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1 [The R.M.C. 803 session was called to order at 0914,
2 18 October 2017.]

3 MJ [COL POHL]: The commission is called to order.

4 Trial Counsel, any changes in the government from the
5 last open session?

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

7 MJ [COL POHL]: Good morning.

8 Mr. Nevin, any changes?

9 LDC [MR. NEVIN]: No, sir.

10 MJ [COL POHL]: I would note all detainees except for
11 Mr. Hawsawi are present.

12 Ms. Bormann, any changes?

13 LDC [MS. BORMANN]: No, Judge.

14 MJ [COL POHL]: Mr. Harrington?

15 LDC [MR. HARRINGTON]: No, Judge.

16 MJ [COL POHL]: Mr. Connell?

17 LDC [MR. CONNELL]: No change, Your Honor.

18 MJ [COL POHL]: Mr. Ruiz?

19 LDC [MR. RUIZ]: Judge, Mr. Wilkinson and Commander Furry
20 are present today.

21 MJ [COL POHL]: Thank you. Mr. Swann. Captain.

22 CP [BG MARTINS]: Captain, could you please move to the
23 witness stand.

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1 CAPTAIN, U.S. ARMY, was called as a witness for the
2 prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

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

5 Q. Captain, did you have occasion this morning to advise
6 Mr. al Hawsawi of his right to attend these proceedings?

7 A. I did.

8 Q. What time did you do that?

9 A. I began at 0621 and ended at 0625.

10 Q. All right. I'm referring to what's been marked as AE
11 529 (MAH). It's a three-page document. Do you have it in
12 front of you?

13 A. I do.

14 Q. When you advised him of his right to attend, did you
15 use this form?

16 A. I did.

17 Q. All right. Did you use the Arabic form?

18 A. I read it in English and I had a translator read it
19 in Arabic.

20 Q. All right. Do you believe he understood everything
21 contained within that form and how you read it and the
22 interpreter interpreted it?

23 A. Yes.

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1 Q. Did he sign the document that you have in front of
2 you?

3 A. He did.

4 Q. And I believe I am referring to -- well, he signed
5 the Arabic version; is that right?

6 A. He signed both.

7 Q. Do you believe he voluntarily understood that he had
8 a right -- that he understood he had a right to attend but
9 chose not to attend?

10 A. That's correct.

11 Q. All right.

12 TC [MR. SWANN]: I have no questions, Judge.

13 MJ [COL POHL]: Mr. Ruiz, any questions?

14 LDC [MR. RUIZ]: No questions. Thank you.

15 MJ [COL POHL]: Thank you, Captain. You are excused.

16 **[The witness was excused and withdrew from the courtroom.]**

17 MJ [COL POHL]: Before we renew the argument on 517, there
18 are a couple of issues I want to address. First of all, on
19 Monday the defense raised an issue as to a change in policy
20 concerning defense visits to Echo II, the location used by the
21 defense to meet with their clients at the detention facility.
22 In essence, the defense was told that meetings in Echo II were
23 not supportable by the JTF due to resource limitations while

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1 the commission was in session this week. The commission
2 ordered the government to produce evidence as to the basis for
3 the change. A detention official testified in a closed
4 session since the testimony involved classified information.
5 The commission has issued a written ruling authorizing the
6 closed session.

7 To summarize the unclassified findings, an unplanned
8 contingency required diversion of guard force personnel. For
9 this week only, the camp has insufficient resources to support
10 defense meetings in Echo II if commission proceedings with
11 detainees present are being conducted at the same time. If no
12 detainees are in the courtroom or no commission hearings are
13 being conducted, then the regular policy of defense meetings
14 in Echo II would be followed.

15 Based on the evidence, the commission chose not to
16 order any change in the Echo II policy in effect for this
17 week. Unforeseen contingencies are inevitable and require a
18 certain degree of flexibility. The government has represented
19 that this is a unique occurrence and have implemented remedial
20 measures going forward.

21 On 21 November 2017, the government will provide a
22 status update whether the temporary policy change will impact
23 the scheduled December hearings in this case.

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1 In conclusion and most importantly, the right for the
2 defense to meet with their clients is fundamental to a fair
3 adjudication of this case. If similar issues arise in the
4 future, the commission will take appropriate action to ensure
5 this right is fully protected.

6 Prior to this hearing, I was notified by my CISO that
7 there is an issue with 502J slides and 525 slides. This has
8 come up at the last minute. My suggestion is that we will do
9 the other unclassified session today, and give the rest of the
10 day an opportunity for counsel for both sides to address that
11 issue. Tomorrow morning then, assuming that's resolved, we
12 will do the unclassified portion of those two motions, and
13 then after that we will do the closed 806 sessions. And the
14 orders are promulgated.

15 Mr. Connell, they are your slides. I know this is
16 kind of late-breaking news, this is why I want to give you
17 time to address it.

18 LDC [MR. CONNELL]: Yes, that is perfectly fine. The two
19 things that I want to put on the record are: Number one, that
20 we timely submitted the slides for review according to the
21 military commission's rules; and second, that it is my
22 understanding this is a mosaic issue and not anything that I
23 would have had notice of.

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1 MJ [COL POHL]: Okay. That being said, that brings us
2 back to, I think, the continuation -- excuse me. Ms. Bormann?
3 Is this on 517 or something else?

4 LDC [MS. BORMANN]: Something else.

5 MJ [COL POHL]: Okay.

6 LDC [MS. BORMANN]: This morning we were informed by our
7 clients that en route to the hearing, certain attorney-client
8 privileged materials were seized by JTF-GTMO personnel. I'm
9 told by Mr. Trivett that they don't know yet what they plan to
10 do with that material. Mr. Trivett has agreed to the idea of
11 a court order ordering JTF not to review that material until
12 further order of the court to preserve attorney-client
13 privilege, and we are asking for that order now.

14 MJ [COL POHL]: Was the material allegedly seized in
15 transit while being carried by the detainee?

16 LDC [MS. BORMANN]: Yes, from the legal bins and
17 elsewhere.

18 MJ [COL POHL]: Okay.

19 LDC [MS. BORMANN]: It was a laptop -- all of them,
20 laptops and hard drives.

21 MJ [COL POHL]: Okay. And would it be fair to say normal
22 procedure is they bring this material with them to the
23 hearings?

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1 LDC [MS. BORMANN]: Yes, always; because it contains
2 attorney-client privileged material, you know, developed with
3 counsel.

4 MJ [COL POHL]: Well, given what I just said earlier about
5 what we are going to do this morning, I think there will be
6 time to resolve this.

7 Mr. Trivett, do you have any objection to me issuing
8 such order?

9 MTC [MR. TRIVETT]: No objection, Judge. The laptops that
10 were seized, they have not been looked at, they have not been
11 powered on; they are just seized pending further order from
12 you.

13 MJ [COL POHL]: Okay. Well --

14 MTC [MR. TRIVETT]: So we do not object to an order now.

15 MJ [COL POHL]: Things happened. Let me find out why they
16 happened.

17 LDC [MS. BORMANN]: That was my next request.

18 MJ [COL POHL]: Well, okay. The order -- I am ordering
19 that none of the materials that were seized today be reviewed;
20 and secondly, that the people who did the seizing explain why
21 they seized them and why the normal procedure was not being
22 followed. And they are to explain that to any defense counsel
23 whose client's materials were seized.

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1 LDC [MS. BORMANN]: That's what I was asking for, thank
2 you.

3 MJ [COL POHL]: And, if necessary, we will have a hearing
4 on it tomorrow.

5 LDC [MS. BORMANN]: Thank you very much.

6 MJ [COL POHL]: Mr. Trivett.

7 MTC [MR. TRIVETT]: We had anticipated at some point
8 filing a motion; we don't have all of the facts yet either.
9 But it may be unnecessary based on what you just said.

10 MJ [COL POHL]: We are trying to preserve the status quo
11 and to see why things change, other than the fact we are in
12 Guantanamo Bay and things seem to change frequently.

13 Mr. Connell.

14 LDC [MR. CONNELL]: Thank you, sir. I just wanted to note
15 that it may be, in the seizure of Mr. al Baluchi's client
16 information, that it is more expansive than others. With the
17 cooperation of all the parties, we basically shredded all the
18 stuff that was piled up in Mr. al Baluchi's cell and stored it
19 onto a hard disk. And the government has been cooperative in
20 setting up appropriate protections for that and for making
21 that process, which was, I think, endorsed by all parties,
22 possible.

23 But what it means is that there is -- in addition to

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1 an actual laptop, there is a hard disk and possibly some other
2 information. We don't really have a full picture yet. I just
3 want to make sure that your order covers whatever it was that
4 was seized in whatever format.

5 MJ [COL POHL]: Just so I am clear, material are brought
6 by the -- legal material are brought by the detainees in the
7 vans into court.

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

9 MJ [COL POHL]: Okay. Any of those materials that were
10 seized, in whatever format or carrying device -- computer,
11 paper, CD, there may be something I am not thinking of -- but
12 whatever was seized from them as relates to legal materials is
13 what I am talking about and that's covered by the order not to
14 be reviewed until this issue has had an opportunity for
15 defense counsel to weigh in on this thing.

16 LDC [MR. CONNELL]: Thank you, sir.

17 LDC [MR. RUIZ]: Judge?

18 MJ [COL POHL]: Yes.

19 LDC [MR. RUIZ]: Just because Mr. al Hawsawi is not here
20 today, I do not know if the search of materials also would
21 cover him. Even though he has not been transported and you
22 have narrowly tailored it to materials seized in transit, I
23 would ask that you extend that to make sure it covers

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1 Mr. al Hawsawi to make sure whatever search and seizure
2 encompassed also his legal materials.

3 MJ [COL POHL]: Are you talking about back in the camp?

4 LDC [MR. RUIZ]: Yes, sir. I am not aware that this is
5 not a search that was conducted of every detainee.

6 MJ [COL POHL]: That's already covered by preexisting
7 orders, isn't it, that they are protected?

8 LDC [MR. RUIZ]: Yes, sir. But I think attorney-client
9 materials are covered in total and apparently they are still
10 being seized, so ----

11 MJ [COL POHL]: Exactly. I got it. The issue before me
12 is material seized while in transit today, not what's
13 happening with the camp. If there is a problem with the camp,
14 I will address that when there is a factual predicate to
15 support it.

16 Mr. Harrington.

17 LDC [MR. HARRINGTON]: Judge, just two things: One is, if
18 we could have the SJA or somebody notify whatever persons have
19 this in JTF that your order has gone into effect so they know
20 it right away; and secondly, in disclosure about why the
21 seizure was made, the method in which the seizure was made
22 because we believe, based on information we have, that it was
23 outside of the protective order for going through legal bins

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1 outside of the presence of our clients.

2 MJ [COL POHL]: Okay. But, I mean, at this point -- yeah,
3 well, it's clear. Trial Counsel, make sure that the
4 protective order -- or the order I just issued, is conveyed to
5 whoever is -- I don't know, was the material seized at the
6 camp or was it seized here or do you know?

7 LDC [MR. HARRINGTON]: At the camp, Judge.

8 MJ [COL POHL]: At the camp?

9 LDC [MR. HARRINGTON]: In the transportation process, but
10 at the camp.

11 MJ [COL POHL]: Okay. So they were getting into the vans
12 and they said, give us all this stuff?

13 LDC [MR. HARRINGTON]: That's about all we can talk about
14 here, but ----

15 MJ [COL POHL]: But as I am saying, the material was last
16 seen in the custody of a person at the camp?

17 LDC [MR. HARRINGTON]: Right before entry of the truck.

18 MJ [COL POHL]: Okay. Trial Counsel, make sure that's
19 conveyed.

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

21 MJ [COL POHL]: Now. Okay, that's good. I see somebody
22 conveying it. That was kind of my question. Okay.

23 LDC [MR. HARRINGTON]: And with respect to the manner in

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1 which it was seized, Judge, your order also ----

2 MJ [COL POHL]: Well, at this point what I said, I said
3 don't read it; and then they are to discuss -- explain to the
4 defense counsel what was seized, why it was seized, and that
5 would include obviously the manner it was seized.

6 LDC [MR. HARRINGTON]: Right. Thank you, Judge.

7 MJ [COL POHL]: Okay. So that brings us to the
8 continuation of the argument on 517.

9 DDC [Maj WAREHAM]: Good morning, Your Honor. Major
10 Wareham for Mr. al Baluchi.

11 MJ [COL POHL]: Major Wareham, I thought you were done
12 last time.

13 DDC [Maj WAREHAM]: Well, we all had probably hoped so,
14 but I have got to correct one factual error before we go if
15 you are -- before we go further that's both listed in the
16 brief and argument.

17 MJ [COL POHL]: Okay.

18 DDC [Maj WAREHAM]: It was originally understood by me
19 that the evidence was produced to us in portable document
20 format and I related it in that way. I was corrected
21 afterwards to learn that our team had been the one to convert
22 it to portable document format. We actually had received the
23 subject pictures in printed hard-copy form. So instead of

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1 actually receiving it in any electronic form, the photos,
2 which were originally electronically stored, were printed and
3 provided to us in hard copy, thereby stripping any associated
4 information with it.

5 MJ [COL POHL]: Okay.

6 DDC [Maj WAREHAM]: So I wanted to correct that error
7 before we continue.

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

9 DDC [Maj WAREHAM]: Thank you.

10 Captain Brady.

11 ADC [Capt BRADY]: Good morning, Judge.

12 MJ [COL POHL]: Good morning.

13 ADC [Capt BRADY]: Delay, degrade, and destroy. The
14 government has a consistent policy of delaying the production
15 of discovery. When they do provide discovery, they degrade
16 the quality of that discovery. And when they are not delaying
17 or degrading, they destroy the evidence which is necessary to
18 the preparation of the defense.

19 Judge, this motion to compel is about metadata, which
20 is essentially digital information about location, date, time
21 when pictures were taken. Under R.M.C. 701(c), the defense is
22 entitled to photographs and documents that are in possession
23 of the United States Government. We are entitled to examine,

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1 we are entitled to copy, and we are entitled to have those
2 documents if they are material to the preparation of the
3 defense.

4 Why is the metadata requested here material to the
5 preparation of the defense? These are photographs that have
6 to do with the conditions of confinement. The metadata that
7 we are talking about here, Judge, instead of defining it as
8 metadata, let's talk about it as the location of where the
9 picture was taken, the date and time as to when the picture
10 was taken. Why would those be important to the defense? Why
11 would that be material to the preparation of the defense?

12 The date and time can inform the defense about when
13 our clients looked the way they did in that photograph: When
14 they looked potentially emaciated; whether they looked
15 potentially a certain way when they were held by the CIA
16 during 2003 to 2006.

17 The location, why is that important and material to
18 the preparation of the defense? This will inform defense
19 investigations, it will inform us as to where we should go to
20 investigate the crimes of the CIA, where we should go to
21 investigate/define mitigating evidence that will support our
22 arguments at sentencing, the locations about where our clients
23 were held, and the conditions in which they were held.

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1 Both of these information -- both of these, the time
2 and date and the location, inform our ability to investigate
3 this case which we are ethically required to do. It's Brady
4 material in that it is impeaching information. If the time
5 and date and location do not match up with the government's
6 narrative or what witnesses say on the stand, that will be
7 impeaching evidence and can impeach the credibility of
8 government witnesses that can potentially take the stand
9 during trial.

10 Metadata can also inform the defense on even smaller
11 points of information that are very critical to the defense's
12 investigation and to our presentation at trial. The order in
13 which the photographs were taken; if the order or the file
14 name indicates that there were 40 photographs in a certain
15 series, the metadata will tell us that -- the file name will
16 indicate that there were -- or certain photographs were
17 missing. That will inform us about other detainees that might
18 have been present during the time these photographs were
19 taken. It will inform the defense, Judge, about the number of
20 photographs that were taken.

21 If the government were taking hundreds of photographs
22 of our clients and they all take place over the course of
23 several weeks, it will inform the defense investigation about

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1 why they were taking these photographs, why was there a need
2 to document what our clients looked like on that date and
3 time. If there were large gaps in time or there weren't
4 photographs that were taken, it will inform the defense
5 investigation about potentially why there were gaps, why were
6 our clients away from an area where this camera was used.

7 The metadata can also inform about the type of camera
8 that was used so we can identify that the same camera
9 potentially could have been used. If the government argues
10 and Your Honor agrees that the location somehow is not
11 relevant, we can associate the camera type, via that metadata,
12 to associate our client's pictures being taken with the same
13 camera, two different dates, time, two different pictures to
14 one singular location.

15 That's important for the defense's investigation so
16 we can tie where our clients were held, what dates and times
17 they were located at that location, and we can associate their
18 pictures and their conditions with the statements they have
19 alleged to have made under torture by the hands of the CIA,
20 Judge.

21 Judge, 478 came up on Monday. The government wants
22 us to set a trial date. But this is a great example of the
23 government taking affirmative steps to delay, to degrade, and

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1 to destroy evidence that the defense is entitled to. The
2 metadata can assist the defense in sorting these photographs.
3 We have tens of thousands of photographs, Judge. Metadata
4 comes on photographs. You don't have to do extra steps to add
5 in the date, time, and location; you don't have to take
6 additional steps to put the metadata in.

7 The government has to take additional steps to print
8 out these photographs, give it to a paralegal, go and scan it
9 or print it, and just hand it to the defense versus just
10 putting them in our shared box. This takes additional time
11 from the government. And then when the defense attorneys
12 receive these photographs, we have additional difficulties in
13 sorting the photographs and associating photographs together
14 because that metadata in various programs that can be used is
15 not available to us.

16 For example, Judge, there are programs out there
17 which allow the metadata to be looked at in these photographs
18 and associate photographs together that, to the naked eye,
19 would not be associated with each other. These programs would
20 assist the defense counsel in preparing for trial and being
21 ready for trial sooner, but trial counsel takes affirmative
22 steps to slow down the defense's ability to look at, analyze,
23 and investigate our own discovery.

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1 Judge, this information is material to the
2 preparation of the defense and can even be Brady material. It
3 helps inform our constitutional investigation that we are
4 constitutionally and ethically required to do and the defense
5 is entitled to it.

6 May I have a moment?

7 MJ [COL POHL]: Sure.

8 ADC [Capt BRADY]: Judge, subject to your questions, that
9 is all I have.

10 MJ [COL POHL]: I have none.

11 MTC [MR. TRIVETT]: Subject to your questions, sir, we
12 rest on our brief.

13 MJ [COL POHL]: Mr. -- I do have one question. Do these
14 pictures, the original of these pictures, have metadata on it?

15 MTC [MR. TRIVETT]: There is metadata on the pictures,
16 yes, sir.

17 MJ [COL POHL]: Thank you. That's my only question.

18 No, actually that raises another question. Is the
19 removal of the metadata based on relevance or that it's
20 classified?

21 MTC [MR. TRIVETT]: Yes, sir, based on relevancy.

22 MJ [COL POHL]: You are not asserting a classification
23 issue on it?

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1 MTC [MR. TRIVETT]: Not at this time. As our brief said,
2 though, we would, if we were ordered to provide it -- because
3 it is consistent with other protections that we sought for
4 substitutions of specific dates, being early, mid, and late,
5 certain time periods in the discovery.

6 MJ [COL POHL]: All right. Thank you.

7 MTC [MR. TRIVETT]: Thank you.

8 MJ [COL POHL]: Do my questions elicit a response, Major
9 Wareham?

10 DDC [Maj WAREHAM]: Your Honor, based on the second
11 question involving relevance versus national security
12 privilege, as far as relevance is concerned, they conceded
13 relevance once they produced these pictures. As far as the
14 700 analysis goes, the metadata, and this needs to be very
15 clear, is nothing separate from the photographs. And let me
16 step away briefly from the technical, because everyone's eyes
17 tend to glaze over when I say metadata, everybody kind of
18 backs up and goes to sleep. So let's take it out of that and
19 talk about evidence as a whole.

20 Take, for example, a gun, right? Say we had a nice,
21 simple gun case here instead of the military commissions, and
22 they produced this gun for my inspection but removed the
23 trigger, removed the trigger saying, you know what, that part

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1 you don't need to know about. It's one piece of a whole.
2 That's exactly what's going on with these photos. It's one
3 piece of a whole.

4 Or let's take it out of the physical and go to an
5 issue that we discovered previously here with redactions.
6 This is a redaction of information without judicial review or
7 approval. They are, in essence, by clicking print redacting
8 this information permanently.

9 So either way you look at it, don't get lost in the
10 technical. This is one piece of a whole. And under a
11 relevance concept ----

12 MJ [COL POHL]: Will I have to review all redactions that
13 the government says are being redacted because they are not
14 relevant to discovery?

15 DDC [Maj WAREHAM]: We would maintain that there should be
16 no redactions without judicial approval. No, the evidence
17 should never be changed without judicial approval or national
18 security privilege process. Absolutely. So if they are going
19 to start redacting ----

20 MJ [COL POHL]: Would that apply then -- should I review
21 everything they don't give you then?

22 DDC [Maj WAREHAM]: When we make a motion to compel, if we
23 decide to object to it, absolutely. In fact, this process

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1 needs to stop overall. A process of redaction without
2 judicial review is not discovery practice.

3 MJ [COL POHL]: Okay.

4 DDC [Maj WAREHAM]: From that, we go on to the concept
5 that they have hinted at a national security privilege or
6 objection. If they are making that objection, that objection
7 should have been made at the time of the production of the
8 photos. But at the time of the production of the photos, they
9 have conceded both relevance and materiality, as well as
10 helpfulness, because they have produced these photos which
11 are, in fact, classified. And if they needed to withhold that
12 information, they should have followed the summary
13 substitution procedures that exist in 505.

14 And so as far as these two arguments are concerned,
15 you produce the photos, you concede the metadata. This
16 practice of separating the two is exactly the point that we
17 are trying to confront here and needs to cease. So there is a
18 process of 505. They have not followed the 505 process here.
19 And to hint at a national security objection should the
20 existing evidence that should have already been produced be
21 produced properly, is not the way to do this.

22 So this is messy discovery practice overall, it needs
23 to be solved. And raw data in its original form needs to be

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1 produced to us just like any evidence, unless there is proper
2 objection under the rules.

3 MJ [COL POHL]: Thank you. Captain Brady, anything
4 further?

5 ADC [Capt BRADY]: No, Your Honor.

6 MJ [COL POHL]: Okay. That brings us to 114.

7 DC [MS. PRADHAN]: Good morning, Your Honor.

8 MJ [COL POHL]: Good morning.

9 DC [MS. PRADHAN]: I would like the court's indulgence for
10 one minute as we have our slides -- our pre-approved slides
11 marked.

12 [Pause.]

13 DC [MS. PRADHAN]: Your Honor, you should have just
14 received a set of slides that we have had pre-approved by the
15 court information security officer. Those slides have been
16 marked 114W. I understand that we may have a technical glitch
17 from Table 4 today, so I will not ask to display them, but I
18 will be referring to them.

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

20 DC [MS. PRADHAN]: Your Honor, AE 114 is a motion on
21 behalf of Mr. Bin'Attash, Mr. Binalshibh, Mr. al Baluchi, and
22 Mr. Hawsawi to compel discovery of information related to
23 buildings in which the defendants and potential witnesses were

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1 confined.

2 Our original discovery request from 2013 asks for --
3 there is a long list, Your Honor, and it asks for as-builts of
4 original work; as-builts of subsequent changes, alternatives
5 and additions; change orders; logs of submissions;
6 subcontractor's drawings; construction meeting reports and
7 agency inspector reports; construction meeting minutes;
8 inspection reports, included but not limited to special
9 inspection reports; project monitor reports and agency
10 inspector reports; architectural drawings, contracts, and
11 subcontracts; photographs of rough construction and additional
12 phases of construction; and closeout documents. And so what I
13 would like to explain is exactly why we need that information
14 and those specific documents.

15 So the original motion was actually filed in January
16 2013 before the redacted executive summary of the SSCI report
17 was issued and before we received much of whatever we have
18 received to date in terms of RDI discovery. Perhaps most
19 significantly, it was filed long before the destruction of the
20 black site, which was the subject -- or before we were
21 informed of the destruction of the black site, which was the
22 subject of our arguments at the last hearing in AE 425.

23 So obviously we have an unclassified portion of this

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1 argument and a classified portion. What I would like to do in
2 open session is go through some of what we have learned since
3 AE 114 was filed that make it more important than ever for the
4 government to produce further information about the buildings
5 in which Mr. al Baluchi, other defendants, potential witnesses
6 were tortured.

7 In AE 425, Your Honor, we submitted a number of
8 declarations from experts on torture, torture investigation,
9 and imprisonment. I would like to highlight, in particular,
10 two of those declarations. First, the declaration of
11 Dr. Pierre Duterte, who is a world-renowned torture specialist
12 and therapist; and Mr. Raphael Sperry, who is an architect and
13 sustainable building consultant with specialization in the
14 architectural and human rights aspects of prisons and jails.

15 Dr. Duterte's declaration is found in the record at
16 425E Attachment B. And he discusses the examination of the
17 physical spaces and calls it mandatory full, for a full and
18 effective assessment of torture.

19 Mr. Sperry's declaration -- I am slowing down for the
20 interpreters. I would like to spend a bit more time on
21 Mr. Sperry's declaration, which is in the record at 425E,
22 Attachment E. Mr. Sperry's declaration states that prison
23 architecture directly affects the experience of guards and

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1 prisoners. The color of walls, presence or absence of
2 windows, and access or lack thereof to natural light can form
3 part of an overall deprivation of sensory input. Prison
4 architecture affects the experience of guards and prisoners in
5 ways which may not be immediately obvious from photographs or
6 diagrams.

7 For example, many prisons have hard surfaces that
8 reflect sound back to building occupants, resulting in
9 prisoners being unable to get proper rest in facilities due to
10 the constant noise. Some prisons may use techniques to dampen
11 noise or limit communication among prisoners, increasing the
12 sense of isolation among the prisoners.

13 Indoor climate is also important. Mr. Sperry states,
14 "Some prisons, for example, in the American South have been
15 criticized for the impact of climate, i.e., heat and humidity,
16 on the prisoners because the design does not mitigate the
17 effect of climate. The construction materials used to build
18 the prison facility, the materials contained within the
19 facility, the building systems and equipment, and the
20 structural and spatial layout of a facility may all contribute
21 to issues, including noise and indoor climate."

22 He also says that, "Even though a prisoner may only
23 directly experience a limited portion of a prison, the

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1 architecture of the remainder of the prison indirectly
2 influences the overall experience."

3 He says that there may be intended or unintended
4 acoustical connections between a cell and other cells or rooms
5 by means of mechanical ducts, of plumbing pipes or other
6 openings, that brings sounds from outside the cell into the
7 prisoner's experience.

8 Also a prison's -- I never thought I would be
9 standing before you talking about a prison's plumbing layout
10 but here we are. A prison's plumbing layout may also
11 influence the movement of prisoners between cells and in-cell
12 or out-of-cell time.

13 Now, we don't have the option of examining the
14 physical spaces. Those have, to our knowledge, all been
15 destroyed, or decommissioned as the government puts it. So
16 the closest we are ever going to get is by obtaining every
17 piece of information we can about those physical spaces and
18 the locations, as we will argue in AE 525, to put together as
19 holistic an understanding as possible of exactly what happened
20 to Mr. al Baluchi at the black sites, whichever ones he was
21 held at.

22 Now, what I would like to do is compare that volume
23 of information that Mr. Sperry and Dr. Duterte believed

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1 important to know about the physical spaces of imprisonment
2 and compare it to some of the examples of what we have now.

3 So on our first slide, Your Honor, you can see that
4 this is from government produced discovery, the marking is on
5 the slide, it's MEA-13E-00000339, and this document makes
6 clear that certain sites were engineered to reward detainees.
7 It talks about -- in the last line, it says, "The detainees
8 held at our site have provided significant intelligence and,
9 as such, have earned privileges beyond that of other
10 detainees."

11 So the questions engendered from that are what go
12 into a reward space or a privileged space? Is the temperature
13 more regulated? Are there beds like prison beds affixed to
14 the wall as opposed to, we know from the SSCI report, in some
15 places there were no beds or in some places there were just
16 mattresses on the floor? Are there any windows or natural
17 light? Are there florescent lights? Where are the controls
18 for the lights and the temperature? Are there sinks? Are
19 there toilets? What kind of toilets are there? Keeping in
20 mind that some of these men have been tortured such that they
21 have movement issues or nerve damage. So the type of toilet,
22 whether they are squatting or they are sitting, makes a
23 difference.

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1 What are the cell materials? Are they steel? Are
2 they concrete? Are they wood, which can be much warmer? Are
3 there outdoor recreational spaces? Are there indoor
4 recreational spaces? Are there medical spaces? What is the
5 configuration of those cells? What is the layout of those
6 cells? Are the prisoners aware through proximity or sound
7 traveling that other prisoners are present? And are they --
8 excuse me. Are they aware of how far away the guards are?

9 This is just a handful of questions for which it
10 would be -- it would be extremely helpful to have the
11 information that we originally requested to put information
12 like this in context.

13 And our second slide, we have the summary of a report
14 that talks about how this particular site was designed to
15 accommodate, quote, compliant detainees and those with
16 behavioral problems.

17 In here, this document actually provides an example
18 of some additional information about the physical differences
19 between the spaces designated for compliant versus
20 noncompliant detainees. Some of this is quite helpful. Type
21 A is a little bit bigger, it has a toilet and running water;
22 type B is smaller, it has a bucket for waste and no running
23 water. But we don't know what the light situation is in each

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1 cell and we know that that's important from the SSCI report.
2 From Mr. Baluchi's medical records, we don't know what the
3 temperature differentials are between type A and type B cells.

4 We don't know if music or loud noises or white noise
5 is being played at the site; and, if so, whether they are
6 being -- it is being played in the hallways, whether it's
7 being played directly in the cell, where the speakers are, if
8 there are speakers. All of this makes a difference.

9 We don't know where the guards are located; if they
10 are close to each cell, if they are just outside each cell, or
11 if they are farther down the hallway. And we don't know if
12 there is a way for the guards to see the detainees in their
13 cells. We don't know if there are cameras in the cells. We
14 don't know how meals are brought. We don't know if there is a
15 slot in the door or if the door is opened completely. And if
16 the doors are opened, what can the detainees see? Can they
17 see the hallway? Can they see other cells? Guard rooms?
18 What's their line of site?

19 I recall that the SSCI report says the site code
20 named COBALT had double doors, but we just don't know what's
21 being used at this particular site that's housing compliant
22 detainees and those with behavioral problems.

23 And now that brings us to the most exciting slides.

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1 And this is about a site, Your Honor, that had three different
2 configurations. So I was actually very excited to read this
3 document. I thought it would have much more information, and
4 it does have some. This is where we can sort of start to put
5 together the outlines of a picture that can only be filled in
6 by the rest of the information that we have requested.

7 You have a newly arrived detainee in, quote,
8 interrogation mode. Now, I would like to know whether the
9 approved interrogation and exploitation plan is approved
10 before he gets to the interrogation mode holding cell, but
11 that's probably a subject for a different motion to compel.

12 The interrogation cell is a very small cell; it's not
13 more than a box of 6 feet by 6 feet. No running water. There
14 is a bucket instead of a toilet. We don't know if there are
15 pipes in the room at all or if there is the ability to have
16 running water.

17 But we don't -- but we do know that there is a drain
18 grate in the floor, presumably for runoff liquids of some sort
19 and possibly for water torture. And that purpose is
20 important. And this is where a contract or a blueprint with
21 notes or communications among contractors would be helpful.
22 We need to know what that grate was for if there was no
23 running water in that cell.

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1 There is an HVAC system and an air grate presumably,
2 so the temperature in the cell can be controlled. Again,
3 where are the controls for temperature in the cell? Where are
4 the controls for the air? Could the grate be opened or
5 closed? Did it serve a purpose?

6 They talk about the paint on the walls. The paint on
7 the walls is white; the paint on the floor is gray. We don't
8 know what type of paint it was. We don't know if the type of
9 paint had a purpose. Some paints do. Some, depending upon
10 whether they are matte or glossy, they can be wiped down more
11 easily.

12 They list a single shackle point, which is about 12
13 inches above the floor. 12 inches above the floor, Your
14 Honor, I'm just stepping away from the mic for a second, is
15 about -- about here. All right? It's too high to be an
16 ankle, and it is sort of too low to be an arm. So what
17 exactly was that shackle point meant for? Were they on the
18 floor having their arms tied to it? Were they on the floor
19 having their legs tied to it? Were their arms and legs tied
20 together? What kind of shackle point was it? What was it
21 made of? These are all questions that that engenders.

22 I would also like to know where exactly the air grate
23 was in relation to the shackle point. Because what would be

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1 helpful to know is if the temperature was modified to torture
2 detainees shackled to the wall.

3 Speaking of the wall, what is it made of? We don't
4 know. Is it sturdy or hard? Is it steel or concrete? Or
5 does it have any kind of give? Is there a false wall for use
6 of the walling technique?

7 Now, we know that walling was described in a 2005 CIA
8 memorandum as, quote, the interrogator pulls the detainee
9 towards him and then quickly slams the detainee against a
10 false wall. The false wall was intended to help avoid
11 whiplash or similar injury. Now, it also says -- excuse me,
12 the SSCI report says that, despite the requirement to use a
13 false wall, Abu Zubaydah was first slammed against a concrete
14 wall. And Mr. al Baluchi, who suffered a traumatic brain
15 injury, was slammed against a concrete wall.

16 So just a general question: Were any cells across
17 the program actually specially designed with special walls for
18 the walling technique? Or was that all made up and the
19 technique just always used with normal concrete for
20 cost-cutting measures? Mr. al Baluchi 's TBI, I would very
21 much like to know as, frankly, would my tax dollars.

22 The second part of that slide, when we move to
23 Category 2, it says that there is -- excuse me, it says that

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1 there is a speaker in the ceiling area of the Category 1 and
2 Category 2 and 3 cells. In reality, Category 2 cells are
3 just two Category 1 cells put together. So again, my question
4 is what are those speakers being used for? Where are the
5 controls? What are the volume parameters on those controls?
6 We what we need to see are the notes and discussions around
7 the purpose of those speakers because of the way in which
8 Mr. al Baluchi and others in CIA custody were tortured using
9 loud music or white and other noise.

10 And we recently learned from speaking with music
11 experts about the psychological impact of different types of
12 noise. And so we need to know much more about exactly how
13 those speakers were used, how many there were, what the volume
14 was like.

15 Coming back to the air grate for just a moment, we
16 need to know if it was used only for temperature. It is an
17 open secret that the number -- that a number of food retailers
18 pump scents into the air to encourage buyers. The ones that
19 have admitted to it are -- include Planters Peanuts and
20 Hershey's, and possibly Subway as well. The reason for that
21 is that neuroscientists have actually identified smell, the
22 sense of smell, as the perfect target because it is linked
23 directly to the emotional and memory parts of the brain which

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1 skip the rational center entirely.

2 So smell in the context of torture -- excuse me,
3 smell in the context of torture sites can be extremely
4 important, both in terms of identifying methods of torture and
5 building a picture of a location, and in treating and avoiding
6 retraumatization later, which is always a priority for torture
7 victims. Again, we don't have the sites themselves, so
8 contemporary documents, notes, e-mails, meeting minutes,
9 contracts, prototypes, dioramas, anything regarding the
10 purpose of the fixtures in the physical buildings are what we
11 need.

12 Two last notes on this particular report: There is
13 no mention of light at all in this particular report. And
14 again, we know from Mr. al Baluchi's unclassified, quote,
15 medical records that he was exposed to 24 hours a day of light
16 for about two and a half years in order to keep him sleep
17 deprived. We need to know what the type of light was. Was it
18 all florescent light? How many bulbs were there, what was the
19 wattage and what the controls looked like.

20 If you go back to the second-to-last slide, at the
21 top it says that, the report summarized in this document -- to
22 be clear, this is not the report itself, but the report
23 summarized in this document supersedes all others regarding

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1 cell configurations in this site for ease of understanding.
2 What does this mean exactly? What were the configurations
3 before this? How many times did they change and why did they
4 change? Was it due to the number of detainees being held at
5 the site? Was it because of security issues? Was it because
6 of the torture techniques? We need to know what all those
7 previous cell configurations were and the reasons for the
8 changes.

9 It's clear to us now, as we have expressed over the
10 course of 425 arguments and in the context of this particular
11 motion, that the physical features of the black sites are of
12 absolutely enormous importance, material importance to every
13 aspect of the defense for these men. I have gone through, you
14 know, in some detail a litany of the qualities that we need to
15 know: humidity, temperature, color, ambient noise, speaker
16 noise, construction materials, the relationship of outside
17 noise to inside noise, outside temperature to inside
18 temperature, lines of site.

19 The purposes or incidence of each of these physical
20 details are material to build the picture of Mr. al Baluchi's
21 torture and interrogations. And yes, in the years since AE
22 114 was initially filed, we have received some measure of
23 additional information from both the redacted executive

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1 summary of the SSCI report and from government-produced
2 discovery, but there is an important difference between these
3 secondary or really other documents and the primary documents
4 that we actually requested in AE 114.

5 Subject to your questions, Your Honor --

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

7 LDC [MR. NEVIN]: Your Honor, I just want to say, maybe I
8 misheard counsel's recitation a moment ago, Mr. Mohammad has
9 joined to this motion.

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: Okay. Thank you.

12 MJ [COL POHL]: Any other defense counsel wish to be heard
13 on this?

14 LDC [MS. BORMANN]: We are also joined, so adopt her
15 arguments.

16 MJ [COL POHL]: This may have been filed before the
17 automatic joinder rule, but anyway.

18 Trial Counsel?

19 CP [BG MARTINS]: Your Honor, the court should deny the
20 motion. We adopt all of our prior pleadings and argument in
21 the AE 114 series because the AE 114 series included two
22 motions for relief. Our response, initial response, was in
23 114A, and then we filed a second response to the second

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1 request for relief in AE 114G.

2 I note that we had oral argument on this motion
3 February 25, 2016, so we would adopt the arguments made there;
4 although that was earlier in the process and we had not fully
5 litigated Appellate Exhibit 397, which was our motion to
6 consolidate 114 with several -- a number of other motions that
7 were RDI related. So we adopt the 114-related argument in
8 397.

9 What I would like to do here, Your Honor, is
10 highlight what we believe is the controlling -- very few,
11 really, authorities here that are the controlling law.
12 Tomorrow we will highlight for you what we believe in the
13 hundreds of photographs, thousands of pages related to
14 conditions of confinement that we believe is the controlling
15 facts on these determinations that we made. So the
16 controlling law, we would -- we find helpful day to day as we
17 do this, of course.

18 Our discovery Rule 701, with the applicable rule
19 being Rule for Military Commissions 701(c)(1), this is a Rule
20 for Military Commission that, near verbatim, is the rule from
21 the Rules for Courts-Martial. It also happens to be one --
22 although there are some differences in military discovery
23 practice with the federal courts, as you are aware, it happens

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1 to be near verbatim. The comparable rule in Federal Rule of
2 Criminal Procedure 16, and I'm going to go ahead and get a
3 bit -- a bit nerdy here on the specifics of Rule 16 because it
4 goes to the case law I'm going to refer to, which was dealing
5 with an earlier set of numberings in Federal Rule of Criminal
6 Procedure 16.

7 So the comparable paragraph of Federal Rule of
8 Criminal Procedure 16 to our 701(c)(1) is Rule 16(a)(1)E,
9 which, before 2002, was (a)(1)C. And that's the paragraph
10 that is construed by the two controlling cases that I will
11 talk about here. So 701 is obviously important authority.
12 It's promulgated by the Secretary of Defense under statutory
13 authority in Section 949a subsection A of the Military
14 Commissions Act, which gives him that authority, and the
15 operative rule. And bear with me, I know you know this rule,
16 but this is where we are all litigating right now and where
17 counsel, Ms. Pradhan, has been litigating in this material to
18 the preparation of the defense phrase.

19 So 701(c), upon a request of the defense, the
20 government shall permit defense counsel to examine any books,
21 papers, documents, photographs, tangible objects, buildings,
22 places, or copies of portions thereof which are material to
23 the preparation of the defense or are intended for use by

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1 trial counsel as evidence in the prosecution case-in-chief at
2 trial.

3 So we are not using any of this material. I think we
4 made long clear, none of this is going to be part of our case.
5 So it's that operative phrase "which are material to the
6 preparation of the defense," the Federal Rule actually says
7 material to preparing the defense, but that phrase is then
8 invoked in the controlling law in our reviewing court.

9 Your Honor, I would also direct the commission's
10 attention to the discussion of 701(c), and it goes to the
11 "material to the preparation of the defense" phrase which
12 appears in all three subparagraphs of 701(c). That first
13 sentence says that, "For a definition of material to the
14 preparation of the defense, see United States v. Yunis," which
15 is a 1989 D.C. Circuit case. So that's our reviewing court.

16 Discussion, as we know, is not binding on you the way
17 the rule is, but it is persuasive. It's an indicator of what
18 the drafters were thinking as they used this rule. And so
19 they are telling us to look to Yunis for this specific phrase.
20 Yunis provides us our guidance, as we know. This term -- what
21 is helpful once you are looking at something, Yunis provides
22 guidance once privilege has been invoked, and we are in that
23 bit of substitutions, and whether you find them adequate and

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1 whether you could order over a government claim of privilege
2 the production of something or the disclosure of classified
3 information. So Yunis gives you guidance about that.

4 But, Your Honor, I wish to point out that Yunis also
5 is a controlling case in the D.C. Circuit for this
6 paragraph -- for this phrase "material to the preparation of
7 the defense." And that's up front. That's when we, as
8 prosecutors, are out and about looking at things and
9 determining what is discoverable or not. So that's 701(c)(1),
10 which we believe is the applicable rule here that we are all
11 discussing and arguing about and which, when we have
12 previously discussed Appellate Exhibit 114, you have had
13 questions about.

14 I also wish to point the commission to the other part
15 of 701 that we think is particularly helpful or particularly
16 useful here in this discussion, and that's 701(f), foxtrot, a
17 very important authority here, because this is not in Rule for
18 Court-Martial 701; it's also not in Federal Rule of Criminal
19 Procedure 16. But the Secretary of Defense has used his
20 authority to promulgate rules and has promulgated Rule 701
21 with this national security subparagraph F. And in doing
22 that, by departing from the Rule for Court-Martial, he is
23 invoking his rule-making authority to make exceptions.

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1 And in Section 949a(b), so it's 949a subsection (b),
2 the exception authority of the secretary in making rules that
3 are different from courts-martial has to be based as required
4 by the unique circumstances of military and intelligence
5 operations in the context of hostilities or by other practical
6 need. The secretary invoked that exact language of practical
7 need and unique circumstances at the preface to the Manual for
8 Military Commissions.

9 So what does 701(f) say? We believe it is very
10 important in this area because all of the material we are
11 talking about here is classified from the start. And 701(f)
12 says that the protection of classified information applies at
13 all points in the proceedings and is privileged at all points
14 in the proceedings. So that bears upon aspects of this,
15 although there is a materiality discussion in 701.

16 So we believe that's very important authority.
17 701(a) -- I'm sorry, 701(c)(1) and then 701(f).

18 Okay. The second major authority I would like to
19 point you to is a case, and that's the Yunis case that I have
20 already mentioned. It is a 1989 case from the D.C. Circuit.
21 And, Your Honor, I would direct the commission to the part
22 where it's talking about materiality, and that's -- that's
23 very much toward the end of the opinion. I will get you a

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1 specific site. We think this is useful authority for some of
2 the questions that have come up here this morning about what
3 goes to you, what doesn't go to you, what is our materiality
4 to the preparation of the defense determination look like.
5 But I would point the commission to page 624 of Yunis. So
6 that the point cite is 867 F.2d, 617 is the start of the case;
7 624 is where I believe is some very helpful guidance on how we
8 are going through this material.

9 And Yunis says that this apparent Catch 22 that
10 Yunis's counsel pointed to about not being able to make a
11 showing of materiality is more apparent than real. It's
12 not -- they have an ability to make this showing of
13 materiality, and Yunis points to two things. It actually
14 quotes a Supreme Court case that I won't mention, but in
15 quoting the case it says, we understand counsel's arguments
16 about being hampered in making a showing of materiality, but
17 they have the ability, even if they can't describe what a
18 piece of information would speak to because they don't have
19 it, they can describe what events -- they may be able to
20 describe what events the information would speak to, and then
21 what the connection of those events are, relevance of those
22 events are ----

23 MJ [COL POHL]: Where would they get this narrative?

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1 CP [BG MARTINS]: I'm sorry?

2 MJ [COL POHL]: Where would they get the narrative of the
3 events from?

4 CP [BG MARTINS]: That's the very next thing in the
5 Supreme Court case that's quoted by the Yunis court in 1989.
6 They are actually quoting the case of Valenzuela-Bernal and
7 they could say they could ask the client, and we will show you
8 examples where that's occurred.

9 MJ [COL POHL]: Do you think the nature of the information
10 requested here is the client would be a good source of that
11 kind of detail should they ask for it?

12 CP [BG MARTINS]: I think the client would and has been,
13 demonstrably to counsel, a good source for events that may
14 help us determine whether something is relevant or not. The
15 presence or absence of materiality as the -- because we are
16 now talking about material to the preparation of the
17 defense -- and the -- so this is at 624 of the Yunis case.
18 And it does say the client is available to discuss aspects.

19 The things that they are speaking to, they do have to
20 show how they are relevant to the crimes charged and to the
21 case. You have given some guidance of that in your order.

22 MJ [COL POHL]: Do they need to be relevant -- could they
23 be relevant to sentencing?

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1 CP [BG MARTINS]: I think they have to make the
2 connection. I think they have to explain how it is relevant.

3 MJ [COL POHL]: You said relevant to the case. I want to
4 make sure that ----

5 CP [BG MARTINS]: Sentencing is part of the case and they
6 have to link it and we have an understanding of things that
7 are material.

8 Allow me to state something here, too, that's come up
9 this morning, though not in this motion, but it's come up
10 before in the AE 114 litigation. We do not concede relevance
11 or discoverability as a matter of law when we turn something
12 over. There are other reasons we may provide something. And
13 they are not a concession as to its discoverability as a
14 matter of law. There is a state of the art, you know, in
15 discovery practices now.

16 There is a memo from the Deputy Attorney General from
17 2010 that, in large cases, broad discovery, consistent with
18 the protection of privilege, serves the truth-finding
19 function, may provide a margin for error and good-faith
20 determinations by counsel that are not quite there.

21 MJ [COL POHL]: General Martins, we are arguing 114. You
22 sound like you are revisiting the previous argument.

23 CP [BG MARTINS]: No, you have -- well, no, you have

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1 specifically asked me in prior discussions of 114 this
2 question, are you guys conceding relevance? So if you are
3 conceding relevance, why aren't you showing them the whole
4 thing or why aren't you giving them more? So I need to hammer
5 that answer down. It has come up before in the litigation.

6 MJ [COL POHL]: I don't want to drift into a previous
7 motion, that's all.

8 CP [BG MARTINS]: No, it is definitely 114 from prior
9 argument.

10 MJ [COL POHL]: Go ahead.

11 CP [BG MARTINS]: And then Yunis, and I would also point
12 the commission to the United States v. Graham case. This is
13 also our reviewing court; it's a 1996 case, and we cite it in
14 our brief. But in Graham, Graham is specifically looking at
15 this material to the preparation of the defense phrase in
16 Federal Rule of Criminal Procedure 16(a)(1)(C) -- again that
17 became the current rule -- and the Graham court says the
18 material -- the materiality burden is not a heavy burden, but
19 the information must enable the accused to significantly alter
20 the quantum of proof in his favor and that, therefore,
21 requires a look to the quantum of proof they already have.

22 So the D.C. Circuit's controlling case on the
23 specific phrase does require an understanding of what they

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1 already have as you are thinking through additional
2 information. That's this Graham case. And in Graham, the
3 information that the D.C. Circuit said did not meet that
4 threshold was deposition testimony of the key government
5 witness, who was a co-conspirator. And the deposition
6 testimony went to other bad acts and things of the witness,
7 and they wanted to cross-examine this witness. So then -- and
8 then also a polygraph result that indicated deception. So
9 they ruled those things were not, because they did not
10 significantly alter the quantum of proof in the accused's
11 favor.

12 Your Honor, the authorities I have just given you --
13 701, specifically 701(c)(1), 701(f), Yunis, page 624, and then
14 Graham, and the discussion I just gave you from
15 United States v. Graham appears at point cite 83 F.3d, the
16 case starts at 1466, but I direct the commission to 1473 to
17 74 -- those authorities, Your Honor, we believe are useful and
18 helpful. They certainly are as we go through the thousands of
19 pages and try to do this work, and we believe they help bring
20 into focus what we will argue tomorrow as what are the
21 controlling facts in light of the thousands and thousands of
22 pages we have provided about conditions of detention, some of
23 which counsel was honest enough to actually provide back to

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1 you today, and then -- and then hundreds of photographs that
2 you haven't seen because we have given to them, including
3 photographs of all of the sites.

4 So that's to set the stage for tomorrow. We believe
5 those are controlling law.

6 And subject to your questions.

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

8 Ms. Pradhan.

9 DC [MS. PRADHAN]: -- just a few quick points, Your Honor.

10 First, I want to note that in AE 397, the government
11 actually did concede the relevance and materiality of AE 114
12 when they discussed their ten-category construct. General
13 Martins spent some time on Rule 701. Under Rule 701, when
14 something is produced, they are actually waiving an objection
15 to relevance. Now, whether you want to call it waiver or
16 concession, that is what they -- excuse me, they are waiving
17 their objection to relevance. Whether you want to call it a
18 waiver or concession, that is what they are doing.

19 In the M.C.R.E., Rule 510 states -- it is entitled a
20 Waiver of Privilege by Voluntary Disclosure. And it states,
21 "A person upon whom these rules confer privilege against
22 disclosure of a confidential matter or communication waives
23 the privilege if the person or the person's predecessor while

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1 holder of the privilege voluntarily discloses or consents to
2 disclosure of any significant part of the matter or
3 communication under such circumstances that it would be
4 inappropriate to allow the claim of privilege."

5 Now, I heard a great deal from the government about
6 explaining the Yunis case and explaining Rule 701. I did not
7 hear any actual challenges to the materiality of what -- of
8 the information that I described as needed from AE 114, Your
9 Honor. Quite the contrary.

10 In our presentation, we presented a large number of
11 reasons for the relevance and materiality of that particular
12 information to Mr. al Baluchi's defense. And this brought the
13 government to a point that they have made numerous times --
14 and that I fail to understand why they keep making this point,
15 because it has been disproven so many times -- but that is
16 that we have the ability to speak to our clients to get the
17 information that we need about their treatment at the black
18 site.

19 Now, we have submitted a great volume of information,
20 including the declarations in AE 425E, about the impact of
21 torture on memory and the fragmentation of memory due to
22 torture. And so while we do, of course, ask Mr. al Baluchi
23 and I'm sure, as I am sure all counsel do speak to their

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1 clients, we are then in the position of having to verify
2 everything that Mr. al Baluchi tells us. That is as part of
3 being defense counsel.

4 As one example, I would like to refer you back, Your
5 Honor, to the declaration of Dr. Pierre Duterte again. That's
6 425E, Attachment B. And he states here that, "Aside from the
7 effects of physical torture, I have observed the following
8 physical manifestations of post-traumatic stress disorder and
9 other traumas among my patients: digestive problems, vision
10 problems, body aches, headaches. In my opinion, physical and
11 psychological effects may occur even 20 or more years after
12 the initial trauma." Now, this is the important point: I
13 have observed that severe trauma may fragment the memory, such
14 that many patients can no longer recall correct facts or
15 conditions about a traumatic event and are unable to have
16 chronological and logical memory of the traumatic events.
17 They instead recount memories that may contain details created
18 as coping mechanisms during or after the trauma."

19 This argument carries no weight and, Your Honor, you
20 should assign no weight to it every time the government makes
21 it.

22 Subject to your questions.

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

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1 DC [MS. PRADHAN]: Thank you. Anything further from any
2 other defense counsel? Apparently not.

3 General Martins, anything further?

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

5 MJ [COL POHL]: That brings us to 510. Mr. Connell.

6 LDC [MR. CONNELL]: Your Honor, I need to take a moment
7 and create a diagram on the screen that I had expected to have
8 a slide for. Would it be appropriate to take the morning
9 break now and I will do that at the break?

10 MJ [COL POHL]: We will go ahead and take the morning
11 break now, but before we -- that's fine. I was going to take
12 it in about 20 minutes anyway, but we can take it now. So the
13 commission will be in recess for 15 minutes.

14 [The R.M.C. 803 session recessed at 1023, 18 October 2017.]

15 [END OF PAGE]

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