

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 [The R.M.C. 803 session was called to order at 0902,  
2 18 February 2016.]

3 MJ [COL POHL]: The commission is called to order. Trial  
4 Counsel, any changes in the prosecution team since we last  
5 recessed?

6 CP [BG MARTINS]: No, Your Honor.

7 MJ [COL POHL]: All detainees are present except for  
8 Mr. Bin'Attash. Any defense changes since we last recessed?  
9 Apparently not, so all parties are again present that were  
10 present when the commission recessed.

11 Trial Counsel. Mr. Swann.

12 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
13 was sworn, and testified as follows:

14 **DIRECT EXAMINATION**

15 Questions by the Trial Counsel [MR. SWANN]:

16 Q. Be seated. Major, I remind you that you are still  
17 under oath.

18 A. I understand.

19 Q. Did you have occasion to advise Mr. Bin'Attash of his  
20 right to be present this morning?

21 A. I did notify him that he had a commissions hearing at  
22 9:00 and that he had the right to be present.

23 Q. And I have in front of me what's been marked as

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Appellate Exhibit 408A, consisting of one page, the Arabic  
2 version of the waiver form.

3 Did you read the English version to him?

4 A. I began reading the English version. He said he  
5 didn't need -- he didn't want the English version read, he  
6 just wanted the Arabic version read to him, so the translator  
7 read everything that is on the exhibit.

8 Q. And did he execute the document that you and I both  
9 have in front of me?

10 A. Yes. He put his name on it and he then signed it and  
11 dated the document.

12 Q. And he indicated he did not want to attend this  
13 morning?

14 A. He advised me that he did not want to come to the  
15 commissions hearing.

16 Q. Do you believe he understood those rights?

17 A. I do.

18 TC [MR. SWANN]: I have no further questions, Your Honor.

19 MJ [COL POHL]: Ms. Bormann, any further questions for  
20 this witness?

21 LDC [MS. BORMANN]: I have no questions for the Major. I  
22 do have a question, however, of AE 408. This is marked as  
23 AE 408A, and I don't know what AE 408A is.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: Mr. Swann?

2 TC [MR. SWANN]: Ms. Bormann has in front of her 408A. It  
3 is just simply a copy of the document that hasn't been marked.  
4 If she wants me to mark a copy of ----

5 MJ [COL POHL]: No, she is just saying, what's the exhibit  
6 number that you are referring to.

7 TC [MR. SWANN]: 408A.

8 MJ [COL POHL]: What is 408?

9 TC [MR. SWANN]: 408 -- I'm sorry?

10 MJ [COL POHL]: What is 408?

11 TC [MR. SWANN]: The appellate exhibit, the waiver form in  
12 this case.

13 MJ [COL POHL]: Does that explain it? I'm sorry. Okay.  
14 As I understand it, 408 is yesterday's waiver. 408A is  
15 today's waiver?

16 TC [MR. SWANN]: That's correct, sir.

17 LDC [MS. BORMANN]: Oh, that's what I was curious about.  
18 Thank you.

19 MJ [COL POHL]: Thank you, Major. You are excused.

20 WIT: Thank you, Judge.

21 MJ [COL POHL]: Before we get to 397, I have a couple of  
22 questions on 396, but then just to put both sides on notice,  
23 that after I do 397, I indicated I was going to do 018, but I

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 want to do the 254 reconsideration first and 254 argument on  
2 the reconsideration and any outstanding 254 discovery and then  
3 we will pick up on 018 after that, just so you kind of know  
4 the order of march. So the way forward is, like I said, I  
5 have a few questions on 396 still, 397 -- I'm talking about in  
6 open sessions now -- the 254 I just referenced.

7           And so when I say "discovery," it is any outstanding  
8 discovery requests the defense wish to be heard on on the 254  
9 series, then we will pick up on 018 with the understanding  
10 that on Monday the first thing will be 400 with the press.  
11 Just kind of the way ahead.

12           That being said, Mr. Connell.

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

14           MJ [COL POHL]: On paragraph 1.3(e) of the Executive  
15 Order ----

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

17           MJ [COL POHL]: ---- which is the one we have been  
18 discussing, and I think I understand the positions, but I just  
19 want to make sure that I do, do you believe this applies to  
20 situations -- okay. Let me start again.

21           It appears on its face it clearly applies to  
22 situations where the holder of the information does not know  
23 whether or not it is classified. Do you agree with that?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: Requiring the follow-on procedure to seek  
3 review.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: Okay. Do you believe it applies to  
6 situations where the holder of the information knows it is  
7 classified, but does not know at what level it is classified?

8 LDC [MR. CONNELL]: Yes.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: Because the same considerations that  
11 apply to whether information is -- is -- or many of the same  
12 considerations apply in both situations. The -- whether  
13 information is classified at the Confidential, Secret or Top  
14 Secret level has a lot of implications. One of them is how it  
15 has to be handled, who can have access to it, what -- you  
16 know, for all of us, what system it has to be maintained in,  
17 which safe it has to go in. So, yes, I think that, you know,  
18 there are four categories of information: Unclassified,  
19 Confidential, Secret and Top Secret, and a lack of  
20 understanding of whether something falls into Secret or Top  
21 Secret is analytically the same as the question of whether  
22 something is Unclassified or Confidential.

23 MJ [COL POHL]: Okay. And it appears one of the real

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 issues here is kind of who is going to do the review ----

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

3 MJ [COL POHL]: ---- and when it needs to be done is  
4 really kind of the issue before me.

5 LDC [MR. CONNELL]: Yes.

6 MJ [COL POHL]: And I am going to give Mr. Trivett an  
7 opportunity to respond too. The government position appears  
8 to be this goes through the defense review process.

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: Mechanically, how would that work?

11 LDC [MR. CONNELL]: Mechanically, what would happen is  
12 that the defense would decide what it wanted to submit for  
13 classification review. We heard yesterday from counsel for  
14 Mr. al Hawsawi that they submitted all 8,317 pages. But  
15 let's -- so let's just take the packet, right, that there is a  
16 stack ----

17 MJ [COL POHL]: Don't -- let's not talk about how wide or  
18 narrow the pipeline is, just simply how would it go through  
19 under your understanding of the defense classification review  
20 system?

21 LDC [MR. CONNELL]: Sure. What happens in that situation  
22 is that we mark the information, we have to banner-mark it  
23 with a privilege marking, if it is privileged. I am not sure

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 if that would apply in this situation or not. But we  
2 double-wrap it, we hand-deliver it to the Office of Special  
3 Security, which is in the National Capital Region. A  
4 representative of the Office of Special Security takes it  
5 around to a variety of original classification authorities,  
6 whoever might have equities in the document -- obviously  
7 different documents have different possible equityholders --  
8 and we don't have any visibility about what happens in that,  
9 but at the end of it, one of two -- one of a couple of things  
10 could happen.

11           What we always ask for is that the classified  
12 information come back highlighted in a document, and the  
13 reason why we ask for that is that then if we could redact  
14 that information, then it might be a perfectly useful document  
15 even without the one word or something that might happen to be  
16 classified in it.

17           Typically we don't get that. Sometimes we do,  
18 sometimes we don't. I think it depends on the OCA and, you  
19 know, whatever else they have on their desk in their pipeline.  
20 Frequently we just get an e-mail that says the information  
21 which is marked as whatever classification request number we  
22 gave it, CR 132, for example, is SECRET/NOFORN, or is  
23 Unclassified, or is some other classification level.

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: Okay. And is this review of personnel  
2 walled off in any way from the government? Rephrase that,  
3 because they are clearly not walled off from the government,  
4 walled off from the prosecution.

5 LDC [MR. CONNELL]: That is a very good question, and let  
6 me tell you what pieces of that that we know. Number one, we  
7 know that Protective Order #1 requires the classification  
8 review process to respect, to the extent possible, the  
9 attorney-client privilege, right? That's the language of  
10 Protective Order #1.

11 When we brought that back to the military commission  
12 to argue that there should be a better protection, a stronger  
13 protection for attorney-client privilege, the government  
14 argued -- and this is in the 13 series -- the government  
15 argued that the defense doesn't understand how classification  
16 review works, that we all need to talk to each other,  
17 everybody needs to talk to each other about whether this  
18 information is classified or not. And so it was at that time  
19 that the military commission, in its order, wrote that the  
20 military commission has an expectation that everyone involved  
21 in the process will do their best essentially to respect  
22 attorney-client privilege.

23 That's the legal framework. The actual framework on

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 the ground is very opaque to us. But in our conversations  
2 with the Office of Special Security, the impression that I  
3 have gotten is that some OCAs maintain separate compartments  
4 for our information and some OCAs do not.

5 MJ [COL POHL]: Okay. Now, just so I am clear, if you  
6 have a classified source document and you prepare a motion,  
7 okay, that motion would be considered what based on the  
8 classified information?

9 LDC [MR. CONNELL]: It's the same as ----

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: ---- we pass through the markings.

12 MJ [COL POHL]: Okay. Then when you do that motion, do  
13 you have to go through a classification review prior to  
14 distribution of that?

15 LDC [MR. CONNELL]: Okay. Generally no, and the reason  
16 for that is the classification review takes between weeks and  
17 months and some occasions years and we would never get  
18 anything filed if we had to go through classification review.

19 If I could just finish giving the answer.

20 MJ [COL POHL]: Okay. Go ahead, I'm sorry.

21 LDC [MR. CONNELL]: There was one example where -- where  
22 we were in the situation where we could not provide -- team  
23 al Baluchi could not provide classified to the other

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 defendants, to the other defense teams and we didn't know how  
2 to handle a particular discovery request. I took it to my  
3 supervisor, the prior Chief Defense Counsel, who directed me  
4 not to file the motion to compel the discovery, but instead to  
5 submit it for classification review prior to filing the  
6 motion. That's an issue that has always stuck to me because  
7 in the government's response they faulted us for taking too  
8 long for filing the motion to compel, which I always  
9 thought -- felt was unfair.

10           So in general, we do not submit our motions for  
11 classification review at this point. Early in the process,  
12 when it first started and, you know, everybody was just trying  
13 to sort of figure out the mechanics of the situation, we did  
14 submit some documents, some of our own pleadings for  
15 classification review, but that was after their filing and not  
16 before their filing.

17           MJ [COL POHL]: Okay. Just so I am clear of how this  
18 works then ----

19           LDC [MR. CONNELL]: Yes, sure.

20           MJ [COL POHL]: ---- I know what my orders say, I just  
21 want to know ----

22           LDC [MR. CONNELL]: How it works on the ground, sure.

23           MJ [COL POHL]: If you have a piece of TS information and

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 a piece of Secret information and a bunch of Unclassified  
2 information and you take that bit of TS information and that  
3 bit of Secret information and you put that in your motion.  
4 Okay? You portion-mark it, I would assume, but you don't need  
5 to send that motion back to anybody for any review before  
6 you ----

7 LDC [MR. CONNELL]: 99 percent of the time, that's exactly  
8 right.

9 MJ [COL POHL]: Okay. You're just following on from the  
10 source documents and just assuming it's the same?

11 LDC [MR. CONNELL]: That's right.

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

13 Mr. Trivett. Let me ask you to start out with the  
14 same question that I asked Mr. Connell, which I think I know  
15 what your answer is. Do you believe paragraph 1.3(e) only  
16 applies to information that the holder does not know is  
17 classified but suspected it may be?

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

19 MJ [COL POHL]: And it does not apply to the situation  
20 where the holder of the information knows its classified or  
21 believes it's classified -- or rephrase that, knows it's  
22 classified but does not know at what level?

23 MTC [MR. TRIVETT]: Correct. That's the government's

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 position.

2 MJ [COL POHL]: If you have a holder of information, knows  
3 it's classified but not at what level, does that holder of the  
4 information have any requirement to find out at what level it  
5 is?

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

7 MJ [COL POHL]: And just treats the whole document as  
8 whatever the highest level is?

9 MTC [MR. TRIVETT]: Correct.

10 MJ [COL POHL]: Now -- and this goes back to a comment  
11 that Ms. Bormann made yesterday. I have not seen these  
12 documents and it may be helpful if actually I look at what  
13 they look at, and so are they available?

14 MTC [MR. TRIVETT]: We can get you samples, sir, yes.

15 MJ [COL POHL]: Tomorrow at the closed hearing ----

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

17 MJ [COL POHL]: ---- bring me some samples of it because I  
18 think it may be easier to conceptualize it.

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

20 MJ [COL POHL]: Just so I understand it now, if you  
21 provide information -- and again, I don't know what format it  
22 is in -- and it all has to be treated as TS, because that's  
23 the highest level of one bit in there, don't you run into the

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 situation where you are, to use the term, overclassifying but  
2 maybe let me use a slightly different approach, being forced  
3 to treat Secret information as TS unless this gets reviewed?  
4 Isn't that the net effect?

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

6 MJ [COL POHL]: Okay. And you discussed yesterday about  
7 access to the client, the display-only.

8 MTC [MR. TRIVETT]: Correct.

9 MJ [COL POHL]: Do you have -- what about the comment or  
10 the remark that Ms. Bormann made yesterday that if a whole  
11 bunch of information is Secret, there are people on the  
12 defense team that can see Secret information that can't see TS  
13 information and so, therefore, how do you address those  
14 concerns without requiring a review?

15 MTC [MR. TRIVETT]: I think it's consistent with when we  
16 discussed the ACCM material, that there is not an automatic  
17 presumption that every single person on the defense team has a  
18 need to know every piece of discovery that's turned over if it  
19 is classified.

20 MJ [COL POHL]: And who decides that?

21 MTC [MR. TRIVETT]: Well, I think it would depend.  
22 Certainly if Ms. Bormann believes that someone on her team has  
23 a need to know certain information, they can put in for a Top

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Secret clearance. The government is not part of that process,  
2 but they can ----

3 MJ [COL POHL]: No, but what I am saying now is, is there  
4 are -- and I take it at face value because I don't know the  
5 clearances of everybody, I just know the clearances of people  
6 in this room. Rephrase that. I believe I know the clearances  
7 of people in this room. But, you know, she alleges that there  
8 are certain members of the team that only have a Secret  
9 clearance, and therefore they would be precluded from  
10 reviewing any of this information, right, if it's all TS?

11 MTC [MR. TRIVETT]: Correct.

12 MJ [COL POHL]: And therefore they would be precluded from  
13 reviewing Secret information because it must be handled as if  
14 it were TS?

15 MTC [MR. TRIVETT]: Correct. But the process can't be  
16 that the government has to classify things or try to disclose  
17 things at the lowest possible level to satisfy every possible  
18 consultant -- which, by the way, we don't even know what  
19 consultants they have and what their clearances are. The  
20 process can't work that way.

21 MJ [COL POHL]: Well, does the government have a  
22 responsibility to classify information properly?

23 MTC [MR. TRIVETT]: We do have -- yes.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: So if you have a piece of Secret  
2 information ----

3 MTC [MR. TRIVETT]: Yes.

4 MJ [COL POHL]: ---- embedded in a document that you know  
5 has another piece of TS information, the government is  
6 basically forcing the defense to treat that as TS information,  
7 even though the OCA has categorized it as Secret information.  
8 I mean, the net effect is the same.

9 MTC [MR. TRIVETT]: I don't know that it is safe to say  
10 that the OCA has considered it Secret information.

11 MJ [COL POHL]: Well, what's your basis for saying some of  
12 this is Secret and some of it is not?

13 MTC [MR. TRIVETT]: We know that it's at least  
14 SECRET/NOFORN, all of it.

15 MJ [COL POHL]: Okay. I got it, but if ----

16 MTC [MR. TRIVETT]: And we know there is information  
17 within there, maybe not on every single document, but  
18 certainly collectively, that makes it TS/SCI.

19 MJ [COL POHL]: Okay. But your TS/SCI banner forces the  
20 defense to treat the SECRET/NOFORN as TS/SCI, correct?

21 MTC [MR. TRIVETT]: Correct, until and if they want to get  
22 a classification review.

23 MJ [COL POHL]: Okay.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MTC [MR. TRIVETT]: That's completely within their purview  
2 if they want to do it. So if Ms. Bormann, who has a  
3 clearance, says I really need to not -- and, again, there is a  
4 certain resource limitation to this, just like there is for  
5 anything in the government. But if Ms. Bormann goes through  
6 certain documents and says, you know, "I really need to show  
7 document 1, 8, 10 and 12 to this person with a Secret  
8 clearance," there is nothing that stops her from putting those  
9 documents back through the process, getting a classification  
10 review, and if they come back just Secret and not TS, then she  
11 can certainly show it to them. So there is a process that  
12 gets you there; it's just not a default process at the very  
13 beginning, primarily because of the resources and the volume  
14 of material that we are talking about.

15 MJ [COL POHL]: Okay. Let me -- you talked about volume  
16 yesterday and you didn't give me an exact number and I  
17 understand your position on that. But in the larger scheme of  
18 things I'm going to pick a number.

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

20 MJ [COL POHL]: It's not your number, it's my number.

21 MTC [MR. TRIVETT]: Okay.

22 MJ [COL POHL]: I am going to say 20,000 documents. We  
23 heard about the 8,000 number -- again, that's my number, not

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 your number. I got it. I don't know what the number is, so  
2 don't take that as any verification of a classified bit of  
3 information.

4 Okay. We are talking about 20,000 government-owned,  
5 government-generated documents, correct?

6 MTC [MR. TRIVETT]: Correct.

7 MJ [COL POHL]: Okay. And approximately -- and I have  
8 looked at all these numbers -- how many classified documents  
9 of discovery, not this bit, I am talking about a classified  
10 discovery, does the government intend to turn over in this  
11 case once all the reviews and substitutions are done? Just  
12 ballpark it for me.

13 MTC [MR. TRIVETT]: Can you give me one moment to confer?

14 MJ [COL POHL]: Sure.

15 MTC [MR. TRIVETT]: Thanks.

16 LDC [MR. NEVIN]: Your Honor, your question goes to any  
17 classification level?

18 MJ [COL POHL]: Any -- yes, I am going to anything that  
19 had to be reviewed for a classification. I am just trying to  
20 figure out what the universe is.

21 [Pause.]

22 MJ [COL POHL]: Mr. Trivett.

23 MTC [MR. TRIVETT]: Yes, sir. Just to clarify a few

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 things. In total for the case, not discovery of this specific  
2 type, but in total of the case ----

3 MJ [COL POHL]: Right.

4 MTC [MR. TRIVETT]: ---- what we intend to turn over which  
5 is classified is tens of thousands of pages. I can't give a  
6 specific number because if we give a specific number of  
7 tens ----

8 MJ [COL POHL]: All of these tens of thousands of  
9 documents have gone through an OCA classification of review?

10 MTC [MR. TRIVETT]: Correct. Quite frankly, sir, as we  
11 discussed this morning, detailed tomorrow, I think it will  
12 become easier for you to understand why the government treated  
13 this specific information different than the other classified  
14 information.

15 MJ [COL POHL]: Okay. I got it. I got it, and I am  
16 interested to see that.

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

18 MJ [COL POHL]: Now, I think I am going to end with you  
19 with the same way I ended with Mr. Connell. This defense  
20 review system was set up to review defense-generated  
21 documents, right?

22 MTC [MR. TRIVETT]: That may have been the intention so  
23 they had the ability to do it, correct.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: To do that. Okay. These are  
2 government-generated documents?

3 MTC [MR. TRIVETT]: They are.

4 MJ [COL POHL]: Really what we are talking about here, at  
5 this point, is who is going to do the reviewing. It seems to  
6 me that's the issue. If defense says, for example, here is my  
7 8,137 pages, and the question is who do we send them to to get  
8 them reviewed so we now can break it down accordingly, and the  
9 government's position appears to be that it should go through  
10 the defense review process, is that what you are telling me?

11 MTC [MR. TRIVETT]: Correct, because ----

12 MJ [COL POHL]: Why should government-originated,  
13 government-generated documents go through that process? That  
14 process is designed to protect privileged and strategic  
15 information. This information is government information that  
16 you already know. So, again, I'm just curious. Why would  
17 this segment of government-owned, government-generated  
18 evidence have to go through the defense review process when  
19 all the other thousands of pages of discovery go through the  
20 normal government review process?

21 MTC [MR. TRIVETT]: A couple of different reasons, and the  
22 first is that we hope to get the case done during the lives of  
23 living men. That's part of it. As we will talk in more

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 detail with what it is that we are talking about, you will  
2 understand that the volume and the importance are two very  
3 different discussions, but that ultimately it was not worth  
4 the government's time to go through a document-by-document  
5 review on the classification of things that we know are  
6 classified, so it's not a question as to whether or not they  
7 are unclassified -- we know that they are classified -- and  
8 that ultimately the defense has the ability to identify what  
9 documents in there are of interest to them that they want to  
10 use in some way, and they have the ability to go back through  
11 the process and get a classification review.

12           They can do that, but in the end, as of now, where  
13 the classification levels are right now, it's coming back as  
14 either SECRET/NOFORN or as TS. It's not going to come back as  
15 Unclassified.

16           MJ [COL POHL]: Okay. But that distinction may be -- have  
17 a difference on who they could show it to, correct?

18           MTC [MR. TRIVETT]: Only in the first instance when they  
19 first get the material. But if there is certain material they  
20 go through and say, "My consultant needs to see these things,"  
21 they can put it back through the process and then the process  
22 can work through that way. But with the -- and you will hear  
23 lots -- you will hear volumes. There is clearly a lot of work

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 we need to do with classified discovery, but there are finite  
2 resources to be able to go through and make determinations on  
3 all of these documents regarding what their correct  
4 classification level is. I submit to you that when you learn  
5 of more details for this you will better understand why the  
6 government chose to do it this way, which we think is  
7 completely proper under the regulations, the Executive Order,  
8 and for pragmatic purposes to get this case to trial.

9 MJ [COL POHL]: Okay. I understand your position. We  
10 will discuss it at the classified session and then, if  
11 necessary, revisit it on the record next week. Thank you.

12 MTC [MR. TRIVETT]: Thank you, sir.

13 LDC [MS. BORMANN]: Judge, may I comment just briefly in  
14 an unclassified setting?

15 MJ [COL POHL]: Sure. Sure.

16 LDC [MS. BORMANN]: You asked Mr. Trivett about the use of  
17 a consultant who has a Secret clearance and no TS yet,  
18 although it's been pending for two years and we can't seem to  
19 move it to the top of the pile. With that particular  
20 consultant, here is the problem that Mr. Trivett doesn't  
21 understand and I think the commission needs to.

22 That consultant needs to read all of that material,  
23 because the nature of the material that's been provided is

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 something only the consultant can parse out for purposes of  
2 importance. It's not -- it's not something I have the  
3 expertise to be able to determine what portion of that would  
4 be important and what wouldn't.

5           So in your example, all 20,000 pages are going to  
6 need to be reviewed so that consultant can reach a complete  
7 and informed decision.

8           MJ [COL POHL]: I understand that, Ms. Bormann, but then  
9 that is a clearance issue, not a -- not a pending  
10 classification review issue. What I am saying is he has got  
11 to review TS too.

12           LDC [MS. BORMANN]: It's actually both, Judge, because to  
13 quote Mr. Trivett, he'd like to get the case done during the  
14 lives of living men, and I would like to get the case done  
15 before the lives of this living woman. And at the rate we're  
16 going, if I have to submit 20,000 pages for discovery through  
17 our pipeline, I honestly can't say that it will be done during  
18 my lifetime given the situation we have faced. And it's  
19 possible that the consultant I am discussing may -- I mean, at  
20 this point, I don't know what the holdup is; nobody gives us  
21 any answers. We have asked all the way up the chain. So it's  
22 possible that this person may only ever get a Secret  
23 clearance. So if 98 percent of the material we have been

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 given is actually at the Secret level and only 2 percent  
2 isn't, which I think is probably about accurate, then we have  
3 deprived my consultant and Mr. Bin'Attash of the right to look  
4 at this stuff during the lives of living men, and that's  
5 really the issue. So part of it is expediency and part of it  
6 is being able to provide consultant services that have been  
7 approved and have been waiting in the wings for, at this  
8 point, years.

9 MJ [COL POHL]: Thank you.

10 LDC [MR. CONNELL]: Your Honor, may I reply to the  
11 government?

12 MJ [COL POHL]: I'm sorry, Mr. Connell.

13 LDC [MR. CONNELL]: One of the reasons that we know that  
14 the defense interpretation of Section 1.3(e) is superior to  
15 the government interpretation of Section 1.3(e) is to read it  
16 with the rest of the Executive Order and not simply in a  
17 vacuum. One of the requirements in handling classified  
18 information is that when a person originates a document, they  
19 have to put a classification block on it. That is required by  
20 Executive Order 13526, Section 1.6. It's also required by the  
21 DoD regulations as well, DoD Manual 5200.01, Volume 2,  
22 Enclosure 2, Paragraph 3. And part of that classification  
23 block is what is the actual classification of the information,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Confidential, Secret, Top Secret. The other portion of it is  
2 the declassification date. In fact, we have recently received  
3 guidance -- and proper guidance, I think -- about reminding us  
4 that we have to put classification blocks on every document  
5 that we generate and giving us additional guidance on how to  
6 identify the derivative classifier.

7 Under the government's interpretation where, you  
8 know, it doesn't matter, nobody ever has to find out whether  
9 it's confidential or SAP material of 1.3(e); the information  
10 would always have the wrong declassification date on it, which  
11 is not insignificant because it matters for the public, it  
12 matters for other agencies, it matters for the whole  
13 classification regime itself. And if the government is right  
14 that there is no responsibility ever to find out the real  
15 classification of information, then information can just  
16 remain classified indefinitely.

17 The second observation that I wanted to make is it's  
18 funny how these issues all bleed together, but the question of  
19 Secret versus Top Secret handling is not simply a consultant  
20 question. You know, there was some discussion yesterday in  
21 respect to AE 406 that, you know, attorneys and paralegals  
22 within the military, when they come to our office at least,  
23 and I suspect the other components of the Office of Military

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Commissions, generally come with a Secret clearance, and it  
2 may take a year or longer. We have -- two of our paralegals  
3 only have a Secret clearance, and it's not -- it's extremely  
4 difficult to process information which is overclassified, and  
5 I'm talking about individual responsibility within the case  
6 now because military members, when they PCS to our office,  
7 come with Secret and, you know, leave after a couple of years.  
8 And for at least one of those years generally cannot handle  
9 Top Secret information. So it's not simply a matter of  
10 consultants, it's a matter of military members who are  
11 deprived of the ability to participate fully in the case and  
12 the military commission's defense office which is deprived of  
13 the ability to process information quickly and properly.

14           You know, it was a little bit strange to hear the  
15 government's argument that it simply wasn't worth their time  
16 to submit the information for classification review. The  
17 government has publicly taken the position that it's working  
18 seven days a week on discovery review. We know that the  
19 prosecution is currently in a surge posture where they have 25  
20 new employees for discovery purposes. And the defense, you  
21 know, has this thin pipeline that is staffed not very well and  
22 it seems, you know, the misapplication of resources to push  
23 the responsibility for this over to the defense pipeline

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 instead of the prosecution pipeline.

2           The last observation I want to make is that some of  
3 the questions that the military commission asked today have  
4 been addressed in prior pleadings. The question -- the  
5 military commission asked the question of the government of  
6 who makes the need-to-know determination. Our position on  
7 that is stated in AE 113S. It's clear under the Executive  
8 Order that the authorized holder of classified information  
9 makes the need-to-know determination, but the government has  
10 taken the position that they get to make the need-to-know  
11 determination for each individual item of information, which  
12 in the situation here would become almost unworkable because  
13 the defense would have to raise its hand and say, hey, I am  
14 interested in page 1003; I would like a need-to-know  
15 determination that this paralegal can work on it in processing  
16 it. It's just an unworkable situation.

17           The last observation that I want to make is that with  
18 respect to the military commission's questions about the  
19 privileged structure of our classification review, that is  
20 found in the record at AE 113II [sic]. Thank you very much.

21           MJ [COL POHL]: Thank you.

22           Mr. Ruiz.

23           LDC [MR. RUIZ]: Judge, I have a couple of short points

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 just based on some of the arguments that have been made.

2 MJ [COL POHL]: Sure.

3 LDC [MR. RUIZ]: Number one, I want to challenge the  
4 notion that all of this information is classified, will be  
5 classified, and will come back unclassified as being one of  
6 the underlying assumptions.

7 MJ [COL POHL]: I thought he said it will come back  
8 classified and not lower than the SECRET/NOFORN.

9 LDC [MR. RUIZ]: Right. What I can tell you about that is  
10 very limited in this session. But what I can tell you is that  
11 in the closed session, I will be able to provide you with some  
12 evidence, some documents, that will completely contradict that  
13 position from the government.

14 MJ [COL POHL]: Okay.

15 LDC [MR. RUIZ]: I can't do it here, because even though I  
16 have the unclassified documents, to reference them in the  
17 context of these documents would I think maybe put us closer  
18 to the line than you want to be. But what I can tell you is,  
19 and I rarely do this, that I will conclusively rebut that ----

20 MJ [COL POHL]: Okay.

21 LDC [MR. RUIZ]: ---- during the closed session; that is,  
22 this category of documents will not be coming back as  
23 something less than Secret. So I wanted to highlight that for

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 you. I wanted to challenge that, at least to the extent that  
2 I can in these proceedings, and I want to echo what my  
3 colleagues have said, which ultimately comes down to an issue  
4 of efficiency and the government's willingness to engage their  
5 resources to move this case forward.

6 I did also hear Mr. Trivett yesterday very clearly  
7 say that they had not looked at every page of this discovery  
8 before they made a determination that in fact it would all be  
9 at least Secret. I don't know how they can do that, but I did  
10 hear that clearly.

11 Those were the points that I wanted to make.

12 MJ [COL POHL]: Thank you. Mr. Nevin or Mr. Harrington,  
13 do you have anything you wish to add?

14 LDC [MR. HARRINGTON]: No, sir.

15 MJ [COL POHL]: Apparently not.

16 LDC [MR. NEVIN]: No, Your Honor.

17 MJ [COL POHL]: We will discuss this, just so everybody  
18 understands, I know the attorneys do, but the way ahead is  
19 that the hearing tomorrow is to decide whether or not we need  
20 to have -- the hearing tomorrow will discuss classified  
21 information. But the purpose of that hearing is, quite  
22 frankly, to decide whether or not we need to have a closed  
23 session under Rule for Military Commission 806 to put the

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 information on the record for the various motions. So -- and  
2 I know the attorneys understand that, but so everybody else  
3 understands this, the hearing tomorrow is really a preparatory  
4 hearing to see whether or not we have to have a closed session  
5 to discuss classified information. It may seem to some that  
6 we are doing the same thing twice, but actually the two  
7 hearings have completely different functions under the law and  
8 this is actually the same practice as is done in military  
9 court-martials and, in my understanding, under CIPA.

10 That being said, let's turn to 397 and I believe the  
11 government will start this one.

12 General Martins.

13 CP [BG MARTINS]: Good morning, Your Honor.

14 MJ [COL POHL]: Good morning.

15 CP [BG MARTINS]: In December the prosecution proposed  
16 that some 14 different defense motions to compel discovery  
17 pertaining to the Central Intelligence Agency's former  
18 Rendition, Detention and Interrogation program be  
19 consolidated. The commission directed the prosecution to file  
20 a consolidated litigation plan, which it did in Appellate  
21 Exhibit 397 in the week before the new year.

22 The defense responded and we replied.

23 In short, the plan we propose the military judge

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 adopt as part of his power to specify the time, place and  
2 manner of discovery and to prescribe such terms and conditions  
3 as are necessary to the interests of justice is the  
4 ten-category framework cited first for the first time  
5 favorably in this case by counsel for accused Ali Abdul Aziz  
6 Ali in 2014 in the motion marked as Appellate Exhibit 308.

7           A point of clarification, Mr. Connell requested  
8 information within these ten categories, but while also still  
9 maintaining all his other requests associated with the other  
10 RDI program. And this is indeed part of the problem. As many  
11 of the other requests are overbroad and also implicate  
12 documents that remain properly classified, many of these  
13 requests are also far afield from any real issue in this trial  
14 of these five men for terrorism and murder of civilians and  
15 protected persons in the context of hostilities.

16           Another point of clarification, we are talking about  
17 only one category of discovery in these 14 motions to compel  
18 and in this consolidation plan. As the government has already  
19 provided hundreds of thousands of pages in satisfaction of its  
20 obligation to permit the defense to examine documents, books,  
21 papers, photographs, objects, reports, statements ----

22           MJ [COL POHL]: Mr. Nevin, can you guys keep it down a  
23 little bit, please.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 LDC [MR. NEVIN]: I'm sorry.

2 MJ [COL POHL]: It's distracting. I don't mind you  
3 talking, but just keep it down.

4 Go ahead.

5 CP [BG MARTINS]: These are things in the possession,  
6 custody and control of the government, known or by the  
7 exercise of due diligence may become known to the prosecution  
8 and are material to the preparation of the defense or are  
9 intended for use by trial counsel as evidence in the  
10 prosecution case-in-chief at trial. We have also produced  
11 other categories of discovery, to include Brady evidence.

12 Among the discovery that has been produced in these  
13 categories that also overlaps the categories of RDI-related  
14 discovery were more than 600 pages of statements by the five  
15 accused related to the September 11 attacks as a result of our  
16 motion for substitutions that you granted in the Appellate  
17 Exhibit 073 series and more than 100 pages for each accused  
18 pertaining to his conditions of confinement as a result of our  
19 request for substitutions in Appellate Exhibit 136.

20 While we used the M.C.R.E. 505 process to protect the  
21 original classified documents, almost all of that material was  
22 provided to the defense in an UNCLASSIFIED/FOR OFFICIAL USE  
23 ONLY form. Here then are four essentials of our proposed

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 plan. First, we will be providing extensive information  
2 related to the individual accused's experience within the RDI  
3 program, to include ten things -- and I'm going to use letters  
4 as opposed to numbers, to offset them from the four elements  
5 of the plan:

6 (a) A chronology containing the sequence of sites  
7 where each accused was held between date of capture and  
8 September 2006;

9 (b) A description of how the accused was transported  
10 between the locations.

11 Footnote. (a) and (b) have been provided to you,  
12 Your Honor, and we are seeking substitutions and other relief  
13 regarding the underlying material.

14 (c) Photographs and other ----

15 MJ [COL POHL]: Just a second. Those were provided to me  
16 this week?

17 CP [BG MARTINS]: Yes.

18 MJ [COL POHL]: Okay.

19 CP [BG MARTINS]: (c) Photographs and other information  
20 documenting the accused's conditions of confinement at each  
21 location;

22 (d) Information about certain medical personnel,  
23 guard force personnel and interrogators having direct and

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 substantial contact with the accused in the sites;

2 (e) Copies of standard operating procedures,  
3 policies or guidelines on handling, moving, transporting,  
4 treating, interrogating, et cetera, so-called high-value  
5 detainees at and between the various facilities cited;

6 (f) Employment;

7 And, (g) Training records of those medical  
8 personnel, guard force personnel and interrogators who had  
9 direct and substantial contact with the accused;

10 (h) All statements obtained from interrogations,  
11 reports of interrogations, interrogation logs and notes of the  
12 accused and all co-conspirators on the charge sheet.

13 (i) Copies of requests and justifications and legal  
14 reviews to employ so-called enhanced interrogation techniques  
15 on the accused and all co-conspirators;

16 And, (j) Copies of documents memorializing decisions  
17 and guidance on such requests.

18 I mentioned that (a) and (b) have been submitted to  
19 you, as you note, this week. Also, we submitted material  
20 responsive to (i) and (j). I would like to also in this first  
21 element of the plan talk about a rough schedule for the  
22 provision of the other materials.

23 MJ [COL POHL]: Okay. Just -- let me get this framework

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 down just so I understand the government's position. This is  
2 a similar framework that the judge in Al Nashiri set up and  
3 your pleading expressed some displeasure with the framework,  
4 which is fine -- and I understand we are talking about the  
5 same judge here. I got it. But as I said, this is a  
6 different case.

7           So the government -- just so I am clear, the  
8 government's position is they are going to say, we will use  
9 this framework and we are not going to relitigate this  
10 particular ten-category framework for this case?

11           CP [BG MARTINS]: That is correct.

12           MJ [COL POHL]: You understand what I am doing. I just  
13 want to make sure ----

14           CP [BG MARTINS]: You're not asking me to love it.

15           MJ [COL POHL]: I am not asking you to love it or embrace  
16 it, but you are not going to contest this framework and, as a  
17 start-up, you agree that's the plan we will use in this case.

18           CP [BG MARTINS]: That's the plan we are proposing, that  
19 we use this to guide the government's analysis as it reviews  
20 for discoverable information of RDI materials.

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

22           CP [BG MARTINS]: And I do have some qualifiers related to  
23 the rationales of relevance that the judge in that case

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 recognized and how we anticipate this commission will view  
2 various theories as either legally cognizable or not.

3 MJ [COL POHL]: Got it.

4 CP [BG MARTINS]: So then I mentioned of those ten  
5 categories, (a), (b), (i) and (j), we have submitted material  
6 to the military judge and information seeking substitutions  
7 and other relief.

8 (e), this is the standards, the standing operating  
9 procedures, policies, guidelines associated with the handling,  
10 treatment, so forth, of high-value detainees. Hundreds of  
11 pages we intend to bring to the military judge by 8 March,  
12 again seeking substitutions and other relief.

13 (h), which is the statements of co-conspirators,  
14 Your Honor referred to our lack of agreement with aspects of  
15 the previous order. This was an area that we felt was quite  
16 broad in terms of statements; not merely statements related to  
17 the 9/11 attacks, but all statements of the accused. We  
18 anticipate that this commission would deem that one or more of  
19 the rationales of relevancy causing that to be discoverable,  
20 so we are -- we will be producing the first installment of  
21 more than a thousand pages of material, eventually, to the  
22 military judge seeking substitutions and other relief by  
23 22 March.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           (c), which is the conditions of confinement of each  
2 accused, hundreds of pages.

3           (d), (f), and (g), this is information relating to  
4 certain medical personnel, interrogators, guard force  
5 personnel having direct and substantial contact with each  
6 accused, hundreds of pages, both of those, (c). on the one  
7 hand, (d), (f) and (g) on the other by late summer. We plan  
8 to produce those hundreds of pages, with the aim of delivering  
9 all of the discovery in this area to the military judge or to  
10 the defense directly by 30 September 2016.

11         MJ [COL POHL]: Just so it's clear how this procedure  
12 works, you deliver the information to me, I review it and then  
13 you propose summaries. If I find the summaries an adequate  
14 substitute under the definition of the law, I approve them and  
15 then they can be given to the defense. If I don't approve  
16 them and I send them back to you, then we have to revisit the  
17 adequacy of the summaries. So just so it's clear that saying  
18 they get to me by the end of the summer, September, okay. It  
19 just starts one review process by me -- it won't start it; it  
20 is going to start as soon as I get back and I have got the  
21 stuff I have already got, but I just don't want to create an  
22 expectation ----

23         CP [BG MARTINS]: I understand.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: ---- that on 1 October it all goes to the  
2 defense. It's going to be after.

3 CP [BG MARTINS]: Your Honor, we are very aware of that,  
4 with the back and forth that may be necessary.

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

6 CP [BG MARTINS]: In fact, other pieces of the plan will  
7 refer to this aspect.

8 MJ [COL POHL]: Let me ask you this. We are talking about  
9 RDI discovery here, right? Okay? And this is a little off  
10 topic, but I think it's related. What about other classified  
11 discovery that's ----

12 CP [BG MARTINS]: We are aiming ----

13 MJ [COL POHL]: ---- that's going to require judicial  
14 review?

15 CP [BG MARTINS]: We are aiming to have it by  
16 30 September. We are working seven days a week on this. We  
17 are working towards it.

18 MJ [COL POHL]: I am not saying you guys aren't working  
19 hard and from the defense submission yesterday by  
20 General Baker, I am not saying they are not working hard. I  
21 don't make those kind of judgments. I'm simply trying to ----

22 CP [BG MARTINS]: That is our aim.

23 MJ [COL POHL]: I am just trying to figure out how hard I

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 am going to have to work, quite frankly. But you have the RDI  
2 discovery, and I have an idea of how much that is. Can you  
3 approximate how much other discovery ----

4 CP [BG MARTINS]: We provided the vast bulk of our  
5 case-in-chief and of the materials required under 701(c)(3).

6 MJ [COL POHL]: Okay. Which I have already reviewed.

7 CP [BG MARTINS]: The material you have had to review you  
8 reviewed, other material has not been provided.

9 MJ [COL POHL]: Let's come back to 397.

10 CP [BG MARTINS]: Your Honor, the second element of the  
11 plan, the government has invoked the classified information  
12 privilege as to documents requested that are classified and  
13 has filed the necessary declaration under 10 United States  
14 Code, Section 949p-4 and Military Commission Rule of Evidence  
15 505(f).

16 The standard of discoverability is thus not mere  
17 theoretical relevance, but rather whether the information is  
18 noncumulative, relevant, and helpful to a legally cognizable  
19 defense rebuttal of the prosecution's case or to sentencing.  
20 On this point, the discussion in Rule for Military Commission  
21 701(c) cites to the controlling case on this standard in our  
22 reviewing court, United States v. Yunis, 867 F.2d 617. It's a  
23 D.C. Circuit case from 1989 and the controlling case in this

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 area. That's the second part of the plan, that the standard  
2 is a different standard when we have invoked the privilege and  
3 we have filed the proper declaration.

4 Third, we should continue to be guided throughout by  
5 relevance rationales that have been averred by the defense  
6 within these proceedings and that this commission can be  
7 expected to deem as legally cognizable and beyond mere  
8 theoretical, and I will use (a), (b), (c), (d), for these as  
9 well to offset them.

10 So relevance rationale (a), relevance to the  
11 sentencing case in a capital prosecution. While we will  
12 object to expansive theories of mitigation, we expect that the  
13 commission, for the purposes of discovery, will maintain the  
14 treatment of the accused could be argued to mitigate  
15 imposition of the death penalty;

16 (b), relevance to which the accused would be a threat  
17 if sentenced to confinement rather than death;

18 (c), relevance to a defense motion for appropriate  
19 relief alleging outrageous government conduct;

20 (d), and while the prosecution does not intend to  
21 introduce any statement from the accused taken in the course  
22 of the administration of enhanced interrogation techniques,  
23 nonetheless the use of EITs on the accused we can expect the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 military commission will deem a legally cognizable issue  
2 implicating the admissibility of any subsequent statement of  
3 the accused.

4           The fourth component of the plan, we are seeking and  
5 intend to seek substitutions and other relief under the  
6 statute and under the Rule of Evidence in order to protect the  
7 classified information while still enabling the military judge  
8 to find that a summary or a statement of relevant facts to  
9 which the prosecution will admit for the issue in question or  
10 other relief would provide the accused with substantially the  
11 same ability to make a defense as would discovery of the  
12 specific classified information.

13           And, Your Honor, I am not sure how you would like to  
14 go through this procedurally, but in order to illustrate how  
15 the government -- how the prosecution recommends you apply  
16 this plan, I would propose to now discuss our specific  
17 response to Appellate Exhibit 112 to show how we would  
18 recommend it work, but I'm open to another way of doing that  
19 if you would like to hear from Mr. Connell on the framework.  
20 It just seems to me that a particularized discussion since we  
21 have asked for a consolidation, it would show how we could go  
22 through the ----

23           MJ [COL POHL]: Let me ask you a few questions before we

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 get to that because I think I want to do kind of a global  
2 approach first and then we will go -- we are going to have to  
3 go to the individual. I've got that.

4           From many of your motions, you make a couple of  
5 statements and I need to make sure I understand them. In your  
6 reply brief of 5 February, you make a couple of statements  
7 here and I just want to check them. You say, "The prosecution  
8 does not intend to use the statements of any former RDI  
9 detainees in its case-in-chief, so this part of the motion is  
10 not ripe." And that always begs the question of would you use  
11 such statements in rebuttal or sentencing?

12           CP [BG MARTINS]: Your Honor, that means what it says. I  
13 think it certainly has implications for discovery with regard,  
14 as you know, to Giglio and so forth and impeachment. These  
15 are not our witnesses that are being discussed in this Delta  
16 here, the paragraph D. But that's what we are prepared to  
17 say.

18           MJ [COL POHL]: Okay. And then you further say, actually  
19 in the next paragraph about "Brutonizing" the statements; that  
20 "Defense counsel will be receiving the conditions of  
21 confinement for their clients, and not the conditions of  
22 confinement for the other co-Accused." What do you mean by  
23 that?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 CP [BG MARTINS]: Since we are going to use Bruton, a  
2 Bruton approach to ensure that statements are not implicating  
3 others, we intend to, if we are litigating voluntariness of  
4 subsequent statements, the conditions of detention as to a  
5 particular accused should be all that's needed with regard to  
6 the totality of the circumstances.

7 MJ [COL POHL]: Okay. But that's an argument of how to  
8 approach an evidentiary issue. My question is if you have  
9 statements from Mr. Mohammad, for example, are you saying that  
10 those cannot be shared with his counsel, with the other four?  
11 I understand what you are saying and I think that's a  
12 different issue altogether just dealing with the evidentiary  
13 admissibility of statements and whether or not treatment of  
14 co-accused may or may not be relevant to that issue for an  
15 individual. I've got that part. But the way this is worded,  
16 it seems like you are only going to give statements of  
17 Mr. Mohammad to Mr. Mohammad's team and the other teams. Of  
18 course, if the answer is that's the way it's going to be, the  
19 follow-up question is how do you intend to enforce that, but  
20 that's a separate issue. But you understand what I am saying?

21 CP [BG MARTINS]: Let me just say the conditions of  
22 confinement information that we provided already that I talked  
23 to you about was all Unclassified/FOUO. Allow me, if I may

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 take a moment with the rest?

2 MJ [COL POHL]: Sure.

3 [Pause.]

4 CP [BG MARTINS]: Thank you for giving me the opportunity.  
5 We have endeavored to get everything in these areas to FOUO  
6 level for this reason, so they can use it. And, again, the  
7 material provided, except for a small amount with regard to  
8 two accused was Unclassified/FOUO because we've provided in  
9 the Charlie and Hotel areas material already. The vast  
10 majority of the remainder, including the more than a thousand  
11 in the H, which again bears upon the questions we are talking  
12 about here, statements they made in conditions of confinement,  
13 a lot of the information ends up getting intertwined, but a  
14 vast majority of that is Unclassified. There is some that is  
15 going to be marked that will not be able to be moved to an  
16 Unclassified level that will be display-only to a particular  
17 accused who said it or experienced it.

18 MJ [COL POHL]: Let's talk about -- let's not talk about  
19 what goes to the accused, necessarily, first. Let's just  
20 simply talk about statements of co-accused going to other  
21 defense teams, because there is a currency issue.

22 CP [BG MARTINS]: The impediment we are seeing here is  
23 going to be an impediment of the classification banner that's

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 on it and most of it is going to be Unclassified/FOUO.

2 MJ [COL POHL]: For example, I'm saying is, can a  
3 statement from Mr. Mohammad, will that be also given to the  
4 other four teams?

5 CP [BG MARTINS]: Not automatically. We intend to deliver  
6 it to the ----

7 MJ [COL POHL]: To the individual, but ----

8 TC [MR. RYAN]: With the court's indulgence, Your Honor.

9 CP [BG MARTINS]: Sure.

10 [Pause.]

11 CP [BG MARTINS]: Material that is going to be  
12 Unclassified/FOUO, we intend to provide to each accused.  
13 There are materials in here, there are some medical records,  
14 issues and other things that are just -- we don't believe are  
15 either discoverable or should be.

16 MJ [COL POHL]: Okay. But let me -- I am just talking  
17 about mechanically here ----

18 CP [BG MARTINS]: I understand.

19 MJ [COL POHL]: ---- is if you provide discovery that  
20 relates -- let's just take a medical condition of  
21 Mr. Bin'Attash. Okay? I can understand why you would provide  
22 that just to Mr. Bin'Attash's team initially and they can make  
23 a judgment about -- he has got a privacy interest and other

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 interests. I've got that. But is there anything to prevent  
2 them -- if they make it -- in their professional judgment it  
3 should be shared with the other teams, you have no problem  
4 with that? I just don't want ----

5 CP [BG MARTINS]: If it's marked properly, if it's  
6 Unclassified.

7 MJ [COL POHL]: Exactly. Even if it is classified. I am  
8 not talking about with the accused.

9 CP [BG MARTINS]: I mean ----

10 MJ [COL POHL]: I mean, your statement seems to be  
11 saying -- that's what I am trying to clarify here -- that we  
12 are going to give these only to the individual teams,  
13 implicitly saying that there is something preventing them from  
14 sharing, what you are telling me is there isn't within ----

15 CP [BG MARTINS]: It will be explicit on the banner, but  
16 what I can't commit to is a particular accused who doesn't  
17 have a clearance is going to get the information.

18 MJ [COL POHL]: I am talking about within the clearance  
19 limitations. I've got that. I am simply saying if Mr. Nevin  
20 wants to share with Mr. Harrington's team, there is no  
21 prohibition with that, assuming people with the proper  
22 clearances for the information are sharing it?

23 CP [BG MARTINS]: Correct.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: I just wanted to clarify. Thank you. Let  
2 me hear -- that's all the questions I have on your pleadings  
3 on the global approach. Let me hear ----

4 CP [BG MARTINS]: With a request that I be able to sort of  
5 show how that approach, because part of what would be  
6 compelling about a plan would be how it would apply.

7 MJ [COL POHL]: Because we discussed on the 802, on this  
8 issue, because the subparts deal with all sorts of different  
9 motions, that as we talk about a specific motion -- and we  
10 will go through each of them, whatever it is -- both sides can  
11 use multiple attorneys on the different subparts, but not  
12 multiple attorneys on an individual subpart. Are you with me  
13 on that? So ----

14 CP [BG MARTINS]: If I am not going get another ----

15 MJ [COL POHL]: No, you can.

16 CP [BG MARTINS]: I just ----

17 MJ [COL POHL]: Okay. You want to explain an example of  
18 it?

19 CP [BG MARTINS]: Yes.

20 MJ [COL POHL]: Go ahead. If we have to come back to it,  
21 we can.

22 CP [BG MARTINS]: They will explain how the plan would  
23 work. I realize we are going to be going into these different

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 ones and I don't want to cut that off, but I think it's  
2 important ----

3 MJ [COL POHL]: Okay.

4 CP [BG MARTINS]: ---- to see how the plan could work. So  
5 in Appellate Exhibit 112, there is a defense motion to compel  
6 prosecution to produce all documents and information relating  
7 to White House or DoJ authority for the CIA RDI program.  
8 So we have done and continue to do our due diligence and we  
9 will, even with this framework, and although there is no  
10 obligation for the government to search for every document  
11 that's requested by the defense, absent a particularized  
12 showing of relevance, we have done reasonable searches for  
13 however -- depending upon how you count them, between 72 and  
14 76 documents that are stated with some specificity in that  
15 example motion, in this motion that I am using as an example.

16 We have found and examined 32 of the 72 to 76 that  
17 we're reasonably confident are the ones he was asking for.  
18 Now, nine of these are available to the defense already, and  
19 these are Office of Legal Counsel memos, and this will be  
20 discussed more fully by Mr. Groharing, and I'm sure by defense  
21 counsel, under Appellate Exhibit 286. But we have actually  
22 gone into those and looked at the redacted portions. These  
23 are publicly available redacted OLC memos that we went back

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 and looked at, and two of those we found information that was  
2 relevant and fit within the framework and we are providing  
3 those, and there was actually a third that we also felt that  
4 we should also provide and that although it wasn't  
5 specifically requested, that we should provide it.

6           So -- and then with regard to the requests, we would  
7 urge the court then to decide that certain parts of these  
8 requests are denied because they are overbroad or premature,  
9 because there is going to be material coming that is partially  
10 responsive. For example, Mr. Connell requests in that motion  
11 that I cited, Appellate Exhibit 112, all documents and  
12 information regarding the exercise of any purported power to  
13 construe the Detainee Treatment Act of 2005, and we would seek  
14 the court ruling that our denial of that should be upheld and  
15 be denied by the commission.

16           In conducting searches for discoverable information,  
17 and we still have material to go through, we encounter a  
18 document that is responsive and relevant, we will produce it.  
19 If it is classified, we will apply that higher standard of  
20 noncumulative, relevant, and helpful to a legally cognizable  
21 defense rebuttal to the government's case or to sentencing,  
22 and we will continue reasonable searches of the other items  
23 and, if found, we will evaluate them for discovery information

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 and, as appropriate, will seek substitutions and other relief.  
2 So that's how we would recommend it be.

3 MJ [COL POHL]: This would be basically the normal  
4 discovery process. They put a discovery request to you, you  
5 see if it is discoverable information, the ten categories, it  
6 doesn't fit within the ten categories, and you believe  
7 somebody is overbroad, then you respond to them and then they  
8 make their motion to compel to me.

9 CP [BG MARTINS]: Right.

10 MJ [COL POHL]: And then we just do the normal discovery  
11 process. I understand.

12 CP [BG MARTINS]: Right. And we will read everything they  
13 send us and if it has got some specificity, we will do a  
14 reasonable search, eyeball it and do the analysis carefully.

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

16 CP [BG MARTINS]: Thank you. Defense.

17 Mr. Connell. Mr. Connell, rather than get you  
18 started and then take a break, we will go ahead and take the  
19 mid-morning break a little early now and then we will start  
20 with you. It's now 1008. We will break for -- or 1009,  
21 almost 1010. We will break for 15 minutes. The commission is  
22 in recess.

23 [The R.M.C. 803 session recessed at 1009, 18 February 2016.]

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

[END OF PAGE]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23