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1 [The R.M.C. 803 session was called to order at 1041, 5 August  
2 2014.]

3 MJ [Col SPATH]: The commissions are called to order. All  
4 of the parties present before the recess are again present.

5 Just give me a moment to open a couple of documents,  
6 and we will pick up with 280. Defense Counsel, who has 280?

7 ADDC [MAJ HURLEY]: Good morning, sir. This is Major  
8 Hurley for the defense.

9 MJ [Col SPATH]: Good morning.

10 ADDC [MAJ HURLEY]: Specifically, sir, with 280 the  
11 defense requests that the classified summaries that have been  
12 the subject of some discussion already this week be marked  
13 appropriately, at least in accordance with the appropriate  
14 executive order and Department of Defense Manual.

15 If the commission is disinclined ----

16 [Pause in the proceedings for audio recording issues.]

17 MJ [Col SPATH]: You may proceed. Thank you.

18 ADDC [MAJ HURLEY]: Is there any portion of my remarks  
19 that need to be repeated?

20 MJ [Col SPATH]: No.

21 ADDC [MAJ HURLEY]: Thank you. Apparently not.

22 Sir, beginning, picking up where I left off, in the  
23 alternative the defense requests that the commission compel

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1 the disclosure to the defense of the classification guides  
2 used by the governmental agency, the governmental agency or  
3 governmental agencies that they used in drafting -- in  
4 reviewing their classified information, drafting the  
5 summaries.

6           Sir, specifically, as you can tell from General  
7 Martins' remarks and from Mr. Kammen's remarks, there is a  
8 level of involvement in the commission himself in this summary  
9 process. And according to General Martins, what he said  
10 yesterday, you are going to be presented with the underlying  
11 documents and then the summaries. And what we ask that you  
12 do, first we would ask the government itself do, is  
13 appropriately portion mark the summaries, so the underlying  
14 documents that you see, they are marked in whatever way.

15           And as those underlying documents get transformed  
16 into the summaries, sir, there may be information that's  
17 added -- that, you know, is added for narrative. The  
18 importance of the narrative, so it's carried over from one  
19 document to other, but that other information is not itself  
20 classified, and that be identified -- that piece of the  
21 information be identified as unclassified.

22           What the government says in its response and what the  
23 government has done by practice is essentially just take, with

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1 the summaries that we have so far, it's just a banner across  
2 the top, the classification of the document, it's header and  
3 footer. And what we -- what the defense requires and what we  
4 believe, frankly, the appropriate executive order and the  
5 Department of Defense Manual require is specific markings with  
6 respect to the specific facts, paragraph markings that no  
7 doubt the commission has seen in his military career, I have  
8 seen in mine and everyone here has seen paragraph portion  
9 markings as a matter of course. And that is, frankly, what we  
10 believe, what the defense believes to be appropriate even with  
11 respect to these particular documents.

12           And what we would call the -- pardon me just one  
13 second, sir.

14           What we call the commission's attention to is the  
15 appropriate Executive Order 13526 and what is required fully  
16 when derivatively classifying information, because that's in  
17 effect actually what's occurring. They are taking -- you  
18 know, when you do a summary, when you take any classified  
19 information that exists in one document and you put it in  
20 another document, it's a derivative classification.

21           What the commission -- what the defense also need to  
22 understand is who is doing that, what individual is doing  
23 that, is making the move of the information from one document

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1 to another so that it would assist in the efficacy or the  
2 efficiency of future litigation, getting questions answered.  
3 Because as part of this iterative interactive process,  
4 regardless of its length, whether it last a month or months,  
5 it is the position of the defense that it's going to take  
6 longer than apparently General Martins believes. But whatever  
7 period of time it takes that identification portion marking,  
8 the information that's included and identifying it  
9 specifically we believe is what's required.

10 Now, the government in its response believes that  
11 they are complying with the spirit of the executive order, and  
12 obviously the defense disagrees with that. And that what the  
13 spirit of the executive order is to be specific as to what  
14 information is classified and what information is unclassified  
15 or is classified at different levels so that we can take that  
16 and move forward.

17 Importantly for us -- well, first off, importantly  
18 for the commission is the decision, sir, you are going to have  
19 to make, and you are already in the process of making,  
20 frankly, where should the commission be closed, where  
21 shouldn't it be closed. Those specific decisions, a part of  
22 the foundation, sir, to be blunt, is going to be these  
23 summaries. And it's going to be your understanding of why --

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1 if the court must be closed and the public must be excluded,  
2 why must they be excluded.

3           Also, and this gets a little bit to the argument in  
4 Appellate Exhibit 281 that Mr. Kammen is going to do later, or  
5 I understand Mr. Kammen is going to do later. But if it is  
6 unclassified, if the information is unclassified, we know then  
7 that we can share that information now with Mr. al Nashiri.  
8 It doesn't have to be registered in some specific way or  
9 declared to be display only to al Nashiri. And again,  
10 Mr. Kammen is going to respond to that more fully. But if we  
11 know it is unclassified material we can share that information  
12 directly with Mr. al Nashiri, and that is an important,  
13 critical point.

14           Sir, you haven't heard this argument, at least from  
15 this particular counsel, but establishing and maintaining an  
16 attorney-client relationship is difficult when there is a  
17 substantial portion of information that's serving as the basis  
18 for this trial that has been provided even to the defense in  
19 discovery, and say, well, we can't talk to you about that.  
20 And as much as that is possible to eliminate that hurdle in  
21 establishing an effective attorney-client relationship, the  
22 defense believes obviously is a requirement of this  
23 commission, it's a requirement of you personally, frankly, as

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1 well as the government.

2 I'll proceed. As the defense understand the  
3 government's response to Appellate Exhibit 280, they also  
4 indicate that Department of Defense Manual does not apply, DoD  
5 Manual 5200.01. The defense contends that it does, it frankly  
6 applies to them and it applies to you both, sir. And in that  
7 Manual 5200 is much more specific. And that's the basis in  
8 regulation for specific paragraph portion marking, and that's  
9 what we would contend is required in this particular case, and  
10 it's required of this commission.

11 This is a Department of Defense function. And as you  
12 are approving of these summaries you are acting in your  
13 official capacity as an agent of the Department of Defense.  
14 And in doing that and in participating in the creation of this  
15 document, whether -- both you and the prosecutors must comply  
16 with that particular manual, basically a regulation. And it's  
17 clear, it talks about having the need for paragraph portion  
18 marking.

19 If you have the defense motion, I will direct you to  
20 page 10 of our motion.

21 MJ [Col SPATH]: Page 10?

22 ADDC [MAJ HURLEY]: Page 10, yes, sir.

23 MJ [Col SPATH]: I'm there.

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1           ADDC [MAJ HURLEY]: And it's the second bold heading DoD  
2 Manual 5200. Are you there, sir?

3           MJ [Col SPATH]: I am.

4           ADDC [MAJ HURLEY]: That's where we would point you to,  
5 "Every portion" -- and I will just read very briefly, "Every  
6 portion, e.g., subject, title, paragraph, sections, tabs,  
7 attachments, classified signature blocks, bullets, tables and  
8 pictures." And the clear import of this regulation -- it's  
9 called a regulation, even though it's titled a manual.

10           The clear import of this regulation is to be very  
11 specific and to have the United States Government be very  
12 specific in identifying and showing what is classified and  
13 what isn't. And we would submit to you, sir, that the unique,  
14 indeed the extraordinary, to borrow the D.C. Circuit's term  
15 when it classified these commissions as an extraordinary  
16 entity, the nature of this extraordinary entity requires that  
17 this step -- and we would submit to you that the step is a  
18 requirement of the law, but that this step, which the  
19 government sees as additional, be completed because of  
20 everything that's happening, because as much as possible all  
21 parties to this commission and, indeed, the commission itself,  
22 want this litigation to be done as smoothly as possible,  
23 smoothly and efficiently as possible.

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1           Again, sir, the other portions of the executive order  
2 that we would point the commission to are those that  
3 repeatedly warn and admonish against the risk of  
4 overclassification, that the clear import of President  
5 Obama ----

6           MJ [Col SPATH]: Slow down. Just pause. Okay.

7           ADDC [MAJ HURLEY]: The clear import of the executive  
8 branch -- I guess I should be a little bit more broad -- is to  
9 declassify this information and to carry that forward with  
10 specificity rather than with generality.

11           Another note, sir, is about the security officer  
12 that's been appointed to the defense that seems to be an  
13 individual that the government is relying on in believing that  
14 whatever questions we have, because the process generally  
15 stated would be this, sir: The commission -- the government  
16 submits substitution to the commission, you approve it, it's  
17 delivered to the defense. The defense takes this substitution  
18 and relies on it in a filing or elsewhere.

19           The government believes that our security officer is  
20 the person that can help us in this regard, answer all of our  
21 questions and assist us in whatever way we need, along with  
22 going back to the government and asking additional questions.

23           What the security officer doesn't have in the process

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1 is what we are asking for in the alternative, and that is  
2 these classification guides, because at this point the  
3 security officer -- in this case it's a woman -- she is  
4 receiving all this classification, this classified information  
5 and doesn't have a security guide to say okay, this is how  
6 this should be done. The government's perspective is when we  
7 get this classified information, then we put it back into a  
8 document with the same security or the same classification  
9 safeguards as before.

10           In our case our security officer takes this  
11 information and can't say, all right -- that's all that she  
12 can do for us, is say okay, put it in another document. She  
13 doesn't know it has been handled in a classified or  
14 appropriate way. Those classification guides haven't been  
15 shared with her, and sharing classification guides, at least  
16 in my very limited experience in national security cases, is  
17 fairly routine. It just tells you here is how to handle this  
18 classified information, here is what makes the information  
19 classified or not. So that's why we request in the  
20 alternative that at the very least we be given the  
21 classification guides for these particular -- for these  
22 agencies that you are approving these substitutions for.

23           But, sir, most specifically, and again what we

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1 believe the executive order and the DoD Manual require is  
2 specific paragraph portion markings to where the generality  
3 that Mr. Kammen talked about yesterday, "Mr. Kammen goes from  
4 one place to another in the middle of 2014," that a  
5 determination be made in this process whether or not that  
6 generality is in fact classified.

7           If that's what we are going to get, then up front a  
8 determination has to be made is that a particular, an  
9 important, appropriate topic for classification, and that's  
10 the determination that the government first has to make and  
11 you have to approve of.

12           And we would submit in those situations if you  
13 believe and if the government -- I guess, specifically, sir,  
14 if you believe that the information should be carried forward,  
15 you make and require of the government specific determinations  
16 or specific statements as to Mr. Kammen, all right, the  
17 identity of Richard Kammen from Indianapolis, Indiana is  
18 classified, the year, that's classified, the location and the  
19 fact that he traveled from one place to another, all right.  
20 Well the fact that a human being traveled is not classified,  
21 and that is the specific type of relief that the government  
22 seeks.

23           Sir, do you have any questions based on my argument

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1 of the motions?

2 MJ [Col SPATH]: I don't. Thank you.

3 ATC [MR. CLAYTON]: Good afternoon, Your Honor -- or  
4 morning, excuse me.

5 MJ [Col SPATH]: Morning.

6 ATC [MR. CLAYTON]: One slight digression. I want to  
7 share with the court that I am encouraged by the conversation  
8 I heard this morning from defense counsel with respect to  
9 attempts through this process to make very real what are  
10 weighty, weighty issues, which are sometimes considered in the  
11 abstract, some of which are a part of these classified  
12 summaries.

13 Equally for us, it is very real and not abstract, the  
14 national security concerns involved in these summaries. And  
15 just as much as mitigation evidence in the defense's world is  
16 very real and very weighty, the grave nature of these offenses  
17 and the pain and suffering of those who are impacted by these  
18 offenses is very real and very weighty. So I admire the  
19 commitment of both sides to present that in a way that's no  
20 longer in the abstract but in a way in which panel members can  
21 truly and currently observe that within the boundaries of the  
22 law that governs those matters.

23 With that, I will turn now to the issue at hand.

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1 Yesterday the court discussed at length its efforts to brush  
2 up on matters of statutory construction, and I think that that  
3 effort will be well served in this issue in particular. As  
4 the court is well aware, one of the first principles of  
5 statutory construction is to apply plain language to the  
6 meaning of the statute. And the government's position in this  
7 particular issue is simply that. The plain language of the  
8 executive order proffered by the defense to support their  
9 relief suggests and requires that those of us handling these  
10 materials simply carry forward the markings as presented on  
11 the underlying materials.

12           The plain language -- if not the plain language,  
13 certainly the spirit of the DoD Manual Section 8c(1) does the  
14 same thing when it requires us to mark, in accordance with the  
15 underlying materials. Setting aside the debate of whether or  
16 not the DoD Manual controls here, I think we can say with some  
17 confidence that both have that same sort of textural  
18 requirement that it carries forward what is on the underlying  
19 documents.

20           What I think this court will see, as it has an  
21 opportunity to examine some of these underlying documents and  
22 examine this process, this CIPA-like process through Rule 505,  
23 is that the government is doing exactly that. The court will

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1 see that there are underlying intelligence materials that are  
2 marked with a header and a footer, and based upon the way in  
3 which those materials were allowed to be marked by rule, which  
4 can be discussed in a different type of session if necessary,  
5 they were marked appropriately.

6 Consistent with the marking on those particular  
7 underlying documents, which the court can review back in the  
8 record if it would like -- I would direct the court to AE 022  
9 Attachment B for examples -- you will see the summaries are  
10 then created by the government, sometimes substituting,  
11 sometimes redacting, sometimes summarizing the information  
12 contained in those underlying intelligence cables, creating a  
13 second document by the government. And by "the government" I  
14 mean quite literally the persons in this room in most  
15 instances. Those documents that are created and provided to  
16 the court carry forward exactly the same banner markings on  
17 the underlying document.

18 So in that sense if the defense's request is for the  
19 government to appropriately mark and mark consistently with  
20 the executive order, we have done that. We have done what the  
21 statute requires. And in the world of statutory construction,  
22 in plain language meaning, that's where we are.

23 Now, to then ask the government as a blanket matter

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1 to go back and remark these documents with additional  
2 markings, be it by paragraph, be it by sentence, be it by word  
3 is, I think as Major Hurley suggested at one point, the name  
4 is unclassified but the place may be, would be to ask the  
5 government to do something, frankly, inconsistent with the  
6 plain language of the statute, to mark the summary document in  
7 a way different from the underlying source material. The  
8 statute -- I'm sorry, the executive order simply does not  
9 require that.

10           Moreover, if we look to the plain language of the  
11 executive order, it also states in Section 6.2(d) that that  
12 particular executive order doesn't create a right or a  
13 substantive ability to challenge or any procedural or  
14 substantive right for any party against the United States. So  
15 to the extent that the defense is relying upon this authority  
16 as a basis to compel the government to act differently, that  
17 also would be inconsistent with the plain language of the  
18 executive order itself. So again we only ask the court to  
19 engage in the exercise it has told us it is now well versed  
20 in.

21           Moving on ----

22           MJ [Col SPATH]: Getting. Getting well versed in.

23           ATC [MR. CLAYTON]: Yes, sir.

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1           Moving on to the additional relief requested, in the  
2 defense's motion they have asked for the identity of the  
3 persons who are the original classifying authorities with  
4 respect to these matters as well as the guidelines. And in  
5 our brief we pointed the court to Section 1.6(b) of that  
6 particular executive order where it notes that if revealing  
7 these matters reveals additional classified information, that  
8 it need not be disclosed.

9           And as the court will see with the declarations  
10 attached to these underlying materials in our motions for 505  
11 processes, you will see that those identities of those  
12 persons, as well as many of the guidelines referenced therein,  
13 are classified, which begs the question even if there weren't  
14 that issue strictly limiting the disclosure by the executive  
15 order, to what end?

16           One could only conclude that there would be an effort  
17 by the defense to second guess or challenge the original  
18 marking of that document or the executive order that's simply  
19 not open for discussion. Once, as the court now knows, once  
20 the government has properly invoked the classified information  
21 privilege and a document or piece of information is presented  
22 to the court having been marked in a certain manner, the  
23 defense's obligations are quite clear. They carry forward and

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1 handle that information consistent with the marking.

2           This particular type of rule makes intuitive sense,  
3 because in a case such as this or in another larger federal  
4 case with CIPA material with volumes equal to this, one could  
5 imagine that if the underlying marking of every summary and  
6 questioning whether or not the summary should be marked at the  
7 level the original classification authority set it out was  
8 open to litigation, there would be a never-ending string of  
9 litigation over those facts, debating whether or how a  
10 particular classified fact impacts national security. The law  
11 says that's not to be had in this forum, it's not to be had in  
12 federal courts dealing with CIPA. There is, however, an  
13 avenue under the executive order for proper persons to make  
14 those assessments and challenge those particular markings.  
15 It's just not here.

16           Another point of encouragement I heard from today's  
17 discussion to that end is a desire to talk a little bit about  
18 voir dire and very forward-moving issues. As the defense has  
19 raised, issues such as voir dire and things that approach the  
20 merits of this particular trial are coming and are coming in a  
21 relatively reasonably near term. What can delay these matters  
22 is if we get into a world of litigating issues which are  
23 simply not up for discussion or up for debate per the

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1 executive order in the plain language.

2           So I think in the spirit of the court's assessment of  
3 statutory construction and in the spirit of moving this case  
4 forward to the merits, to voir dire as Mr. Kammen raised, I  
5 think we have to resist the relief requested by the defense in  
6 this case. And subject to questions by the bench, I would  
7 turn the argument back to the defense.

8           MJ [Col SPATH]: Thank you. Defense?

9           ADDC [MAJ HURLEY]: Sir, we would first note -- the  
10 defense would first note that if the government, that is to  
11 say those individuals in this room, are making the  
12 substitution, they are in a position to identify with  
13 specificity where they believe this is classified information.  
14 And not only can they make those discrete decisions, but one  
15 imagines that they also have the classification guides to say,  
16 all right, this is a classified bit of information and the  
17 defense absolutely, we would love it, and as long as it  
18 encouraged narrative flow in the commission's understanding  
19 and our understanding, it would be great if they go fact by  
20 fact, verb by verb. Fantastic.

21           We recognize, and I think the Department of Defense  
22 Manual recognizes that a paragraph, title, subject, those  
23 sorts of things, the information that I read to the commission

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1 earlier, that's probably what's required and what's  
2 appropriate in this particular case.

3           Likewise to the individuals in this room that are  
4 creating those substitutions, they are in a place to determine  
5 whether or not this is an appropriate classified document,  
6 because they have the classification, they have the  
7 classification guide, and if they believe that this is  
8 inappropriately classified, then they have the obligation to  
9 fix that and move forward, not merely as I understood the  
10 government's position, carry forward the classification from  
11 before.

12       MJ [Col SPATH]: The executive order does say -- it does  
13 say they are going to carry forward the classification of the  
14 underlying documents.

15       ADDC [MAJ HURLEY]: Right. And if that is required to get  
16 the substitution out, that's one matter. But the government  
17 also has an obligation, because they are in a position to know  
18 more, to fix it if they believe this is an improperly  
19 classified document.

20       MJ [Col SPATH]: Yes, I think I would concur in a general  
21 sense the government has an interest in declassification. I  
22 think everybody has said that in here, and I think it's been  
23 pretty clear throughout practice. There is always movement to

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1 try to declassify.

2 Here, dealing with the documents that are being  
3 turned over, the government -- their assertion, and as I look  
4 through the E0, what they are saying is they have documents  
5 that are marked appropriately. They then engage in either the  
6 substitution or the summary, whatever method it is that they  
7 are going to get those documents to you, and they carry the  
8 classification over into that summary or into that  
9 substitution, which seems in line with the executive order.

10 ADDC [MAJ HURLEY]: Yes, sir. Or in the idea -- again in  
11 the general sense that if it's in one document, as it is  
12 pushed forward derivatively classified into another document,  
13 then it's got to carry with it ----

14 MJ [Col SPATH]: The highest level classification.

15 ADDC [MAJ HURLEY]: Yes, sir. Well, not the  
16 classification -- the document has to carry forward the  
17 classification of this earlier document.

18 MJ [Col SPATH]: Correct.

19 ADDC [MAJ HURLEY]: Yes.

20 MJ [Col SPATH]: So if they are doing that, how are they  
21 not -- the E0 doesn't seem to suggest going through a summary  
22 word by word or line by line.

23 ADDC [MAJ HURLEY]: The E0 does not seem to suggest that,

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1 sir, and that's where we would fall back to the Department of  
2 Defense Manual to say that it does suggest it. What we  
3 believe the EO suggests is, because of its admonishment and  
4 encouragement to appropriately classify, that as you are  
5 carrying forward -- so let's say this, and I am just going to  
6 pick one out.

7 Let's say that this document is top secret, the  
8 original, the baseline document, the original. And we carry  
9 forward and we say, all right, this new document, it's also  
10 top -- its classification is top secret.

11 MJ [Col SPATH]: It would have to be.

12 ADDC [MAJ HURLEY]: Yes.

13 MJ [Col SPATH]: Okay.

14 ADDC [MAJ HURLEY]: Right.

15 MJ [Col SPATH]: It would have to be.

16 ADDC [MAJ HURLEY]: In order to comply with the executive  
17 order which combines under all it would have to be. But as  
18 far as carrying forward information from one document to  
19 another, portions of that, the baseline document can't contain  
20 unclassified information. A top secret document can contain  
21 unclassified information. We would all agree with that.

22 MJ [Col SPATH]: Yes.

23 ADDC [MAJ HURLEY]: What the government is saying, it's

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1 all marked top secret, so it's all top secret.

2 MJ [Col SPATH]: I think what they are saying is in  
3 compliance with the E0, when you take the underlying source  
4 document and then you move to the derivative document,  
5 whatever format the government chooses to use in that case.

6 ADDC [MAJ HURLEY]: That's approved ultimately by the  
7 commission.

8 MJ [Col SPATH]: Yes. But they don't have discretion to  
9 change the classification of the underlying document. They  
10 are not the classification authority.

11 ADDC [MAJ HURLEY]: Right. I would agree with that.

12 MJ [Col SPATH]: So they are taking a document and they  
13 are summarizing it, and because it is a derivative document  
14 they are carrying forward the classification on the document.  
15 We would agree with that?

16 ADDC [MAJ HURLEY]: Yes, sir, I would agree with that.

17 MJ [Col SPATH]: What you are asking is, because of your  
18 interpretation of the Defense Manual, that they go in and  
19 treat it like the source document, where, yes, we are familiar  
20 with how we mark paragraphs unclassified, secret, top secret  
21 and then all of the other things you can put next to that,  
22 that's what you want them to do?

23 ADDC [MAJ HURLEY]: Yes, sir. Is to be specific as they

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1 move forward and not just have this be blanket. Because again  
2 you are right, it depends on the nature of the document that's  
3 being created, again as I understood the government's  
4 argument, by the people in this room.

5           So as those prosecutors are creating this document in  
6 anticipation of litigation, which is another thing, but  
7 it's ----

8           MJ [Col SPATH]: That's an accepted -- that, we can't fix  
9 here. That's not just the commissions. They use that in  
10 federal court. That is -- that's here, by law, how we deal  
11 with classified information.

12          ADDC [MAJ HURLEY]: Right.

13          MJ [Col SPATH]: If somebody thinks it's unfair that the  
14 prosecution sees it and can summarize it for the defense, I  
15 can't fix that.

16          ADDC [MAJ HURLEY]: Agreed. Absolutely, sir.

17          MJ [Col SPATH]: We fix that with elections and some  
18 appellate process.

19          ADDC [MAJ HURLEY]: I am not sure ----

20          MJ [Col SPATH]: My question is they are not the  
21 classification authority, and I want to make sure I understand  
22 it and I'm going to look back, 22(b) was on my list, but there  
23 are some others. They get the document that has got the

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1 header and the footer ----

2 ADDC [MAJ HURLEY]: And according to them that's it.

3 MJ [Col SPATH]: ---- convening order and according to  
4 them and their reading of the executive order.

5 ADDC [MAJ HURLEY]: Right.

6 MJ [Col SPATH]: And how they are supposed to work through  
7 this 505 process here and frankly in almost any other forum  
8 where you have classified information. They take the  
9 classification, that the classification authority has given it  
10 because they are not going to go through and determine whether  
11 the classification authority was right or wrong about that.  
12 That's not their job. They mark it and they give you again  
13 the derivative format. I know it comes through the  
14 commission, but they give you the derivative format.

15 ADDC [MAJ HURLEY]: Yes, sir.

16 MJ [Col SPATH]: I am just trying to figure out where the  
17 authority comes from to have them to basically act -- sort  
18 through a document that has been marked as top secret or  
19 secret, and sort through and find parts that are unclassified  
20 and mark it.

21 ADDC [MAJ HURLEY]: In that sense, sir, if they are  
22 sorting and identifying specific portions of the document that  
23 are unclassified ----

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1 MJ [Col SPATH]: But that's what you are asking them to  
2 do, is take a document that's marked as top secret ----

3 ADDC [MAJ HURLEY]: Yes, sir.

4 MJ [Col SPATH]: ---- put a derivative together and then  
5 go through that and sort through, well, this is classified,  
6 this isn't classified, this is classified.

7 ADDC [MAJ HURLEY]: Yes, sir.

8 MJ [Col SPATH]: Where is that process in the rules as  
9 currently given to the commission and again, frankly, to  
10 federal court or anyone dealing with classified information?

11 ADDC [MAJ HURLEY]: Sir, we would point them to the DoD  
12 Manual to say that the process of taking the information and  
13 marking it specifically, if they are carrying forward the  
14 information from one document to another to say, all right, in  
15 our hypothetical all of that is TS. If it was in this  
16 document, then as we move it forward, every paragraph is  
17 marked with top secret.

18 But they are also in a position that they have  
19 denied that -- they are in this position to look at the  
20 classification manual -- they are in a position to look at the  
21 classification manual, look at the document that they have and  
22 say is this appropriate classified -- is this appropriately  
23 classified or not. Because at this point we are talking about

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1 older documents that may need to go through a classification  
2 review based on the rules inside that original classification  
3 authority, and it's incumbent upon that original  
4 classification authority and indeed the government to ensure  
5 that everything they are passing along appropriately -- is  
6 still appropriately classified.

7 MJ [Col SPATH]: Yes, hopefully everybody -- I hope the  
8 government is making that effort. I assume they are.

9 But my question then is: How do you then deal with  
10 the executive order language that you don't have a right or a  
11 benefit, substantive or procedural, enforceable at law by a  
12 party against the United States? The E0 says yes, all of this  
13 should happen, and if it doesn't happen that's unfortunate,  
14 but how does that give you the procedural right here for me to  
15 turn to them ----

16 ADDC [MAJ HURLEY]: To compel them to do it.

17 MJ [Col SPATH]: ---- to compel them to do it.

18 ADDC [MAJ HURLEY]: Well, sir, we would cite the E0 and  
19 its persuasive authority and its ability, now that you are  
20 apprised of this situation, to compel the government to comply  
21 with its own rules, the rules that it created, and it gives  
22 you a framework to see whether or not that was complied.

23 We would also cite the manual for the same principle,

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1 that it gives the enforcement of the provisions of the manual,  
2 more specific that they are, for the same idea that we and --  
3 or that the government should mark appropriately the documents  
4 that it's going to use in this particular case.

5           The executive order and the Department of Defense are  
6 talking about compelling the government's own treatment of its  
7 own information by its appropriate classification authorities.

8           MJ [Col SPATH]: Again, yes, in a general sense I  
9 understand the government has an absolute duty to ensure they  
10 are -- and, again, writ large government, to mark classified  
11 documents appropriately and to continue to ensure that that's  
12 actually classified material as it works through a  
13 declassification process.

14           I think we all agree with that in a sense. But the  
15 trial counsel aren't the classification authorities. They  
16 can't do that assessment. I mean, they are getting the  
17 documents from somewhere, and whoever owns those documents is  
18 marking them as classified at whatever level they believe they  
19 should be classified at, based on their understanding of their  
20 classification guide. So I'm trying to figure out -- I'm  
21 trying to figure out how the relief that you requested is  
22 envisioned in this 505 process.

23           ADDC [MAJ HURLEY]: Yes, sir.

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1 MJ [Col SPATH]: That's all.

2 ADDC [MAJ HURLEY]: Is there anything else that I can add  
3 to your understanding of that?

4 MJ [Col SPATH]: Not right now. I'll keep reading the  
5 motions and the cites. Thank you.

6 ADDC [MAJ HURLEY]: All right, sir. Thanks.

7 ATC [MR. CLAYTON]: Your Honor, I believe the questions  
8 from the bench capture the government's position well. I  
9 don't believe we have any additional argument based on that.

10 MJ [Col SPATH]: Thank you.

11 We'll move to 281. Just, again, give me a couple of  
12 moments.

13 LDC [MR. KAMMEN]: I will defer to the government, but it  
14 may be more efficient if we proceed with the initial portion  
15 of the argument because in many respects we are seeking  
16 relief.

17 MJ [Col SPATH]: That makes sense to me. Trial counsel or  
18 government?

19 ATC [MR. CLAYTON]: Your Honor, no objection to that.

20 MJ [Col SPATH]: All right. I want to make sure I have  
21 the right one open. This is the display-only handling  
22 procedure?

23 LDC [MR. KAMMEN]: Yes.

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1 MJ [Col SPATH]: All right.

2 LDC [MR. KAMMEN]: It really follows logically in the  
3 discussion regarding 280, because in many respects both the  
4 issues -- the issues are interlinked, and I think in some  
5 respects 281 -- our concerns over 281 flesh out some of the  
6 frustration we feel with respect to 280.

7 And let me say, Your Honor -- and there is just no  
8 way to sugarcoat this. I mean, one of the arguments you will  
9 hear over and over again is in many respects Guantanamo is a  
10 law-free zone, and that will be fleshed out as you rule on  
11 things. But the one thing we can unequivocally say about  
12 proceedings in military commissions is that it is absolutely a  
13 trust-free zone.

14 Virtually every day, virtually every hour that we are  
15 in this courtroom we, on the defense side at least, have  
16 visual and oral reminders that we are not at all trusted. It  
17 doesn't make any difference whether it is when we meet with  
18 our client and what we are allowed to bring, we are not  
19 trusted. General Martins yesterday says, well, yeah, they  
20 have all these fancy clearances and all this background  
21 investigation, but they are still not trusted to see the  
22 underlying information. Fine.

23 MJ [Col SPATH]: I didn't -- I understand where you are

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1 going, and, again, I am more than happy to let you go and  
2 talk. I just -- I think General Martins' proposition in that  
3 case was in relation to he can't simply release information  
4 unless some things are satisfied. He just can't.

5 LDC [MR. KAMMEN]: Right. That's fine.

6 MJ [Col SPATH]: Again, that's the construct that's been  
7 given to him by statute.

8 LDC [MR. KAMMEN]: And I understand that he is not a free  
9 agent, but these other folks don't trust us. We have all the  
10 clearances in the world, but we are still not trustworthy  
11 enough. Fine.

12 The other piece of this, we have got to be honest,  
13 the trust -- the lack of trust runs both ways. One of our  
14 members of the defense team had her access to the client  
15 revoked on patently frivolous, false reasons, and the  
16 commission has ruled that can't be challenged. So we serve at  
17 the sufferance of who ever, big G, some bureaucrat, somebody  
18 wants to decide. You messed up, and all manner of havoc,  
19 starting with you no longer can see your client, you no longer  
20 can be a lawyer in this case, flow from that.

21 The other thing is, Your Honor, I don't know what  
22 your briefing looked like, but in our briefings you can't go  
23 ten minutes without somebody doing the briefing reminding the

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1 defense of the Lynne Stewart case, where a defense lawyer in  
2 her mind operating, as the prosecutors say, in the spirit of  
3 the rules, got prosecuted and went to federal prison.

4           What we are told over and over again is there is no  
5 spirit to these rules. You follow them to the letter. That's  
6 fine.

7           The rules for handling classified information really  
8 at their heart are very simple. The person receiving the  
9 information has to have a need to know. The person receiving  
10 the information must have the appropriate level of clearance,  
11 and the discussions have to take place in an appropriate  
12 location. Also, if we are talking about documents, there is a  
13 whole host of handling procedures. We get briefed on those,  
14 and we are told this is not the spirit, this is not close  
15 enough for government work, you've got to do it this way.

16           In 181 we argued, and it is a huge, huge issue, and  
17 if you are going to -- one of the things we may request is  
18 that you do hear reargument on that because that's uniquely  
19 important here. And one of the arguments in that is that at  
20 least 15 percent, probably more by our count, of the  
21 information the government says is relevant and material and  
22 important, they concede, yeah, you guys gotta have this, we  
23 are prohibited by law from sharing with our client.

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1           As we raise this, the government created this display  
2 to Nashiri. And essentially all we want -- they say we won't  
3 take yes for an answer. We are happy to take yes for an  
4 answer. We just want to make sure that we understand what the  
5 rules are, and we want to make sure we are not violating any  
6 rules. And, frankly, the fact that General Martins says don't  
7 worry isn't good enough.

8           What we have asked for is, at a minimum, that we have  
9 something from the original classification authority in  
10 writing that says you have the right to do this. They say  
11 some proper executive has approved this. Well, I don't know  
12 who they think that proper executive is, but if it turns out  
13 they are wrong -- and you know the rules here change by the  
14 day and the bureaucracy changes by the minute, and if you can  
15 get kicked off the case because you are pro bono counsel, you  
16 can sure get kicked off the case because you violated some  
17 security situation.

18           You know, the starting point is we want something in  
19 writing from the original classification authority saying  
20 yeah, I have signed off on this. Now, the reason that's  
21 important is because when we raised this issue they said,  
22 well, go to the DoD Manual.

23           And this is the psychedelic quality of what goes on

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1 here. In the prosecution's prior argument he says we can just  
2 kind of disregard the whole DoD Manual, whether that applies  
3 or whether it doesn't apply. Well, in their written argument  
4 on 280 they were very clear the DoD Manual doesn't apply  
5 because the DoD does not own this information. Here, the same  
6 information, but they say, well, the DoD Manual does apply  
7 because you can, I guess, look to the spirit. But when you  
8 look at the DoD Manual they cite, by its own terms -- much of  
9 this information is code word. By its own terms it's not  
10 within what the DoD Manual says. So the DoD Manual would  
11 exclude what it is they are trying to do. So that provides us  
12 no guidance.

13           The DoD Manual is also talking about something where  
14 the United States could share something with Great Britain or  
15 Afghanistan. It doesn't have to do with sharing information  
16 to somebody who is alleged to be an al Qaeda terrorist. And  
17 so we understand that they are trying to do this, we just want  
18 to make sure that it's being done correctly. And, frankly,  
19 nothing that they have filed gives us any confidence that this  
20 is being done correctly.

21           I don't want to be facetious, but, you know, I can't  
22 take a spiral notebook in to the meetings anymore because  
23 supposedly, you know, we can't -- you know, we can't be

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1 trusted or Mr. Nashiri can't be trusted or the guards aren't  
2 observant enough or who knows, but they want us to take  
3 classified materials in to a meeting. And, you know, in their  
4 motion they don't answer any of the subsidiary questions which  
5 are critically important here. I assume we have to use proper  
6 handling procedures, because the stuff's still classified.  
7 You know, courier bags, double wrapping, all of that. Fine.

8 I don't know and we don't have any information that  
9 tells us that the Privilege Review Team has the appropriate  
10 security clearances. Do they have a need to know? Do they  
11 live in a SCIF? We don't know any of that. We have asked.  
12 Our security person reached out to OMC security and posed this  
13 and a whole bunch of other questions and were basically told  
14 go talk to the prosecution because it's a matter in  
15 litigation.

16 We are told you can only discuss classified  
17 information in a SCIF. I mean, literally we will meet in  
18 different rooms in our office when we are discussing different  
19 kinds of information. Where we meet with Mr. Nashiri is most  
20 assuredly not a SCIF. It is -- at a minimum it is subject to  
21 visual monitoring with cameras that are so good they can pick  
22 up words on a piece of paper, and there has been issues about  
23 whether they are subject to electronic eavesdropping. They

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1 are not a SCIF. Is that waived? I don't know. You know,  
2 take it in there and find out, and if you are on your way home  
3 in handcuffs, well, I guess it wasn't waived.

4           When we go to meet with Mr. Nashiri, you know, the  
5 guards look at stuff. Do they have the right clearances? Are  
6 we allowed to open the courier bag to show it to them, or is  
7 it double wrapped? I mean, have they been briefed on all of  
8 this? Nobody knows. So it's not just as simple as go --  
9 okay, we have given you this stuff, take it in. You know, the  
10 rule -- we can't take in cufflinks.

11           Now, one of the questions we have posed, and we posed  
12 it in argument before, and we have posed it, and this is not a  
13 frivolous question. We tell Nashiri and discuss with Nashiri,  
14 look, here is what they say. Is he required to sign a  
15 protective order, a nondisclosure agreement? I don't know.

16           What happens to him if he goes back to where they  
17 keep him and he says to somebody you can't believe the load of  
18 nonsense they are saying. It's classified. We don't have  
19 any -- what do we say to him if he asks can I tell anybody?  
20 We can say no, don't tell anybody. We most assuredly would  
21 say no. But he hasn't signed any agreements. He hasn't  
22 done -- you know, he is not a part of this. He is the  
23 accused. And so what's the rule? How does this affect him?

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1           If he tells somebody, is that an aggravating  
2 circumstance that the government is going to use in an effort  
3 to kill him? I don't know.

4           If he is acquitted, will the government then say,  
5 well, you know -- because obviously one of the things, the  
6 very first motion we filed is, is this a real court? Because  
7 if he is acquitted in a real court he gets to go home. That's  
8 what happened in the Nuremberg trials. Two guys were  
9 acquitted, they were released. Well, the government has made  
10 it very clear that won't happen, but will then additional  
11 justification be to hold him, well, we can't let him go  
12 because he has all this classified information?

13           Does this mean if we share this with him that he will  
14 even be more isolated than he is now, because the government  
15 will need to keep these secrets? Are we going to be making  
16 his conditions of confinement worse? None of these questions  
17 have been answered. They basically say somebody has put these  
18 markings on a piece of paper, have fun, without any apparent  
19 consideration to the practical consequences of implementing  
20 this and as it flows through.

21           Now, as we have said yesterday, you know, the  
22 summaries as they presently exist are reasonably useless if  
23 not outright false. And, again, this is the first time that

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1 we have heard that it's the prosecution who is creating these  
2 summaries. I presume then that they are creating them from  
3 the underlying materials, so it must be the underlying  
4 material that's false as opposed to what they are creating.

5           But however, in the future, I mean, certainly -- and  
6 when we answer these questions we will certainly share this  
7 with Nashiri, but what's really going to be important is what  
8 comes in the future pursuant to 120, and that's really going  
9 to be the far more important discussion. And we want to show  
10 them to Nashiri, we need to discuss them with Nashiri, but we  
11 really need to have the written assurances from the owners of  
12 the material, not General Martins, that what we are doing is  
13 proper.

14           General Martins has said over and over again, the  
15 prosecution has stated over and over again we are not the OCA.  
16 Fine. They are not the OCA. His assurances don't cut it. I  
17 don't doubt that he means them. I don't doubt that maybe  
18 somebody has said to him yeah, this is fine. We want to know  
19 and we want it in writing who that person is, because if it is  
20 somebody from DoD who is not the owner of the material, not  
21 good enough.

22           If we know who the owner of the material is, it is  
23 easy enough for somebody to say, you know, we, I, this is

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1 appropriate, and here are the handling procedures we want  
2 used. That happens all the time in security law. Nothing  
3 unique here.

4           Now, you know, the prosecutor stood up and said boy,  
5 we, you know -- we want you to take it seriously that this is  
6 a grave risk to national security. What we are doing here is  
7 a grave risk to national security. Fine. And the way this  
8 stuff is classified, it is at the highest risk to national  
9 security. Okay. Go ahead and show them to the alleged  
10 terrorist who is so crafty, we are told, who is so clever, who  
11 is so devious, that even 13 years -- 12 years after his  
12 confinement, which has been unprecedented in the way he has  
13 been kept from the rest of the world, he can't even talk to  
14 his 85-year-old father on the telephone. That's what they  
15 want us to do, and they want us to do it without any thought  
16 to the consequences of what we are about here.

17           Now, the prosecutor cites to the Moussaoui case and  
18 the Ghailani case, and it's interesting. First, Moussaoui I  
19 don't believe was in CIA custody, so I don't know that that's  
20 particularly germane. Ghailani was, although that was not a  
21 death penalty case, and I am not real clear to what extent,  
22 because I think the court suppressed his so-called clean team  
23 statement, so I'm not real clear what it is they are referring

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1 to.

2           And they interestingly don't provide any insight into  
3 that, at least not to us, so we don't have any way of judging  
4 whether that's a good analogy or not. Although again, I would  
5 be interested in knowing and, if the protective orders in  
6 those cases would allow it, we would be interested in knowing  
7 precisely what happened, especially in the Ghailani case. And  
8 if there was something displayed at Ghailani, I am going to  
9 bet that somehow there was something a little bit more than  
10 just the prosecutor saying, well, this is okay. I am going to  
11 bet they had something from the OCA saying that this was okay.

12           The final point is this, and it's confusing to us,  
13 because in their pleadings, as I read it directly, and perhaps  
14 I am reading more into it than what they meant, they  
15 essentially said you don't need to hear anything from the OCA  
16 here because General Martins speaks for the whole executive  
17 branch in the context of commissions. He is, if you will, the  
18 designee of the OCA, the President, the DoD. Every executive  
19 department somehow has given him the authority, which raises  
20 some interesting questions.

21           Was the prosecution aware in the other case of the  
22 outside agency being -- monitoring the courtroom and counsel,  
23 as it was suspected, and did he have some role in that? That

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1 would be significant to know if he is really as much in charge  
2 as they say. And I am not suggesting he would do that, I  
3 would think he would not, but that's what -- it is sort of you  
4 can't have it both ways. You can't be in charge and not in  
5 charge.

6           You know, if he speaks for the executive, why do we  
7 need CSOs, why do we need this gentleman here? I mean, if it  
8 passes General Martins' muster, I guess we can talk about it.  
9 The point is that that's not the situation.

10           There are rules, and with national security we are  
11 told over and over again you don't -- it's the letter of the  
12 law. It's not about spirit, it's not about complying  
13 generally. You know, I can say, you know, I really need to  
14 work on this document at home and I'm going to put it in my  
15 briefcase and I'll lock my briefcase and I'll keep it with me,  
16 and it's just in there, and I'll take it home and I'll bring  
17 it back the next day. And if it's the right document, that  
18 would be a federal crime, even though I have complied with the  
19 spirit and I didn't talk to my wife about it and I only looked  
20 at it in my home office. No question, everyone would say that  
21 is improper to do, and they would be right. They would be  
22 absolutely right.

23           So I recognize that what they are trying to do, you

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1 know, has some potentially long-range benefit. We just want  
2 them to do it right. The starting point of this is give us  
3 the written assurances from the relevant public official that  
4 this is appropriate. Give us the handling procedures in  
5 writing. Let's make sure that JTF knows about it. Let's make  
6 sure that the Privilege Review Team is in the right place.  
7 Let's make sure that all of this happens properly, and then  
8 answer the final question: How can we discuss this in a  
9 nonsecure facility?

10 Answer all those questions, we are happy to proceed,  
11 but we can't proceed in this environment until those questions  
12 are answered. And it's not about not taking yes for an  
13 answer, it's about making sure that we are doing things right,  
14 because at the end of the day, what the big G government has  
15 demonstrated, that if they want to get rid of a lawyer, they  
16 can find a way to do it, and they have made that perfectly  
17 clear. And they have also made it clear you don't have any  
18 authority to stop them. And so that's the environment we are  
19 operating in, and that's why we need the relief we requested.

20 MJ [Col SPATH]: Thank you.

21 ATC [MR. CLAYTON]: At its most basic and fundamental  
22 level I disagree with the description of Guantanamo as a  
23 law-free zone, and I suspect this bench presiding as judicial

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1 magistrate would share that view. But I think that's  
2 emblematic of the difficulty I have of standing before the  
3 court and making something of a principled and well-reasoned  
4 and linear argument, because frankly, beginning with the  
5 procedural posture of this issue, ranging now into the wide  
6 ranging nature of Mr. Kammen's argument, there really is no  
7 linear response here.

8           So I'll do what I can beginning with the procedural  
9 posture and then working through a little bit of the history  
10 of this, and then where I can I will attempt to address some  
11 of the individual points Mr. Kammen raised, if the court will  
12 indulge.

13           Procedurally, as Mr. Kammen properly raised prior to  
14 taking the lectern, this was a notice by the government in  
15 response to the defense's request for additional guidance, and  
16 to peel back a little bit of our deliberative process. There  
17 was some consideration as to whether we would simply provide  
18 that notice to the defense in the form of a letter or a public  
19 pleading. The decision was ultimately to make a public  
20 pleading for the very reason Mr. Kammen now rejects our offer.

21           We wanted to be sure that there was a record styled  
22 on behalf of the United States, General Martins, as any  
23 U.S. Attorney in any district would be authorized to do,

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1 represents the position of the United States and to bind the  
2 United States with respect to any particular position, was a  
3 signatory to a pleading which said this is the position of the  
4 United States with respect to the handling procedures relevant  
5 to these documents, and then articulated very specifically the  
6 handling procedures relative to those documents.

7           In response to that, although styled as a response,  
8 it really was some sort of a motion by the defense for which  
9 the relief is not quite clear. As I now hear the relief  
10 articulated, I believe we have answered the two pieces of  
11 relief that are primarily raised by the defense, therefore a  
12 clear marking or clear authorization by an OCA as well as  
13 handling guidelines, and I will get to that in a moment.

14           MJ [Col SPATH]: We are talking about the marking here  
15 without talking about the document.

16           ATC [MR. CLAYTON]: Yes.

17           MJ [Col SPATH]: Those documents are currently marked with  
18 a classification level, and then what do they say about  
19 Mr. al Nashiri?

20           ATC [MR. CLAYTON]: They say specifically "display only  
21 Abdel Al Rahim al Nashiri."

22           MJ [Col SPATH]: Similar to the case that you cited, let  
23 me find the name.

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1 ATC [MR. CLAYTON]: The only difference being instead of  
2 the word "releasable," it is "display."

3 MJ [Col SPATH]: That's the Ghailani case.

4 ATC [MR. CLAYTON]: Correct.

5 So flashing forward to take the court's question,  
6 that is the marking. That is the assurance from the OCA.  
7 When OCA provides a change to a marked document and the marked  
8 document is then handed to a different party, you respect the  
9 marking. You don't presume the marking is a mistake,  
10 certainly not when the government has filed now two pleadings  
11 assuring you that it is not a mistake, giving you guidelines  
12 on how to handle it.

13 I suspect, by way of comparison, had the document  
14 been marked unclassified FOUO, Mr. Kammen would not be  
15 suspicious of the marking, would not reject the marking, would  
16 take the OCA at its word that it is authorized to mark that  
17 particular document consistent with that particular handling  
18 procedure.

19 So again, a little bit of this seems as if it were  
20 someone who simply doesn't want to take yes for an answer. I  
21 hate to continue to beat that drum, but that's what it feels  
22 like, because there has been a number of instances where the  
23 defense has requested specifically this relief.

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1           And in the spirit of Rule 505(a)(3) and our  
2 obligation to try to declassify information as much as  
3 possible, we noted back in the arguments under the motion to  
4 reconsider at other places that there is this effort we  
5 discussed yesterday to provide to the defense this SSCI report  
6 in an unclassified format such as some of these facts may be  
7 shared with their client. This was meant to be an interim  
8 measure to give them some sort of relief between those two  
9 periods of time.

10           Consistent with all assessments by an OCA in making a  
11 classification marking, the OCA assessed the potential damage  
12 to national security by marking a document the way in which it  
13 is marked, determined that that particular type of risk,  
14 somewhat limited in this instance -- sorry.

15           MJ [Col SPATH]: Okay. We are good. Thank you.

16           ATC [MR. CLAYTON]: That limited risk in this instance as  
17 opposed to a fully unclassified document was a risk acceptable  
18 to the OCA. It's no secret that the OCA is aware of  
19 Mr. al Nashiri's circumstance, where he is housed, how he is  
20 detained. It's no mystery to anyone that he is here at  
21 Guantanamo as a detainee. One should presume that by marking  
22 these documents as such, those factors were taken into account  
23 as to the nature in which the particular attorneys can meet

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1 with their client and how they may discuss these materials.

2           And as we cited in the Ghailani case, it's notable  
3 for a couple of reasons. In the Ghailani case many of the  
4 same issues existed because, as with Mr. al Nashiri, it's been  
5 publicly disclosed that Ghailani was in CIA custody and was  
6 formerly an HVD here in Guantanamo Bay.

7           Different from al Nashiri, as Mr. Kammen points out,  
8 that case was not a capital case, that case did not seek to  
9 admit subsequent statements. But the same as Mr. al Nashiri's  
10 case, I would suspect, there was a motion for outrageous  
11 government conduct filed in the Ghailani case alleging many of  
12 these same issues we are discussing today about his time in  
13 the custody of others. So for the very reasons Mr. Kammen  
14 wants these materials in this case, in addition to other  
15 reasons, those were the very reasons they were disclosed in  
16 that case, and were made available, releasable to be reviewed  
17 and discussed with Ghailani.

18           What's notable I think for this commission is that  
19 there is not a specific record as to that disclosure, as there  
20 is in this case. There was not a public filing regarding the  
21 handling procedures, because typically that's not the way  
22 discovery is done. When the government discloses to a defense  
23 counsel materials and then downgrades those materials to give

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1 them the benefit of greater handling freedom, defense counsel  
2 typically don't question that. That's not the posture of this  
3 case, and the difference is difficult to explain. That's why  
4 it puts us in a unique position here to try to discuss this.

5           So if we look to the two pieces of relief that the  
6 defense specifically has asked for, the marking, the assurance  
7 from the OCA, the header and footer is that assurance, as it  
8 would be with an unclassified document, as it would be with a  
9 secret document, as it would be with any other, with a  
10 confidential document for example. Any downgrade is then  
11 signaled to the defense as to how to handle it.

12           We added the additional handling caveats and  
13 descriptions at their request, and I digress for one moment.  
14 The citation to the DoD Manual in this particular pleading was  
15 done as analogous authority. Words have meaning as to why  
16 something is cited. It's not the governing authority, but it  
17 is certainly someone can look to see other places in which  
18 this type of handling caveat has been used.

19           So with all of that said, I don't believe the  
20 government can force Mr. Kammen's team or the defense team to  
21 utilize these materials in the way in which we've said  
22 publicly twice now they can. We only hope that their decision  
23 not to utilize these documents is based upon some sort of

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1 strategic decision about the representation of Mr. al Nashiri  
2 and not some perceived grand conspiracy to kick them off the  
3 case or somehow prosecute them.

4           Because I can say as a prosecutor I would not want to  
5 get the case to attempt to prosecute Mr. Kammen where the  
6 government has represented twice in public pleadings how to  
7 handle these documents, and Mr. Kammen has acted consistently  
8 with those pleadings. I think that's a very poor prosecution.  
9 That may not give him much comfort, but I think it does frame  
10 for the commission what we are talking about here.

11           And subject to questions, I pass the argument

12           MJ [Co] SPATH]: I don't know the answer to this. Were  
13 there any -- other than the markings, which we talked about  
14 markings in Appellate Exhibit 280. Other than the markings,  
15 were there any kind of procedures provided about how those  
16 documents could be then displayed to Mr. al Nashiri?

17           ATC [MR. CLAYTON]: Within the notice itself there was a  
18 description of being allowed -- Mr. al Nashiri is allowed to  
19 read these documents, presumably once translated into Arabic,  
20 he is allowed to review those documents, they are allowed to  
21 discuss those documents freely with Mr. al Nashiri. He is,  
22 however, not allowed to keep a copy of those documents. And  
23 that's all spelled out pretty explicitly in the notice.

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1           With respect to the conversation taking place in a  
2 nonsecured environment, one must presume that the OCA has  
3 contemplated that as part of their calculated and limited risk  
4 and has allowed for that, because it would not be lost upon  
5 the OCA that Mr. al Nashiri is not allowed into a SCIF.

6           MJ [Col SPATH]: Except for here.

7           ATC [MR. CLAYTON]: Except for here. And that raises a  
8 great point. Presumably they can pass those documents to  
9 Mr. al Nashiri in this courtroom and allow him to read it if  
10 there was some concern. Maybe not an effective means to  
11 communicate with the client, but certainly a means to put the  
12 documents in front of the client and have a discussion  
13 elsewhere. There may be other ways to peel this apple if one  
14 were truly concerned and truly trying to find a way to make  
15 this workable.

16           I guess I leave the commission with this. I don't  
17 know there is any more relief to be given, so I am not exactly  
18 certain if I am even arguing against what they are requesting  
19 because I believe they have it. So if the commission can  
20 formulate or come up with something different, I am open to  
21 the suggestion, but I just simply don't know what that would  
22 be at this point.

23           MJ [Col SPATH]: Thank you.

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1 LDC [MR. KAMMEN]: One of the other things we are taught  
2 in security law when we get these briefings is don't presume.  
3 You know, they say you can presume the OCA -- and I  
4 understand. The problem, again, we are not writing on a blank  
5 slate here. They have already removed one lawyer from the  
6 case on a pretext. These are not a frivolous concern. Do I  
7 think they are going to prosecute me? No. Do I think they  
8 might try and get rid of me? Yeah. Do I trust them on this?  
9 No. You know, is there any reason to, given what happened to  
10 Ms. Hollander? No. Given the position of the commission,  
11 that it has no authority? No.

12 It's real simple what we want. Tell us how to handle  
13 this stuff.

14 MJ [Col SPATH]: I don't want to get off on much of a  
15 tangent.

16 LDC [MR. KAMMEN]: Okay.

17 MJ [Col SPATH]: I haven't gotten to Ms. Hollander in the  
18 record yet, so I guess --

19 LDC [MR. KAMMEN]: It's a closed issue.

20 MJ [Col SPATH]: I haven't gotten there.

21 LDC [MR. KAMMEN]: What happened -- I will give you the  
22 short version.

23 MJ [Col SPATH]: Has she entered an appearance?

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1 LDC [MR. KAMMEN]: Yes.

2 MJ [Col SPATH]: Has she been here yet?

3 LDC [MR. KAMMEN]: She was here and was told she couldn't  
4 come into the courtroom because her SAP had been withdrawn.

5 It was withdrawn because she was pro bono counsel and engaged

6 in what somebody called dual representation, which was that

7 she appeared on behalf of Mr. Nashiri in the European Court of  
8 Human Rights.

9 MJ [Col SPATH]: Which was the decision I take it that  
10 was, that came out recently?

11 LDC [MR. KAMMEN]: Yes.

12 MJ [Col SPATH]: All right. And I'm sure I will hear  
13 more. I hadn't seen it yet ----

14 LDC [MR. KAMMEN]: You won't because it is a closed issue.

15 MJ [Col SPATH]: I understand.

16 LDC [MR. KAMMEN]: We can't sit here and -- an important  
17 member of the defense team was excluded on basically a  
18 pretext, and the commission had no authority to revisit that.

19 Now ----

20 MJ [Col SPATH]: I guess here ----

21 LDC [MR. KAMMEN]: You know, and let me just ----

22 MJ [Col SPATH]: I don't know, I am trying to figure out  
23 what order I could do here. So I start of course with -- I

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1 saw some discussion about transactional immunity. I know my  
2 limits there. I don't have it. I have no authority there.  
3 Certainly if anyone at the U.S. Attorney's Office wants to  
4 pursue that -- I mean, and that's not facetious. That  
5 resolves for you that issue. It probably doesn't resolve it  
6 for your client.

7           But then I look to if the documents are marked,  
8 taking your argument in two pieces, which is, first, has it  
9 been marked appropriately. So do you have assurances from the  
10 OCA? I don't know what else I can do there because I rely on  
11 markings -- I have in this case, as I have started to work  
12 through the record, I rely on those markings without pause  
13 because that's what the OCA is supposed to do.

14           So if the OCA has said here is the classification  
15 with the language that you saw in the Ghailani case and now  
16 here -- either "display only," or I forgot the language for  
17 him -- but review, I don't know what more the OCA can do with  
18 regard to marking them. Clearly they mean your client can see  
19 those documents. I can't -- we have to rely on that.

20           LDC [MR. KAMMEN]: But here is what the security people  
21 tell us is the logical -- what has their heads exploding. The  
22 documents aren't downgraded. They are still ----

23           MJ [Col SPATH]: Yes, whatever security language is in

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1 front, secret, top -- right. I assume in this case secret  
2 would be my guess, but I don't know.

3 LDC [MR. KAMMEN]: No.

4 MJ [Col SPATH]: I understand. So whatever security level  
5 along with "display only" language.

6 LDC [MR. KAMMEN]: Right. And that carries with it these  
7 host of subsidiary concerns. Now, he says, and we can presume  
8 all of that, but they don't answer the question, for  
9 example -- you know, we don't just get to go see him, hi, we  
10 are here to see Nashiri. We have to jump through a whole lot  
11 of hoops.

12 MJ [Col SPATH]: I understand.

13 LDC [MR. KAMMEN]: And all of those hoops would have a  
14 vote in handling this material. So it doesn't say "display  
15 only" to Nashiri, Privilege Review Team, and no offense to any  
16 of the men in the courtroom, the 19-year-old guard who may or  
17 may not have the appropriate security clearance and may or may  
18 not be briefed on what to do with this stuff when we take it  
19 in. And so it's all of these intermediate steps that need to  
20 be resolved.

21 So, you know, the answer, you know, is certainly if  
22 you are writing an order, direct somebody from the OCA just to  
23 put in writing they know about this. I don't doubt it, and if

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1 the prosecutor says it, how does it hurt for somebody to say  
2 we know about that? And, frankly, I'm surprised that they  
3 resist that so much.

4           The second, either direct the OCA to establish these  
5 other handling procedures. It's okay to show it to him in a  
6 nonsecure location. It's okay -- you know, you have to double  
7 wrap it, that's fine. And then let's make sure that the  
8 Privilege Review Team and the SJA and everybody else has the  
9 same stuff so that when we tender it to the Privilege Review  
10 Team they are in a position to say, yeah, we are allowed to  
11 look at this. We know they are allowed to look at this. As I  
12 said, I don't know what their security clearance is. I don't  
13 know. Maybe they have the right security clearance. I hope  
14 they do. But up until now they have never really been tasked  
15 with reviewing classified information, so again I don't know  
16 that.

17           So, again, it's all these subsidiary steps we have to  
18 jump through, and once everyone is on the same page, then we  
19 can forge ahead. But, you know, we just need to make -- at a  
20 minimum make sure again that there is this authority and that,  
21 secondly, everyone in the continuum is on the same page so  
22 when this happens, you know, we -- it goes smoothly and we  
23 don't have a lot of unnecessary drama.

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1           I mean, we want to take yes for an answer. We just  
2 want to make sure that as we do so, we are really genuinely  
3 complying with what they say. And, again, we are not allowed  
4 to presume things. You know, he says you can presume. Well,  
5 we are just not allowed to do that. That's not the way it  
6 works, and we have been briefed on that over and over and over  
7 again.

8           It may well be that the ultimate response is -- you  
9 know, if they say you have got to do it in a SCIF, maybe then  
10 our client meetings have to occur here in the courtroom, and  
11 if that's the deal, that's the deal. That's fine. You know,  
12 if they are happy with this hugely insecure location that is  
13 most assuredly not a SCIF, that's fine, but again, you know,  
14 we just can't presume that that's okay.

15           So, you know, that's why we raised this issue,  
16 because, you know, essentially what they provided was guidance  
17 of once you get in the same room with him and the documents,  
18 here is what you can do, but they also don't answer any of  
19 these other subsidiary questions.

20           And the final question that he didn't touch on, which  
21 really is a hugely important question, is what are Abdel  
22 Rahim's responsibilities with this information? They say,  
23 gosh, you know, we are comfortable with that. But, again, we

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1 signed this huge protective order and, you know, we don't want  
2 to be in a position where later on, again, you know, they  
3 learn, well, he told somebody, and so that has these  
4 subsidiary consequences.

5           And, you know, it's classified material. It says  
6 display to Nashiri, but then what's he supposed to do? And I  
7 said this earlier, and I mean this very seriously, his  
8 conditions of confinement are almost unimaginably difficult.  
9 I don't want to make them worse. And I'm not suggesting, you  
10 know, any bad faith, but, I mean, it is what it is, and if all  
11 of a sudden we are going to be in a position where somebody  
12 says, well, you know, now he has got this information so we  
13 have got to keep him completely isolated, we at least need to  
14 know that, we need to know that going in.

15           And, again, they want to simplify this because  
16 that -- you know, that's easy for them, but it's not a simple  
17 situation, given the fact that they have chosen to classify  
18 this material, and that's fine. We can't revisit that. We  
19 get that. But if it's classified, it's classified and it has  
20 a whole lot of residual consequences. And all we ask them to  
21 do is think it through, come up with a comprehensive plan. We  
22 would be happy -- you know, if they want we will draft a  
23 proposed plan and they can modify it and they can -- you know,

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1 we will start that as a working document.

2 But, you know, that's where we are.

3 MJ [Col SPATH]: Thank you.

4 One second. Mr. Kammen.

5 LDC [MR. KAMMEN]: Three things and then I really will sit  
6 down.

7 The DoD guidance which the prosecutor says is sort of  
8 instructive, which is interesting because in their memo they  
9 say, well, this is really it, and now it becomes, well, now  
10 it's instructive. Again, my understanding of security law is  
11 it's all in writing. It's sort of -- we're used to operating  
12 from here to there, but security law doesn't do that. So if  
13 the DoD Manual really doesn't apply, then it doesn't apply.  
14 So where is the written guidance? What they did show was to  
15 other countries, and it doesn't apply to the kind of material  
16 we are dealing with, and certainly doesn't apply to  
17 individuals.

18 You know, finally maybe the situation has changed. I  
19 mean, the prosecutor says that they are working regarding the  
20 SSCI report, and I want to make sure that we are talking about  
21 the same thing. What's being discussed in the newspapers is  
22 not the full report. What's being discussed in the newspapers  
23 is the executive summary, and at least according to what I

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1 read on the Internet this morning, which may or may not be  
2 correct. I mean, *The New York Times* makes mistakes. But  
3 essentially they say it's redacted to the -- what has gone  
4 back to the Senate is redacted to the point that you can't  
5 even understand it. That's 400 pages.

6           What we have asked for is not some declassified  
7 version that could be reviewed by, you know, anybody in Omaha  
8 who wants to buy it, but we have asked for the whole report to  
9 be provided to us under secure circumstances in a SCIF, and  
10 that's one of the motions before you. And one of the  
11 questions Colonel Pohl had was, does he have the authority,  
12 and even the government concedes you have the authority to  
13 order the Senate to produce it. They don't have to follow it,  
14 but they might.

15           It's interesting though, at least, because -- and  
16 maybe the situation has changed in the last couple of weeks,  
17 but the last time we had any communications, nobody from  
18 Congress -- nobody from the prosecution had even requested  
19 access to the full report from Congress, from the SSCI. And  
20 at least the people on the SSCI we spoke with had never heard  
21 from the prosecution, so I don't really know where we are on  
22 that. Thank you.

23           MJ [Col SPATH]: Thank you.

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1           ATC [MR. CLAYTON]: Recognizing the value of lunch, I  
2 won't take time to defend the honor of the good people of  
3 Omaha.

4           But clarifying a couple of points which I think will  
5 be informative for the court, the Office of Chief Prosecutor  
6 has requested the full SSCI report through the proper  
7 executive channels. That's not -- there is not an ability for  
8 us independently to reach over into another branch. We have  
9 to go through the proper channels. Those requests have been  
10 made up through those channels and are processing.

11           Secondly, with respect to the collateral consequences  
12 for the accused as to hearing or receiving this information  
13 marked "display only" to him, I note first if the information  
14 is marked as "display only" to him, it doesn't seem as though  
15 there could be a significant collateral consequence in part  
16 because Mr. al Nashiri does not have a clearance, to my  
17 knowledge. So the obligations attaching to him with respect  
18 to classified information are very different from those  
19 attaching to myself, the court or the defense counsel. So I  
20 think the idea that there can be pecuniary or penal  
21 responsibilities or culpability for that I think is just not  
22 there.

23           MJ [Col SPATH]: He has not signed a nondisclosure

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1 agreement, I presume.

2 ATC [MR. CLAYTON]: That's correct.

3 MJ [Col SPATH]: So I concede that likely there is not a  
4 lot there.

5 ATC [MR. CLAYTON]: That's right. Finally, one point ----

6 MJ [Col SPATH]: Here is my question, just in a -- the  
7 defense counsel has signed a nondisclosure agreement, and it's  
8 okay that he has. The list of concerns, I understand where he  
9 might have those just based on the in-briefs and the  
10 out-briefs that you are going to get where they are going to  
11 ask you did you ever disclose to somebody who did not have a  
12 clearance. Their answer would have to be yes to that. They  
13 could explain it, and I think reasonably.

14 So here is just the question I think with relation to  
15 the OCA or your team with General Martins: Is there a way to  
16 get from them not a step-by-step, we understand it's going to  
17 go through a Privilege Review Team and this person and this  
18 person, but something in a more general sense of by marking  
19 the documents this way we understand that they are going to  
20 make their way to Mr. al Nashiri through people who have  
21 signed nondisclosure agreements necessarily in ways that are  
22 not typically used for classified material? Something --  
23 that's probably not the exact language, but I think that

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1 that's where we are heading. Does that make sense?

2 ATC [MR. CLAYTON]: It does. I can't commit the OCA to a  
3 specific document or a specific ----

4 MJ [Col SPATH]: Sure.

5 ATC [MR. CLAYTON]: ---- or a specific filing with the  
6 court. What I can say is we can assess that issue, and if  
7 there is an appropriate document that can be filed with the  
8 court, presented to the court or even presented to the  
9 defense, if there is one that exists, we will continue to  
10 assess that.

11 MJ [Col SPATH]: I will ask that -- I will hear that, but  
12 I would ask at least we can start the discussion everybody --  
13 look, everybody signed the nondisclosure agreement, everybody  
14 understands the point of handling classified material. And  
15 cynical or not or realistic or not -- and I am not commenting  
16 on that, I can understand being a cynic, I think all of us  
17 develop that if you practice in criminal courtrooms over time.  
18 I think I understand what the defense is saying: Look, we  
19 just don't want to run into something later unexpected.

20 ATC [MR. CLAYTON]: We can ask the question, Your Honor.

21 MJ [Col SPATH]: All right, now let me hear.

22 ATC [MR. CLAYTON]: Part and parcel to that, I think there  
23 are a number of other practical concerns raised by Mr. Kammen

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1 that actually the court can address. For example, the  
2 Privilege Review Team is owned by the commission, so to speak.  
3 So to the extent there needs to be a procedure put in place  
4 with respect to that team, I believe the court can do so.

5 So there are certain things, certain remedies as I  
6 heard the argument, if I agreed, if I think relief is possible  
7 we're amenable to some of these things, and this proposed  
8 issue, we can certainly respond to the question and respond  
9 back to the court in an appropriate way.

10 MJ [Col SPATH]: All right. Thank you. That will at  
11 least help me as I try to craft a response to anyone.

12 Do we want to attempt to roll through 283, or do we  
13 want to -- I think 283 is probably best taken up after lunch  
14 because I don't think it's going to be short.

15 General Martins.

16 CP [BG MARTINS]: I just had a brief housekeeping matter.

17 MJ [Col SPATH]: Sure.

18 CP [BG MARTINS]: This relates to 048K. It's not  
19 docketed. The government filed it 17 July. It reflects a  
20 conferencing with defense without opposition to the motion for  
21 leave to file a supplement to 048D. We simply seek to get  
22 before the court the Bahlu decision of the en banc  
23 D.C. Circuit and associated law that we believe is new law

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1 within the meaning of Rule 3.E of the court relating to  
2 supplements. And the defense has not opposed. We do not  
3 request oral argument for request for relief to file, but we  
4 do before we file the supplement and in that connection.

5           We don't oppose -- we have preconferenced a defense  
6 pending motion which they are putting together, as I  
7 understand it, relating to a motion for leave to file a  
8 supplement with regard to the European Court of Human Rights  
9 opinion -- I mean, we reserve the right to respond to that  
10 supplement with regard to what the court should make of it,  
11 but we don't object to the motion for leave to file and would  
12 not object to you ruling both on 048K and on that, when it  
13 comes before Your Honor between sessions, to rule on those,  
14 and that way we could get them together and get them before  
15 the court if you don't rule against the joint motion. Thank  
16 you.

17           MJ [Col SPATH]: Defense counsel concur?

18           LDC [MR. KAMMEN]: We don't oppose you considering the  
19 Bahlu opinion. We do intend then to present to you in an  
20 appropriate way the decision of the European Court of Human  
21 Rights. The issue on our side is -- and, again, this relates  
22 to all of this, is some folks are taking the position that  
23 even though it was published all over the world, it somehow

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1 here is classified. You know, that's how subtle and how  
2 complicated all this is, which is part of our concern.

3 MJ [Col SPATH]: I understand. Thank you. So yes, good.

4 Let me just -- when we come back after lunch we will  
5 take up, I think I said -- I did, 283. And then we will move  
6 into the motions we have.

7 I anticipate we will either get done either late  
8 today or early tomorrow with the motions we have before us.  
9 My hope is over the lunch -- we will take an hour and a half  
10 today -- I'm going to try to get a ruling on 277, at least  
11 whether or not the classified piece we need to discuss in a  
12 closed hearing as we work through the motion.

13 Working on 284, as I said, that one is more  
14 complicated to me so it is taking a little longer, because we  
15 can deal with all of 277 if I can get that done.

16 What I envision as we go forward is working through  
17 these motions. You have seen I think where, if I can rule  
18 quickly, I have been. I mean, I will get you rulings  
19 expeditiously, verbally if I can, some I can't, and in  
20 writing. Now that I have taken on some motions, I'm going to  
21 work through those very expeditiously, read the record, read  
22 the attachments. And I plan to either issue rulings on those  
23 or make clear that I need to hear argument and any evidence if

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1 I have questions, and that might be where we are for the  
2 September or October piece of this, depending.

3           The other is at the end of our time here, what I  
4 would like to do is have an 802 session and just discuss  
5 scheduling in a pretty detailed sense, but I would like to do  
6 it in an 802, it is a little less formal, and talk through  
7 scheduling issues and ideas so I can get a feel for where I am  
8 going so I can put out a scheduling order which makes sense in  
9 our current environment where we are right now. We will  
10 probably do that at the end of this, if not after the last  
11 session here, the next day or something. Again, we may have a  
12 little bit of leeway since we will be waiting for our flight  
13 home if we finish early, so we will have some time to work and  
14 have that 802, just so you know that.

15           So 1345 is an hour and a half, so I will see you all  
16 at 1345.

17           General Martins.

18           CP [BG MARTINS]: Not to belabor, 048K, have you just  
19 ruled from the bench or are we awaiting a ruling?

20           MJ [Col SPATH]: You said you were going to file.

21           CP [BG MARTINS]: We filed 048K on 17 July. Are you going  
22 to look at it before ----

23           MJ [Col SPATH]: I will spend some time with it, yes. To

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1 make clear, he was not opposing you asking me to review the  
2 decision from the district court I think was the ----

3 CP [BG MARTINS]: Just to be clear, we have not filed the  
4 supplement. This is the motion for leave to file, and I was  
5 wondering if you had ruled on that from the bench. You  
6 mentioned oral orders.

7 MJ [Col SPATH]: Maybe I had. Give me a second.

8 Do you have any objection to them filing?

9 LDC [MR. KAMMEN]: The supplement?

10 MJ [Col SPATH]: The supplement.

11 LDC [MR. KAMMEN]: No.

12 MJ [Col SPATH]: Yes, you may file the supplement.

13 Granted.

14 LDC [MR. KAMMEN]: To be clear, and I think it is clear,  
15 we do oppose the relief they seek in 45 whatever.

16 MJ [Col SPATH]: I am not ruling on that without spending  
17 some time and seeing the supplement and ----

18 LDC [MR. KAMMEN]: That's another one, because of the  
19 length of time and because of the Bahlu decision and,  
20 frankly, because of the way in which they phrased their  
21 argument, that you really need to rehear the argument.

22 MJ [Col SPATH]: I understand.

23 LDC [MR. KAMMEN]: There are probably four or five that

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1 probably need to be reargued in front of you.

2 MJ [Col SPATH]: We will talk through that. So yes, to  
3 file the amended pleading, granted, and there will be no  
4 additional findings of fact. It's concurred to and you  
5 may ----

6 CP [BG MARTINS]: We understand.

7 MJ [Col SPATH]: We have lost a minute for lunch. I will  
8 still see you at 1345.

9 We are in recess.

10 [The R.M.C. 803 session recessed at 1222, 5 August 2014.]

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