times before in motions to
4 compel, but I think it's worth repeating every time: All of
5 us sit here at this table or all the tables with TS/SCI/SAP
6 clearances, so there is no reason that they have to be put
7 through the 505 process at all, really. The actual documents
8 could be provided to the defense. Obviously under the
9 protective order and our MoU and the law and the rules in
10 place, we can't provide them to our client, we can't
11 disseminate them, we have to properly mark them, we have to
12 properly store them. But there is no reason that we don't
13 have a need to know these things, I would submit, because they
14 go directly to theories of defense that are obvious.

15 But here we are. Thank you, Your Honor.

16 MJ [COL POHL]: Thank you, Mr. Perry. Any other defense
17 counsel want to be heard on this?

18 DC [MS. PRADHAN]: Yes, Your Honor.

19 MJ [COL POHL]: Ms. Pradhan.

20 DC [MS. PRADHAN]: Good afternoon, Your Honor. With
21 regards to AE 494, as we noted in our brief for
22 Mr. al Baluchi, which is AE 494A, Mr. al Baluchi at the
23 outset, we should note, joins some but not all of

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1 Mr. Bin'Attash's arguments in AE 494.

2 Mr. al Baluchi does disclaim any intent to assert
3 belligerent privilege. He is and has always been a civilian.
4 And Mr. al Baluchi also does not intend to assert that the
5 Saudi government was involved in the planning and
6 implementation of the September 11 attack.

7 However, Your Honor, we do have a great interest in
8 the unredacted 28 pages. And the reason for that is regarding
9 our theory of hostilities. In AE 488/502, Mr. Connell argued
10 our procedural posture with regards to the issue of
11 hostilities. And I told you this morning that we could have
12 that argument another day. And so what this is is really just
13 to go through what that argument might look like when we
14 eventually get to it.

15 The government continues to maintain the position
16 that there were hostilities in existence on September 11,
17 which is of course their prerogative, but which Mr. al Baluchi
18 has argued that they have to prove, both with regards to
19 personal jurisdiction now and with regard to the legal
20 standards for hostilities later on.

21 So AE 494, of course, is a motion to compel the 28
22 pages that could be significant for that subsequent
23 hostilities discussion. With your permission, Your Honor, I

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1 would like to give you a little bit of background as to the
2 standard that we are looking at in hostilities. There are two
3 major factors in determining whether a state of hostilities
4 was in existence on September 11, 2001; the organization of
5 the parties and the intensity of the conflict.

6 And we heard, of course, Major Wilkinson talk a
7 little bit about this yesterday with regards to AE 488 and
8 502. And this was the standard laid out in the Yugoslav
9 tribunal of 1997, one that Mr. al Baluchi explains in great
10 detail in AE 494D.

11 The purpose of that very detailed explanation in 494D
12 was to illustrate exactly how much information the government
13 will need to present in order to prove that hostilities
14 existed on September 11, which would then confer jurisdiction
15 on this military commission and how much information the
16 defense will need to respond to the government's argument.

17 MJ [COL POHL]: How is that related to the 28 pages?

18 DC [MS. PRADHAN]: Well, Your Honor, if we look past the
19 Tadic standard, the 28 pages contained redactions
20 demonstrating that the attacks charged did not occur in the
21 context of and associated with hostilities; rather, the
22 redacted information we believe supports Mr. al Baluchi's
23 defense that prior to the 7th of October 2001, the United

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1 States actually treated al Qaeda as a law enforcement, a
2 diplomatic and intelligence problem rather than a military
3 problem, rather than a state of war.

4 The request -- the information that we have requested
5 we believe will support Mr. al Baluchi's defense that prior to
6 October 7, and certainly prior to September 11, the executive
7 did not consider the United States to be at war with al Qaeda.
8 And I do have a couple of examples that we have submitted in
9 our brief from the redacted 28 pages. Your Honor, I was going
10 to use the document camera but I will refrain.

11 But one of them, for example, starts with the line:
12 Prior to September 11, the FBI apparently did not focus
13 investigative, and there is a long line of redaction, Saudi
14 nationals to the United States due to Saudi Arabia's status as
15 an American ally, and there are several lengthy redactions. A
16 representative of the FBI's blank testified in open -- in
17 closed hearings that prior to September 11, the FBI received
18 no reporting from any member of the intelligence community
19 that there is a blank presence in the United States.

20 Now, the redacted portions of that paragraph
21 apparently pertain to the -- we don't know for sure, but
22 apparently pertain to the FBI's characterization of al Qaeda
23 and its alleged agents. It's not clear whether underneath the

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1 redaction is reference to any other agency or department, such
2 as the Department of Defense that one would expect to have
3 been involved in monitoring al Qaeda if we were indeed in a
4 state of war prior to September 11 as part of the armed
5 conflict that the government claims.

6 MJ [COL POHL]: Does this -- and maybe I misunderstood
7 Mr. Perry's argument, but I thought the 28 pages deals with
8 alleged Saudi involvement in 9/11. How does that ----

9 DC [MS. PRADHAN]: Yes, Your Honor.

10 MJ [COL POHL]: ---- you are going off a kind of different
11 tack here altogether, saying if Saudi Arabia was somehow
12 involved in the 9/11 attacks that shows there was no activity
13 with al Qaeda prior to, I am not sure when, because you
14 indicated 7 October 2011 [sic] is the triggering date.

15 DC [MS. PRADHAN]: Yes, Your Honor. And let me first say
16 that the date of September, excuse me, of the 7th of October
17 2001 is of course the date that the United States entered into
18 hostilities against Afghanistan, which of course did not
19 involve Saudi Arabia. Now, the importance of the 28 pages
20 was, of course, it would somehow show the importance of Saudi
21 Arabia, the state, being involved in September 11.

22 Now, what it does show is the potential involvement
23 of Saudi nationals. And one hypothesis supporting

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1 Mr. al Baluchi's defense is that as part of its intelligence
2 strategy, the United States sought to enlist -- or, excuse me,
3 sought to assist Saudi intelligence assets. The 28 pages talk
4 about -- we believe, talk about cooperation with Saudi
5 intelligence assets, possibly including, and I am going to
6 throw out a couple of names here, Omar al-Bayoumi, Osama
7 Bassnan to recruit hijackers, and alleged co-conspirators
8 Khalid al-Mihdhar and Nawaf al-Hazmi as human intelligence
9 sources. And this goes into -- if I may refer to the overt
10 acts, overt acts 20 to 24 describe the so-called al Qaeda
11 summit in Kuala Lumpur, Malaysia, and the subsequent travel of
12 Mr. Al-Hazmi and Mr. al-Mihdhar to San Diego where they met
13 Mr. Al-Bayoumi and Mr. Bassnan, who were Saudi intelligence
14 assets, I believe.

15 The dispute over the reported CIA refusal to disclose
16 information about Mr. al-Mihdhar, Mr. al-Hazmi and allegedly
17 Mr. Bin'Attash to the FBI is well known. Assuming that the
18 CIA did contemporary -- excuse me, contemporaneously withhold
19 information from the FBI about overt acts 20 to 24, a
20 reasonable explanation is that the CIA did not want the FBI to
21 arrest Mr. al-Mihdhar and Mr. al-Hazmi because the CIA hoped
22 they would become intelligence assets.

23 Information under the redactions in the 28 pages

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1 would assist Mr. al Baluchi in substantiating this hypothesis
2 and it's a hypothesis with significant weight behind it,
3 Your Honor, in support of the hostilities defense. Seven of
4 the 28 pages, a quarter of the pages, focus on the possible
5 intelligence connections of Mr. al-Bayoumi and Mr. Bassnan and
6 the 28 pages cover over 20 -- excuse me, contain over 20
7 redactions related to -- specifically related to
8 Mr. Al-Bayoumi and Mr. Bassnan, which probably cover
9 information about their possible intelligence connections.

10 If I may briefly address the government's response
11 that the document is still a congressional document, this is
12 something that Mr. al Baluchi has actually addressed
13 previously with regards to AE 286, and I believe it came up
14 during oral argument in February 2016 and then was
15 subsequently briefed by Mr. Connell in the AAA third
16 supplement to that motion. And our response there is the same
17 as our response now, which is that the government still has a
18 responsibility to produce discovery required by the rules of
19 military commissions and the due process clause, regardless of
20 its origin.

21 So at the same time, Congress has a privilege against
22 producing its documents in response to a judicial demand. But
23 as with the national security privilege, if the government

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1 asserts -- excuse me, if Congress asserts that privilege and
2 refuses to produce responsive discovery, then the government
3 must absorb or accept the corresponding sanction. And again
4 we have briefed this quite -- I think fairly extensively in
5 the third supplement to AE 286. But in a nutshell, under both
6 Brady and Rule 701(c), the government is required to produce
7 in its possession, as Your Honor is well aware, in its
8 possession, custody and control, anything that's material to
9 the preparation of defense.

10 Congress does have the authority, in response to a
11 demand from the executive, or in response to a subpoena, to
12 assert legislative privilege and keep its records secret.

13 Now, the issue which Mr. Perry was talking about is
14 that there is no indication at this point that Congress has
15 attempted to assert that privilege; there is no indication
16 that the government has asked them whether or not they would
17 be willing to turn over the 28 pages. We simply don't know.
18 We simply have been given -- we have simply been given a
19 blanket refusal.

20 So if a request is made, and at that point Congress
21 chooses to assert that privilege, then an appropriate sanction
22 would apply. And again there is case law again in our third
23 supplement, our third supplement to AE 286 regarding that, the

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1 assertion of that privilege and what a corresponding sanction
2 would look like.

3 But the legislative privilege rule, Your Honor,
4 mirrors the national security privilege rule, in which it is
5 considered unconscionable to allow the government to undertake
6 prosecution and then invoke its governmental privileges to
7 deprive the defendants of anything that might be material to
8 their defenses.

9 So unless you have further questions, Your Honor, I
10 will rest here.

11 MJ [COL POHL]: I don't. Thank you.

12 DC [MS. PRADHAN]: Thank you.

13 MJ [COL POHL]: Mr. Nevin, he is closer. You will get
14 your chance, Major Wilkinson. Mr. Nevin.

15 LDC [MR. NEVIN]: And, Your Honor, I just wanted to direct
16 your attention to the relevance issue that was raised by that.
17 I believe Mr. Perry put a portion of the government's pleading
18 on the presenter, and that included a reference to an FBI
19 agent looking at some of these allegations or materials or
20 references that were contained under redactions and concluding
21 that none of those things could be proved and, therefore, it
22 wasn't relevant and didn't need to be provided.

23 And it's another instance, from our standpoint, of

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1 the parties having different ideas of relevance, which I ask
2 you to direct your authority to, because the fact that the
3 government thought to pursue leads which turned out not to be
4 provable, if that's what is referred to under those
5 redactions, is extremely relevant to the preparation of our
6 case, because it probably -- what it refers to is, is
7 investigations that were undertaken as a result of information
8 provided under torture by Mr. Mohammad, and perhaps by others,
9 and that has considerable significance, depending upon how the
10 evidence develops.

11 But even if we don't see or if the military
12 commission doesn't entertain an argument that the torture
13 was -- actually produced actionable information, still it will
14 reveal something -- if that's what this material is, it will
15 reveal something very important about the effect that torture
16 had and the reason that the existence and the extent of the
17 torture of Mr. Mohammad is a mitigating factor and argues
18 against -- argues in favor of a more lenient sentence rather
19 than a more serious, more severe sentence.

20 So I just wanted to speak to the proposition that
21 what is stated there as a grounds for treating it as
22 nondiscoverable is actually a clear indication of its being in
23 fact discoverable.

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1 And that's my argument. Thank you.

2 MJ [COL POHL]: Major Wilkinson.

3 Mr. Nevin, again, I don't have the dates in front of
4 me. I have this being completed in December of 2002, and I
5 don't know when the -- I don't have the apprehension date of
6 any of the accused, but just to put it in context, I don't
7 know whether that predates his apprehension or not.

8 LDC [MR. NEVIN]: It does. It does. It does predate
9 Mr. Mohammad's apprehension, and so it's not going to be
10 relevant to that, but ----

11 MJ [COL POHL]: The other parts are, I get it ----

12 LDC [MR. NEVIN]: Exactly.

13 MJ [COL POHL]: ---- but again I am looking at it quickly,
14 I think it was complete in December of '02. So as far as that
15 part of it, it seems like it predates ----

16 LDC [MR. NEVIN]: I can't deny that, but I think the
17 principle is the same.

18 MJ [COL POHL]: I got it. Major Wilkinson.

19 DC [MAJ WILKINSON]: Yes, sir. I just want to say, I
20 mean, we don't begrudge this kind of discovery to anybody who
21 needs it. You should absolutely give all the parties whatever
22 discovery they need. But with respect to what Ms. Pradhan was
23 saying about 488/502, I just want it to be clear that we are

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1 maintaining our position that you have enough information to
2 rule for us on that issue and that we are not asking you to
3 delay a decision on those motions for the discovery that the
4 other teams need. Since they are not joined to it, it doesn't
5 prejudice them.

6 That was all, sir.

7 MJ [COL POHL]: Thank you. Mr. Harrington.

8 LDC [MR. HARRINGTON]: Nothing further, Judge.

9 MJ [COL POHL]: Trial Counsel?

10 TC [MR. RYAN]: Good afternoon, Your Honor.

11 MJ [COL POHL]: Good afternoon.

12 TC [MR. RYAN]: Your Honor, based on two comments -- or a
13 couple of comments from defense counsel, I think I would like
14 to hit those very quickly because I think it will help us
15 frame the argument somewhat.

16 First, Mr. Perry said the source documents are the
17 game, talking about the underlying information reports and so
18 on that were generated by investigative agencies; in this
19 case, the FBI. As to that, I completely agree.

20 Second is that acronym itself, the FBI. Mr. Perry,
21 in reading from the item he put on the overhead from the 28
22 pages, repeated it several times. In the two rather brief
23 paragraphs cited by the Ali team in their pleading, in which

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1 they point out to you why this is so important, the acronym
2 appears seven different times over the course of two small
3 paragraphs.

4 The point is that that's because they were the ones
5 doing the work. For the most part, this was an FBI
6 investigation. So the 28 pages, as it is so commonly referred
7 to now, coming from a congressional committee, is something of
8 a red herring, and I would like to address that to you right
9 now, sir.

10 First off, the chronology is important. As
11 Your Honor pointed out, it was in 2002 that this initial
12 report, that is, the House Permanent Select Committee on
13 Intelligence Issues issued its report on September 11 and the
14 intelligence community, and it included the famous 28 pages.

15 2002, very early in this chronology, the country had
16 suffered through a terrible episode, things were very fresh,
17 lots of people were running around looking under lots of
18 rocks, lots of people were saying many things, lots of people
19 were looking in lots of different places, many different
20 agencies.

21 At the time it was released, the committee itself
22 said, and I am quoting from our brief, it has made no final
23 determination as to the reliability or sufficiency of the

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1 information regarding these issues and that it was not the
2 task of this joint inquiry to conduct the kind of extensive
3 investigation that would be required to determine the true
4 significance of such alleged support to the hijackers, talking
5 about where financial or logistical support may have come
6 from. Now, that's back at the point when they released this
7 document.

8 Mr. Perry was talking about when further unredacted
9 or somewhat unredacted versions were released. Attachment C
10 of the government's pleading quotes Chairman Devin Nunes of
11 that same committee, but now, of course, 13 years or so down
12 the road. At the time he releases it he says, "However, it's
13 important to note that this section does not put forward
14 vetted conclusions, but rather unverified leads that were
15 later investigated, fully investigated, by the intelligence
16 community. Many of the intelligence community's findings were
17 included in the 9/11 Commission Report."

18 Following the issuance of the committee's initial
19 report back in '02, there was far more work to be done. The
20 whole country knew this. Certainly Congress knew this. So
21 Congress then directed the creation of the 9/11 Commission,
22 one of the more noteworthy bodies ever created by Congress in
23 its history. It was bipartisan in nature, Republicans,

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1 Democrats, and everything else.

2 Its job, and what it did do, was build on existing
3 investigations, including that of the joint committee,
4 including that which was put forward in the report we have
5 been referring to.

6 It conducted an extensive and in-depth investigation.
7 On many occasions, it was televised. Of particular note, it
8 had subpoena power.

9 Among the persons who were -- who testified in the
10 course of the investigation, include the President, the Vice
11 President, the Attorney General, the Secretary of State, the
12 National Security Advisor and the Director of Central
13 Intelligence. Also of great note, it had the full support of
14 the FBI. Agents from the bureau were tasked to aid the
15 commission and take care of all of its needs to make sure that
16 this became the true final word, to the greatest extent
17 possible, on 9/11.

18 The commission existed from November of 2002 through
19 August of 2004. It issued a public report that is still
20 available today, consisting of hundreds of pages and thousands
21 of footnotes.

22 As to the subject sought by the defense, the
23 commission, after this thorough investigation that the joint

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1 committee was hoping would happen, the commission concluded
2 that there was simply no competent evidence to support
3 concerns that had been raised by the joint committee. But as
4 a final failsafe, Congress directed the FBI to establish the
5 9/11 Commission review; in essence to do a double-check on the
6 work of the 9/11 Commission. The FBI, not only at that time
7 but on a continuing basis, has come to the same conclusion.

8 And now fast forward to this case and this
9 prosecutive body. The FBI is our major source of
10 investigative support. We work with agents every day, some of
11 whom literally started working on 9/11 while the towers were
12 still standing, although certainly mortally wounded. Some of
13 those agents worked on the 9/11 Commission as well and were
14 part of that investigation.

15 So now where are we and what are they asking for?
16 Judge, they want us to jump backward three steps and give over
17 unredacted portions of 28 pages of a legislative document
18 that, by the legislative committee's own admission, was
19 incomplete and preliminary.

20 In short, what it really boils down to in a basic law
21 enforcement sense is they want original suspicions or tips or
22 leads. But even more noteworthy, they want leads and
23 suspicions that were found to have no basis in evidence,

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1 evidence that simply did not support what they are saying it
2 supports.

3 The defense in one of its pleadings, I believe from
4 the Bin'Attash team, said it as follows: A review of the
5 redacted 28 pages makes clear that the United States
6 Government investigated numerous individuals of Saudi descent
7 and/or connection to the Saudi state for involvement in the
8 September 11 attacks.

9 Now, as far as that committee's report is concerned,
10 Judge, I must emphasize they were the concerns raised by the
11 committee. It was not the prosecution or its agents at that
12 time, having had the benefit of many years and very much
13 investigation down the road. It was a legislative committee
14 that gave way to a legislatively created commission with far
15 greater investigative powers that investigated fully, followed
16 up and concluded the opposite was true of the concerns that
17 were raised.

18 The key word in that language I cited to you just now
19 from the defense is the word "investigated." Such a broad
20 term, if applied throughout the United States Government, will
21 include many individuals and many groups. And when you think
22 about the crime that we are talking about, it is pretty
23 obvious as to how this would be the case. Think of how many

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1 things were involved, how many equities and concerns of the
2 United States Government were at stake.

3 Nineteen men from other countries gained access to
4 the United States. They lived among us. They even took
5 flying lessons. They took weapons on board U.S. commercial
6 air carriers. They hijacked four carriers in busy air
7 corridors in the United States by brutally killing the crews.
8 They crashed those planes into iconic buildings in major
9 cities.

10 As I said, there were a lot of obvious U.S. equities
11 at stake in that, but the biggest one of all is its people.
12 2,976 people were killed as a result of these attacks. Such
13 an event obviously mobilized the entire U.S. Government to one
14 extent or another. The U.S. Government kicked over a lot of
15 rocks, as I said before, but that doesn't make the rocks
16 discoverable. The law is clear that there is no right to
17 rummage through investigative files hoping to construct a
18 false narrative.

19 Mr. Perry said before in talking about this as to
20 what they wanted, maybe it's a dead end, but we submit it's
21 because it doesn't fit the government's narrative. Now, he
22 has no basis for saying that other than his own hope, and hope
23 is not discoverable under law.

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1 There has been something, Your Honor, of an intent to
2 expand greatly the government's discovery obligations that we
3 are seeing from discovery requests and often in motions to
4 compel. It's often boiled down to it's material because we
5 want it and we want it because it's material.

6 I would like to discuss one case very specifically to
7 draw a clear line in this instance, and I would ask the
8 commission to bear with me for a moment. The United States,
9 in the course of its briefing, cited one particular case,
10 among others, Coleman v. Calderon, a Ninth Circuit case
11 involving a murder. In that case a woman named Ms. Hill was
12 raped and strangled. The defendant, a man named Coleman, was
13 convicted. The basis of his conviction, according to the
14 Ninth Circuit, and I think this is valuable, was basically
15 down to three things: One was a palmprint of the defendant's
16 found on a windowsill next to the victim's, and this was on a
17 home where she lived at the time.

18 Second, the tests on blood and semen found on the
19 victim showed that the defendant was part of a group that
20 comprised approximately 8 percent of the population that was a
21 match to those samples found on the victim's body.

22 The third piece of evidence that convicted him.
23 Initially the defendant said to police that he had never been

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1 in that house, but then at trial he backtracked and said he
2 had been there a few days before the murder.

3 Now, I give you these details because although people
4 may agree or disagree as to whether it was a good case or not,
5 I don't think it can be said that it was an overwhelming case
6 in that sense.

7 Following conviction, the defendant, Coleman, made a
8 Brady claim that the prosecution should have turned over
9 information as to the investigation of other suspects. And I
10 would like to read now from the case itself.

11 The police investigated four other suspects: Number
12 one, Ms. Hill's current boyfriend; number two, a man who had
13 been bothering Hill and had served time for rape; number 3, a
14 man who had committed a rape and a kidnapping nearby where
15 Hill was killed; and four, a former boyfriend who had been
16 following Hill around and who frightened Hill because he was
17 so violent.

18 The police eliminated these suspects because their
19 fingerprints did not match. The police did not check the
20 suspect's blood type nor did they check the suspect's hair
21 against a hair fragment found on Hill's hand.

22 The success of Coleman's Brady claim depends on
23 whether the information about the other suspects was material.

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1 Coleman argues that had he been given the information, he
2 could have conducted a timely investigation which might have
3 uncovered witnesses who saw these other suspects bothering
4 Hill or being violent towards her.

5 And this is the court speaking: What is missing in
6 Coleman's argument is any evidence linking any of these other
7 suspects to the crime or any showing that disclosure of their
8 existence would have led to the discovery of admissible
9 evidence. The missing link compels the conclusion that the
10 information about the other suspects was not material.

11 I emphasize the words "could" and "might," because we
12 see them very often in discovery requests and I imagine
13 Your Honor sees them now in motions to compel.

14 "Could" and "might" lead to something is not the
15 standard for required discovery under Brady or under the rules
16 at issue.

17 MJ [COL POHL]: Mr. Ryan, just to maybe cut to the chase a
18 little bit, the defense has a specific discovery request for
19 28 pages, and there is apparently two separate positions the
20 government has taken, but the one I want to ask you about is
21 has a member of the prosecution reviewed these 28 pages?

22 TC [MR. RYAN]: No, sir. No, sir. These 28 pages, and
23 let me explain it, sir, this area, this subject is obviously

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1 one that has received a great deal of notoriety through the
2 years. It's one we have been well aware of.

3 Now, the agent that we sent to look is the most
4 knowledgeable agent in the case, as far as we are concerned,
5 and has done much of this investigation or been part of much
6 of this investigation. We know the general areas of what the
7 joint committee was saying by virtue of, among other things,
8 what has been released. What we sent the agent to make sure
9 of was anything else underneath was not so earth shattering or
10 different that we had missed something, and his report to us
11 was that we had not.

12 MJ [COL POHL]: How do you respond to Mr. Perry's argument
13 that that should be the role of a prosecutor and not an FBI
14 agent?

15 TC [MR. RYAN]: As a general rule, it often is and it
16 often is in our situation. But in certain cases -- the
17 prosecutive body is obviously a comprehensive thing. In this
18 particular case, based on the circumstances I have given you
19 and the facts, we are confident that ----

20 MJ [COL POHL]: The government again has taken two
21 positions in their pleading, one dealing with it being a
22 legislative record, and I will push that one to the side, but
23 the basic government position is this just is not material to

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1 the preparation of the defense?

2 TC [MR. RYAN]: That is correct, sir.

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

4 TC [MR. RYAN]: Coleman stands for the proposition,

5 Your Honor, that the prosecution has to turn over evidence or
6 something that would have led to admissible evidence.

7 Now, in that case, as you can see, Judge, there were
8 some issues there; there were some good things that a defense
9 would probably very much want to follow. But the court -- and
10 by the way, this is Ninth Circuit, who are never afraid to
11 hold the government responsible for Brady violations -- was
12 very clear in drawing the line. And I would submit, sir, that
13 that's important because, especially in this case, there are
14 an enormous number of roads that were traveled and an enormous
15 number of areas that might be fertile. As Mr. Perry said,
16 maybe it leads somewhere, maybe it doesn't, but that's our
17 call and it's up to us to make that determination, especially
18 in a case of this importance and this volume.

19 Now, they can investigate all they want. It's not
20 saying they can't find out or try to find out on their own.
21 If Mr. Bin'Attash was an agent of a foreign government, he can
22 sure tell them that. This is about where we can set limits.
23 And those limits justify us defining various steps in an

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1 investigative process, especially, Judge, in this case where
2 we are talking about a non-Executive Branch body that was in
3 fact a noninvestigative agency itself and was working on the
4 work of the FBI.

5 As another case cited by the government reads,
6 Downs v. Hoyt, Brady does not require a prosecutor to turn
7 over files reflecting leads and investigations where no
8 exonerating or impeaching evidence has turned up. We have
9 Chairman Nunes, we have the 9/11 Commission, we have the
10 continuing work of the FBI, and we have this prosecutive group
11 that says nothing turned up as a result of these concerns that
12 were stated in 2002.

13 As Your Honor just said, another portion of our
14 argument is the House committee report is, in fact, a
15 legislative document, still under their control. A big
16 distinction from the SSCI report was in SSCI the then chairman
17 sent it to the Executive Branch and said here it is for you to
18 work on, use, rely on, et cetera. That did not happen in this
19 case.

20 MJ [COL POHL]: Where did the FBI agent review the report?

21 TC [MR. RYAN]: Because he was part of the investigative
22 report, he was given access for the specific purpose of
23 reviewing the redactions, the unredacted form.

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1 MJ [COL POHL]: So that is a relatively recent review of
2 the document permitted by Congress?

3 TC [MR. RYAN]: That was the original document without the
4 redactions that have been released.

5 MJ [COL POHL]: What I am saying is the FBI -- the FBI
6 review that you are relying on that it's nondiscoverable was
7 conducted more recently ----

8 TC [MR. RYAN]: Yes, sir.

9 MJ [COL POHL]: ---- of the unredacted copy with the
10 permission of Congress.

11 TC [MR. RYAN]: Yes, sir.

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

13 TC [MR. RYAN]: Without, of course, turning it over and
14 saying do what you wish with it. It's still in their
15 possession.

16 There is no copy with the Executive Branch in this
17 case. Everything else aside, Your Honor, as stated in our
18 brief, the prosecution cannot unredact their document and
19 simply turn it over of our own volition. But we are aware,
20 and this is most important point, this goes back to the
21 documents of the game, we are aware of the full investigation
22 and can and will turn over information that is truly material
23 to the preparation of the defense.

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1 The last point, Your Honor, as to hostilities, we
2 don't dispute that we must turn over information -- and we
3 spent a good deal of time on this yesterday. The area of
4 hostilities we understand is a defense being raised certainly
5 by the Ali team, maybe others, and as they put it, it is our
6 burden to prove as well.

7 So we understand that evidence regarding hostilities
8 is a matter of concern. But the Joint Intelligence
9 Committee's report is not the vehicle for getting into the
10 area of hostilities. They weren't looking anywhere near that
11 particular subject back at that time. It was a preliminary
12 inquiry very early, ending in 2002, even before military
13 commissions. And once again, it was based on conclusions on
14 FBI work, which we do have access to.

15 At this time, as to hostilities, we have in our
16 possession several defense -- I'm sorry, discovery requests
17 into the specific area of hostilities. We are looking into
18 enormous amounts of information demanded by the defense from
19 sources that cut across the entire U.S. Government.

20 What we will provide will be the best source of the
21 information as to hostilities rather than concerns of a joint
22 committee; that even they concede were preliminary and not
23 based on complete information.

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1 Your Honor, subject to your questions.

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

3 TC [MR. RYAN]: Thank you, sir.

4 MJ [COL POHL]: Mr. Perry, anything further?

5 DC [MR. PERRY]: Your Honor, the Coleman case would be
6 helpful for Your Honor if it were a death case. When we are
7 dealing with capital cases, things are different with respect
8 to Brady. Because at the end of the day it's not just about
9 exoneration and impeachment of witnesses, it's about relative
10 culpability and whether that individual that has been found
11 guilty needs to be put to death. And if there is information
12 that there are others that are more culpable than
13 Mr. Bin'Attash, that is something that we are entitled to
14 explore and present to the panel, regardless of whether it
15 ultimately tips the scales as far as guilt or innocence.

16 And what we do know from the 28 pages, the redacted
17 form that we have now, and what we suspect are the underlying
18 documents, which the prosecution says was an FBI venture, they
19 were the ones in charge of it, there are 302s, there are a lot
20 of documents that verify and document other individuals that
21 provided logistical and financial support to some of the 19
22 hijackers.

23 MJ [COL POHL]: Does the report have footnotes to these

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1 documents?

2 DC [MR. PERRY]: Does the report -- do the 28 pages
3 have ----

4 MJ [COL POHL]: You said earlier it could be 80,000 pages.

5 DC [MR. PERRY]: It's basically based on the redaction.
6 You know they are referring to a particular document.

7 MJ [COL POHL]: Didn't you say earlier you thought there
8 could be as much as 80,000 pages?

9 DC [MR. PERRY]: That is what the FBI is reported to have
10 submitted in camera in the FOIA litigation. That doesn't mean
11 necessarily that that's it, but that is what they reportedly
12 sent to ----

13 MJ [COL POHL]: Your position is you have not gotten any
14 of those 80,000 pages?

15 DC [MR. PERRY]: Right. Now, the government has said in
16 their response that they have provided some information that
17 is potentially responsive to this. They have now said they
18 are going to do another review of potentially the underlying
19 documents and make some call about whether they are going to
20 provide ----

21 MJ [COL POHL]: Regardless of the 28 pages, the government
22 has the responsibility to provide you those documents,
23 correct?

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1 DC [MR. PERRY]: We are asking for those underlying
2 documents.

3 MJ [COL POHL]: No, no, what I am saying is, regardless of
4 the 28 pages, if there is ----

5 DC [MR. PERRY]: I see what you are saying.

6 MJ [COL POHL]: ---- if there is government material in
7 the source documents, the government has an independent
8 responsibility to provide those outside the 28 pages?

9 DC [MR. PERRY]: There could never have been a joint
10 inquiry and no 28 pages generated, but if there were FBI 302s
11 and memoranda discoverable based on Brady and the R.M.C. 701
12 and the rules of this proceeding, then we would be entitled to
13 have them anyway, yes.

14 MJ [COL POHL]: I understand.

15 DC [MR. PERRY]: Can I have a moment, Your Honor?

16 [Pause.]

17 DC [MR. PERRY]: And just to comment about Mr. Ryan's
18 assessment of why it should be sufficient to the court that
19 they talked to the most, in their words, reliable case agent
20 that was perhaps substantially if not principally involved in
21 this, and that's sufficient for Your Honor to determine that
22 this is not discoverable. Again, this is the same
23 organization, FBI, that is investigating and prosecuting this

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1 case, you know, these individuals.

2 So it would be as if we have a common, everyday bank
3 robbery, right? And we have three versions from three people
4 that are substantially the same, guy X did it, but we have a
5 fourth version that guy Y did it, or we have a fifth version
6 that guy X and Y with the help of Z did it and they are not
7 providing any of those other versions, they are just providing
8 guy X did it, because in their mind they don't believe the
9 other versions.

10 And when I say they, I mean this particular case
11 agent, because that's what they said. They talked with this
12 particular case agent. This particular case agent reviewed
13 the unredacted 28 pages. It's uncertain whether this
14 particular agent then reviewed all the underlying documents.
15 Maybe they did. That's a lot of documents, but maybe they
16 did. And in their personal opinion it's not true; therefore,
17 we don't need to give it to the defense. That's not how this
18 works. We are entitled to get those other versions regardless
19 of whether that case agent thinks it's legit or not or thinks
20 it's happened or not.

21 Thank you.

22 MJ [COL POHL]: Ms. Pradhan?

23 DC [MS. PRADHAN]: Briefly, if I may.

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1 MJ [COL POHL]: Sure.

2 DC [MS. PRADHAN]: Your Honor, I won't belabor the points
3 that we have already made regarding Mr. al Baluchi's approach
4 to these 28 pages, but there are a couple of things that I
5 don't quite understand from what Mr. Ryan presented. And the
6 first is just that, if I am clear, the government has not seen
7 the 28 pages, but the government is still here representing
8 that it is not material to the defense.

9 I'm not quite clear on why we are being expected to
10 take at face value the opinion of an FBI agent, no matter how
11 reliable or no matter how long they have been at the agency,
12 when the FBI has, frankly, a specific interest in not
13 disclosing this information, particularly if Mr. al Baluchi's
14 theory of hostilities is correct.

15 And I'm not also clear on why exactly the government
16 is not able to go to the committee offices and read the
17 document themselves, as I understand that they have done with
18 the full SSCI report. It is their responsibility to do so and
19 they have not done so.

20 The only other point I want to make is that Mr. Ryan
21 mentioned that the joint inquiry wasn't looking specifically
22 into hostilities. Well, Your Honor, they don't have to have
23 been looking specifically into the question of hostilities in

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1 order for their report or those redactions to include
2 information relevant and material to the issue of the
3 existence or nonexistence of hostilities on September 11 or
4 prior to September 11.

5 Pending any questions.

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

7 DC [MS. PRADHAN]: Thank you.

8 MJ [COL POHL]: Mr. Nevin.

9 LDC [MR. NEVIN]: Right. Just on that point, it wouldn't
10 make any difference if they were charged with -- if this
11 commission were charged with doing -- studying anything.
12 Suppose they are charged with studying the rules of horse
13 racing. If they come across a document that's relevant or
14 material to the preparation of the defense, it's in the
15 possession of the government. If the prosecution is aware of
16 it, they have an obligation to turn it over. The point or the
17 purpose is -- of where it came from doesn't control the
18 outcome of any of this.

19 And second, the question of the outcome -- I guess
20 the point I was trying to make before is that the question of
21 the outcome of the actual investigation, presuming that the 28
22 pages and what's redacted under the 28 pages, within the 28
23 pages is relevant to the question of Saudi Arabia's

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1 involvement in this or support for it, whether it shows that
2 there was such involvement or not, either way, it's relevant,
3 it's material to the preparation of the defense.

4 If it does show that, clearly there is no question
5 about it, and I think you have to -- I think you can take
6 judicial notice of it that Congress passed JASTA and allowing
7 changes, upending many years of sovereign immunity law and
8 allowing Saudi Arabia to be reached, at least potentially.
9 And I think you can conclude from that that Congress knew
10 something, and so ----

11 MJ [COL POHL]: I'm not sure I would conclude Congress
12 knows anything, but go ahead. I understand your point.

13 LDC [MR. NEVIN]: They probably know something,
14 Your Honor.

15 MJ [COL POHL]: That's true, they know something.

16 LDC [MR. NEVIN]: I guess the point, the remark that I was
17 making before is that even if they conclude there is nothing
18 there, even if they say these are all dead ends, it's still
19 material, but for other reasons.

20 And finally, just in support of the argument that was
21 made before, I believe Kyles v. Whitley will show you that --
22 I mean, if I remember correctly, the prosecution's argument in
23 that case for why they didn't turn it over was because the

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1 police didn't give it to me. I think that's a quote. And
2 what the Supreme Court held was that it is the prosecution's
3 obligation to review these materials and make a decision about
4 their materiality, whether they are material to the
5 preparation -- whether they are discoverable. And so the
6 answer that someone else has told us that they are not is not
7 a sufficient answer under Kyles.

8 Thanks, Your Honor.

9 MJ [COL POHL]: Anything further?

10 If not, Mr. Ryan, anything further?

11 TC [MR. RYAN]: No, sir, thank you.

12 MJ [COL POHL]: Okay. We are about to take a break. But
13 before we do that, I want to revisit something we discussed
14 yesterday. This deals with the Rules of Court issue we talked
15 about yesterday.

16 As usual, after I talked to my staff, I may have -- I
17 just want to make sure we are on the same page. Mr. Connell,
18 the only change that was made was -- just a second, please.

19 LDC [MR. CONNELL]: [Microphone button not pushed; no
20 audio.]

21 MJ [COL POHL]: Changed the word "motion" to "notice."
22 The idea was that declination of joinder should simply be a
23 notice and there is no need for motions to file out of time or

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1 anything like that, and if you notice in your 4994A pleading,
2 you have notice of declination of joinder in motion to
3 consider other arguments or for other relief.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: That's the new procedure.

6 LDC [MR. CONNELL]: Yes. I'm following the procedures as
7 best I can.

8 MJ [COL POHL]: Again, just to clarify, the way it was
9 written was the declination of joinder simply requires a
10 notice.

11 LDC [MR. CONNELL]: Right.

12 MJ [COL POHL]: And the motion is the other part. And
13 then -- and I will add when you file a motion to consider
14 other arguments or other relief, that will trigger an
15 additional briefing cycle.

16 LDC [MR. CONNELL]: Right.

17 MJ [COL POHL]: And that's not in either the old rule or
18 the new rule, quite frankly.

19 LDC [MR. CONNELL]: Well, a previous version of the
20 rule -- and to be honest with you, I have lost track of the
21 changes. But a previous version of the rule included when
22 another party joins another motion, another party's motion, it
23 reset the clock for filing.

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1 The connection of that to filing a joinder meant that
2 each time that a new party filed a joinder, the government had
3 two weeks to respond.

4 MJ [COL POHL]: Right.

5 LDC [MR. CONNELL]: The change of regime to notice of
6 declination of joinder, which you are no longer joining
7 things, you are now declining to join things ----

8 MJ [COL POHL]: Right.

9 LDC [MR. CONNELL]: ---- meant that the extension that
10 came from joinder no longer operated. So if you fix it the
11 way that we discussed yesterday, I think it satisfies us all.

12 MJ [COL POHL]: I think the issue was, as I got it, is not
13 so much the change, the wording of the rule, because the word
14 that was changed was motion to decline joinder to notice of
15 declination of joinder, and that doesn't require any action by
16 anybody.

17 LDC [MR. CONNELL]: It's not the notice of motion part,
18 it's the ----

19 MJ [COL POHL]: It's the briefing part. So it's clear
20 what we talked about yesterday, when you file something like
21 you did in 494A, which is notice of declination of joinder and
22 motion to consider other arguments or other relief, that
23 restarts the two week response period for the other side.

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1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: So we are -- so I think ----

3 LDC [MR. CONNELL]: That's what I want to happen.

4 MJ [COL POHL]: After we had a discussion yesterday I went
5 back and talked to my staff to get with the problem they are
6 getting, and there is apparently confusion among the staff of
7 this. If you could just convey that's the way it will work,
8 and if I need to change something in writing, but I don't
9 necessarily think I do.

10 LDC [MR. CONNELL]: All right. That sounds good.

11 MJ [COL POHL]: We will go ahead and recess for 15
12 minutes. The commission is in recess.

13 [The R.M.C. 803 session recessed at 1507, 16 May 2017.]

14 [END OF PAGE]

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