

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1335,
2 18 February 2016.]

3 MJ [COL POHL]: All parties appear to be present that were
4 present when the commission recessed, including the four
5 accused. Am I wrong for any individual? Major Poteet is not
6 here.

7 LDC [MR. NEVIN]: He is not, but he is on his way.

8 MJ [COL POHL]: He is not. He is on his way. Okay.

9 LDC [MR. RUIZ]: The same with Ms. Lachelier.

10 MJ [COL POHL]: Thank you, Mr. Ruiz.

11 Ms. Bormann, you may pick up where you left off.

12 LDC [MS. BORMANN]: That would require a memory that was
13 intact.

14 MJ [COL POHL]: Okay. And just to put on the record, the
15 commission is called to order.

16 LDC [MS. BORMANN]: Oh. Good thing.

17 MJ [COL POHL]: That's why I have good, efficient court
18 reporters reminding me what I need to do.

19 Go ahead.

20 LDC [MS. BORMANN]: I believe we were talking about the
21 issue of cumulative and whether or not the government gets to
22 decide what's cumulative or whether you do with respect to
23 substitutions, redactions, et cetera. And I want to point

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 you -- we talked a little bit about a chain of correspondence
2 that would implicate a much bigger issue versus a smaller
3 issue for purposes of outrageous government conduct. But I
4 wanted to talk a little bit and bring it to something a little
5 more germane and easier to understand in the context of any
6 criminal case.

7 So let's say that you have a prosecution of an
8 individual -- you know, I am going to go back to my old public
9 defender days. You have a client charged with shooting
10 somebody in public, and the government has 12 witnesses, 12
11 eyewitnesses, to that shooting.

12 Now, if the defense -- let's turn it on its head --
13 were charged with providing them helpful information, but
14 noncumulative, the defense might say, well, there are 12
15 eyewitnesses, they all saw the same thing, substantially the
16 same thing, there are 12 different witness statements, but
17 really. I only need to tender one because the other 11 would
18 be cumulative. Of course, that never happens, because the
19 concept of weight of evidence is necessarily correlated with
20 the number of people who viewed it.

21 So a single eyewitness saying something happened is
22 very different from a busload of eyewitnesses saying something
23 happened, which is very different from an entire world knowing

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 something happened.

2 So in this case ----

3 MJ [COL POHL]: Does the government contract -- conduct
4 become more outrageous the more people that know about it?

5 LDC [MS. BORMANN]: It depends on what it is. So in the
6 case if the number of people that know about illegal conduct
7 or what I would characterize as war crimes and cover them up
8 and the further those fingers stretch into various components
9 of the United States Government, I would say that makes it
10 more outrageous. Absolutely. I mean, I think back to the
11 Nuremberg trials and the paper trails that were used to
12 connect the various Nazi officials with the crimes of the
13 Holocaust and how the then-coalition of prosecutors did it was
14 they used the paper trail and the fact that the Final Solution
15 program went to a variety of different people to show that it
16 was indeed a war crime, right? To show that it wasn't just a
17 few bad actors. It wasn't just a couple of guys sitting over
18 here on the side saying, "We want to do this." It was an
19 entire government. And so the answer to your question, I
20 think, is yes, in some instances it does.

21 MJ [COL POHL]: But if you have evidence -- let's just
22 talk about the EIT program ----

23 LDC [MS. BORMANN]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: ---- was approved at the highest level, I
2 am talking about the approved part, not the unapproved we
3 talked about earlier.

4 LDC [MS. BORMANN]: I started with unapproved.

5 MJ [COL POHL]: Let's talk about the John Yoo memo and all
6 the other stuff that went through the Office of Legal Counsel,
7 the President was involved, perhaps the Vice President, but
8 the highest levels of the United States Government. Let's
9 operate from the assumption fully approved, fully knew about
10 it, fully approved, knew about it, knew it was being done,
11 whatever it is. What more of a universe do you need to show
12 the United States Government was engaged in outrageous conduct
13 if it was outrageous? I am making no assumptions here.

14 LDC [MS. BORMANN]: Of course.

15 MJ [COL POHL]: The fact that we go down three or four
16 bureaucratic levels and everybody in the Central Intelligence
17 Agency knew about it and everybody in the Department of State
18 knew about it, everybody else knew about it, does that make it
19 more outrageous?

20 LDC [MS. BORMANN]: The concept of impunity with respect
21 to that comes to mind, and I don't mean to correlate what
22 happened with the RDI program with Nazi Germany and I am not
23 at all.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: I understand that. I just wanted to ----

2 LDC [MS. BORMANN]: But since you asked me the question,
3 the Nazi regime acted with impunity. They didn't care that
4 all of their lower level soldiers, that everybody who was the
5 head of an organization, that all of the regime sort of heads
6 there knew about it because they acted with impunity. They
7 believed, you know, they didn't care honestly and frankly, and
8 so I don't know what the answer is here because I haven't been
9 given the discovery. So I frankly don't have any idea about
10 who knew what here.

11 But what I am saying to you is that the concept of
12 cumulative depends very much on the theories of defense, and
13 since the government doesn't have access to Mr. Bin'Attash's
14 theories of defense and you do, you, because of that, have to
15 make those decisions about what's cumulative and what's not.

16 If we take it back to ----

17 MJ [COL POHL]: Will that cover now -- Mr. Connell,
18 perhaps Mr. Nevin, took issue with this, they believe the
19 cumulative analysis applies to Brady material.

20 LDC [MS. BORMANN]: Do you mean the government can't make
21 the decision about what's cumulative with respect to Brady
22 material? I would agree.

23 MJ [COL POHL]: Okay. But does not necessarily agree that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 applies to non-Brady/Yunis material.

2 LDC [MS. BORMANN]: So I don't take quite a distinct view,
3 because I think that the government can't be in a
4 decision-making position here about what is considered Brady
5 material without knowing what the theories of defense are.

6 MJ [COL POHL]: But would that mean that I would need to
7 review?

8 LDC [MS. BORMANN]: I'm getting water.

9 MJ [COL POHL]: I understand, but there is a world of
10 potential Brady material that is nonclassified, potentially.

11 LDC [MS. BORMANN]: Yes.

12 MJ [COL POHL]: Okay. So do you not have to rely on the
13 government's somewhat determination of what is Brady material
14 to get that without a judicial review of what they don't give
15 you?

16 LDC [MS. BORMANN]: In most instances you could. In most
17 instances, when it came to any -- in most instances when it
18 came to matters that didn't deal with the concept of
19 cumulative, that would be I think the case, right? So if you
20 have a simple report that says Mr. Bin'Attash -- oh, I don't
21 know, you know, said something helpful, said, you know, I
22 didn't mean to do it. This is just ----

23 MJ [COL POHL]: Whatever.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: ---- this is just whatever it is.
2 That would obviously be Brady material, right? I mean, on its
3 face you look at it, you say it's exculpatory, we are done,
4 done of that.

5 Now, the cumulative part, though, comes in when it
6 might not be so clear, right? So what is on its face
7 exculpatory, the government has a duty to provide. What I am
8 saying to you is the government doesn't have enough
9 information to determine what is Brady material by the very --
10 by the very -- is Brady material by definition because it's so
11 cumulative. In this case, because the program itself was so
12 large, the very fact that something is cumulative can actually
13 be more helpful to the defense and may very well fall into the
14 category of cumulative.

15 MJ [COL POHL]: No, but -- but I'm talking about
16 unclassified material relating to the RDI program. That's
17 what we are talking about. We are talking about the RDI
18 program here.

19 LDC [MS. BORMANN]: Classified or unclassified.

20 MJ [COL POHL]: Unclassified.

21 LDC [MS. BORMANN]: Okay. You are talking about
22 unclassified material?

23 MJ [COL POHL]: Unclassified RDI program material.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: Then cumulative doesn't matter, it's
2 just clearly material and helpful to the defense.

3 MJ [COL POHL]: Material to the preparation of effective
4 defense?

5 LDC [MS. BORMANN]: Right.

6 MJ [COL POHL]: What I am saying is doesn't the government
7 have to make a decision it was material in preparation to the
8 defense including Brady material without any judicial
9 involvement whatsoever?

10 LDC [MS. BORMANN]: Well, material and helpful to the
11 defense doesn't require an issue of cumulative, so the answer
12 is yes, but generally in every -- almost every case I have
13 been in, except the couple where they violated Brady, the
14 government has pretty much had an open discovery policy. This
15 is by far the most restrictive discovery regime I have ever
16 seen in my career. And so my concern here is rather than
17 opting to let the decision-makers know about what the defense
18 should be -- determine what's helpful and erring on that side,
19 what we are doing here is erring on the side of letting the
20 government decide what's helpful to the defense. And it's
21 sort of like letting the defense decide whether or not they're
22 going to turn over the statements of the other 11 witnesses.

23 MJ [COL POHL]: No, I am just asking a question about --

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 about -- you've said it a couple of times, that -- and to make
2 this clear, this was no requirement, it was an invitation. If
3 defense wanted to provide me with a copy of their theory of
4 defense, I would keep it under seal and have that with me when
5 I am reviewing the material.

6 LDC [MS. BORMANN]: Uh-huh.

7 MJ [COL POHL]: I am reviewing primarily classified
8 material. I don't recall seeing much classified material to
9 review for this purposes. But if I have, so be it.

10 What I am saying is I don't generally review
11 unclassified discovery, so the government doesn't know the
12 theory of defense and therefore you have to rely on their good
13 faith to give information that's material to the preparation
14 of the defense without any judicial involvement.

15 LDC [MS. BORMANN]: That's correct.

16 MJ [COL POHL]: Okay. And now when we slide into
17 classified material, your view is that if they're going to
18 claim cumulative, they've got to convince me it is cumulative
19 in a sense that you don't get it and different people can try
20 to determine what cumulative is. What I am saying is there is
21 some cumulative evidence you would agree with me that doesn't
22 go to weight, it is two different papers in two different
23 files?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: Absolutely.

2 MJ [COL POHL]: Same paper, two different files. That's
3 the class definition of cumulative.

4 LDC [MS. BORMANN]: It is, and I don't want that because
5 frankly there is enough.

6 MJ [COL POHL]: So if they claim we are not going to give
7 this one because it is cumulative with that one, that's an
8 issue. But if they say -- if I am reviewing a summary of
9 something and I see a piece of evidence that says why didn't
10 you give this, why is this being redacted -- I'm just letting
11 you know procedurally is I have the original, the redacted
12 copy, and then the clean copy that eventually goes with the
13 defense, so I compare the original to the redacted copy.

14 LDC [MS. BORMANN]: Yes.

15 MJ [COL POHL]: And if I say why doesn't this go to the
16 defense and if they say to me, well, Your Honor, it's
17 cumulative with something else over here or something else
18 like that, then I can make a cumulative determination. So
19 what I am saying is there is built in currently somewhat of
20 that analysis currently.

21 LDC [MS. BORMANN]: Okay. So let me see if I can
22 understand what you're saying. So I start from the premise,
23 and I think we would agree, that cumulative doesn't really

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 play a role in the tendering of unclassified discovery. The
2 government doesn't get to make a decision that something is
3 cumulative and not tender it. If it is helpful to the
4 preparation of the defense -- or material to the preparation
5 of the defense, rather, it's ----

6 MJ [COL POHL]: With the exception of if it is exactly the
7 same piece of paper in two different files, you don't get it
8 twice, but you might. I got it.

9 LDC [MS. BORMANN]: Right. Maybe. Maybe. But with
10 respect to classified discovery, that's the only place where
11 the term "cumulative" comes in to be a sort of filter on the
12 tendering of discovery; otherwise, it's not. So the
13 government has to then determine what's cumulative, and that's
14 their position.

15 Our position is that because the cumulative issue in
16 this case is such that the fact that something might be
17 cumulative could actually make it more helpful to the defense,
18 it's something that the commission should be -- should review.
19 And if the commission determines properly that in fact it's
20 cumulative, then so be it.

21 MJ [COL POHL]: Yeah.

22 LDC [MS. BORMANN]: But the commission is in the position
23 of being informed as to at least the basic theories of the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 case to make those decisions.

2 MJ [COL POHL]: I think maybe we are talking across each
3 other because I think we are getting to the same point and
4 part of it is because of the apparent opaqueness of the
5 process.

6 LDC [MS. BORMANN]: I understand that.

7 MJ [COL POHL]: Part of that is the way classified
8 evidence is handled. But when I am doing the reviews, you
9 know, if I see something that ought to be in the summary and
10 we make notes and we send them back to the government and you
11 say why isn't this here and they say it's cumulative, then I
12 make a determination whether it really is cumulative.

13 Mr. Connell's example, for example, I don't think is
14 necessarily cumulative. What I am saying is purely cumulative
15 is I have cable 1 saying -- and then the identical cable is
16 later on somewhere else and that's cumulative. If there is
17 something in cable 1 that in cable 2 is a unique piece, they
18 say, well, it's the same thing here, well, it may be, it may
19 not be. Then whether it is truly cumulative or simply not --
20 and of course if I am not sure, the answer is give it to them
21 twice, three times, four times, whatever it is.

22 LDC [MS. BORMANN]: You and I agree absolutely on this,
23 but your premise is different than mine. Because what you are

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 assuming in your example is that the government has given you
2 both copies, so you can look at them and say, hmm, that looks
3 cumulative, okay, and make a decision. But the government's
4 position, as far as I could tell from what General Martins
5 said, is that they don't have to give you those copies.

6 So taking it back to my example of 12 eyewitnesses to
7 a shooting, the government's position has been that they can
8 determine and make the decision to only give you one of those
9 statements, so you wouldn't even know the other 11 exist. So
10 you wouldn't be in a position where you would go back to them
11 and say, hey, how about those other 11 that I don't know that
12 I don't know about, because you don't know about them.

13 MJ [COL POHL]: Right, I don't know what I don't know
14 about. I got that.

15 LDC [MS. BORMANN]: What I am saying to you is I believe
16 the reasons the rules are written for the commission in the
17 way they are, and I know Mr. Connell said he tried to make it
18 fit with the case law, but I believe the rule is written the
19 way it is and it is slightly different than the analysis that
20 Mr. Connell went through just for this very reason. The
21 commission, because you are reviewing all of the classified
22 discovery here, ought to be in the position of determining
23 whether or not something is cumulative, instead of the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 government.

2 So what I am asking for is in that instance of 12
3 individuals who are eyewitnesses to a shooting is let you
4 decide whether or not tendering all 12 witnesses', you know,
5 statements is cumulative or letting the government decide. I
6 think you should decide whether or not 12 eyewitnesses is
7 cumulative instead of the government, and that's -- that's my
8 position.

9 MJ [COL POHL]: I understand.

10 LDC [MS. BORMANN]: Okay. And with that, unless you have
11 any questions -- if you don't have anything else, I'm done.
12 Thank you.

13 MJ [COL POHL]: Thank you.

14 Mr. Harrington, do you have anything you wish to add?

15 LDC [MR. HARRINGTON]: Judge, a few comments about the
16 Brady universe we are talking about here. I am pleased that
17 General Martins is using the term Brady here and not referring
18 back to Rule 701(e), which talks about exculpatory evidence,
19 and I noticed in Mr. Connell's slides this morning that he had
20 Brady up there and he referred to evidence that was
21 exculpatory, and he didn't use those terms when he argued, but
22 it was on his slide. And exculpatory is a word that
23 prosecutors managed to get into trial courts and some

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 appellate decisions after Brady was decided and some courts
2 have adopted it, but most courts have gone back to what Brady
3 actually said and Brady talks about favorable evidence; it
4 doesn't talk about exculpatory. Exculpatory is included in
5 favorable evidence, but it doesn't have to be to that degree.

6 And I think that that impacts on some of the
7 questions that you have asked today about, for example, the
8 review of unclassified discovery that we get that you don't
9 see and the question is how does anybody know about whether
10 you've gotten all the Brady material or not, and for the most
11 part the defense doesn't unless it gets information from other
12 sources and then can make more specific requests of the
13 prosecution. But most of the time Brady is disclosed during
14 the trial or in some cases after the trial, and there have
15 been some significant cases such as the Stevens case where
16 post-conviction development of Brady evidence has led to
17 dismissals of some very significant indictments, but that's a
18 different -- really different issue than what we are talking
19 about today.

20 But I think that because of that situation, whether
21 this is classified information or unclassified information,
22 that the trial court is really extraordinarily critical on
23 this and I think has to have the attitude that you are looking

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 for favorable information in the broader context.

2 So, for example, I think the best examples of this
3 are the requirement of the government to turn over information
4 about deals that they've given to a witness. Is that
5 exculpatory to whether the person committed the crime or not
6 or whether the person should be given the death sentence or
7 not? I think you could argue no, it has nothing to do with
8 them being exculpatory, but it's favorable to the defense
9 because it offers a way to cross-examine a particular witness
10 and undermine their credibility, and I think that's the
11 easiest example to understand that ----

12 MJ [COL POHL]: Do you think any prosecutor would believe
13 that favorable treatment agreements, immunity agreements of a
14 testifying witness shouldn't be disclosed?

15 LDC [MR. HARRINGTON]: No, no, they do disclose them,
16 Your Honor, and there is no question about that because there
17 is case law.

18 MJ [COL POHL]: That's an easy example.

19 LDC [MR. HARRINGTON]: There is case law that has affirmed
20 that over and over again and now we just accept it.

21 MJ [COL POHL]: Sure.

22 LDC [MR. HARRINGTON]: But it is an example of how
23 something is beyond exculpatory.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: But arguably -- okay. It's favorable and
2 it gives you impeachment evidence which is not per se
3 exculpatory. Quite frankly, the witness is inculpatory
4 because he wouldn't get the deal to begin with. Go ahead. I
5 understand your point, Mr. Harrington.

6 LDC [MR. HARRINGTON]: That's just the point I wanted to
7 make, Your Honor.

8 MJ [COL POHL]: General Martins.

9 CP [BG MARTINS]: Your Honor, we are not going to respond
10 at this point. I mean, we are going to start going down the
11 individual motions, correct.

12 MJ [COL POHL]: Let me ask you one question again. The
13 global thing -- we will go to each one -- this comes back to
14 the word of the day being cumulative. On classified material,
15 you know, you know better than the government and the defense
16 does, but the process is, as I discussed earlier the
17 three-page process, so it is easier for me to see if something
18 is deleted that I think is potentially relevant to ask why is
19 this deleted and arguably I will hear, well, it's cumulative
20 with this one over here, and then I can compare whether it is
21 truly cumulative or not. I think I already do that, but it's
22 not -- Ms. Bormann's point is do I -- do you make a culling
23 cumulative decision before you forward them to me? Do you

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 understand my question?

2 CP [BG MARTINS]: Your Honor, we have to. I mean, it
3 can't be the case that you have to examine every one of these.
4 It's just ----

5 MJ [COL POHL]: Okay. I understand.

6 CP [BG MARTINS]: That's just -- we categorically reject
7 this notion that we have to present every duplicate we have to
8 you so you can sort out which is cumulative and which is not.

9 MJ [COL POHL]: Okay.

10 CP [BG MARTINS]: I believe some of the confusion here
11 lies in what is cumulative. I mean, some things that are
12 Brady that do involve information relating to who got the memo
13 can take it out of the cumulative analysis altogether. But we
14 have examined these cases Mr. Connell has cited, and I just
15 can't find the proposition he is citing them for.

16 MJ [COL POHL]: Okay. And understand, when I ask
17 questions, I am not taking a side one way or another. I just
18 wanted to make sure.

19 CP [BG MARTINS]: I understand.

20 MJ [COL POHL]: I don't know what you do before you give
21 it to me and that's why I asked the question. You make what
22 you believe is a cumulative determination not to give me the
23 same thing in ten different formats that you think is the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 exact same thing ten times. But it would not be to -- like
2 Ms. Bormann's example, if you have 12 witnesses, you wouldn't
3 just give me one witness.

4 CP [BG MARTINS]: Now you are in the realm of witnesses
5 and I think you are at a different analysis than discovery.

6 MJ [COL POHL]: Exactly. That's a little easier, but I
7 understand. Okay.

8 CP [BG MARTINS]: It is a different sort of analysis than
9 discovery. The statute does have the judge as the subject of
10 the noncumulative, relevant, helpful phrase that's in the
11 statute, and that's because in Section 949p-4 and Military
12 Commission Rule of Evidence 505(f), we are talking about what
13 happens when the government invokes the privilege and the
14 judge finds that something is noncumulative, relevant and
15 helpful, he shall not order the classified information to be
16 disclosed unless he finds that it's noncumulative, relevant,
17 helpful to a legally cognizable defense for rebuttal of the
18 prosecutor's case or sentencing, and were we to say wait a
19 minute, it's classified, it can't be disclosed and that's not
20 a judicial determination to make, you then -- are then moved
21 to the different sanctions that you could do, and that's the
22 framework there. It doesn't say anything about it being the
23 exclusive judicial discretion relating to cumulativeness.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 That's just not the way the discovery system works. We have
2 to -- as a first cut, you are looking at ----

3 MJ [COL POHL]: I think that's the position you take in
4 your brief.

5 CP [BG MARTINS]: Right.

6 MJ [COL POHL]: I just wanted to give you a chance to
7 clarify it.

8 Okay. Let's start with the eaches, then, and I think
9 as we do this -- you have anticipated what I am about to
10 say -- this would appear to be a defense motion to compel.

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

12 MJ [COL POHL]: And we are starting with 112.

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

14 TC [MR. RYAN]: Excuse me, Your Honor, may I be excused
15 for just a couple of minutes? I am not handling this motion.

16 MJ [COL POHL]: Sure.

17 Now, you have, just for a frame of reference, the
18 chart the government prepared?

19 LDC [MR. CONNELL]: I could. What chart is that?

20 MJ [COL POHL]: 350B. They attached a whole series of
21 charts.

22 LDC [MR. CONNELL]: 350?

23 CP [BG MARTINS]: Your Honor, 397B.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: 397B. Thanks for correcting me.

2 LDC [MS. BORMANN]: Judge, is it Attachment F?

3 MJ [COL POHL]: This is -- just to tell you where I am at,
4 397B, government reply. Attachments beginning with --
5 Attachment A is the service, but B is a chart which I think
6 corresponds and they continue there on dealing with RDI
7 motions filed by the defense and B deals with 112.

8 LDC [MR. CONNELL]: Sir, my 397 Attachment B is listing of
9 51 defense requests.

10 MJ [COL POHL]: I'm sorry, 397. My mistake.

11 LDC [MR. CONNELL]: All right. I am at 397B. Sorry, it
12 has taken me a minute to come along.

13 MJ [COL POHL]: Do you see that little chart there?
14 Actually, it's a big chart.

15 LDC [MR. CONNELL]: Yes.

16 LDC [MS. BORMANN]: The one entitled ----

17 MJ [COL POHL]: This one is "RDI-Related Motions Filed by
18 the Defense."

19 LDC [MS. BORMANN]: Thank you.

20 MJ [COL POHL]: And tab B deals with 112.

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

22 MJ [COL POHL]: Okay. This kind of goes back to earlier
23 about what they concede or don't concede.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Right. And I am ready to start there,
2 but I want to answer your specific question first.

3 MJ [COL POHL]: Okay. So you have got 112, they have
4 summarized what you asked for, they summarized what they have
5 already given you and what they are committed to provide and
6 what they are not going to.

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

8 MJ [COL POHL]: So I am assuming you want to be heard at
9 least on the far right column, if not the ----

10 LDC [MR. CONNELL]: Yes. I don't think this whole chart
11 is very helpful, but if you have a specific question about the
12 chart, I want to answer it.

13 MJ [COL POHL]: No. I am just saying is as a starting
14 point, they are saying basically they have given you
15 everything -- they have been or are going to give you
16 everything on 112, except for the overbroad category.

17 LDC [MR. CONNELL]: [Laughed.] So, yeah, let's start and
18 we will see whether ----

19 MJ [COL POHL]: We will see where this goes.

20 LDC [MR. CONNELL]: ---- if the exception follows the
21 rule. If I could put up slide 9 from AE 397D. It's the same
22 slide we skipped before. If that's okay with you, I will ask.

23 MJ [COL POHL]: Sure. That's the -- one of the ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Pending motion, sir.

2 MJ [COL POHL]: Yes, okay.

3 LDC [MR. CONNELL]: If that's approved, sir, I will move
4 on with the procedural part.

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

6 LDC [MR. CONNELL]: May I have the feed from Table 4,
7 please?

8 MJ [COL POHL]: Understand, when I said refer to the
9 chart, you are not limited to that.

10 LDC [MR. CONNELL]: I understand.

11 MJ [COL POHL]: I am just saying it's just a shorthand way
12 of looking at what we got.

13 LDC [MR. CONNELL]: No, I understand. Absolutely.

14 All right. With respect to AE 112, I believe this
15 falls into the category of motions the prosecution has
16 conceded, and let me tell you why. Or defaulted might be a
17 better word. Let's review the bidding in 112. We filed a
18 motion in 112 for four categories of information, which I will
19 get to the exact categories before, previously -- no, excuse
20 me, I will get to it in a moment.

21 The government's response was, we will provide
22 information when the protective order has been dealt with.

23 All right. That's fine. So we came to court in December, on

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 11 December 2015, to argue AE 112. The court may remember I
2 spent well over an hour going through each of the slides on
3 112, explaining in detail the theory of materiality,
4 explaining in detail the information that we were looking for,
5 and explaining in detail why each of it -- all of it was
6 discoverable.

7 The prosecution stood up and did not want to discuss
8 AE 112, did not offer any substantive reasons why the military
9 commission should not order its production, but said instead
10 that it planned to produce a discovery plan, and there was
11 then a very pointed interaction between the military
12 commission and the government at page 10126 to 10128 from the
13 transcript of 11 December 2015 -- and I apologize in advance
14 for quoting you back to yourself, but this is actually very
15 important.

16 Colonel Pohl: And if 112 is on that list, I will get
17 a substantive government argument of why it's not discoverable
18 or a concession that it is discoverable?

19 Brigadier General Martins: Correct.

20 Colonel Pohl: Because I have yet to hear that
21 because you don't want to do that.

22 Moving to page 27 to 28. Colonel Pohl: If the
23 government chooses not to contest any further discovery, I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 will consider that a concession and that the discovery is to
2 be granted, understand?

3 Brigadier General Martins: Yes, Your Honor.

4 So 397 comes, right, and 397 does not offer any
5 reasons to rebut either the arguments that were in the
6 pleadings in 112 or the reply in 112B or the oral arguments
7 that I spent an hour making in December. And so -- I mean,
8 I'm not trying to win by default but at some point I am boxing
9 against air because the prosecution has never offered any
10 reason why it thinks it should not have to produce these four
11 categories, and so I'd like to just briefly discuss again what
12 those categories are. The slides from December are already in
13 the record at AE 112J. I would ask permission to display
14 those.

15 MJ [COL POHL]: Sure.

16 LDC [MR. CONNELL]: Thank you. And if I could have the
17 second slide. These were the four categories that we
18 discussed at great length in December. White House
19 consideration of authority for rendition, detention and
20 interrogation; White House extraordinary -- use of White House
21 extraordinary powers to order RDI; the Office of Legal Counsel
22 analysis of RDI; and the information the CIA provided to OLC
23 or White House regarding RDI.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So essentially I don't know what to say, really,
2 because the government has never suggested any reason to the
3 military commission why the military commission should not
4 order these four categories of production.

5 Now, the one thing that I did hear that was somewhat
6 relevant to this question is that the government argued that
7 as -- used 112 as an example of its due diligence.

8 Here is the way the process should work. The way the
9 process should work, the government makes whatever voluntary
10 disclosure it wants to make. If the defense thinks something
11 else should be produced, then it writes a discovery request to
12 the prosecution. The prosecution does due diligence, figures
13 out does the information exist, is it material and exculpatory
14 or material to the preparation of the defense and then either
15 provides it or provides a reason why it is not going to. The
16 defense then, if it feels the information should be compelled,
17 files a motion to compel. That is what has happened here.

18 Now, the government has gone out of order. It simply
19 gave a -- you know, a very minimalist answer initially, but
20 now it says that it has examined 32 documents and out of those
21 32 documents found three which had additional information,
22 which it has provided.

23 Now, I want to just show an example of exactly what

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 we are talking about here.

2 Your Honor, if I may have permission to use the ELMO,
3 the overhead camera?

4 MJ [COL POHL]: Sure.

5 LDC [MR. CONNELL]: And for the prosecution's reference I
6 will be showing MEA-MEM-A-0000001.

7 To be completely clear, the government had originally
8 produced the public version of this document, the same one
9 which was released under the Freedom of Information Act, and
10 this is one of the three documents that the government says
11 that it has found additional information within.

12 This document, which was originally released under
13 the Freedom of Information Act, is an August 31, 2006
14 memorandum to Mr. Rizzo, and the government has -- in
15 scrubbing it, has gone through and produced 62 additional
16 words. So this is a red-boxed version. This version
17 describes -- includes each of the -- and I'll show you the new
18 red-boxed information that the government has produced. The
19 reason why that's significant is I shouldn't have to do this.
20 I shouldn't have to go through each individual redaction and
21 say look at this redaction, the redaction on page 2 is one
22 which contains information which is material and favorable to
23 the defense. The redaction on page 3 contains that. But I am

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 prepared to do so. It's a cumbersome, improper way to conduct
2 discovery, but I don't know what else to do because the
3 government is not producing any reasons why it should not have
4 to produce this document. So let me just give you some
5 examples.

6 So this is page 2. Page 2, the large redaction at
7 the top of page 2, appears to describe the legal authorities
8 under which the CIA operates the program, which is directly
9 responsive to the discovery request which is at issue in
10 AE 112.

11 This is the top of page 4, where the government
12 retains the FOIA redactions of the actual conditions of
13 confinement, the circumstances under which detainees' vision
14 is blocked by covering their eyes by some opaque material.

15 MJ [COL POHL]: If this was an FOIA response, were the
16 redactions based on some FOIA exemption?

17 LDC [MR. CONNELL]: Exactly right, Your Honor. All of
18 these redactions -- except the ones I am about to show you in
19 just a moment, all of these are based on FOIA exemptions, not
20 on a discovery standard. The only change the prosecution made
21 in the production of this document are 62 words. I'm showing
22 you page 5. The red-boxed information, the original sentence
23 said, "Solitary confinement is used for security purposes."

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 That was the FOIA redaction. The new discovery version says,
2 "Solitary confinement is used for security purposes to keep
3 detainees from conspiring with each other to plan escape
4 attempts or commit acts of violence against each other or CIA
5 personnel."

6 This and two or three other similar uncoverings are
7 all -- are when the government makes its chart and says we are
8 going to provide them all the information that they have asked
9 for in AE 112. That's what they mean. In the three
10 documents -- so out of the 32 documents that the government
11 describes having revised or reviewed, it has produced less
12 than 200 words additional to what has been produced to the
13 government under these same memoranda under the Freedom of
14 Information Act.

15 MJ [COL POHL]: Did you ask the government what is the
16 basis of the redactions?

17 LDC [MR. CONNELL]: Well ----

18 MJ [COL POHL]: I'm not sure that's helpful, I am just
19 curious if you did.

20 LDC [MR. CONNELL]: No, I didn't ask that specific
21 question. I mean, in a way, that's what AE 112, the motion,
22 is, is to say, all right, we disagree over what is producible,
23 here are my reasons why I think it should be produced. And

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 what ordinarily would happen is the government would state
2 reasons why they think should not have been produced and then
3 debate it out, but the government has never produced any
4 reasons why these four categories of information should not be
5 produced, which is why I really consider this to be defaulted
6 because at some point the government has to bring something to
7 the table and defend its denial of what appears to be
8 information about conditions of confinement about the
9 information, true or false, that the CIA provided to
10 policymakers, about the response from those policymakers; in
11 other words, the exact material that's being covered by
12 AE 112. And all I can do is guess what's underneath FOIA
13 redactions unless the government produces something else.

14 So at this point, I am going to turn it over to the
15 government or whoever wants it because -- and save the rest of
16 my argument for rebuttal, because I don't know what to rebut.
17 I mean, I don't know what else to argue against. I mean, the
18 government has to produce these four categories of information
19 or they have to produce some reason why they don't need to.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: Thank you.

22 MJ [COL POHL]: Just to clarify the record, the slide you
23 put up, it's already been marked as an exhibit?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: The slide from 112, those slides are
2 AE 112J. I put up one slide from 397D and one slide from
3 AE 112J.

4 MJ [COL POHL]: Just so it is clear, I know there is
5 joinder on this, but this was your discovery request,
6 Mr. Connell?

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

8 MJ [COL POHL]: I am going to start and let the government
9 respond and then I will let the other counsel weigh in, but
10 let's start with the proponent and then opponent and then we
11 will go to everybody else.

12 Trial Counsel?

13 CP [BG MARTINS]: If I could have one moment.

14 MJ [COL POHL]: Sure.

15 [Pause.]

16 CP [BG MARTINS]: Your Honor, with respect to that
17 particular example of an OLC memo, the redacted material
18 remains classified; the version that was posted was
19 unclassified. We did go back and look at the redactions.
20 Some redactions throughout these OLC memos refer to conditions
21 of confinement information that has been declassified that we
22 are going to be providing under the paragraph (c).

23 Because it is classified, this material that's

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 underneath the redactions, we are in a situation where we are
2 invoking the privilege. The standard for ordering production,
3 which is exactly what he is asking you to do, over our
4 invocation of the privilege, is that it be noncumulative,
5 relevant and helpful to a legally cognizable defense, rebuttal
6 of the prosecution's case, or to sentencing, and it isn't.

7 Now, we are looking at all this material. We are
8 doing it in light of his specific requests, where he is
9 articulating comments about who received what memo, and he is
10 stating with particularity, you know, particular documents
11 that he wants. This is an OLC memo that's been available and
12 usable by him even with his client. But to the extent he is
13 looking for specific pieces of information and trying to link
14 them, when he has asked for that, we are looking at that. We
15 are going to be bringing you information that is discoverable
16 and summarizing documents where that appears. To some extent
17 this is still premature, because we are producing those
18 documents for you, but we're not doing this -- in terms of
19 denying this, we are not doing it perfunctorily, we are not
20 doing it without an understanding of our obligation to produce
21 material, and I say that while maintaining that we do have a
22 role with classified information in determining
23 cumulativeness.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay. Let me -- let me make sure I
2 understand the government's position. And, again, the
3 FOIA-released material, that's already out there, that's not a
4 big deal. Embedded in this document is a number of
5 redactions, and Mr. Connell alleges they were FOIA redactions;
6 is that correct?

7 CP [BG MARTINS]: There are FOIA redactions in the
8 document.

9 MJ [COL POHL]: Of course, that doesn't control criminal
10 discovery. Okay. You now said all the material that's
11 blacked out is ----

12 CP [BG MARTINS]: If I might, if there is a privilege
13 there, a government informant's privilege that also happens to
14 be a Freedom of Information Act privilege ----

15 MJ [COL POHL]: It can fall into both categories, but I am
16 primarily going to focus on criminal discovery, not on the
17 FOIA exemptions, so embedded in there you said is all
18 classified material, do I understand you correctly, what's
19 redacted?

20 CP [BG MARTINS]: There is material that remains
21 classified in there.

22 MJ [COL POHL]: Okay. Is all of the redacted material
23 classified?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: Well, he gestured toward a big black box
2 and said, "I want that." I would rather talk to you about
3 that tomorrow.

4 MJ [COL POHL]: Okay. Okay. Okay. I mean, here
5 is the -- and, again, I am not sure we are going to solve it
6 today, but here is what I am trying to struggle with, is that
7 you are correct, I do not generally review unclassified
8 discovery, as a general rule, and I don't review what you
9 don't give them, again, as a general rule. That's your
10 responsibility, and there is a big universe of stuff that you
11 don't give them that I certainly don't want to look at that or
12 don't need to look at or required to look at.

13 But in this case, on something like this, where it
14 raises an issue that there could be relevant material in
15 there, would a judicial review be inappropriate? I mean, I
16 don't know what's there or not there. I take you at your
17 word, General Martins.

18 CP [BG MARTINS]: We can show you material if there is a
19 judgment call that we don't feel comfortable with, but you
20 said the unclassified versions that are out there are -- you
21 sort of put them to the side rather quickly. They contain a
22 lot of information that was discoverable that because it was
23 public we ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: I was not making a value judgment about
2 the weight of that information, but I am saying that issue is
3 not before me. I have enough trouble dealing with issues that
4 are before me. What you give them, that's not before me, and
5 the FOIA-releasable stuff obviously they have been given.
6 That's what I meant when I said I put that to the side. I am
7 not making a value judgment of the weight or for whatever use
8 it is.

9 CP [BG MARTINS]: Sure.

10 MJ [COL POHL]: What I am struggling with here is on this
11 type of document, because I have had other documents where you
12 had a big blackout and the government said it is not relevant
13 to this guy and it is unclassified discovery and I don't look
14 at what you don't give them because discovery in my view
15 relates to information, not necessarily the format on a piece
16 of paper. But in this case, there is an issue that may appear
17 that I need to look at them. I mean, I understand what you're
18 doing and I certainly don't want to get into the business of
19 looking at stuff I don't need to look to, but the weight of at
20 least what I saw so far just raises a potential issue that a
21 judicial review of it wouldn't hurt. I know that's not the
22 legal standard, I've got that, but I am just simply saying is
23 if the idea is let's make sure, why don't we make sure.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: Your Honor, these OLC memos come up in a
2 couple of different motions. 286. I'm sorry, 252.

3 MJ [COL POHL]: If we need to slide this into a
4 classified ----

5 CP [BG MARTINS]: These are memos he cited. He cites some
6 eight to nine in the 72 to 76 items in this motion.

7 MJ [COL POHL]: Okay.

8 CP [BG MARTINS]: I would prefer to talk about ----

9 MJ [COL POHL]: If we need to move them until we are
10 talking in a classified setting, I understand that. Do you
11 have unredacted versions of these memos?

12 CP [BG MARTINS]: We have reviewed -- we have viewed the
13 unredacted versions.

14 MJ [COL POHL]: I'm sorry?

15 CP [BG MARTINS]: We have reviewed the unredacted
16 versions.

17 MJ [COL POHL]: I'm sorry, I didn't make myself clear. Do
18 you have them here that I can look at?

19 [Pause.]

20 CP [BG MARTINS]: We can get them.

21 MJ [COL POHL]: Okay. It may be easier -- and, again, I'm
22 taking everybody at good faith here. Just bring them tomorrow
23 and we will see whether or not they are -- if you can get them

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 tomorrow ----

2 CP [BG MARTINS]: We will try to get them.

3 MJ [COL POHL]: I am just saying that would be appropriate
4 to see whether or not -- because they are directly related I
5 think to this particular argument and that may be the easier
6 way to do it, or easier -- but that's the way I want to do it.
7 Okay? We will address it tomorrow and then we will go to see
8 whether or not they are useful for the argument later on at
9 112.

10 So, Mr. Connell, you sat down because you said you
11 didn't know what you needed to rebut. Maybe tomorrow you will
12 know. But the last category was an objection for being
13 overbroad.

14 LDC [MR. CONNELL]: So ----

15 MJ [COL POHL]: I mean, do you think they have defaulted
16 on that claim? I'm not sure how the government could, but I
17 would certainly listen to an argument.

18 LDC [MR. CONNELL]: So the only way -- so truthfully, I
19 will defend this discovery request as a model discovery
20 request anywhere in the world because it is set up ----

21 MJ [COL POHL]: You just need to do it here.

22 LDC [MR. CONNELL]: It is set up in concentric circles.
23 We have four major categories of information, which are the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 four that I put on the board before, and to avoid the claim
2 that I wasn't being specific enough, I went and scrounged up
3 every reference to -- I mean, this is all in 2013, there are
4 more of them now, but in every reference available in late
5 2012, early 2013, and listed those as examples of the four
6 categories.

7 So the overbreadth is the idea that a person can't
8 know what they are supposed to produce because the description
9 is so vague. These descriptions are not vague. In December
10 when the military commission asked the government, do you
11 understand what is being asked for, the answer was yes,
12 generally, with some exceptions, because some of the specific
13 documents are fragments of information that are fairly vague,
14 but in general, yes. And so to me, the claim of overbreadth
15 is without more. Like there is no description of what the
16 problem with the breadth is. They know what they are looking
17 for, there are both general categories and specific examples,
18 and whether they have defaulted overbreadth or not, I don't
19 think it gets them very far, because there is no description
20 of in what possible respect is it overbroad.

21 MJ [COL POHL]: Well, the way I am reading it -- and again
22 I am reading from the chart as well as kind of your motion so
23 I am putting two things together.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Sure.

2 MJ [COL POHL]: The overbreadth categories of request for
3 documents are listed as all documents, so I would assume that
4 would be ----

5 LDC [MR. CONNELL]: I didn't ask for all documents in the
6 world. I asked for all documents on very specific topics, and
7 you know, the example that the government gave earlier was all
8 documents relating to purported White House exercise of
9 authority to construe the Detainee Treatment Act of 2005.
10 That was the sole example of overbreadth that we have from the
11 government, and I struggle to see how that's overbroad. I
12 mean, the construction of the power to construe the Detainee
13 Treatment Act of 2005 is awfully specific. It would surprise
14 me if there were more than half a dozen documents responsive
15 to that request. So I want to answer any question that you
16 have, but the overbreadth just doesn't seem to fit the bill of
17 such a highly focused and specific discovery request.

18 The problem with asking for all documents ----

19 MJ [COL POHL]: I'm looking at your discovery request here
20 and you kind of go back and forth, and I understand you don't
21 know what you don't know, and there is a lot of references to
22 specific documents, dates. Okay. And then there is ----

23 LDC [MR. CONNELL]: Some of them are general fragments of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 information.

2 MJ [COL POHL]: And others are -- let me see the other one
3 that caught my eye. And you start out -- for example, I am
4 looking at paragraph 4 just because it is the one I happen to
5 have here.

6 LDC [MR. CONNELL]: Sure.

7 MJ [COL POHL]: It says, "All documents and information
8 provided by the CIA to the White House or DoJ for action or
9 analysis regarding authority for the CIA RDI, including, but
10 not limited to, the following."

11 Okay. So you have got the list of the specifics
12 below that, but then you also say anything else. I'm not
13 saying you have to change this.

14 LDC [MR. CONNELL]: No, no, no, no, that's exactly right,
15 because there is a circle of information right down to what
16 the CIA told the OLC told the White House to get the RDI
17 approved. That's what this fourth category is about. And the
18 reason is pretty obvious. I went through, in some depth -- in
19 December, I want to say, they made false claims which is the
20 same factual claims that are made in the SSCI report that they
21 provided misinformation, et cetera. So the only way that I
22 have, and so they are in that, to use your construction or
23 Secretary Rumsfeld's construction, there are no knowns, there

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 are documents of which I know the existence of. The one that
2 I just referred to just a moment ago, MEM-1, is an example of
3 that. The August 31, 2006 memorandum to Mr. Rizzo is an
4 example of a document that I know of. I know that it has
5 relevant information because I can read what's unredacted, and
6 so I listed, okay, we need an unredacted version of that.

7 There are other documents no doubt of which I did not
8 know the exact document, and so those are the ones that fill
9 in the gaps in that circle.

10 MJ [COL POHL]: And that's all the documents and
11 information including but not limited to, so you have got your
12 specific -- I don't know how many are on their ----

13 LDC [MR. CONNELL]: Sure.

14 MJ [COL POHL]: ---- lists and anything else that is like
15 these.

16 LDC [MR. CONNELL]: That falls into that category.

17 MJ [COL POHL]: Okay. Okay. I understand.

18 LDC [MR. CONNELL]: Thank you.

19 But let me say this. If that is overbroad, I am
20 willing to accept instruction on how to write discovery
21 requests, because that -- I don't know how to write them any
22 more, any better than to say here is a category of information
23 and here are some examples that I know of that fall into that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 category. That's the best practice for discovery requests,
2 and if there is a better practice, I will adopt it, but I
3 don't know how to do it any better than that.

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

5 LDC [MR. CONNELL]: Thank you.

6 MJ [COL POHL]: Just to tie up this one, General Martins,
7 I am assuming you are still discussing this. And again, I am
8 looking at Category 4. Is it the government's position that
9 you need to respond to all the A through -- well, there is a
10 lot of subcategories, but there is a whole laundry list of
11 specific documents underneath that?

12 CP [BG MARTINS]: We count 72 and then there is a
13 follow-up document of his from 27 January which is Appellate
14 Exhibit 112E where he is actually given notice that he is
15 going to show some redacted documents.

16 MJ [COL POHL]: Okay.

17 CP [BG MARTINS]: And we went ahead and counted those as
18 well and we come up with 72 to 76 specific documents that we
19 were doing reasonable searches for to try to eyeball.

20 MJ [COL POHL]: But it is your objection to the catchall
21 phrase of "included but not limited to those"?

22 CP [BG MARTINS]: Yes. We are talking about this trial,
23 these accused, their being in the RDI program, not some

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 communications between two government officials. It does come
2 back to being able to state its relevance.

3 MJ [COL POHL]: But if there was a document related to
4 these accused that fell within this, but was not listed by
5 Mr. Connell, would you feel compelled to turn that over?

6 CP [BG MARTINS]: The information.

7 MJ [COL POHL]: I'm not talking about format here, I am
8 talking about information.

9 CP [BG MARTINS]: Right. Again, we have been producing a
10 lot of underlying materials, we have been analyzing things,
11 and if the information has already been produced, maybe not.
12 Maybe not.

13 MJ [COL POHL]: Okay. But when he puts in a request --
14 just because I think it is going to come up again and again,
15 so I am just trying to figure out the way ahead, when they
16 provide a request such as this with a long list, 72, 78
17 specific documents, you will have a specific response for each
18 of those documents, either give them or whatever ----

19 CP [BG MARTINS]: Or deny it.

20 MJ [COL POHL]: ---- or deny it, yes.

21 CP [BG MARTINS]: We will endeavor to look at all of them
22 and find them, yes.

23 MJ [COL POHL]: The other, the including but not limited

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to language, will simply -- well, does that then sensitize you
2 that if he comes across something else not on the list to give
3 it to them?

4 CP [BG MARTINS]: We have encountered some examples. We
5 even found one. I like the way if there is an attempt to
6 defend the category of all documents and information regarding
7 exercise of any purported power to construe the Detainee
8 Treatment Act of 2005. If we find something in there, we are
9 going to look at it, see if it bears upon those rationales of
10 relevance and the accused, and it could be that we will turn
11 it over, and I have found a couple like that. But it sounded
12 to me we are speaking of concessions here and using that term
13 rather loosely earlier, it sounds as if he is conceding that
14 that 72 items is really what the request is because these
15 concentric circles that go very, very broadly I believe need
16 to be given a more particularized linkage to this case and
17 these accused.

18 MJ [COL POHL]: And then just to back up on something that
19 Mr. Connell did, quoting the judge in December, you provided a
20 detailed response to this, the discovery request?

21 CP [BG MARTINS]: We have not gone down paragraph by
22 paragraph. We have stated what I believe ----

23 MJ [COL POHL]: I mean, I see what you have in your chart.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: Wait a minute. No, we responded in
2 detail to the underlying discovery requests. We did deny many
3 of the things, produced some, but in light of some of the more
4 recent searching and finding, which we're putting together
5 with the ten categories of information, it would -- I mean, it
6 would have to be updated.

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

8 CP [BG MARTINS]: That would be a worthwhile thing at this
9 point.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: Two things demand to be said. The
12 first one is that our discovery request is for the four
13 categories that I argued, identified, and gave examples of. I
14 absolutely decline the suggestion that I have conceded that
15 because the government has succeeded in hiding information
16 from us for the past ten years, that it is not discoverable in
17 the case.

18 The second thing is the government -- the military
19 commission just asked the government whether the government
20 had given detailed responses and the government said yes, in
21 fact, that it had.

22 I would like to direct the government's attention to
23 AE 112, Attachment D, which is the government's response to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the underlying discovery request. If I may have permission
2 to -- this document is unclassified. If I may have permission
3 to use the document camera?

4 MJ [COL POHL]: Sure.

5 LDC [MR. CONNELL]: I'm sorry, AE 112, Attachment D, is
6 that the question?

7 This is AE 112, Attachment D. This is the
8 government's response. It has some boilerplate on the front,
9 which is not specific to the specific case. There is some
10 discussion of the protective order, an explanation of what the
11 rules are, but then the actual part which is relevant is
12 contained in three boilerplate paragraphs on the second page
13 of a two-page document. This is what the government describes
14 as a detailed response to what was -- what took 16 or 20 hours
15 to write a discovery request. They simply respectfully
16 decline to provide such information and cite boilerplate
17 explanations of why. So the ----

18 MJ [COL POHL]: And that was in 2012 and you got no
19 further -- and the pleadings of the case weren't more detailed
20 or anything like that?

21 LDC [MR. CONNELL]: That's correct, sir.

22 MJ [COL POHL]: Okay. I know Mr. Connell was the
23 proponent of this. Do any of the defenses counsel want to be

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 heard in this? Apparently not.

2 That brings us to 114.

3 LDC [MR. CONNELL]: Sir, on 7 December 2015, you deferred
4 the 505(h) arguments on 114.

5 MJ [COL POHL]: Is that all we have with 114?

6 LDC [MR. CONNELL]: I'm sorry?

7 MJ [COL POHL]: Is that all we have left with 114?

8 LDC [MR. CONNELL]: Is it all we have left.

9 MJ [COL POHL]: Yes.

10 LDC [MR. CONNELL]: No, we have never -- I don't know what
11 I can say. Can I consult with the prosecution for a moment?

12 MJ [COL POHL]: Yes.

13 [Pause.]

14 LDC [MR. CONNELL]: Your Honor, the parties agree that we
15 have to talk about it in the 505(h).

16 MJ [COL POHL]: Let me ask you one question which I can
17 think you can answer in an unclassified session. If you tell
18 me you can't ----

19 LDC [MR. CONNELL]: Sure.

20 MJ [COL POHL]: In one of your circle charts, you have 114
21 and 114F as conceded motions. Are they defaulted motions?

22 LDC [MR. CONNELL]: Defaulted, because the government made
23 certain -- I mean the military commission made certain orders

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 in the closed session on 7 December which essentially were
2 ordering additional information from the government and the
3 government did not comply.

4 MJ [COL POHL]: And, Trial Counsel, does the government
5 consider either of these two motions conceded or defaulted?

6 CP [BG MARTINS]: You are speaking of 114 and 114F?

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

8 CP [BG MARTINS]: We do not. We do not concede them.

9 MJ [COL POHL]: I didn't think so but I thought I will
10 ask. All right. We will get to that in the due course.

11 That brings us to 190.

12 LDC [MR. CONNELL]: Sir, you've never had a 505(h) hearing
13 on 190. Even the topic of 190 is classified.

14 MJ [COL POHL]: Don't go away, then. 194?

15 LDC [MR. CONNELL]: 194 was conceded explicitly by the
16 government at the last hearing. The military commission has
17 already issued an order on it.

18 MJ [COL POHL]: Do you agree, Government?

19 CP [BG MARTINS]: Yes, Your Honor.

20 MJ [COL POHL]: Okay. 195?

21 LDC [MR. CONNELL]: 195 is now completely unclassified. I
22 am happy to argue it.

23 MJ [COL POHL]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: If you will give me just a moment to
2 get set up.

3 MJ [COL POHL]: I know we are maybe duplicating stuff that
4 I have done in other orders, but 194 is done.

5 [Pause.]

6 LDC [MR. CONNELL]: Your Honor, may I approach the bench?

7 MJ [COL POHL]: Sure.

8 LDC [MR. CONNELL]: Sir, I have provided a copy of the
9 slides in AE 195 to the government and to counsel for the
10 defense. I previously provided a disc containing these slides
11 and the underlying film to the court security officer, I
12 provided a copy to the bench, and I would ask them to be
13 marked as the next appellate exhibit in the 195 series.

14 MJ [COL POHL]: Okay. Just a second. What will be the
15 numbers? The slides are 195H (AAA).

16 LDC [MR. CONNELL]: Thank you.

17 MJ [COL POHL]: And the movie ----

18 LDC [MR. CONNELL]: Just as a reminder, this is the series
19 in which AE 195, Attachment I, was originally classified and
20 the government advised that it is no longer classified, which
21 is the reason why we don't have to have a 505(h) on this.

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: Your Honor, I would ask permission to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 have the feed ----

2 MJ [COL POHL]: I mean, did I misunderstand that you
3 wanted the movie itself as an exhibit?

4 LDC [MR. CONNELL]: I'm sorry, sir?

5 MJ [COL POHL]: Did I misunderstand, or did you want the
6 movie itself as an exhibit?

7 LDC [MR. CONNELL]: That's a good idea.

8 MJ [COL POHL]: I am not suggesting you make the record
9 longer.

10 LDC [MR. CONNELL]: I will provide a disc later.

11 MJ [COL POHL]: It is probably unnecessary because of the
12 public record if somebody wants to see it. Let's leave it at
13 that. We are talking about Zero Dark Thirty here, right?

14 LDC [MR. CONNELL]: Yes.

15 MJ [COL POHL]: Go ahead.

16 LDC [MR. CONNELL]: May I have the feeds and permission to
17 display to the gallery?

18 MJ [COL POHL]: You have seen this, Mike? All right. Go
19 ahead.

20 LDC [MR. CONNELL]: Your Honor, AE 195 is a motion to
21 compel the government to produce communications between the
22 government and Zero Dark Thirty filmmakers, specifically the
23 director and the writer.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 As far as I can tell there is nothing related to
2 these matters in the government's ten categories. It, in my
3 view, is one -- is a motion which falls wholly outside what
4 the government has voluntarily decided to produce.

5 So in order to understand this, it is important to
6 understand first the public relations goals of the Central
7 Intelligence Agency with respect to its RDI program. The SSCI
8 revealed a communication from Deputy Counterterrorism Director
9 Philip Mudd where he wrote about the RDI program, "We either
10 get out and sell or we get hammered, which has implications
11 beyond the media. Congress reads it, cuts our authorities,
12 messes up our budget. We need to make sure the impression of
13 what we do is positive. We must get more aggressive out
14 there. We either put out our story or we get eaten. There is
15 no middle ground." That material is found at the redacted
16 executive summary of the SSCI report at pages 402 and 403.

17 So pursuant to this strategy, the CIA provided access
18 to CIA facilities and personnel to the filmmakers of the movie
19 which later became known as Zero Dark Thirty. There have been
20 two investigations into this by the Inspector General of the
21 CIA and that have been redacted -- released in redacted form
22 to the public. One of those documents describes that the
23 access to agency facilities and personnel were provided to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 further the research of Mark Boal for a screenplay later
2 released under the title of Zero Dark Thirty. I have analyzed
3 the meetings which are described in the OIG report of
4 investigation alleged disclosure of classified information by
5 the former director of the CIA, a 12 March 2014 document, and
6 it is apparent that there were at least 23 meetings between
7 CIA personnel and the filmmakers of Zero Dark Thirty. Five of
8 those took place at the CIA, 15 of those took place off the
9 CIA, but were still official meetings, and then three meetings
10 took place on an unofficial basis.

11 In the chart that I have provided, A, B, C and D
12 refer to redacted CIA agents who were interviewed as part of
13 the Office of Inspector General report.

14 The information is further described in a public
15 declaration of Martha Lutz, a FOIA official at the CIA, which
16 is contained at AE 195, Attachment C.

17 Now, in response to a Freedom of Information Act
18 request brought by Judicial Watch, the DoD and the CIA
19 released some redacted e-mail traffic between DoD and CIA
20 officials and the filmmakers, Mark Boal and Kathryn Bigelow.
21 Mark Boal is the writer and Kathryn Bigelow is the director.
22 This slide is my analysis of how many e-mails went to and from
23 each one and the separate one. You will see that e-mails

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 regarding Boal to Boal, from Boal, and the same for Bigelow
2 went back and forth. There are substantial redacted e-mail
3 traffic that we know about so far. Of course, we don't know
4 what's under the redactions, but we do know of the existence
5 of the traffic.

6 The other major source of information is the OIG
7 report on the ethics violations, which was -- the report took
8 place on 16 September 2013, and there was a redacted release
9 to the public on 3 August of 2015. The document consists of
10 74 pages, 39 of which are redacted in their entirety, meaning
11 everything on every page is blacked out. But there are other
12 heavy redactions for materials that were not blacked out in
13 their entirety.

14 There are two CIA officers that I would like to focus
15 my arguments on today. The first, Officer A -- and this
16 corresponds with the meetings; Officer A is the person that
17 had 13 meetings, three of which were unofficial with the
18 CIA -- gave a statement, which is redacted Exhibit A in the
19 OIG report, and that person, Officer A, is female. And then
20 there is a second redacted CIA officer, who we will refer to
21 as Officer B, who also had a number of meetings with Mark
22 Boal, some of which are described in highly redacted format in
23 the OIG report on potential ethics violations.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 All of this led to the filming of a movie, the
2 writing of a script and the filming of a movie which came to
3 be known as Zero Dark Thirty. Time Magazine gave a
4 description of Zero Dark Thirty which sums up the portion for
5 us today, which is, "A character called Maya, played by
6 Jessica Chastain, observed her colleague Dan, played by Jason
7 Clarke, as he tortures a detainee, Ammar, played by Reda
8 Kateb. The first 25 or so minutes of the film are largely
9 taken up with torture. Ammar is strung up, beaten and
10 waterboarded and kept awake for 96 hours straight."

11 The one distinction I would draw there is
12 "waterboarded," because as you will see, there is no board
13 involved, so it is not technically waterboarding.

14 I want to play you a few clips from the movie. The
15 first one is going to focus on Dan, who I believe to be CIA
16 Officer B; Maya, who I believe to be CIA Officer A; and Ammar.
17 [Played segment of movie from exhibit marked AE 195H (AAA).]

18 LDC [MR. CONNELL]: There are three characters shown on
19 this clip. One of them is Dan, who I believe to be CIA
20 Officer B, he is the interrogator; one of them is Maya, who I
21 believe to be CIA officer A, she is the substantive debriefer;
22 the third character in this clip is Ammar, and that is the
23 same person as Ammar al Baluchi.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 In response to a Freedom of Information Act request
2 by the website Gawker, the CIA site released a three-page
3 document which describes parts of the process of the making of
4 the film, and the memorandum says the film begins and includes
5 several interrogation scenes, the first of which is an
6 interrogation of a character who is modeled after Ammar
7 al Baluchi. The main character, a substantive debriefer Maya
8 is introduced and an ops officer/interrogator named Ted, who
9 participates in the interrogation. For this scene we, meaning
10 the Office of Public Affairs of the CIA, emphasized that
11 substantive debriefers did not administer EITs because in this
12 scene he, meaning Boal, had a noninterrogator substantive
13 debriefer assisting in a dousing technique. You will see that
14 dousing technique in just a moment. But in the film the
15 character Ammar is described as having been in Karachi, is
16 described as Khalid Shaikh Mohammad's nephew, is described as
17 the sender of \$135,000 to a 9/11 hijacker, is described as a
18 co-conspirator with Walid, who we heard about in the last
19 clip, and later Majid Khan, and later is described as having
20 met Ramzi Yousef in the 1990s. Clearly this character is
21 based on Ammar al Baluchi.

22 I would like to show you a second clip now.
23 [Played segment of movie from exhibit marked AE 195H (AAA).]

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: In that clip we hear a reference to
2 "You step off of this mat, I hurt you." That is a technique
3 of interrogation that was used against Ammar al Baluchi, the
4 real Ammar al Baluchi that has never appeared in any public
5 document. The OLC memoranda do not describe the use of
6 prohibiting the person from stepping off a mat, the public
7 descriptions of EITs do not include prohibiting a person from
8 stepping off a mat; yet the idea that if you stepped off the
9 mat, you got hurt, was central to Mr. al Baluchi's experience
10 of abuse at the hands of the CIA. The only way that these
11 filmmakers would have known about that technique to include it
12 in this film is by hearing it from these CIA officers because
13 they certainly did not hear it from Mr. al Baluchi.

14 If I might show you another clip.

15 [Played segment of movie from exhibit marked AE 195H (AAA).]

16 LDC [MR. CONNELL]: The clip that we just saw does not
17 depict waterboarding. There was no board; there was no
18 inversion of the character Ammar in the way that has been
19 described in the Office of Legal Memoranda. The technique
20 that is shown in that clip is water dousing, frequently called
21 cold-water dousing because cold water was used to drown the
22 detainees.

23 It may be that the filmmakers could have guessed that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 or they could have extracted it or speculated, but more likely
2 it is that the CIA Officer A and CIA Officer B described their
3 water dousing of Ammar al Baluchi, because there are two
4 details in this clip that have never been described anywhere
5 else. The first is the use of the tarp. In this clip, the
6 tarp is just placed underneath the defendant, Mr. al Baluchi,
7 or the character Ammar, excuse me, but what happened -- that
8 same sort of tarp was used on the real Mr. al Baluchi because
9 often they would move the water around in the tarp to further
10 drown him.

11 The second detail that I propose that the filmmakers
12 got from the CIA, Officers A and B, is the use of the
13 watercooler. There is no explanation -- the watercooler
14 doesn't even appear in the script. The watercooler, it
15 appears, was a detail added by the director that closely
16 mirrors the actual use of water and ice against Mr. al Baluchi
17 in the fashion described in this film.

18 The last clip, however, shows something different.

19 [Played segment of movie from exhibit marked AE 195H (AAA).]

20 LDC [MR. CONNELL]: What is depicted in that scene is the
21 CIA narrative that Ammar al Baluchi first described to the CIA
22 the existence of Abu Ahmad al-Kuwaiti. I am not saying that's
23 true. I don't know if it is true or not. But what we do know

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 is that this film came out in 2012. In 2012 the CIA narrative
2 of Ammar al Baluchi providing this information did not come
3 out in the public domain, but it came out two years later. On
4 December 9 of 2014, in response to the release of the redacted
5 executive summary of the SSCI report, the CIA released a fact
6 sheet; I mentioned it earlier today.

7 In that fact sheet, they claim that as an example
8 Ammar al Baluchi, after undergoing EITs, was the first
9 detainee to reveal that Abu Ahmad al-Kuwaiti was the first to
10 serve as messenger for bin Laden. Again, I don't know that is
11 true. What do I know is the filmmakers had access to
12 information that the CIA did not release in a public form for
13 another two years.

14 There is another thing that I don't know, and that is
15 whether the interrogation technique described in that scene
16 that we just watched actually occurred. What that scene
17 depicted is the implantation of false memories. The character
18 Maya tells the character Ammar that "We kept -- I know you
19 don't remember telling us all this, but we kept you up for
20 96 hours, memory loss is a symptom of sleep deprivation, you
21 told us a lot of information that was very helpful to us.
22 This is your celebration lunch." That is how in the process
23 of the learned helplessness that the CIA sought to induce,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 they were able to do things like implant false memories. Why
2 else would interrogators who had never brought anything but
3 pain bring lunch instead if this memory weren't true?

4 TC [MR. GROHARING]: Judge, I would just note that this is
5 a movie, not a documentary.

6 LDC [MR. CONNELL]: No, in fact, that's exactly my point.

7 MJ [COL POHL]: Just a second. I am assuming that was an
8 objection of some kind. It sounds like ---

9 TC [MR. GROHARING]: Objection, relevance.

10 MJ [COL POHL]: It sounds like the argument the government
11 is going to make about this whole motion. So you will have an
12 opportunity at that time, Mr. Groharing. As an objection, it
13 is overruled. But go ahead.

14 LDC [MR. CONNELL]: It is an excellent segue and a good
15 place to conclude because the point of this is not that this
16 was a documentary. The point is that these filmmakers had
17 access to information, true information that no one else had
18 or at least information the CIA claimed is true, information
19 like the cold-water dousing using a cooler and a tarp,
20 information like the use of a mat as an interrogation, as a
21 smaller prison within a prison, and information like the claim
22 of the CIA that it was Ammar al Baluchi who provided
23 information about Abu Ahmad. That information, those things

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 were not in the public domain, and the fact that several years
2 later other information suggests the same thing tells us that
3 there was information that went from the CIA in these 23
4 meetings to the screenwriter and the director.

5 We know that there are at least 400 responsive
6 documents to this claim because we have seen redacted versions
7 of many of them. There is a heavily, heavily redacted version
8 of the CIA Inspector General investigation into the -- into
9 CIA Officer A and B. There is the unredacted -- there is the
10 unredacted version of the memorandum about the film, which was
11 released to Gawker, and there are well over 150 e-mails to,
12 from and about the filmmakers that no doubt describe
13 information provided by the CIA to those filmmakers. So this
14 is not a situation where we are looking for information that
15 doesn't exist. There is an already identified universe of
16 information which has been partially released under FOIA which
17 is responsive to this request.

18 Thank you very much.

19 MJ [COL POHL]: You want the information that the CIA gave
20 the filmmakers?

21 LDC [MR. CONNELL]: Yes.

22 MJ [COL POHL]: To show what?

23 LDC [MR. CONNELL]: To show ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: They gave it to the filmmakers?

2 LDC [MR. CONNELL]: No. There probably is a motion out
3 there -- you know, we had a discussion earlier about the
4 CIA's -- excuse me, the SSCI's individual description of what
5 it considered to be deceptive activities by the CIA. The
6 thing that I led with is the CIA's attempt to shape the
7 battleground on RDI, but the main -- so I think there is a
8 motion that the CIA has acted to influence the jury pool or
9 pollute the environment or simply shape the battleground.

10 But more importantly is if one of these -- if CIA
11 Officer A or CIA Officer B really told the filmmakers that,
12 for example, they used the technique "You step off that mat, I
13 hurt you," then that's going to be extremely useful
14 information when the motion to suppress or the trial comes
15 around, because that's an up-close, personal description not
16 sanitized in a cable, not vetted by a lawyer, but up-close,
17 personal description of the interrogation techniques and
18 conditions of confinement of Mr. al Baluchi.

19 MJ [COL POHL]: Okay. I understand. Thank you.

20 LDC [MR. CONNELL]: Thank you.

21 MJ [COL POHL]: Again, if other defense counsel want to be
22 heard on this, they can, but this seems to be specific to
23 Mr. al Baluchi at this time.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: You can take down the feed.

2 MJ [COL POHL]: Trial Counsel?

3 TC [MR. GROHARING]: Judge, I will pick up I guess where I
4 left off with my objection.

5 MJ [COL POHL]: Okay.

6 TC [MR. GROHARING]: It's a movie. It's not a
7 documentary. I think I was inclined to object during the
8 movie to relevance as far as why we were watching a movie when
9 the defense request is for unredacted copies of particular
10 documents, if you look at their motion.

11 After receiving that request, I reviewed the actual
12 documents in question with another member of our office and
13 confirmed there are no materials in those documents that are
14 communications between the CIA and the filmmakers. So there's
15 no relief as far as what the defense is requesting here.

16 MJ [COL POHL]: Which documents are you talking about?

17 TC [MR. GROHARING]: The documents cited in the defense
18 motion and the documents that were the subject of the FOIA
19 litigation referenced by Mr. Connell. I'll note ----

20 MJ [COL POHL]: Just so I am clear on this, he is
21 asking -- and he has got specific numbers in his pleading,
22 obviously, but asking for the communications between the -- I
23 am using filmmakers generically here, and the CIA; and you

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 said there was no e-mail communications at all with them?

2 TC [MR. GROHARING]: That's right. The FOIA litigation --
3 the same matters were at issue in the FOIA litigation where
4 they wanted communications between the CIA and the Zero Dark
5 Thirty filmmakers. In response to this request, we asked to
6 review all of the materials that were assembled to that
7 litigation so we could have our own look to determine if there
8 were any responsive materials that were redacted. So we
9 conducted a hard copy review of the very same materials and
10 came to the same conclusion that the CIA information review
11 officer came to when she conducted that review for the FOIA
12 litigation, that there were not, within those materials, any
13 specific communications between the filmmakers and the CIA.

14 There certainly is evidence that they had
15 communications. We don't dispute that, that there were
16 meetings and that they had communications. They weren't
17 documented in these materials that were made available for our
18 review.

19 MJ [COL POHL]: Have you reviewed the IG report?

20 TC [MR. GROHARING]: Yes.

21 MJ [COL POHL]: So just so I'm clear what the government's
22 position here is, the motion is for all unredacted records of
23 communications to and from United States personnel and the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 filmmakers of Zero Dark Thirty?

2 TC [MR. GROHARING]: Yes.

3 MJ [COL POHL]: I guess one could have voicemail messages,
4 but we are talking primarily here hard copy e-mails or
5 e-mails?

6 TC [MR. GROHARING]: Correct.

7 MJ [COL POHL]: Okay. And you are standing there to tell
8 me that there is no e-mail traffic between the CIA and the
9 filmmakers relevant to this motion?

10 TC [MR. GROHARING]: Well, no. What I'm saying is the
11 materials that we asked the CIA to produce, that Mr. Connell
12 had asked for, that were the subject of the FOIA litigation,
13 we asked them to produce the same materials for our review. I
14 assume that their search would have generated responsive
15 materials, substantive communications. Among all the
16 communications that were made available to us, there were no
17 communications between CIA personnel and filmmakers of Zero
18 Dark Thirty.

19 MJ [COL POHL]: Okay. I am just trying to get around the
20 factual predicate here. In Mr. Connell's presentation, he has
21 his little pie chart of released redacted e-mail traffic of a
22 hundred -- again, I can't get all the numbers up quickly, but
23 again it appears to be over 150, involving Bigelow, Boal --

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Bigelow and Boal. So I could ask him eventually, but I'm
2 curious, are you saying those e-mails don't exist? Do you
3 understand the pie chart that I am looking at?

4 TC [MR. GROHARING]: Correct. Yes, sir.

5 MJ [COL POHL]: Okay.

6 TC [MR. GROHARING]: What I'm saying is the documents we
7 reviewed -- and I can confirm that to the extent that that's
8 accurate, they would have been included in there -- there were
9 no unredacted -- there were no redacted materials that were
10 communications between the filmmakers and CIA personnel.

11 MJ [COL POHL]: Okay. So there were -- let me -- again, I
12 don't want to get into a FOIA litigation posture. Were there
13 unredacted e-mails released pursuant to FOIA requests between
14 the CIA and the filmmakers?

15 TC [MR. GROHARING]: No, there were -- I believe all the
16 materials that were released were redacted to some degree.

17 MJ [COL POHL]: Okay. I am slow here, Mr. Groharing, so
18 help me. Did you tell me there was redacted e-mails released
19 or not?

20 TC [MR. GROHARING]: All the information, e-mails or
21 otherwise that were released ----

22 MJ [COL POHL]: Right.

23 TC [MR. GROHARING]: ---- had some redactions.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay.

2 TC [MR. GROHARING]: When we went in and reviewed the
3 materials that are the subject of this discovery request to
4 determine whether or not any of the redactions that were in
5 those materials were in fact communications, and none of them
6 were.

7 MJ [COL POHL]: Can you give me an example of what they
8 were, then?

9 TC [MR. GROHARING]: They are the actual ----

10 MJ [COL POHL]: Unless they are classified.

11 TC [MR. GROHARING]: ---- actual reports that are attached
12 to defense filings that was behind those boxes. It's
13 classified information, obviously. That's why ----

14 MJ [COL POHL]: Okay. Let me see if I understand. Well,
15 it's classified information?

16 TC [MR. GROHARING]: Yes.

17 MJ [COL POHL]: Did Bigelow and Boal have a clearance?

18 TC [MR. GROHARING]: No.

19 MJ [COL POHL]: So -- okay. And, again, I apologize here.
20 I'm just trying to understand the factual predicate.
21 Sometimes I'm the last one to know.

22 But we are talking about e-mails that went from the
23 CIA to the filmmakers, Bigelow and Boal, and you are telling

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 me the redactions out of those e-mails was because it was
2 classified information? I don't want to get into personal
3 servers for classified information on it. Understand that. I
4 am just trying to get your position here.

5 TC [MR. GROHARING]: What I am saying, sir, is the
6 information that was requested by the defense were the
7 documents that were withheld as a result of the Judicial Watch
8 litigation that Mr. Connell referenced.

9 MJ [COL POHL]: Okay.

10 TC [MR. GROHARING]: The entirety of those materials was
11 made available for our review. From those communications,
12 everything that was made available for our review, there were
13 no communications between the filmmakers and the CIA.
14 Whether -- and what I mentioned before, if there are other
15 e-mails in this that were beyond the scope of that review,
16 beyond the scope of this discovery request, that's something I
17 can try to confirm.

18 MJ [COL POHL]: No, but just so -- because I think we have
19 gone back to where we started here. It's the government's
20 position is there are no e-mails, redacted or otherwise,
21 between the CIA and the Zero Dark Thirty filmmakers relevant
22 to making the film, related to making the film?

23 TC [MR. GROHARING]: I don't know.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: And understand I am not talking about
2 whether they get them or not. I am just simply saying if they
3 don't exist, usually discovery issues are resolved pretty
4 easily.

5 TC [MR. GROHARING]: Right. What I don't know standing
6 here, Judge, is the materials that were reviewed that were not
7 redacted, whether there were materials in there that were
8 e-mail communications that were part of what was provided, was
9 part of what was released, but the redacted portions that we
10 reviewed, that were not publicly releasable, that the defense
11 didn't have that Mr. Connell wanted, there were no
12 communications in those materials.

13 MJ [COL POHL]: So the government response is the
14 requested materials do not exist?

15 TC [MR. GROHARING]: I'm not aware -- that's correct,
16 Judge. I am not aware of materials in existence. This is the
17 first mention of the pie chart by Mr. Connell and of specific
18 references to specific e-mails. I am happy to follow up with
19 additional inquiry to see if, for whatever reason, there would
20 have been e-mails that wouldn't have been included in response
21 to the FOIA litigation.

22 MJ [COL POHL]: But what you're telling me is that at this
23 point in time the requested records don't exist and therefore

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the government couldn't provide them if you wanted to?

2 TC [MR. GROHARING]: Precisely.

3 MJ [COL POHL]: That's not -- that's a separate issue
4 altogether for this movie. Okay.

5 Mr. Connell, help me out here.

6 LDC [MR. CONNELL]: All right, sir. I've got a record for
7 you.

8 MJ [COL POHL]: Just so -- again it seems like we are
9 talking about two separate things. Your neat little pie chart
10 here of 100 and -- I don't know, more than 150 e-mail traffic
11 between Boal and Bigelow ----

12 LDC [MR. CONNELL]: That pie chart is a distillation of
13 information which exists at AE 195, Attachment B. I simply
14 went through the redacted e-mails that I had attached to the
15 motion to begin with in Attachment B.

16 MJ [COL POHL]: So what you are asking for is those
17 e-mails in nonredacted form?

18 LDC [MR. CONNELL]: Yes. And there are two other known
19 sources of information which contain responsive information to
20 the discovery request. The first of those is contained in
21 redacted form at AE 195 (AAA Sup), which was filed in February
22 of this year. That is the redacted Inspector General report.
23 That Inspector General report contains within it exhibits

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 which are statements of interviews with CIA Officer A and B
2 and four others about their communications with and their
3 interactions with the filmmakers of Zero Dark Thirty. The
4 second or third known source of responsive information is
5 contained in redacted information in the record at AE 195,
6 Attachment D, which is a redacted memorandum of a meeting
7 between the CIA Office of Public Affairs and filmmakers of the
8 film describing their interactions.

9 So while I agree that e-mails are responsive
10 information and communication, there are at least two other
11 formats of essentially memoranda of record which describe the
12 communications between United States Government persons and
13 the filmmakers of Zero Dark Thirty.

14 MJ [COL POHL]: Thank you.

15 LDC [MR. CONNELL]: Your Honor, the last thing I would
16 like to mention is that the military commission asked about
17 the movie itself being in the record. My own crack staff
18 reminded me that at AE 195, Attachment H, there is already in
19 the record a DVD of the four clips that we watched.

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

21 Mr. Groharing.

22 TC [MR. GROHARING]: Sir?

23 MJ [COL POHL]: Response?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [MR. GROHARING]: I thought you had questions for me,
2 sir.

3 MJ [COL POHL]: Oh, I do. What is your response? I mean,
4 you guys got me here at a disadvantage. Mr. Connell says
5 these things existed and I am giving you copies of them. You
6 tell me they don't exist. Are we talking about the same thing
7 here?

8 TC [MR. GROHARING]: The materials that he just referenced
9 we have reviewed those and those don't -- the redacted
10 portions of those materials do not have any communications
11 between the CIA and the filmmakers.

12 MJ [COL POHL]: Okay. So just so I'm clear is -- let me
13 make sure I understand. We are not talking about his pie
14 chart group now, we are talking about the other two he just
15 mentioned?

16 TC [MR. GROHARING]: Right, the IG memo and the other memo
17 that Mr. Connell referenced.

18 MJ [COL POHL]: Those do not have communications between
19 the CIA and the filmmakers, therefore would not be responsive
20 to his request. That's what you are telling me?

21 TC [MR. GROHARING]: Correct.

22 MJ [COL POHL]: Now let's go back to the pie chart one.
23 That's the one you say doesn't exist, those 150-plus?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [MR. GROHARING]: I don't know from the materials that
2 we reviewed whether there were specific e-mails in those
3 materials that were unredacted.

4 MJ [COL POHL]: Okay.

5 TC [MR. GROHARING]: So if there were unredacted e-mails
6 that were already provided, that wasn't what was at issue. We
7 looked at the redacted portions of the specific materials that
8 Mr. Connell had requested.

9 MJ [COL POHL]: Okay.

10 TC [MR. GROHARING]: So we looked within those redactions
11 to see whether there were any communications, and there were
12 not.

13 MJ [COL POHL]: Okay. Thank you. Mr. Connell, let me --
14 and I hate playing tennis match here, but it appears that's
15 how we are going to do it.

16 Your pie chart e-mails, you say they are attached to?

17 LDC [MR. CONNELL]: They are Attachment B to 195.

18 MJ [COL POHL]: Was that at one time classified?

19 LDC [MR. CONNELL]: No, sir. Those e-mails were released
20 in redacted form in the FOIA litigation. That's the Judicial
21 Watch case.

22 MJ [COL POHL]: Hold on. 195B, the attachment?

23 LDC [MR. CONNELL]: Yes, sir. 195, Attachment B.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Is that your original motion you filed in
2 August of -- I'm sorry, July of '13?

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

4 MJ [COL POHL]: 517 pages?

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

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

7 What we are going to do is we are going to take our
8 afternoon break and then we may pick this up or we may go to
9 the next one. I'm not sure yet.

10 LDC [MR. CONNELL]: Okay.

11 MJ [COL POHL]: The commission is in recess.

12 [The R.M.C. 803 session recessed at 1535, 18 February 2016.]

13 [END OF PAGE]

14

15

16

17

18

19

20

21

22

23