[The R.M.C. 803 session was called to order at 1341, 17 February 2016.]

MJ [COL POHL]: The commission is called to order. All parties appear to be again present. We have also been joined by Mr. Binalshibh.

Mr. Trivett and/or Mr. Nevin, whoever has the answer to my question, do we know where we are at with this thing? Mr. Trivett?

MTC [MR. TRIVETT]: It's the program manager for the National Programs Special Management staff, is the point of contact at the Office of the Under Secretary of Defense for Intelligence. If the commission needs his name specifically, I would ask that I file it under seal because it is subject to Protective Order #2.

MJ [COL POHL]: Okay.

MTC [MR. TRIVETT]: What we can say is that there is an ongoing review relating to this individual's access to program information when he was under a Department of Justice contract working on habeas matters, and he has now transferred from the Department of Justice to the Department of Defense.

The program manager has engaged in direct conversations with the Chief Defense Counsel and the Deputy Chief Defense Counsel regarding the SAP processes on multiple

1 occasions, and I did want to clarify something for the record,
2 and I think we were speaking about the same thing. But the
3 due process right that attaches when someone is losing a
4 clearance is separate and apart from whether an individual
5 gets SAP access. So SAP access isn't part of the clearance.
6 I think that the commission understood that. I wanted to make
7 clear that that's what I was speaking about when I conceded
8 that.
9 MJ [COL POHL]: All right. Don't go away.
10 MTC [MR. TRIVETT]: Okay.
11 MJ [COL POHL]: So where are we at? I heard what you
12 said, but I just don't know where we are at.
13 MTC [MR. TRIVETT]: We believe we are at the same place as
14 when we filed our motion. We don't believe there is a right
15 to a by-name requested interpreter; that we have made a
16 competent and qualified interpreter available in the event
17 that Mr. Mohammad wants one. The court pointed out, as the
18 prosecution pointed out, and even as the defense conceded,
19 that he does speak English. He has been in here on at least
20 two different occasions, in October and December, without his
21 interpreter. If he wants an interpreter, we can make one
22 available. We have a qualified one ready. Mr. Nevin alluded
23 to the fact that he believed that she wasn't qualified. Ten

1 years ago she worked for the FBI, never on detainee matters,
2 never overseas. But in the end, it can't be that every
3 interpreter that has some prior U.S. Government experience is
4 somehow disqualified from the interpreter pool. That can't be
5 the standard. If that's the standard, the U.S. Government is
6 going to have a very hard time being able to find fully
7 cleared TS/SCI interpreters to be able assist in these
8 matters. So we believe that he is not entitled to one by
9 name. We will provide one and she stands by ready to assist,
10 if needed, but in the end he probably doesn't need one.
11 MJ [COL POHL]: Let's -- I understand that issue.
12 MTC [MR. TRIVETT]: Yes, sir.
13 MJ [COL POHL]: And that's one -- one facet of this whole
14 problem, but here is where I need some clarification,
15 Mr. Trivett.
16 MTC [MR. TRIVETT]: Yes, sir.
17 MJ [COL POHL]: Let me ask you this, if you know, is
18 Mr. Nevin's understanding that this individual has a TS/SCI
19 and now we are waiting for the SAP, is that where we are at?
20 MTC [MR. TRIVETT]: That's correct. He has a TS/SCI
21 clearance.
22 MJ [COL POHL]: Okay. And we're waiting for the SAP
23 portion?

1 MTC [MR. TRIVETT]: Correct, but the statement that I read
2 is what needs to happen before the SAP program. So I don't
3 want you to get the impression that this is just waiting on
4 some nameless, faceless bureaucrat's desk to sign. That's not
5 the case. There is the further review.
6 MJ [COL POHL]: I used that term because in this area,
7 nobody takes ownership of anything.
8 MTC [MR. TRIVETT]: I understand.
9 MJ [COL POHL]: And now I have a name or at least a
10 position ----
11 MTC [MR. TRIVETT]: Yes, sir.
12 MJ [COL POHL]: ---- of the individual responsible. I am
13 not minimizing their service. I am just saying I get
14 frustrated with somebody out there, not me, is the long pole
15 in this tent, and nobody ever knows who this person is or even
16 where the piece of paper is.
17 MTC [MR. TRIVETT]: Yes, sir.
18 MJ [COL POHL]: So that issue, he is no longer a nameless,
19 faceless bureaucrat, he is an individual that does serious
20 business. I got that. I want to make sure there is no
21 personal insult taken with that comment, it is just
22 frustration with the process.
23 So do we know -- it seems to me there are three

1 possibilities here. Actually, we are down to two
2 possibilities. Do we know whether or not the holdup in the
3 SAP process is related to any allegation of commission-related
4 misconduct?
5 MTC [MR. TRIVETT]: It's got nothing to do with
6 commission-related misconduct, as far as I know. The review
7 relates to his access to program information when he was under
8 DoJ working for habeas -- working for on habeas matters.
9 MJ [COL POHL]: Now, from what you are talking about, I am
10 assuming you have contact with this individual?
11 MTC [MR. TRIVETT]: Yes, sir.
12 MJ [COL POHL]: I'm talking about the decision-maker, not
13 the -- okay. Okay. Okay.
14 You are making a logical assumption. Okay? But what
15 I want to know with clarity is specifically ask him, and until
16 we get this answer we are not doing anything else: Is there
17 any commission-related issue holding up the SAP process?
18 Because I believe that will address one of Mr. Nevin's
19 concerns. You have other ones also, I understand that,
20 Mr. Nevin, but it strikes to me is that's the
21 conflict-of-interest concern. When we get that specific
22 answer, we will re-address the other aspects of this motion.
23 How long will it take you to get that answer?

1 MTC [MR. TRIVETT]: If I can get this individual on the
2 phone, not long. Certainly within the half hour.
3 MJ [COL POHL]: Okay. The commission will be in recess
4 until we get that answer.
5 **[The R.M.C. 803 session recessed at 1348, 17 February 2016.]**
6 **[The R.M.C. 803 session was called to order at 1523,**
7 **17 February 2016.]**
8 MJ [COL POHL]: The commission is called to order. All
9 parties are again present that were present when the
10 commission recessed.
11 Mr. Trivett.
12 LDC [MR. RUIZ]: Judge, I would indicate
13 Lieutenant Colonel Williams is not currently with us.
14 MJ [COL POHL]: Will she be joining us later?
15 LDC [MR. RUIZ]: Yes.
16 MJ [COL POHL]: Thank you very much, Mr. Ruiz.
17 By the way, when I account for parties, because I am
18 looking at the crowd here, just let me know if I miss somebody
19 or somebody's missing that I didn't account for.
20 Mr. Trivett.
21 MTC [MR. TRIVETT]: Thank you, sir. DoD is doing an
22 administrative review regarding whether certain individuals
23 had access to HVDs without a fully adjudicated TS/SCI with all

1 the tickets and a SAP read-on. There is no indication this
2 inquiry is due to any commission-related misconduct on the
3 part of Mr. Mohammad's interpreter. However, until this
4 review is complete, SAP access will not be granted to the
5 interpreter.
6 MJ [COL POHL]: Do we know when the review will be
7 completed?
8 MTC [MR. TRIVETT]: They do not know, because it is not
9 limited to just this interpreter. It does not involve anyone
10 else on any of the other five defense teams.
11 MJ [COL POHL]: Just to back up -- go ahead, Mr. Nevin.
12 LDC [MR. NEVIN]: That was a carefully selected phrase,
13 but I wasn't able to write it all down. Could I ask
14 Mr. Trivett to repeat that?
15 MJ [COL POHL]: Yes, please.
16 MTC [MR. TRIVETT]: Sure. DoD is doing an administrative
17 review regarding whether certain individuals had access to
18 HVDs without a fully adjudicated TS/SCI with all the tickets
19 and the SAP read-on. There is no indication that this inquiry
20 is due to any commission-related misconduct on the part of
21 Mr. Mohammad's interpreter. However, until this review is
22 complete, SAP access will not be granted to the interpreter.
23 MJ [COL POHL]: Mr. Nevin.

1 LDC [MR. NEVIN]: [Microphone button not pushed; no
2 audio].
3 **[Pause.]**
4 LDC [MR. NEVIN]: Your Honor, thank you. I am just trying
5 to parse also this statement to be sure I understand it
6 correctly, and here is the problem. The review is whether
7 certain individuals had access to HVDs -- Mr. Mohammad is an
8 HVD -- without fully adjudicated TS/SCI clearance with all the
9 tickets and the SAP read-on, and the suggestion is -- or there
10 is no indication that this inquiry is due to any
11 commission-related misconduct on the part of Mr. Mohammad's
12 interpreter. And I guess my concern is that -- here is the
13 concern I have, is that there -- he has been -- our
14 interpreter has had access to Mr. Mohammad. He had access up
15 through this period when the issue of the DoJ versus the DoD
16 clearances arose, and it sounds like they are saying that this
17 inquiry about misconduct has to do with that access.
18 I understand they are saying it's not due to -- that
19 there is not an indication that it's due to commission-related
20 misconduct on his part, but it's hard to see how -- it's hard
21 to see how you could rule out that possibility given the
22 nature of the inquiry. They're inquiring about access to HVDs
23 and his access to Mr. Mohammad, an HVD, is what he does in

1 working with us. Now, he has had -- I believe it's correct
2 that he has had access to another HVD as well ----
3 MJ [COL POHL]: In the commission case or a habeas case or
4 both?
5 LDC [MR. NEVIN]: I think in only a habeas case, because I
6 don't believe there is a commission case -- a commissions case
7 with respect to this person. I understand there is not a
8 commissions case that's pending, but ----
9 MJ [COL POHL]: I know ----
10 LDC [MR. NEVIN]: ---- this person does have -- this
11 person does have military commissions defense counsel.
12 MJ [COL POHL]: Generic, as opposed to the habeas bunch.
13 Got it.
14 LDC [MR. NEVIN]: In short, it seems to me that this
15 assurance does not provide an assurance that there is not an
16 investigation that touches us going on, and so my request
17 would be simple, that whether we do it in -- it certainly
18 could be done in a closed hearing, that we actually have an
19 opportunity, rather than have Mr. Trivett going back with
20 questions and reporting back to us without completely touching
21 all the questions that these statements raise, that we simply
22 have this person's testimony or a statement, it doesn't have
23 to be -- necessarily have to be under oath, but do it via VTC

1 and cut out the middleman, as it were, and get these questions
2 answered clearly.
3 On the other hand, or in the alternative, simply read
4 the interpreter on. So my suggestion, Your Honor, is that
5 we're not -- we haven't gotten to the bottom of the problem
6 here and that we need to.
7 MJ [COL POHL]: Okay.
8 LDC [MR. NEVIN]: And secondarily, we still are in the
9 position of not having an interpreter.
10 MJ [COL POHL]: Okay. Thank you.
11 Mr. Trivett, do you want to respond to Mr. Nevin's
12 suggestion?
13 MTC [MR. TRIVETT]: I think the statement that I was
14 authorized to make is sufficient for the court to make a
15 determination that it's administrative in nature, it's not
16 criminal in nature, it wouldn't rise to a conflict of
17 interest, and there is no indication that it had anything to
18 do with misconduct of the interpreter.
19 MJ [COL POHL]: You're reading -- you're interpreting your
20 statement to mean we are talking here about the processing of
21 his SAP clearance, that perhaps it had not been processed
22 correctly ----
23 MTC [MR. TRIVETT]: Correct.

1 MJ [COL POHL]: ---- not indicating any type of misconduct
2 or anything like that?
3 MTC [MR. TRIVETT]: That's exactly correct. It is not
4 just limited to this individual.
5 MJ [COL POHL]: Just to make it clear, you are
6 representing on behalf of the United States Government you are
7 saying this is a processing issue involving him and other
8 individuals unrelated to any type of allegation of any type of
9 misconduct related to this commission case?
10 MTC [MR. TRIVETT]: Correct.
11 MJ [COL POHL]: Okay. Thank you.
12 Okay. The commission sees two issues here. The
13 initial issue is whether we continue to have a hearing these
14 two weeks without an interpreter for Mr. Mohammad, which
15 really relates to the conflict issue.
16 The other issue, and we can debate which one is
17 bigger, is going forward and resources for the defense team.
18 The commission finds that the interpreter, a qualified
19 interpreter in the nature of this case, is required and
20 necessary for the defense teams to do their jobs, to
21 investigate cases in foreign countries, to read foreign
22 documents. However, the commission does not believe that the
23 presence of an individual interpreter here during these

1 sessions is required. This particular accused speaks English.
2 We can debate how fluent he is. Also, he has the ability of
3 an interpreter here as everything is being said in court.
4 Consequently, the commission will deny the request to
5 abate the proceedings, but will tell the government that I
6 want to know, by the 15th of March, the status of Mr. Nevin's
7 interpreter's SAP read-on program. These things have a
8 tendency to linger, and the defense has a responsibility to
9 investigate this case. So if we are going to go in April, and
10 we expect the defense to continue with their job, they need to
11 know whether or not this person will continue to be the
12 interpreter or whether a replacement must be done. But it is
13 not fair to leave this issue hanging out indefinitely to the
14 processes that nobody seems to have any control over.
15 So, again, by 15 March, provide the defense and the
16 commission the status of this interpreter's SAP read-on. I'm
17 not asking for a great deal of detail, just has it been
18 accomplished, and if not, when it will be accomplished. And
19 if the answer is "I don't know," then the commission will
20 consider whether or not we will conduct the April hearings.
21 Any question about the commission's ruling?
22 MTC [MR. TRIVETT]: Not from the government, sir.
23 MJ [COL POHL]: Mr. Nevin?

1 LDC [MR. NEVIN]: No, Your Honor.
2 MJ [COL POHL]: Okay. I don't intend to issue a written
3 ruling. That's the ruling of the commission.
4 That being said, let's go to 396. Just for planning
5 purposes, I know we had a great deal of delay here. Normally
6 this would be the afternoon break time for prayer, but what I
7 am going to do is go to approximately 1630. It is indicated
8 that then the accused will have an opportunity to do their
9 prayer and then return to the confinement facility.
10 So, that being said, Mr. Connell.
11 LDC [MR. CONNELL]: Thank you, Your Honor.
12 AE 396 doesn't have -- it doesn't have a motion
13 attached to it, right? It was a question that was requested
14 to be briefed by the military commission that arose originally
15 in a closed hearing, and it comes from the following set of
16 facts.
17 The government has produced 8,317 pages of discovery,
18 which are marked "Classified," followed with classification
19 markings, followed by the words "Pending Classification
20 Review."
21 MJ [COL POHL]: How many pages?
22 LDC [MR. CONNELL]: 8,317.
23 MJ [COL POHL]: Okay.

1 LDC [MR. CONNELL]: The military commission had the
2 question, well, how is that review coming along, which
3 elicited the answer from the government that, oh, we didn't
4 mean there is an actual classification review; we just wrote
5 that on the paper. That position is repeated in the
6 government's briefs. Now, for the past two days the
7 government has been dealing with extremely thorny and
8 difficult issues, but the good news is that 396 is not thorny
9 or difficult. There is a regulation which is directly on
10 point and gives us the answer to the question.
11 But before we get to the exact language of the
12 Executive Order and the DoD regulation, it bears discussing
13 just a little bit about what is classification.
14 Classification is an Executive act. It is not so much a
15 status as it is when a person who has been delegated authority
16 from the President makes a determination that the dangers of
17 disclosure of certain information outweigh the costs of
18 classification.
19 Information only becomes classified after an OCA
20 determination to that effect, which the authority for which is
21 found in Executive Order 13526, the fount of all ability to
22 classify; in this particular instance, Section 6.1(i). There
23 are recognized in Executive Order 13526 three types of

1 classified information. Type number one, the most clear-cut
2 and frankly most common, is originally classified information.
3 A person with original classification authority makes a
4 determination that particular information should be classified
5 and thus, by a speech act, it becomes classified.
6 The second type of classified information, which is
7 dealt with by the military commission most often, is
8 derivatively classified information. Derivatively classified
9 information is when a person who is an authorized holder of
10 classified information uses one of two things, a security
11 classification guide or prior markings, to take information,
12 convert it into another form, which is derivatively
13 classified. Every classified motion which we have filed in
14 the military commission is a derivatively classified document
15 because no one on the defense side possesses original
16 classification authority. We take one of two things. We take
17 prior markings, if they have been given to us, passed down by
18 an OCA, or because we have no access to a security
19 classification guide, our best guess, which is definitely
20 suboptimal.
21 In fact, this security classification guide, I am not
22 going to go far into this, but I do want to say that it was so
23 important that it was the very first discovery request I ever

1 made, DR 001, on June 1, 2012, was a request for a security
2 classification guide because we knew how important proper
3 application of derivative classification rules is. The
4 military commission denied that motion to compel in AE 054C,
5 but didn't address the actual security classification guide
6 issue and it is still before the military commission in AE
7 118. That's derivatively classified information.
8 The third category, much less common -- some people
9 may go their whole lives without encountering it within the
10 military commission or within the intelligence community -- is
11 tentatively classified information. Tentatively classified
12 information is authorized by Executive Order 13526
13 Section 1.3(e), which provides: "When an employee or
14 government contractor who does not have original
15 classification authority originates information believed by
16 that person to require classification, the information shall
17 be protected in a manner consistent with this order and its
18 implementing directives.
19 "The information shall be transmitted promptly, as
20 provided under this order or its implementing directives, to
21 the agency that has appropriate subject matter interest and
22 classification authority with respect to this information.
23 That agency shall decide within 30 days whether to classify

1 this information."
2 Now, Section 1.3(e) refers to implementing directives
3 and in the Department of Defense there is an implementing
4 directive, which is found in the Department of Defense Manual
5 5200.01, Volume 1, Section 4, Subsection 9, which provides
6 individuals who submit information to OCAs for original
7 classification decisions shall provide the OCA the information
8 required by paragraph 6(A) through 6(F) of this enclosure and
9 May, if necessary, tentatively classify information or
10 documents as working papers pending approval by the OCA.
11 Final classification decisions must be made as soon as
12 possible but not later than 180 days from the initial drafting
13 date of the document. Prior to the OCA's classification
14 decision, such information shall be safeguarded as required
15 for the specified level of classification and it shall not be
16 used as a source for derivative classification.
17 MJ [COL POHL]: Mr. Connell, just so I am clear, the
18 Executive Order speaks of 30 days and the DoD Manual speaks of
19 180 days.
20 LDC [MR. CONNELL]: It is the Department of Defense, Your
21 Honor. Everything takes a little bit longer.
22 MJ [COL POHL]: So for whatever reason, you believe the
23 30 days has been expanded to 180?

1 LDC [MR. CONNELL]: Yes, I do believe it.
2 MJ [COL POHL]: But even in the DoD Manual it requires
3 something to be done within 6 months?
4 LDC [MR. CONNELL]: Yes, that's right, sir.
5 MJ [COL POHL]: Got it. Go ahead.
6 LDC [MR. CONNELL]: The government's proposed approach
7 here of having information "Pending Classification Review"
8 without actual classification review violates the entire
9 regulatory regime surrounding classified information, for a
10 few reasons. The first is that it means that information
11 becomes classified without an Executive determination that the
12 risks of disclosure outweigh the costs of classification.
13 MJ [COL POHL]: Does it become classified or is to be
14 treated as classified? Or is that a distinction without a
15 difference?
16 LDC [MR. CONNELL]: It is not a distinction without a
17 difference, but the -- according -- the -- because things can
18 be handled as classified when they are tentatively classified.
19 So I am considering tentatively classified to be a form of
20 classification, of classification, which it is. A person can
21 mark working papers as "tentatively classified" or "Pending
22 Classification Review," and for that period of time they are
23 classified, but it expires after 180 days, that

1 classification.
2 MJ [COL POHL]: Just so I am clear ----
3 LDC [MR. CONNELL]: Yes, sir.
4 MJ [COL POHL]: ----- if a document is marked "Pending
5 Classification Review," the markee or the marker of said
6 document then basically has classified that document or just
7 treated the document as classified?
8 LDC [MR. CONNELL]: "Has tentatively classified the
9 document," is the language.
10 MJ [COL POHL]: You said it expires after 180 days; that
11 means it is no longer tentatively classified and therefore
12 it's unclassified? Is that what you just told me?
13 LDC [MR. CONNELL]: That is the regulatory situation.
14 That is technically true.
15 MJ [COL POHL]: Okay. You say "technically true," which
16 means that on day 181, if it is classified information, it is
17 still classified information.
18 LDC [MR. CONNELL]: When information is -- if you have a
19 question here ----
20 MJ [COL POHL]: Let me ask you this. Let me ask you this.
21 I just want to clarify this point, because I don't think there
22 is a big disagreement. Of this 8,317 pages which you have
23 gotten, have you had any of those for more than six months?

1 LDC [MR. CONNELL]: Yes.
2 MJ [COL POHL]: So they are all unclassified?
3 LDC [MR. CONNELL]: Yes.
4 MJ [COL POHL]: Okay.
5 LDC [MR. CONNELL]: All right. Now, that's separate --
6 and I'm giving you the power answer there, but I want to give
7 you the subtleties to it, too.
8 MJ [COL POHL]: Sure.
9 LDC [MR. CONNELL]: The first subtlety is that the
10 classification is not an ontological status. Information does
11 not have -- is not classified or not classified out there as a
12 result of anything other than an Executive act.
13 Classification is an act. A qualified member of the Executive
14 looks at a piece of information, makes four required
15 determinations and as a result of that, that information
16 becomes classified.
17 One of the problems -- and the military commission
18 knows my objections to presumptive classification of old, and
19 I'm not going to rehash them. But one of the many problems
20 with that as a concept is that it treats information as if it
21 could independently be classified, just because of a topic
22 area as opposed to an Executive act.
23 The Executive has provided that there is a process of

1 tentative classification and that process of tentative
2 classification when a person marks information that they
3 believe should be classified as classified, that status is
4 good for 180 days.
5 Now, after 180 days, the real question is what do I
6 as the markee or the handler of the classified information
7 which has been marked by someone else, I would act at my own
8 risk, of course, to send that information which has been
9 marked "Pending Classification Review" to the media, for
10 example. It might not be wise, my wife might not advise that
11 as conducive to my career, but at the same time it is
12 technically true. There is a 180-day time clock on tentative
13 classification.
14 MJ [COL POHL]: Was that 180 days -- you get a document
15 marked "Pending Classification Review," who triggers the
16 180 days? The person who marked it "Pending Classification
17 Review"?
18 LDC [MR. CONNELL]: Yes. And in fact they are supposed
19 to -- yes.
20 MJ [COL POHL]: So you view the word "pending" different
21 than the government, pending being an affirmative statement
22 that something is being done, in this case reviewed, as
23 opposed to the government's interpretation of "pending"

1 meaning something that may be happening in the future?
2 LDC [MR. CONNELL]: Right. They mean "pending" when
3 somebody gets around to it, but it doesn't really matter. It
4 doesn't really matter whose version of pending is chosen,
5 because "pending" is not the critical word. The critical word
6 is -- or the critical fact is what regulatory authority exists
7 for marking it classified at all, and that has to be one of
8 three ways. It either has to have been determined by an OCA
9 or it has to be followed on or carried through markings from
10 another document or a security classification guide or it has
11 to be tentative classification as working papers, and that
12 Tentative Pending Classification Review is really just
13 language that implements the idea of tentative classification.
14 MJ [COL POHL]: If you, as defense counsel, generate a
15 piece of paper that you are not sure -- okay. So you treat it
16 as a pending classification review I would assume, correct?
17 You generated the document. It didn't come from the
18 government.
19 LDC [MR. CONNELL]: Right, I generate the document.
20 MJ [COL POHL]: Then you review it to go through the
21 process. What we are talking about here, so it is clear,
22 these are documents provided to the defense in discovery from
23 the government ----

1 LDC [MR. CONNELL]: Yes.
2 MJ [COL POHL]: ---- that they have labeled "Pending
3 Classification Review."
4 LDC [MR. CONNELL]: Yes.
5 MJ [COL POHL]: So these are all government-originated
6 documents that we are talking about?
7 LDC [MR. CONNELL]: Yes.
8 MJ [COL POHL]: And you said there is 8,317 pages?
9 LDC [MR. CONNELL]: Yes.
10 MJ [COL POHL]: Is that the whole universe of the Pending
11 Classification Review, or you are not in a position to answer
12 that?
13 LDC [MR. CONNELL]: I believe I am in a position to answer
14 it. We did a search of all of our discovery to find out which
15 of it was marked "Pending Classification Review" by the
16 government and we came up with 8,317 pages.
17 MJ [COL POHL]: Okay. I will ask them whether that's the
18 whole universe or not, but I got it. Go ahead. Go ahead,
19 Mr. Connell.
20 LDC [MR. CONNELL]: Sure. One of the factors that the
21 military commission brought up about, well, what -- so when
22 does this 180-day clock start? That's one of the problems
23 with the indeterminate Pending Classification Review as a

1 regime is that there is no classification date, and
2 classification dates are actually quite important, because
3 they represent the date on which that act that I mentioned
4 takes place; but they are also important because they trigger
5 follow-on dates, especially related to declassification.
6 There are, you know, a presumptive 10 years for a Secret
7 document, presumptive 25 years for a Top Secret document, but
8 there can be other declassification dates typically provided
9 in a security classification guide which might say 10 years
10 from the date of creation or it might say 10 years after the
11 date that the asset being discussed is no longer in use or
12 some other date, but the classification date is actually
13 really important.
14 The third problem with a Pending Classification
15 Review regime as the government has described it is it means
16 the classification could become or actually would be
17 classified in differently. The 8,317 pages produced to us
18 which are maintained on a secure system, unless someone takes
19 action to have those reviewed, then one of two things happens.
20 Either you accept my interpretation that on day 181 they are
21 no longer classified or they are classified indefinitely,
22 which has its own costs to democracy, among other things,
23 because they could never become declassified, they would

1 remain secret indefinitely, which is specifically prohibited
2 by Executive Order 13526 at Section 1.5(a), which says no
3 information can remain classified indefinitely.
4 And finally, the government scheme circumvents the
5 DoD prohibition on derivative use. There are high costs to
6 tentative analysis, and one of those is that no one else can
7 use it. When information is tentatively classified, when it
8 is Pending Classification Review, no one else is -- we are not
9 allowed to put it in a motion, we are not allowed to argue it
10 in a closed session, we are not allowed to use it in any
11 official way because derivative classification is prohibited
12 by Section 4-9 of Volume 1 of the DoD Manual.
13 So that brings us to the question of, all right,
14 well, whose job is it to get the thing declassified or to have
15 a classification review? We know under the regulations,
16 because I read them to you, that the person who submits the
17 information or the person who marks it is the person who is
18 required to do so, but the government argues in its brief
19 that, well, the defense does have a classification review
20 process, which is absolutely true, we do have a classification
21 review process.
22 As part of the preparation for this, I went back and
23 examined all of our defense classification review requests

1 from our particular team and in the past three years, since
2 February of 2013, when the first protective order -- the first
3 version of Protective Order #1 came into play, we made 158
4 classification requests. Those 158 classification requests
5 were less than 1,000 pages of total information -- obviously,
6 some requests are more than one page -- and all of those -- or
7 none of those involved government documents; they all involved
8 work product either of the attorney, such as writing a motion,
9 discovery requests, proposed letter, statement to the United
10 Nations or whatever, or work product of the client, which is,
11 you know, statements that the client wants to make to some
12 other person. It's not documents which come from the
13 government.
14 The -- our process places additional burdens on the
15 OCAs because they have to, under Protective Order #1, maintain
16 privilege for the documents that we submit, as opposed to the
17 government documents which they can submit without privilege,
18 without any additional compartmentalization that the OCAs have
19 to have, and I described in our brief that the process is
20 uncertain because sometimes the OCAs simply refuse to process
21 our classification review request. They consider it unduly
22 burdensome or, for whatever reason, they say, "We are not
23 going to conduct a classification review of what you have

1 requested to be reviewed." And we don't have any enforcement
2 mechanism, there is nothing really we can do about that.
3 There are other difficulties that we on the defense
4 side have which make our classification review process an
5 inferior mechanism. One of those is that we could never
6 answer the question that you posed of how is that
7 classification review coming along, because we have no
8 visibility into the process whatsoever. There is no -- we
9 have no direct contact with the original classification
10 authorities, our only contact is at the Office of Special
11 Security. Once we deliver our double-sealed envelope to them,
12 we don't -- we have no idea whatsoever what has happened to it
13 until we receive an e-mail telling us the classification of
14 the particular information.
15 The -- in many situations one could appeal. The
16 holders of classification -- of classified information are in
17 fact encouraged by the Executive Order to appeal what they
18 consider to be misclassification, but because of this
19 litigation the CIA has denied appeals of both Mr. Ruiz and I
20 on the basis of, well, the information is involved in
21 litigation; that is, the military commissions.
22 And finally, one of the reasons why the defense is a
23 bad pathway to try to get information reviewed, government

1 information reviewed, is that if we think that it should be
2 declassified, our declassification request has to be routed
3 back through trial counsel in the next place. That's
4 contained under Rule for Trial by Military Commission 17-1(f),
5 which says that all requests for further declassification have
6 to be routed through trial counsel to the security
7 classification/declassification review team.
8 So the idea that the whole process should be pushed
9 over to the defense for us to seek classification review not
10 only violates the regulation, but also is just not a workable
11 process. Our pipeline does not have the robust nature to
12 handle 8,317 documents, and it probably never has.
13 MJ [COL POHL]: Okay. Mr. Connell, two questions. One is
14 you said earlier that derivative classification is prohibited
15 for information pending classification review?
16 LDC [MR. CONNELL]: Yes, sir.
17 MJ [COL POHL]: That's not an Executive Order but the DoD
18 Manual?
19 LDC [MR. CONNELL]: Yes, sir.
20 MJ [COL POHL]: I got that part. What was the cite of the
21 DoD Manual?
22 LDC [MR. CONNELL]: DoD Manual 5200, Volume 1, Section 9.
23 MJ [COL POHL]: Reading the government response, page 4,

1 it says, "Providing discovery to defense counsel in this
2 expedited fashion, it," being the government, "does so in the
3 expectation the defense will seek classification review of
4 only the information it intends to use, if any, in preparation
5 of the accused's defense."
6 Now, the way I read their regime, and I want to know
7 if you agree, is that they give you this 8,000-plus pages of
8 Pending Classification Review. You and your team look at it
9 and cull out 2,000 pages or whatever that you think is
10 material to the preparation of the defense and then return it
11 to them and then they do the classification review. Is that
12 how you interpret their position?
13 LDC [MR. CONNELL]: No. What I interpreted their
14 position -- and they can tell us, of course -- but I
15 interpreted their position that we cull out 2,000 pages and
16 then we submit them through our classification review
17 channels, which is through the Office of Special Security to
18 the OCAs, et cetera.
19 Now, I will tell you that on other occasions, and the
20 reason why I think that -- one of the reasons why I think that
21 the government is the proper channel for this, we have said --
22 especially in light of changing classification guidelines, we
23 said "Hey, listen, I think you should take another look at

1 this particular block of discovery, would you mind
2 resubmitting it for classification review?" And then we in
3 that situation we have gotten two tranches of discovery which
4 came back unclassified, and once it worked the other way. You
5 may remember the medical records question where I thought that
6 documents which were marked unclassified should be classified
7 and I asked the government to take another look at them. They
8 did and they came back and remarked some of the pages as
9 classified.
10 MJ [COL POHL]: The defense classification review system,
11 we are talking about defense-originated documents, correct?
12 LDC [MR. CONNELL]: That's right. Every one of our 158
13 requests has been a defense-originated document.
14 MJ [COL POHL]: And you distinguish this because this is
15 government-originated documents?
16 LDC [MR. CONNELL]: Yes.
17 MJ [COL POHL]: Therefore it should be in their lane, not
18 your lane?
19 LDC [MR. CONNELL]: Yes, sir.
20 MJ [COL POHL]: Okay. Got it. Go ahead.
21 LDC [MR. CONNELL]: That's all I have.
22 MJ [COL POHL]: Any other defense counsel want to be heard
23 on this? Apparently not.

1 Trial Counsel? Mr. Trivett.
2 MTC [MR. TRIVETT]: I want to clarify something for the
3 commission. The only quibble, really, in regard to this
4 information, the 8,317 documents that Mr. Connell cites to is
5 not whether it's classified, we know it to be classified, it's
6 just whether it's classified at the Secret NOFORN level or at
7 the Top Secret level, including up to SAP. We know this
8 because we derivatively classified it based on the information
9 that we were aware of from the OCA and other information about
10 sources ----
11 MJ [COL POHL]: Just kind of a question because I want to
12 see what the universe is here.
13 MTC [MR. TRIVETT]: Yes, sir.
14 MJ [COL POHL]: Are there more documents that you intend
15 to label as "Pending Classification Review"?
16 MTC [MR. TRIVETT]: Yes, but only of the same type.
17 MJ [COL POHL]: Okay. Can you quantify what you
18 anticipate, how many?
19 MTC [MR. TRIVETT]: I can't do that in open court, sir.
20 But it's not a large a number as they already have.
21 MJ [COL POHL]: So it's less than the number -- I got it.
22 I am just trying to figure the universe here. Got it. Okay.
23 Now, let's go back. I have read your brief, so I

1 understand. This is information that's derivatively
2 classified.
3 MTC [MR. TRIVETT]: Correct.
4 MJ [COL POHL]: Okay. And that decision is made by whom?
5 MTC [MR. TRIVETT]: By the prosecution.
6 MJ [COL POHL]: Okay. Okay. And then -- but you don't
7 submit it back to the OCA and it's not considered classified,
8 it's not marked classified at that point?
9 MTC [MR. TRIVETT]: It is. We mark it and we send it to
10 the defense based upon our derivative classification
11 authority.
12 MJ [COL POHL]: Then it's marked TS, Secret, whatever,
13 right?
14 MTC [MR. TRIVETT]: Well, again ----
15 MJ [COL POHL]: I am just trying to understand your
16 process, Mr. Trivett. That's all.
17 MTC [MR. TRIVETT]: Yes, sir.
18 MJ [COL POHL]: I am saying you send them a lot of
19 documents that has got classification on it?
20 MTC [MR. TRIVETT]: Yes, sir.
21 MJ [COL POHL]: These things you do a derivative
22 classified review, whatever you call it, and you got it for
23 the sake of this example, from a Secret document. Then you've

1 got this piece of paper and you derivatively classify it as
2 Secret, right?
3 MTC [MR. TRIVETT]: That's how the process would work.
4 MJ [COL POHL]: Okay. And then you hand it to the
5 defense?
6 MTC [MR. TRIVETT]: Yes, sir.
7 MJ [COL POHL]: Okay. When does the "Pending
8 Classification Review" stamp get put on it?
9 MTC [MR. TRIVETT]: Because we know for certain it's one
10 or the other, meaning not unclassified classified Secret
11 NOFORN or TS, meaning -- we handled information within the
12 United States Government consistent with that, including HVD
13 material that we still continue to hold so that's how we mark
14 it. And because of that, we mark it TS/SCI, Pending
15 Classification Review. We don't intend to use any -- much of
16 this information.
17 MJ [COL POHL]: You have made a legal decision that it's
18 material basically at the preparation for the defense level?
19 MTC [MR. TRIVETT]: Yes, sir.
20 MJ [COL POHL]: Otherwise, why would you give it to the
21 defense, true?
22 MTC [MR. TRIVETT]: Yes, sir.
23 MJ [COL POHL]: We can discuss whether it meets the higher

1 level of classified material, but you are taking the material
2 preparation level. Because in some ways -- okay. You give it
3 to the defense and they look at it. Now, according to your
4 pleading, if I understand it correctly -- and I don't want to
5 talk about who does this -- it is the defense is supposed to
6 take the quantity you provide, cull out what they think is
7 material to the preparation of the defense and then submit it
8 for classification review? Is that how you perceive the
9 system to be?
10 MTC [MR. TRIVETT]: Correct. Slight nuance, right? All
11 of the counsel and the teams have clearances. The accused do
12 not have clearances. We are working to make this specific
13 information also "display only." It will remain classified
14 but we are working to get it "display only" so they can share
15 it with the accused.
16 MJ [COL POHL]: Who is going to make that decision?
17 MTC [MR. TRIVETT]: We are working on it, sir. I don't
18 have authority to do that ----
19 MJ [COL POHL]: I am not talking about names. Does it go
20 back to the OCA for that decision?
21 MTC [MR. TRIVETT]: Sure.
22 MJ [COL POHL]: That's all I asked.
23 MTC [MR. TRIVETT]: I understand.

1 MJ [COL POHL]: So you've got stuff to go back to the OCA.
2 Okay. But back to my question. You give the 8,000 pages to
3 the defense and they say, "If I cull it out, I'm tipping off
4 my trial strategy." Okay? Because in your pleading you sit
5 here and you say that they will only seek classification
6 review of material it intends to use in the preparation of the
7 accused's defense. So any culling by the defense reflects a
8 strategic decision that it's material to the preparation of
9 the defense. Would you agree with me on that?
10 MTC [MR. TRIVETT]: No, we are walled off on that. We
11 don't know what it is.
12 MJ [COL POHL]: I didn't ask you who was walled off.
13 MTC [MR. TRIVETT]: Right.
14 MJ [COL POHL]: I am simply saying, isn't that true?
15 MTC [MR. TRIVETT]: Eventually we would have to know --
16 when I say "use it," I don't mean like use it to talk to the
17 accused, I mean present it as evidence for the commission. At
18 some point we need to get 505(g) notice of that anyway.
19 MJ [COL POHL]: I've got it, but you are ahead of me.
20 What I am simply saying is your position is the defense gets
21 this information, and let's break it -- I know I'm kind of
22 slow sometimes, so I'm just asking you to bear with me here,
23 is they get the information, the 8,000 pages. 2,000 pages

1 they make a strategic decision that this is material to the
2 preparation of the defense. But if I give them the 2,000
3 pages for classification review, I'm now disclosing what --
4 part of my strategy, and my simple question is: Is that a
5 reasonable position by the defense?
6 MTC [MR. TRIVETT]: I understand the defense's position,
7 but I think there's other ways around it. Certainly if we
8 give the display-only ability to them where they can show
9 classified information to their client, that issue goes away,
10 right? Then at some point we are entitled to know if they are
11 going to use any classified information in court under 505(g).
12 So really, right now, if the concern is that they have to put
13 all 8,000 documents in -- and don't get me wrong, the
14 prosecution is not prohibiting them from putting whatever they
15 need to put in through -- we are simply saying that if you are
16 simply going to throw it all back into the system, that's
17 probably unnecessary because if we give display-only
18 authority, then they can share everything they want with the
19 accused, it just remains classified, and then at some point in
20 court they have to give 505(g) notice anyway. Because again,
21 we know it's classified, what we are providing is either
22 classified Secret NOFORN or classified Top Secret to the SAP.
23 It's one or the other. So we know it to be classified anyway.

1 That's not revealing any defense strategy whatsoever.
2 So the only issue really I think that I take from
3 your question is whether or not having them put it through the
4 walled-off review to then share it with the accused after
5 culling it out would somehow tip defense strategy.
6 MJ [COL POHL]: No, no, I am not talking about sharing it
7 with the accused. I am talking about sharing it with the
8 Government, the big G. Let me ask you this.
9 MTC [MR. TRIVETT]: Yes, sir.
10 MJ [COL POHL]: Let me ask you this, because I asked how
11 big the universe was. Normally when the government provides
12 classified -- these are all government documents, correct?
13 MTC [MR. TRIVETT]: Correct.
14 MJ [COL POHL]: Normally, except for this particular
15 category, it's labeled TS, Secret, whatever code word,
16 whatever it happens to be, but this is a different category.
17 MTC [MR. TRIVETT]: It's labeled as well.
18 MJ [COL POHL]: I'm saying is -- what you are saying is in
19 your pleading, when we said Pending Classification Review, we
20 meant -- we didn't mean we were doing anything, but simply
21 that it will be if you ask -- if you ask, it will be reviewed.
22 That's how I took your position. Is that accurate?
23 MTC [MR. TRIVETT]: Correct. That's accurate.

1 MJ [COL POHL]: So if the defense says okay. Fine, okay.
2 Okay. We are now asking. There is 8,137 pages. Go review
3 them.
4 MTC [MR. TRIVETT]: Yes, sir.
5 MJ [COL POHL]: That's the regime, I mean, you have a hope
6 that they will cull them out, but if they decide they don't
7 want to and just give the whole stack back to the system,
8 that's okay with you?
9 MTC [MR. TRIVETT]: As in any organization, there is a
10 finite amount of resources and if they have other specific
11 requests also going through that declassification, they need
12 to be able to pick which one they want done most efficiently.
13 We are not going to prevent them from putting whatever we put
14 back through the process. We can't do that. It's the process
15 you set up in Protective Order #1.
16 MJ [COL POHL]: But what about the reference that
17 Mr. Connell made about the DoD Manual that doesn't permit
18 derivative classification, derivatively classified evidence or
19 motions, I am assuming, in this case, until this decision is
20 decided? I mean, bottom line is you have given them, if
21 that's true -- and if you say it's not true, I will certainly
22 listen to you; I don't have that cite, I don't have the
23 resource sitting in front of me.

1 But it seems to me is you have provided 8,000-plus
2 pages that the defense currently is prohibited from doing
3 anything with except read because they can't -- if there is
4 something in there they want to file a motion on, something
5 dealing with discovery or whatever, they can't even do that
6 until a decision is made about the review. Is that ----
7 MTC [MR. TRIVETT]: They could simply give 505(g) notice
8 on whatever documents they want to use, and then it's up to
9 the government to determine whether or not there is a
10 reasonable substitute. At that point, we would bring them
11 back to the OCA and make a determination as to whether or
12 not -- we know they are classified, but at what classification
13 level they should be, and then we would go from there.
14 So they can -- the only thing they can't do with it
15 right now, sir, is share it with the accused and we are
16 working on that. We are trying to get them a display-only
17 authority so they can share it with the accused.
18 MJ [COL POHL]: You keep coming back to that. I'm not --
19 I'm not really addressing what goes to the accused. Maybe
20 it's just -- like I said, I'm not -- perhaps I am a little
21 slow here, because as a general rule the accused do not get
22 classified discovery. I got that. God knows, I've got that.
23 I have heard that for a long time. That's not what I am

1 talking about.
2 I am simply talking about this material in its
3 current format, one of Mr. Connell's points was "We cannot
4 include it even in a motion because of the DoD Manual
5 prohibition of doing that for material marked 'Pending
6 Classification Review.'"
7 MTC [MR. TRIVETT]: I disagree with that premise. I think
8 they can use it for all purposes of litigation at this point.
9 They would have to go under 505(g) ----
10 MJ [COL POHL]: If they got a document that says "TS,
11 Pending Classification Review," they could use that document
12 to prepare a motion that would be labeled "TS, Pending
13 Classification Review," that's your position of that?
14 MTC [MR. TRIVETT]: Yes, sir.
15 MJ [COL POHL]: Okay. Well, I will read the provision for
16 myself and see which one is correct.
17 MTC [MR. TRIVETT]: It's also important to note, and this
18 is no surprise to anyone as what we are about to litigate in
19 397, is that DoD isn't the only agency that has a stake in
20 classified information in this case. So we are not conceding
21 that the DoD Manual would apply to every piece of discovery
22 that we disclose.
23 MJ [COL POHL]: Okay. I understand that. Do you think it

1 applies to this discovery?
2 MTC [MR. TRIVETT]: No.
3 MJ [COL POHL]: No, it doesn't? What applies then, just
4 the Executive Order?
5 MTC [MR. TRIVETT]: Yes, sir.
6 MJ [COL POHL]: Okay. So is it your position, then, that
7 the 30-day rule applies, not the 180-day rule? When it's
8 triggered, it's a 30-day turnaround time, not 180 days?
9 MTC [MR. TRIVETT]: Mr. Connell characterized our
10 discovery of this information as tentative. We categorically
11 disagree with that. We derivatively classified it. There is
12 no set date for a requirement to review the true
13 classification level of this information once it's
14 derivatively classified. He characterized it as tentatively
15 classified. That is not our characterization.
16 MJ [COL POHL]: You're saying 1.3(e) doesn't apply?
17 MTC [MR. TRIVETT]: Correct.
18 MJ [COL POHL]: What provision does apply? 1.3(e) talks
19 about -- you know, it's almost like you guys are talking about
20 two completely separate regimes. I mean, maybe -- what I am
21 saying is you are saying this is just normal derivatively
22 classified material. Is that what you are saying?
23 MTC [MR. TRIVETT]: Yes, sir.

1 MJ [COL POHL]: Then why isn't it just handled with the
2 markings you've already got?
3 MTC [MR. TRIVETT]: That's how we handle it, sir.
4 MJ [COL POHL]: So what's it pending? Again, Mr. Trivett,
5 I am trying to understand.
6 MTC [MR. TRIVETT]: It is my job ----
7 MJ [COL POHL]: You have a TS document, you have a Secret
8 document and you have a confidential document. You take those
9 three documents and you put them into another format and you
10 label the portion marked, and we all know it goes labeled at
11 the highest classification and you hand it to the defense.
12 Now, do you mark that "Pending Classification Review" or is it
13 just what it says?
14 MTC [MR. TRIVETT]: If you know for certain what the
15 classification level is, you just derivatively classify it
16 based on that classification level and you provide it to the
17 defense.
18 MJ [COL POHL]: Okay.
19 MTC [MR. TRIVETT]: And some of this is challenging only
20 because we are talking about classified information. I can't
21 get into a lot of detail on it. What I can say is at a
22 minimum, it has a tendency to reveal sources and methods.
23 MJ [COL POHL]: I don't need that information. What I am

1 simply saying is this ----
2 MTC [MR. TRIVETT]: Because of that, we know it to be
3 Secret NOFORN regardless. It may also have information in it
4 that makes it higher than TS -- than Secret NOFORN, so we
5 derivatively classify it at the highest. We have not looked
6 at every single page and derivatively classified every single
7 page of it because we were trying to get it to the defense as
8 soon as we could. So this is consistent -- my understanding
9 is that this is consistent with federal practice when there is
10 voluminous classified discovery -- I know that the defense
11 cited to the Bismullah case -- so we derivatively classified
12 it at a minimum because we knew having reviewed certain
13 information of the same category that it can at times have
14 TS/SCI information. So we derivatively classified it at the
15 highest level of the information we were aware were in similar
16 documents. We believe that that's completely consistent with
17 the Executive Order. It's completely consistent with how the
18 government handles a lot of this information dealing with
19 high-value detainees.
20 MJ [COL POHL]: Okay. So just so I am clear ----
21 MTC [MR. TRIVETT]: Yes.
22 MJ [COL POHL]: ---- when you developed the derivatively
23 classified document, you are not certain of the classification

level of the information you derived?

MTC [MR. TRIVETT]: We know for sure it's Secret NOFORN or higher. We know that for sure.

MJ [COL POHL]: Well, let me ask you this: Is the original document classified?

MTC [MR. TRIVETT]: Yes.

MJ [COL POHL]: Okay. But it's not ----

MTC [MR. TRIVETT]: The original document is what we are turning over, so I am confused with the question.

MJ [COL POHL]: I am trying to think, derived from what. You said derivative classifications. I am trying to figure out where it is derived from.

MTC [MR. TRIVETT]: I can't get into a lot of detail on this.

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

So information is gathered and put in this document and from that universe you have gathered from, you are convinced that based on your experience and the guidelines and whatever that you have and you don't give it to the government, and I don't want to get into that issue right now, and you believe this is at least the Secret level and maybe higher?

MTC [MR. TRIVETT]: Exactly.

1 MJ [COL POHL]: And then rather than go through the whole
2 classification review process, you are giving it to the
3 defense now in an expedited fashion so they would have it to
4 work with?
5 MTC [MR. TRIVETT]: You got it.
6 MJ [COL POHL]: I got it.
7 MTC [MR. TRIVETT]: 100 percent.
8 MJ [COL POHL]: And then if they want to get it reviewed,
9 they go through their review process? Or do they give it back
10 to you since you are the originator of the document?
11 MTC [MR. TRIVETT]: They go through their walled-off
12 review process. I think what Mr. Connell was citing was
13 something he got last week saying after he gets a
14 classification review, if he disagrees with the classification
15 review, the regulation requires him to coordinate that back
16 through us.
17 MJ [COL POHL]: Okay. Anything further?
18 MTC [MR. TRIVETT]: Let me check, sir. I just want to
19 make sure I touched on all the points.
20 Nothing further from the government, sir. Thanks.
21 MJ [COL POHL]: Thank you. Mr. Connell?
22 LDC [MR. CONNELL]: I think you've taken all my points, so
23 I am not going to repeat any of them, but I just have three

1 thoughts that came to me as I listened to the government's
2 argument.
3 The first is about derivative classification. If the
4 information that we've received is actually derivatively
5 classified, then it's just classified, right? It just gets
6 marked at whatever level that it is, and there are only two
7 places under the Executive Order that they can derive
8 classification from. One of them is a prior document, you
9 know, what's the original document and what's the derivative
10 document, and the other is the security classification guide,
11 which essentially, you know, looks like a spreadsheet and says
12 if it contains this information and matched with that
13 information, if it contains the name of the ship that is
14 sailing and the date that it's sailing on, then it becomes
15 confidential. So those are the only places that derivative
16 classification comes from. So I'm not 100 percent sure about
17 the process that the government has described, and maybe he is
18 constrained from describing it further.
19 The second thing is with respect to the expeditious
20 process, "We wanted to get it to the defense as soon as
21 possible," and that may be true and I don't disagree with it,
22 but the first of this Pending Classification Review
23 information came in January of 2014 to us. And so, you know,

1 it seems clear that if the government had just put that
2 information through their channels at that point, you know,
3 the first few, the first half, 4,000-something pages of it,
4 then we would probably have some answers by now.
5 And that leads to my third observation, which is one
6 of the things that the government just told us was that it's
7 going back to the OCA to seek display determinations, whether
8 we can display this information to the defendants or not, and
9 if the information is going back to the OCA anyway, it seems
10 like an ideal time for them to tell us what its actual
11 classification level is.
12 So that's all I have.
13 MJ [COL POHL]: Okay. As I recall, on this particular
14 issue, you gave a 505(g) notice?
15 LDC [MR. CONNELL]: Yes.
16 MJ [COL POHL]: Okay. And, Mr. Trivett, you indicated
17 earlier that there are issues which we may want to discuss in
18 a closed session on this?
19 MTC [MR. TRIVETT]: I think you understand the argument,
20 so I don't need to, certainly.
21 MJ [COL POHL]: Well, I may need to hear it because I
22 think I understand your argument. But, again, it's almost --
23 I get the sense, I'm not sure we're talking about -- you and

1 Mr. Connell are talking about the same universe.
2 Okay. Go ahead. Anything further, Mr. Connell?
3 LDC [MR. CONNELL]: I don't have anything further.
4 MJ [COL POHL]: Let me ask you one question, Mr. Trivett.
5 Mr. Connell's last point, is all this stuff going back to the
6 OCA anyway for display only?
7 MTC [MR. TRIVETT]: No. A categorical decision may be
8 made, but there is certainly not going to be a review of the
9 8,712 documents when we do that.
10 MJ [COL POHL]: There will be some subset of that?
11 MTC [MR. TRIVETT]: No subsets, just a policy-level
12 decision of whether we are going to share information of the
13 type with the accused.
14 MJ [COL POHL]: Mr. Ruiz.
15 LDC [MR. RUIZ]: Judge, I have a couple of comments I want
16 to make.
17 MJ [COL POHL]: Sure. I'm sure all the defense counsel
18 know, I am not just limiting it to Mr. Connell on this. If
19 you have anything to add on this, you certainly may.
20 Mr. Ruiz.
21 LDC [MR. RUIZ]: Judge, just a couple of observations,
22 because during the exchange I understand there was some
23 emphasis -- at least one portion of that had to do with the

1 culling out of information in the classified discovery and
2 presumably that we would submit that for classification
3 review, and therefore narrow the scope of the universe of
4 documents.
5 And what I would say to you is that I listened very
6 carefully during that exchange and the government kept saying
7 "they," they will cull this out, and they were referring to
8 defense counsel. And I understand that, and I think the court
9 does as well. But that is a concept that is completely
10 divorced from the way that discovery review ought to be
11 conducted in a capital case. To the greatest extent possible,
12 discovery ought to be reviewed in concert with the person that
13 we represent, and the person that we represent ought to have
14 the greatest possible access to that discovery review. And
15 that's where -- that's where, of course, the greatest degree
16 of declassification that is possible assists us in carrying
17 out our duties in this capital case.
18 For that reason, if I am in the position where I am
19 culling out what I think is important, Walter Ruiz thinks is
20 important based on my training and experience, I understand
21 that's one level of the analysis. But that's divorced from
22 the reality that I have to represent Mustafa al Hawsawi, who
23 is asking me why I cannot provide him with 6,000 other pages

1 of discovery and who is wondering what is in those pages of
2 discovery. Of course, he may be able to inform my decision on
3 what discovery is important or what a particular piece of
4 discovery means.
5 And I just wanted to bring that to your attention
6 because I want it not to get lost in the mix of the reality of
7 how that process ought to work, from our perspective. The
8 government can certainly act unilaterally when they provide
9 and they engage in classification review, but we ought not to
10 do that, and we cannot do that, and that is something that I
11 want this court to know.
12 MJ [COL POHL]: Is this -- are you saying your client
13 should have access to classified discovery?
14 LDC [MR. RUIZ]: No. I am saying that to the greatest
15 extent that classified discovery can be unclassified -- and
16 when we are culling through classified discovery that we think
17 is what they ought to be able to see, we are excluding them
18 from a process in looking at 6,000 other pages or 6,000 other
19 documents.
20 MJ [COL POHL]: I just want to make sure I understand your
21 position, though. If you get classified discovery you think
22 they ought to see, you would try to get it declassified? Is
23 that what you are asking?

1 LDC [MR. RUIZ]: No. What I am saying, if the prosecution
2 has already submitted these documents through a classification
3 review process and 5,000 pages come back declassified, I can
4 provide that to Mr. al Hawsawi and review 5,000 pages in
5 concert with him. That's based on the classification decision
6 that's made by the particular entities that have that
7 authority.
8 When you or when we are placed in a position where we
9 are the ones censoring or culling out and then sending that
10 for a classification review, that creates a barrier to
11 communication with the people we represent under the realities
12 of this representation. I just simply want you to be aware
13 that it is not that simple for us to cull out information and
14 send it for classification review.
15 MJ [COL POHL]: Okay. I understand.
16 LDC [MR. RUIZ]: Now, it just so happens in this case that
17 given the last exchange between the government and the
18 commission and a number of parties in this case, we did do
19 just that. We submitted 8,000 pages that were provided to us
20 for classification review, and we did that in December shortly
21 after the hearing.
22 The response that we received -- or the response that
23 our defense security officer received from the people he

1 submitted those documents to were that we were trying to break
2 the system, and he said, "This is what the prosecution said we
3 ought to do, we have this process in place and we are
4 submitting these documents for classification review."
5 MJ [COL POHL]: You went through the defense system, for
6 want of a better term, with the walled-off review?
7 LDC [MR. RUIZ]: Yes. And when we submitted the
8 documents, the response was we were attempting to break the
9 system.
10 MJ [COL POHL]: Was the responses in writing or oral?
11 LDC [MR. RUIZ]: It was oral, but I think we did a
12 response in writing for the record if the court is interested.
13 MJ [COL POHL]: I am not taking sides on this because I
14 don't know what was said, but if the government provides you a
15 system for declassification review or any system and the
16 answer is if this is not robust enough, then that's an issue
17 to address.
18 LDC [MR. RUIZ]: Absolutely. We checked in with them very
19 recently, I think it was on the 15th, and their response was
20 simply it is still ongoing, the review is still ongoing.
21 There was no more specificity than that. We tried to get as
22 much specificity as we could, but none was provided. So
23 that's where we are.

1 In terms of your question about the 505(g), we
2 absolutely want to be able to engage in that hearing because
3 we have information that we absolutely cannot mention in this
4 hearing. While one piece of the information we have has
5 clearly been declassified and declassified by the government,
6 I can't talk about them in concert, so I definitely want to be
7 able to do that.
8 MJ [COL POHL]: Okay. Thank you, Mr. Ruiz.
9 Ms. Bormann? Ms. Bormann has not talked yet today.
10 Well, actually, she did on a different issue.
11 LDC [MS. BORMANN]: A little bit. But this will be quick.
12 One is we also request, given the government's argument here,
13 to examine some potentially classified evidence that would --
14 should be discussed in a 505(g) hearing, so we also join in
15 that.
16 And just a couple of remarks about what was called a
17 robust -- sarcastically called a robust system for the defense
18 pipeline to an OCA. A couple of observations about that from
19 somebody who has actually used it a number of times, although
20 I did not count the number of times, which might not be
21 surprising to you. The bottom line on that is we often
22 take -- we submit small documents, short documents, documents
23 often less than 20 pages, sometimes only one or two, and it

1 can take up to six months to receive classification guidance
2 and review, or not receive because the OCA claims that it
3 doesn't fall under their purview because in their purview --
4 in their opinion, it's not privileged.
5 So there is a huge problem with the concept of
6 submitting several thousand pages through that pipeline,
7 because the history thus far has shown us that they can't even
8 handle 20.
9 There is another issue that I want to direct the
10 commission's attention to with re ----
11 MJ [COL POHL]: You are talking about -- currently you are
12 talking about defense-generated documents?
13 LDC [MS. BORMANN]: Yes, they are defense-generated
14 documents.
15 MJ [COL POHL]: None of this group ----
16 LDC [MS. BORMANN]: None of it comes from the government
17 because the government, when it says it derivatively
18 classifies material, up until this set, we get portion
19 markers, we get a banner headline which gives us the highest
20 classification level and then things that are classified at a
21 lesser level are portion-marked at the lesser level.
22 MJ [COL POHL]: I got it.
23 LDC [MS. BORMANN]: Here, what we are told we are supposed

1 to do is treat everything like it's at the highest level which
2 in this case is TS/SCI. Now, I've reviewed significant
3 portions of the 8,317 pages, and I know I can tell you that
4 there will be much more based on substance. 90 -- and I am
5 going to estimate, 95 percent of it is not classified at the
6 TS level, and I am being generous. It's probably 99 percent
7 of it is not classified in any way, as far as I can tell, at
8 the TS level, which would mean it's classified at the Secret
9 level. That's a big difference for our particular defense
10 team. We have consultants who could review this and it would
11 be useful in formulating their opinions because they have
12 Secret clearances. But because of the jam-up in getting Top
13 Secret clearances, they have not yet been provided, over a
14 two-year period, so we could actually begin working on the
15 substance of consultant's opinions if this was actually
16 properly derivatively marked.
17 So the government's taking the easy way out here, and
18 I understand why they want to, is actually denying
19 Mr. Bin'Attash defense resources he could use right now.
20 MJ [COL POHL]: Thank you, Ms. Bormann.
21 Mr. Nevin?
22 LDC [MR. NEVIN]: Thank you, Your Honor. This -- I have
23 been trying to listen carefully as Mr. Trivett spoke, and as

1 the court questioned Mr. Trivett, to be sure I understand this
2 correctly. But it seems what the government is telling you is
3 they are overclassifying these documents. So, in other words,
4 they are telling you that they know that they are classified
5 at the Secret level for certain reasons and they suspect or
6 think or are positive, even, that somewhere in it there is TS
7 material, and so the entire thing is marked "TS" and then also
8 "Pending Classification Review" so that it can be turned
9 over -- the idea is so it can be turned over more quickly,
10 they can be turned over sooner.
11 But it just illustrates the problems with managing a
12 case of this type, and information of this type, which we have
13 talked about in closed session. This violates the Executive
14 Order's prohibition on overclassifying material, on
15 classifying material at a higher level. And I think in --
16 this in a way goes to Mr. Connell's point. If you view it as
17 tentatively classified information, you put a -- you put a
18 stop date on it. It can only last for so long. But that's
19 obviously not the government's intention; their intention is
20 to classify it permanently at this level and for everybody to
21 treat it at a higher level of classification than it actually
22 has, which violates the Executive Order.
23 And it may be that it takes longer to do it that way,

1 but it's another example of bending the rules to achieve a
2 purpose that's useful to the prosecution, but that violates
3 the rules on classification, and, I, you know, object to it
4 for that reason as well.
5 MJ [COL POHL]: Thank you, Mr. Nevin.
6 Mr. Harrington?
7 LDC [MR. HARRINGTON]: Judge, just one anecdote that I
8 want to add to this. As you know, we went through the
9 situation with the 292 motion, and part of that involved our
10 DSO and we lost our DSO as a result of that, and then went
11 months and months without a DSO and then we finally got a DSO
12 and then went months and months and months during all this
13 period that the court was suspended without having a DSO who
14 had the proper clearance. And I'd just point that out to you
15 because the lack of resources that we have -- not that you can
16 do anything in this particular motion -- but the lack of
17 resources we have impacts greatly our ability to deal with
18 this situation, this complicated situation. So we are at the
19 point now where we are only beginning, after almost a two-year
20 period, of having somebody with us who is our resource to
21 accomplish some of the things that have to be done in the
22 system. I just wanted the court to be aware of that.
23 MJ [COL POHL]: Thank you, Mr. Harrington. Okay. We will

1 discuss this further. Just so everybody understands the way
2 ahead, tomorrow morning we are going to begin with 397. I'm
3 not sure we will get through with 397, given all its subparts,
4 but we will make an attempt, and then we will continue forward
5 as we discussed at the 802.
6 On Friday, again as discussed at the 802, but just to
7 let those who weren't at the 802, the public and everybody
8 else to understand, on Friday we will have a closed classified
9 session under Military Commission Rule of Evidence 505(h) to
10 discuss classified matters and the way ahead on them, and then
11 on Monday we will pick back up in a public session starting
12 with AE 400, and then wherever we are at with the other
13 motions, just so that's the current way ahead. That being
14 said, the commission is in recess until tomorrow morning.
15 **[The R.M.C. 803 session recessed at 1633, 17 February 2016.]**
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