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1 [The R.M.C. 803 session was called to order at 1316,
2 6 December 2016.]

3 MJ [COL POHL]: The commission is called to order. Any
4 changes, Trial Counsel?

5 CP [BG MARTINS]: Your Honor, all are the same for the
6 prosecution, except we also now have Joseph Castellano of the
7 FBI in the back of the courtroom.

8 MJ [COL POHL]: Okay. And, Defense, any changes?
9 Apparently not. And all three accused who were here before
10 the recess are back here.

11 That brings us to 112.

12 CP [BG MARTINS]: Your Honor, before we go into this, I am
13 concerned that we may quickly go beyond what we should be
14 doing outside of a 505(h).

15 MJ [COL POHL]: Okay. I am going to make it -- let me
16 make it clear what I am thinking 112 is about, and then you
17 guys can -- I'm just dealing with -- because we discussed it
18 in open court, so I am assuming the existence of the OLC memos
19 is not an issue.

20 CP [BG MARTINS]: Your Honor, it can become an issue.

21 MJ [COL POHL]: It can become.

22 CP [BG MARTINS]: The whole reason on the 24th that
23 Mr. Groharing stood up and asked you to seal K, L and M makes

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1 this very sensitive.

2 MJ [COL POHL]: Okay. But understand, I don't know what
3 Mr. Connell is going to say.

4 CP [BG MARTINS]: And that's why I would hope we can do
5 this in an (h).

6 MJ [COL POHL]: Let me tell you what I want to know, and
7 then we can go from there. I just want to make sure the
8 government -- are you doing 112, General Martins?

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

10 MJ [COL POHL]: Come to the podium. My focus on 112 may
11 not be the same as Mr. Connell's, so I just want to make
12 this -- we have pulled this issue up a long time ago.

13 My question is a very simple one, whether under 112
14 or somehow in the 308 series, am I going to see the OLC memos
15 as drafted, unredacted, and then if the government is
16 proposing a redacted 505 summary? Or -- well, I'm just
17 saying. Simple question.

18 CP [BG MARTINS]: Your Honor, we do have a motion related
19 to you seeing in camera the OLC memos, and we have already
20 provided you one, which is what I pledged back in February,
21 would happen by March. By March we had given you one, and I
22 can direct the commission to Appellate Exhibit 308H. This is
23 a request for substitutions and other relief, Tab C -- I'm

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1 sorry, Attachment C, Tab 73. You have one of the three OLC
2 memos in its original form.

3 We also have in the brief accompanying that, that
4 request for substitutions and other relief, an extensive
5 discussion of it. Pages 3, 6 and pages 21 to 25 of that brief
6 explain how you are approaching those memoranda.

7 You have a new declaration in the whole 308 series in
8 the 397 series that you received in September, and we request
9 the opportunity to present to you ex parte that declaration
10 and explain it before you decide upon this whole -- the rest
11 of this in camera relief as defense counsel is styling it.

12 So we have given you a completely unredacted one. We
13 have shown you our approach to it in detail there, and that's
14 how -- that aspect of 112 we believe -- the rest of it is not
15 mature, and we believe you need to -- we would request that
16 you consider the matters we provided.

17 MJ [COL POHL]: Okay. Just so I am clear, there is more
18 than one OLC memos?

19 CP [BG MARTINS]: There are, yes.

20 MJ [COL POHL]: I just want to understand the government's
21 position here, okay? I am not going into details of what's in
22 the memos themselves. Because I thought I may have heard
23 something to the effect of that the information contained in

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1 the memos are found somewhere else and, therefore, the memos
2 are somehow cumulative.

3 Is the government's position going to be I am going
4 to see the memos themselves?

5 CP [BG MARTINS]: Your Honor, we have clearance to let you
6 see all of the original memos. We would ask that you read the
7 declaration ----

8 MJ [COL POHL]: Okay. Okay.

9 CP [BG MARTINS]: ---- acquaint yourself with the material
10 in context, and we are committed to ensuring defense counsel
11 have everything that's noncumulative, relevant and helpful and
12 that you are the one approving that.

13 MJ [COL POHL]: Okay.

14 CP [BG MARTINS]: Tab 73 of Attachment C, Attachment E
15 also gives you the redacted one conveniently there so you can
16 kind of see it and explain it.

17 MJ [COL POHL]: I got the position.

18 CP [BG MARTINS]: That's all in 308H. But, Your Honor,
19 there is -- the 112 series has another piece that is mature as
20 of now. And I thought this might be what you are getting at
21 which is why I wanted to make sure we had an opportunity this
22 week if we could to talk about it in a 505(h). Counsel has
23 submitted a 505(g) notice on it. Defense counsel. This

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1 relates to 112Q of 10 May -- yeah, 10 of May, 112Q. 112U, our
2 response of 26 May, and then defense counsel's reply W of 7
3 June.

4 MJ [COL POHL]: And that's all the classified matters?

5 CP [BG MARTINS]: Your Honor, we are seeking an order, and
6 that's important to us, maintaining the privilege. And in
7 that aspect, the aspects of remediation of that, we would want
8 to ----

9 MJ [COL POHL]: We talked about doing the 505(h).

10 CP [BG MARTINS]: 505(h) and then, if necessary, if you
11 are going to grant some oral argument, we do that in a closed
12 session as discussed there.

13 MJ [COL POHL]: Okay.

14 CP [BG MARTINS]: Thank you.

15 MJ [COL POHL]: Mr. Connell, I talked about what I wanted
16 to talk about on 112, so what do you want to talk about on
17 112?

18 LDC [MR. CONNELL]: I want to talk about what you want to
19 talk about, and what I understand is to be a status on 112 and
20 where we are on it. As counsel for the government noted, that
21 requires some history. But the bottom line up front on 112 is
22 that the government has conceded 112, it has not complied with
23 112, and that the military commission should issue an order

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1 that it comply. So I want to go take you through the long
2 procedural history of 112 to explain. Though that's our
3 position in the briefs, I think it bears repeating.

4 So 112 itself was filed on 27 December of 2012 and
5 included four categories of requests, which goes substantially
6 beyond the OLC memos. If I could have access to the document
7 camera, I have some things to refresh the military
8 commission's recollection with, all of which are from the
9 website.

10 CP [BG MARTINS]: Could I please see what you are about to
11 show?

12 LDC [MR. CONNELL]: Of course. In fact, I will tell you.
13 It is AE 112J marked UNCLASSIFIED FOR PUBLIC RELEASE.

14 CP [BG MARTINS]: May I have a few minutes, Your Honor?

15 MJ [COL POHL]: Sure.

16 [Pause.]

17 MJ [COL POHL]: Mr. Connell, you indicated these had come
18 from the website?

19 LDC [MR. CONNELL]: Yes, sir. They are all marked
20 UNCLASSIFIED FOR PUBLIC RELEASE.

21 MJ [COL POHL]: So they have all gone through a security
22 review?

23 LDC [MR. CONNELL]: They have all gone through a security

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1 review.

2 MJ [COL POHL]: Go ahead. General Martins, I thought I
3 heard you said "No objection."

4 CP [BG MARTINS]: No objection to that one slide,
5 Your Honor. I am looking through the others he said he is
6 going to show.

7 MJ [COL POHL]: All right. Let's take some time and do it
8 all at one time rather than piecemeal or nitpick, whatever the
9 word is today.

10 [Pause.]

11 LDC [MR. CONNELL]: Good, sir?

12 MJ [COL POHL]: Any objections, Trial Counsel?

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

14 MJ [COL POHL]: Thank you. Go ahead.

15 LDC [MR. CONNELL]: Thank you.

16 Just as a refresher, I would like to show you what is
17 already in the record as AE 112J, page 2, which is a summary
18 of the four categories of information which are at issue in
19 AE 112 from our 6 September 2012 request for information. The
20 OLC memos themselves are one of those three -- one of those
21 four categories, the third category. The first two are White
22 House consideration, and the fourth is the information that
23 the CIA provided to the OLC or the White House.

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1 In my view, I framed this in my mind as the policy
2 documents, the policy considerations of the power to order RDI
3 or the information that was provided to request the power to
4 order RDI.

5 The government filed its response which was AE 112A
6 on 10 January 2013, and at that time it made no objections to
7 the productions of the information. It said that it would
8 comply when the defendants signed the memorandum of agreement,
9 and shortly thereafter, on 19 February of 2013, I and Colonel
10 Thomas signed the memorandum of understanding.

11 Unfortunately, no discovery was forthcoming at that
12 time, and the issue finally came for oral argument on
13 11 December 2015. And at that time, the government again did
14 not provide any reasons why it would not produce the
15 information which is at issue. And I am going to refresh the
16 recollection of the military commission with the
17 unofficial/unauthenticated transcript of 11 December 2015 at
18 page 10121, where you asked the military commission have you
19 oriented the government to addressing 112, and then asked,
20 "Are you just not going to -- you don't want to address...112
21 at all then as far as the four things he has asked for?"

22 The government responded: "I don't." I want instead
23 to rely on our position about the word "cumulative" and apply

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1 the process. That later became -- I say that it later became
2 397 but, in fact, government's position in December of 2015
3 was much more aggressive than what ultimately became 397.
4 Their position at this time was that doing the eaches would
5 violate the statute, a position that they did not advance in
6 397 itself.

7 So the military commission continued on that, and
8 basically gave a specific direction to the government on the
9 issue of 112, and so I'm referring now to 11 December 2015 at
10 page 10126 and 10127 of the unofficial/unauthenticated
11 transcript, and it stretches over two pages.

12 But in the first the military commission asks, Is it
13 your intent to file a pleading with the commission and list
14 all outstanding CIA-related discovery motions, and if we do
15 that you'll be prepared to argue them. And then here comes
16 the significant part to 112, "a substantive government
17 argument of why it's not discoverable or a concession it is
18 discoverable?" And I'm changing the pages now,
19 "discoverable," and the government responds "Correct." And
20 the military commission says, "Because I have yet to hear that
21 because you don't want to do that."

22 The military commission goes on later to say that if
23 the government chooses not to contest AE 112, then it will be

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1 treated as a concession.

2 The government did file AE 397 on 28 December of
3 2015. In AE 397 the government again makes no objections to
4 AE 112. As for its ten categories that it wants to produce,
5 did not include -- none of those categories are policy
6 documents that are included within AE 112, and it asks to
7 consolidate all the outlying argument -- arguments that were
8 pending at the time for argument, including AE 112.

9 In AE 397A, our response, we pointed out that the
10 government had conceded AE 112, cited the language from the
11 military commission that the government's failure to respond
12 would be treated as a concession, and on 18 February of 2016
13 we argued that concession in 397.

14 The military commission ruled on 397 in 397F, and the
15 government -- the military commission divided its ruling, and
16 it made two rulings in 397. One of them was that the
17 ten-category construct was adopted, but second, that the
18 government's motion to consolidate discovery motions involving
19 information not included within the former RDI program is
20 denied and said that each motion will be addressed on its
21 merits. That motion will be in AE 112.

22 So what I am saying here is I am saying that the
23 status of AE 112 is that the government has never offered any

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1 reason, substantive or procedural, as to why the military
2 commission should not grant 112. The military commission
3 warned it that it would treat government silence on this topic
4 as a concession, and essentially AE 112 is conceded.

5 I think the military commission should issue an order
6 requiring production of the information in AE 112 and then let
7 the government seek whatever remedies that it wants to.

8 I think that that gets to exactly the question that
9 the military commission posed to the government, which is am I
10 going to see the OLC memos. The response from the government
11 -- which I am going to address in the context of AE 112Q in a
12 moment, but the response from the government is we have given
13 you one of those memos and obviously there are quite a number,
14 two dozen or so if they exist.

15 If the military commission issues an order granting
16 AE 112, that of course on its own does not prevent the
17 government from seeking its remedies, but it would require the
18 government at the very least to submit the OLC memos for 505
19 review rather than waiting any longer to do that.

20 The OLC memos, among other things, are an important
21 part of the context of the case. And if the military
22 commission orders them, then it will require the government to
23 act. Otherwise, we could easily wind up here another year

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1 from now without a reason not to grant AE 112 and without the
2 policy information which is sought in 112 being submitted to
3 the military commission.

4 That brings us specifically to the question of
5 AE 112Q.

6 CP [BG MARTINS]: Your Honor, 112Q is the specific motion
7 that I have requested we have a 505(h) before we get into. He
8 has been talking T.

9 LDC [MR. CONNELL]: In what pleading did the government
10 request that? I haven't read any pleading about that.

11 CP [BG MARTINS]: I'm making the point now.

12 LDC [MR. CONNELL]: Oh, we can make oral requests? I
13 concede. We can make oral requests.

14 MJ [COL POHL]: No. No. No. Let's stop and pause.

15 CP [BG MARTINS]: Counsel filed a 505(g) notice for
16 portions of it and we would like an opportunity to discuss
17 that before Q is taken up. We believe that's the approach
18 that's specified in ----

19 MJ [COL POHL]: What was the 505(g) notice number?

20 LDC [MR. CONNELL]: I can tell you in just a moment or you
21 may have it.

22 MJ [COL POHL]: Would it be 112X?

23 CP [BG MARTINS]: It's actually 112V. Correction ----

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1 LDC [MR. CONNELL]: I think that's right.

2 CP [BG MARTINS]: Yeah, 112V is the one in relation to
3 112Q.

4 LDC [MR. CONNELL]: X-ray as well.

5 CP [BG MARTINS]: And 112X also is associated with it.
6 They are both related to materials that are addressed in his
7 112Q.

8 LDC [MR. CONNELL]: I would have thought that the
9 government might have mentioned that at the 802 when we went
10 through what do we want 505s on, but that's the way the
11 world ----

12 MJ [COL POHL]: You can have it. You can have it. But
13 you don't have any unclassified argument on 112?

14 LDC [MR. CONNELL]: Yes, all of my argument is
15 unclassified. Everything I was going to say is unclassified.
16 But it's also true that the government or the defense has a
17 right to a 505(h) hearing first to make sure that it is
18 unclassified. I don't have any problem with that. I have
19 asked for that in the past myself.

20 MJ [COL POHL]: So what do you want to do, Mr. Connell? I
21 would get the government's input too.

22 LDC [MR. CONNELL]: Sure, of course.

23 MJ [COL POHL]: You want to argue what you consider to be

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1 the unclassified portion of it before?

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

3 MJ [COL POHL]: Trial Counsel, do you want to delay the
4 classified portion until we parse out the unclassified
5 portion?

6 CP [BG MARTINS]: Your Honor, I do think a 505(h) to
7 clarify where the lines are is important. I would grant there
8 are pieces that are unclassified, but I don't want to -- I
9 would rather not wade into them.

10 MJ [COL POHL]: So that's a "no" to my question, is you
11 don't want to do the unclassified portion until we clarify
12 what the classified portion is?

13 CP [BG MARTINS]: That is a "no." Thank you.

14 MJ [COL POHL]: So we will add that to the list of the
15 505(h) on Friday.

16 LDC [MR. CONNELL]: Understood, sir. I have nothing
17 further at this time.

18 MJ [COL POHL]: Let me ask you before you wander off.

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

20 MJ [COL POHL]: The other three -- I have been focusing on
21 the OLC memos. The responses to the other three categories,
22 do you consider those conceded too?

23 LDC [MR. CONNELL]: Well, that's where we began in

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1 December 2015. Yes, they are. I don't -- my reason -- my
2 argument for why AE 112 as a whole is conceded is that the
3 government has never argued against production of the
4 information. The AE 112Q issue is a side issue to all of
5 that, and it only concerns three OLC memoranda as opposed to
6 the entire body of the OLC memoranda.

7 MJ [COL POHL]: Again, refresh my own memory. I am
8 looking at the White House Categories 1 and 2.

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

10 MJ [COL POHL]: They keep saying overbroad, not relevant,
11 not necessary or not material.

12 LDC [MR. CONNELL]: We argued over all that. When it came
13 to argument on that, they didn't present any argument in
14 support of those claims. They retreated from part of the
15 claims and said let us deal with it in 397.

16 MJ [COL POHL]: Do you remember, off the top of your head,
17 the date of that argument?

18 LDC [MR. CONNELL]: 11 November 2015, sir.

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

20 General Martins, do you have anything you wish to
21 add?

22 CP [BG MARTINS]: Your Honor, I do. Since he essentially
23 argued 112T, I do want to be heard. We don't concede 112 as

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1 counsel has characterized and we don't believe that any ruling
2 is mature until you have considered materials we are providing
3 you.

4 May I come to the podium?

5 MJ [COL POHL]: Sure.

6 CP [BG MARTINS]: Your Honor, counsel said that the
7 material we are providing in 397F includes no policy
8 documents. The word "policies" is in your ten categories,
9 397F, paragraph (e) says SOPs, guidelines, policies. And also
10 in that ten categories is a reflection of approvals of
11 requests to use techniques, and some of the material that's in
12 the OLC memoranda bears upon that.

13 So we certainly dispute counsel's characterization,
14 and we don't believe any ruling on his specific request, which
15 we concede is dated 2012, but we are working on it, and we are
16 working it through you as the process indicates that it would
17 be premature to start going down that list and granting or
18 denying a motion to compel discovery on that.

19 It is embraced. It is one of the specifically
20 referenced motions that is covered in 397. You do not
21 extinguish thereby -- in granting that motion to consolidate,
22 you didn't extinguish the request, but it requires a
23 consideration of the request in light of what we are

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1 providing. That's what the law requires.

2 MJ [COL POHL]: No, I got that. Which of the ten-category
3 construct do you believe covers this?

4 CP [BG MARTINS]: Your Honor, if you go to 397F.

5 MJ [COL POHL]: I'm looking at it.

6 CP [BG MARTINS]: Let me get my hands on my copy of 397.
7 Here we go. If you look at what is paragraph 2(e), "Standard
8 operating procedures, policies, or guidelines on handling,
9 moving, transporting, treating, interrogating, etc.,
10 high-value detainees at and between the various facilities
11 identified in paragraph (a)."

12 MJ [COL POHL]: You are reading that to include -- just to
13 make sure it's not -- I don't want to do this in three years
14 from now, reword my own ruling, that you read that to cover
15 any policies from the White House on down?

16 CP [BG MARTINS]: If it's a policy on handling, moving,
17 transporting, treating, interrogating high-value detainees,
18 it's something we are reviewing and we are seeing as embraced
19 by your order.

20 MJ [COL POHL]: Okay. Just that you are not reading it at
21 the, for want of a better word, the tactical level. You are
22 reading this as anything that deals with -- to answer my
23 question, I would like a yes or no -- from the White House on

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1 down?

2 CP [BG MARTINS]: Yes, that will include information that
3 is a policy that relates to the detainees, even if it comes
4 from headquarters or the White House.

5 MJ [COL POHL]: And so just to be specific on the issue
6 before me, that would include the OLC memos then?

7 CP [BG MARTINS]: Yes. And in fact we have -- on
8 5 February we were trying to comply in part with the parts we
9 could do without requesting substitutions. So we do see OLC
10 memoranda and some material in Mr. Connell's other stylings of
11 what's covered explaining what's covered by his request.

12 MJ [COL POHL]: Okay. You are telling me right now, at
13 least the OLC piece is embedded in the 308H response?

14 CP [BG MARTINS]: You have an explanation of how we're
15 approaching that whole matter in conjunction with your
16 guidance in 397F.

17 MJ [COL POHL]: Okay. And the other three categories?

18 CP [BG MARTINS]: The other three categories ----

19 MJ [COL POHL]: Understand my confusion here is we have
20 got 112 requests, and the answer is in 308, and I just want to
21 make sure that if it is in a different exhibit but it's the
22 exact same answer I am good with it, but I have to make sure
23 it's ----

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1 CP [BG MARTINS]: Here is how we are approaching this. He
2 had these four general categories that he put up on his slide,
3 but if you go through the separate paragraphs, there is --
4 depending upon how you count subparagraphs, there are between
5 74 and 85 discrete requests.

6 We are tracking every single one of them. We have
7 spent many, many hours reviewing, looking at it, considering
8 issues of privilege, issues at the start of material to the
9 preparation of the defense, discoverable, every one of these,
10 giving a lot of thought to this. We are also determining is
11 there something we can get ahead of the 505 process that we
12 can provide already, and we are doing that.

13 What I am saying is, the devil really is, as we have
14 said, in the details. You have got to look at each one,
15 determine what is the -- what is discoverable in here. There
16 is material in some documents that are present in the White
17 House and OLC that are not discoverable, we would say, and we
18 need to be heard on that.

19 But our position is there is much material in his
20 four categories, in his 74 to 85 paragraphs that we are giving
21 you and that we think he needs to look at what we are
22 providing, and then we can hash out what's left. That's how
23 we read 397F.

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1 We are not extinguishing these separate requests, but
2 you are granting the consolidation. That's what we are trying
3 to achieve with the consolidation is we are not going to
4 piecemeal, we don't get the protection of national security
5 nor the full benefit to the accused that the statute requires
6 if we do it piecemeal. We have got to do it comprehensively,
7 and we did establish, we believe, significant overlap with the
8 ten categories.

9 MJ [COL POHL]: When you respond to 112 and you say
10 there's -- I forgot what the number was, four big categories
11 and what, 74 subcategories, whatever it is?

12 CP [BG MARTINS]: 74 to 85, depending upon how you count
13 those.

14 MJ [COL POHL]: There will be a specific response ----

15 CP [BG MARTINS]: Absolutely.

16 MJ [COL POHL]: ---- provided in here, provided here ----

17 CP [BG MARTINS]: Absolutely.

18 MJ [COL POHL]: ---- or not provided, not relevant, not
19 necessary, whatever.

20 CP [BG MARTINS]: Correct.

21 MJ [COL POHL]: So every one will have a specific
22 response, either you are going to give it to him and here is
23 where it is found, whatever that means depending upon the

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1 context, or it doesn't exist or we are not giving it to you
2 because it's not material to the preparation of the defense,
3 whatever.

4 CP [BG MARTINS]: Correct. We will give them all of them.

5 MJ [COL POHL]: You will break down the response by each?

6 CP [BG MARTINS]: Absolutely. We will give them Bates
7 numbers when we get them. When we are able to assign a Bates
8 number through the process, we will also be able to say you
9 received that in connection with paragraph 2(e) or there are
10 other paragraphs of the ten we would submit overlap with
11 material that he is asking for. It's not just that one.

12 That does use the word "policies" and is perhaps the
13 clearest, but there are others.

14 MJ [COL POHL]: Now, back to the OLC memos, I think
15 Mr. Connell said there is about a dozen of them; is that about
16 right?

17 CP [BG MARTINS]: There are about a dozen memos of
18 different kinds.

19 MJ [COL POHL]: I know they probably write all sorts of
20 different memos.

21 CP [BG MARTINS]: We review all types of OLC memoranda for
22 discoverability.

23 MJ [COL POHL]: So we are clear, and we seem like maybe --

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1 you intend to respond to the 112 request individually, but
2 there may be a cross-reference to the documents provided in
3 the 308 series, for want of a better term?

4 CP [BG MARTINS]: We will be giving him a Bates number by
5 that time because we have gotten the approved, whatever comes
6 out of that process and we will be able to assign it a very
7 specific number.

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

9 CP [BG MARTINS]: Thank you.

10 LDC [MR. CONNELL]: This may be a coincidence, but this is
11 the second December in a row in which you have extracted a
12 promise from the government to respond to 112. I hope -- you
13 know, I will review whatever they give me.

14 MJ [COL POHL]: Let's remember last December. That's when
15 we heard we would get all the classified discovery to me by
16 30 September.

17 LDC [MR. CONNELL]: Yes, sir. I recall. I recall.

18 MJ [COL POHL]: Okay. So ----

19 LDC [MR. CONNELL]: The one thing that I do want to say
20 though is the government just characterized the military
21 commission as having granted consolidation. That is exactly
22 wrong.

23 The military commission granted the government's

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1 request to satisfy its basic discovery responsibilities using
2 a ten-category construction and denied the motion so that each
3 motion will be heard on its merits. So when you asked for a
4 status on 112, you get a status on 112.

5 MJ [COL POHL]: And of course the answer may be it was
6 provided in 308.

7 LDC [MR. CONNELL]: That may be the answer. We will see.

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

9 LDC [MR. CONNELL]: Thank you.

10 MJ [COL POHL]: That brings us to the 018 series -- I'm
11 sorry?

12 LDC [MR. CONNELL]: Before you get to the 018 series, I
13 had mentioned -- since we have just been talking about the 308
14 series, I had mentioned 308MM at the 802 as something that I
15 would like to be heard on. Is now an appropriate time to do
16 that? It is in the same topic that we were just discussing.

17 MJ [COL POHL]: Well, it was at the last of the list.
18 Trial Counsel, are you okay taking that one now? I just don't
19 want to -- I mean, I have a certain order of march. I am fine
20 with switching it, but I don't want to put the government at a
21 disadvantage if they thought that was going to be later.

22 CP [BG MARTINS]: Your Honor, I guess we have got to hear
23 what he is going to ask to do. This was -- 308MM was a

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1 request for substitutions and other relief.

2 LDC [MR. CONNELL]: No, sir.

3 MJ [COL POHL]: I think it was an objection to the 505
4 procedure.

5 LDC [MR. CONNELL]: No. It's a government motion to
6 withdraw.

7 CP [BG MARTINS]: Withdraw.

8 MJ [COL POHL]: But you filed your objections to that?

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: Your objection, what's the AE number?

11 LDC [MR. CONNELL]: Our objection is in ----

12 MJ [COL POHL]: Because MM ----

13 LDC [MR. CONNELL]: It sounds like they want to file a
14 reply, which is what I just heard.

15 CP [BG MARTINS]: Your Honor, although this is in the
16 nature of a standing objection and I guess I can anticipate
17 what he is going to say, I don't believe we have had an
18 opportunity ----

19 MJ [COL POHL]: Has the briefing cycle been completed?

20 CP [BG MARTINS]: No.

21 LDC [MR. CONNELL]: They have until Friday or Thursday to
22 do theirs, if that's what they wish.

23 MJ [COL POHL]: We will let them complete the briefing

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1 cycle.

2 CP [BG MARTINS]: We would like that opportunity,
3 Your Honor.

4 LDC [MR. CONNELL]: That's fine.

5 Okay. I am going to start with 018ZZZZ.

6 TC [MR. RYAN]: Judge, could I be heard for just a moment
7 on housekeeping as well?

8 MJ [COL POHL]: Sure.

9 TC [MR. RYAN]: You said that VVV was one of those on your
10 list.

11 MJ [COL POHL]: I'm not quite sure that's accurate.

12 TC [MR. RYAN]: I may have misheard. That's fine, sir. I
13 just wanted to point out there was not only a 505(g) notice on
14 it, but having reviewed it, it appears the underlying motion
15 is classified as well as our response, so I don't believe that
16 can be taken up in open court.

17 MJ [COL POHL]: Yes, sir.

18 TC [MR. RYAN]: Thank you, sir.

19 MJ [COL POHL]: Mr. Connell, you filed 18ZZZZ?

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

21 MJ [COL POHL]: Which appears to be a unique document and
22 that everybody agrees to it. Now, when you say everybody, I
23 want to make sure.

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1 LDC [MR. CONNELL]: There was one time before. There was
2 one time before.

3 MJ [COL POHL]: So everybody agrees to these changes to
4 018, the protective order?

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

6 MJ [COL POHL]: And everybody means you and all the
7 defense counsel?

8 LDC [MR. CONNELL]: Yes, and the government.

9 MJ [COL POHL]: And the government.

10 LDC [MR. CONNELL]: That's right. In fact, we did that on
11 the record too previously, but ----

12 MJ [COL POHL]: I thought, yeah.

13 LDC [MR. CONNELL]: Yes, we all agree.

14 MJ [COL POHL]: Government, can you verify that?

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

16 LDC [MR. CONNELL]: Thank you.

17 MJ [COL POHL]: We will add 018VVV to the 505(h) hearing,
18 and I don't know if I told you guys before, but I want to
19 revisit at the 505(h) hearing because I think there is -- we
20 keep kicking 425 down the road, and one part being kicked down
21 the road is because of a classification issue that I thought
22 was going to be resolved that's not been resolved, so we will
23 address that at the -- when we get to the hearing.

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1 It's something we have talked about before. It
2 really was whether or not part of it still needs to be
3 classified, but just to let you know we are going to revisit
4 an issue that I thought had been resolved. Anyway, okay.

5 That brings us to 018PP, which I have down is we just
6 have the unclassified argument left on this.

7 ADC [MS. LACHELIER]: Actually, Judge, on PP, I hate to
8 kick another one down the road, but it's connected to 018VVV
9 which you just deferred to a 505(h).

10 MJ [COL POHL]: Do you have any unclassified portion to PP
11 you can discuss now?

12 ADC [MS. LACHELIER]: Not that we are prepared to discuss
13 in anticipation of 018VVV. We would have to break up the
14 argument essentially because 018VVV, once it's ruled on, will
15 inform the open argument on PP.

16 MJ [COL POHL]: Okay. How about 018QQ?

17 DDC [Lt Col THOMAS]: We are ready to proceed on that.

18 ADC [MS. LACHELIER]: I was going to say, I think it's
19 another team.

20 MJ [COL POHL]: Okay.

21 DDC [Lt Col THOMAS]: Good afternoon, Your Honor.

22 MJ [COL POHL]: Good afternoon, Lieutenant Colonel Thomas.

23 DDC [Lt Col THOMAS]: 018QQ is Mr. al Baluchi's supplement

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1 and its own set of facts that relate to searches and seizures
2 of items that violates your protective order.

3 To refresh the court with our pleading, on 14 August
4 2014, S001277 conducted a legal bin search in Mr. al Baluchi's
5 quarters. During that legal bin search he found three
6 documents that contain privileged information, notes that
7 Mr. al Baluchi wanted to discuss with myself and Mr. Connell.
8 Those three documents, notes and folder, were seized. They
9 were transferred to Evidence Custodian Number 1371.
10 Eventually they were stamped and returned to Mr. al Baluchi.

11 Now, at the point that S001277 seized these
12 documents, your protective order was triggered. It triggered
13 paragraph 11(c), documents that are found within a legal bin
14 that are not marked, in this case stamped with his ISN.

15 At that point he should have had prior authorization
16 from the SJA, he should have sealed them up, he should have
17 notified the SJA, who should have kept them, and then we,
18 counsel for Mr. al Baluchi, should have received a notice of
19 this seizure.

20 And I want to make one clarification. The testimony
21 that came forth on the stand in the, I believe, October
22 hearing from the Major indicated that there was a difference
23 between retention and seizure. The Major said at 13495 from

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1 the transcript -- and this is when he is discussing the
2 seizure with Mr. Ruiz -- "So you don't interpret the guards
3 taking the materials from the cells a seizure?"

4 And he replied, "When they simply take the items from
5 a cell and put them in an envelope and are left at the camp,
6 it is just maintaining the status quo. They are still at the
7 camp. Until I physically show up and remove the items, then
8 they would be seized."

9 I have to disagree.

10 MJ [COL POHL]: Let me ask you this, Colonel Thomas,
11 because looking at the order it uses the term "taken" and also
12 uses the word "seizure." I understand "seizure" is a term of
13 art.

14 If a guard comes into a cell and sees an unmarked
15 item ----

16 DDC [Lt Col THOMAS]: Yes, sir.

17 MJ [COL POHL]: ---- okay, is he supposed to leave it
18 there and go get authorization to take/seize it, or can he
19 take it and then go talk to the SJA?

20 DDC [Lt Col THOMAS]: I think that would come down to what
21 their SOP says, but at the point that he takes physical
22 control of it -- I am just clarifying what was left as the
23 status quo. At the point that he retains it, he has seized it

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1 as the law looks at it.

2 MJ [COL POHL]: But whether we call it a taking or a
3 seizure -- and I know there is a distinction between the two,
4 so I am not -- okay.

5 He walks into the cell and sees an item that's not
6 properly marked, is he supposed to leave it there and like go
7 get an authorization from the SJA and then come back and take
8 it, or can he take it and put it in a box and then go tell the
9 SJA and follow the procedure in the protective order?

10 DDC [Lt Col THOMAS]: Well, I defer back to the rule
11 there, sir, and if the materials other than physical
12 contraband observed in the bins don't bear the markings
13 required in paragraph 3, then they are retained and then they
14 are seized. I'm referring to 11(c).

15 So that's the rule they have right now, but I want to
16 clarify that the Supreme Court at least says at the point that
17 he takes immediate possession of it, and I'll just ----

18 MJ [COL POHL]: But -- but let me just -- I am asking you:
19 Is he supposed to leave it there and then go over and get
20 authorization to take it?

21 DDC [Lt Col THOMAS]: In my opinion, yes. That may slow
22 operations down, but that makes it legitimately comply with
23 what's required by the protective order and it also ----

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1 MJ [COL POHL]: So if I want to clarify that some other
2 way, it's just a matter of clarification.

3 DDC [Lt Col THOMAS]: Yes.

4 MJ [COL POHL]: If I take the commonsense reading of this,
5 you seize it, you freeze the status quo, and then you go tell
6 the SJA.

7 DDC [Lt Col THOMAS]: Yes.

8 MJ [COL POHL]: You are reading the order that requires
9 basically an authorization to taking it.

10 DDC [Lt Col THOMAS]: Yes.

11 MJ [COL POHL]: Okay.

12 DDC [Lt Col THOMAS]: If they don't have the
13 authorization, they are not in compliance about 018U.

14 MJ [COL POHL]: Then what's your remedy?

15 DDC [Lt Col THOMAS]: Again, we have been talking about
16 how we should address the stress tests that have come about on
17 018 over time. I would suggest that we make a few changes,
18 and I would like to get to that after I lay out a few more
19 things, and I have my suggestions for you.

20 MJ [COL POHL]: Go ahead.

21 DDC [Lt Col THOMAS]: I want to point out that the court
22 is pretty clear about what a seizure is California v. Hodari D
23 at 499 U.S. 621 at 624, the government is very fond of a

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1 particular Justice Scalia who wrote the majority opinion in
2 this case said, "From the time of the founding to the present,
3 the word seizure has meant taking a possession. For most
4 purposes at common law, the word connoted not merely grasping
5 or applying physical force to the animate or inanimate object
6 in question, but actually bringing it within physical
7 control."

8 A similar finding was written in U.S. v. Jacobsen at
9 466 U.S. 109. Justice Stevens wrote the opinion -- one of my
10 favorite justices -- Justice Powell concurred. "A seizure
11 properly occurs when there is meaningful possessory interest
12 in that property." So by definition, at the point that the
13 government takes control of it in this circumstance, a seizure
14 has occurred, not merely retention.

15 In their response to 018QQ, the government admits
16 that they violated the judge's protective order. They say
17 they should have notified defense counsel. They also should
18 have had a prior authorization of the SJA in accordance with
19 paragraph 11(c) of AE 018U. But the approach they take after
20 that in their argument is something I want to raise for the
21 court's attention.

22 There is a great deal of minimization of the impact
23 of these incursions and we keep bringing these problems before

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1 you again and again and again because they have a deep impact
2 on our ability to maintain healthy relationships with our
3 clients and to maintain privileged attorney-client
4 communications.

5 Mr. al Baluchi had written out a series of things he
6 wanted to discuss with his counsel, and those were taken away,
7 held by government actors, and eventually returned stamped,
8 and we appreciate that. And that leads me to the one part of
9 this that I really want to ask you to consider as the remedy.

10 When the Major had his colloquy with myself and you,
11 one of the things we were trying to get at was how do we avoid
12 this problem occurring again and again when a detainee writes
13 something that he wants to discuss with his client -- excuse
14 me, with his attorney, and it's just on a piece of paper, how
15 can he get stamped paper, et cetera? And we discussed the
16 possibility of getting legal pads and having them stamped or
17 getting a stamp into the camp, something like that.

18 But I think the simplest thing is something actually
19 the government pointed out is a new process that should be
20 codified in your order. It should be in your order that
21 whenever they find something within a legal bin that has been
22 determined to be part of the privileged items, then that
23 should be stamped and just returned. That needs to be put

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1 down because if the ----

2 MJ [COL POHL]: Okay. Let me see if I've got this right.

3 In the fact pattern we've got here ----

4 DDC [Lt Col THOMAS]: Right.

5 MJ [COL POHL]: ---- your client writes something down

6 that's not marked ----

7 DDC [Lt Col THOMAS]: Correct.

8 MJ [COL POHL]: ---- you want them to come in, read it,

9 see it is privileged ----

10 DDC [Lt Col THOMAS]: No.

11 MJ [COL POHL]: Then how will they know?

12 DDC [Lt Col THOMAS]: They should make the presumption.

13 MJ [COL POHL]: Then everything in the legal bin is

14 privileged, then?

15 DDC [Lt Col THOMAS]: Certainly in this instance it was.

16 MJ [COL POHL]: What you are saying, the legal bin --

17 anything in the legal bin will be presumed privileged and

18 therefore the legal bin is off limits to the guards no matter

19 what's in there?

20 DDC [Lt Col THOMAS]: That can't be the case.

21 MJ [COL POHL]: I know it can't be the case, but that's

22 what you are asking.

23 DDC [Lt Col THOMAS]: Perhaps I have talked across you, as

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1 we say.

2 MJ [COL POHL]: That happens. Go ahead.

3 DDC [Lt Col THOMAS]: What I am proposing is if there is
4 something found in their bin that couldn't be determined,
5 there has to be a determination made of it, that probably has
6 to go through the defense counsel. And there is a part of
7 this that says you have to notify defense counsel or return it
8 to them. If that's the case, great, get it out of there,
9 get -- get it stamped, get it back to them.

10 But the simple procedure that I am going on right
11 now, that I am asking you to put in your protective order, is
12 they stamp it as they have. I think that alleviates a great
13 number of issues. And if there is a turnover of the guard
14 force or a turnover of the SJA, that working process should be
15 codified so it could be limited and help calm these issues
16 down.

17 MJ [COL POHL]: I am unclear here, Colonel Thomas. In the
18 scenario we have now -- I am looking at my order. The guards
19 looked in his legal bin and found paper that wasn't marked.

20 DDC [Lt Col THOMAS]: Yes, sir.

21 MJ [COL POHL]: Had writing on it that hadn't been marked.

22 DDC [Lt Col THOMAS]: Yes, sir.

23 MJ [COL POHL]: Then they took this and did what with it?

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1 DDC [Lt Col THOMAS]: The indication is that the NCO took
2 it, turned it over to the evidence custodian. And if you look
3 at Attachment C to 018QQ, it is the last page of our motion,
4 Your Honor, in the lower right-hand corner on 14 August 2014,
5 Evidence Custodian 1371 marks out that he has returned to
6 ISN10018 after stampage -- not necessarily a word I would
7 use -- but after they stamped it, they would return it.

8 MJ [COL POHL]: Okay. And so I am assuming they put it in
9 some type of envelope?

10 DDC [Lt Col THOMAS]: Yes. That's part of what's S001277
11 said he did, was seal it up.

12 MJ [COL POHL]: They took it, put it in an envelope, gave
13 it to the evidence custodian and then they talked to the SJA
14 and then gave it back to him?

15 DDC [Lt Col THOMAS]: That part didn't happen.

16 MJ [COL POHL]: Did they notify you?

17 DDC [Lt Col THOMAS]: Never happened.

18 MJ [COL POHL]: Who decides to give it back to him?

19 DDC [Lt Col THOMAS]: At this point it's entirely within
20 the camp.

21 MJ [COL POHL]: Okay. So I am just looking at my order.

22 DDC [Lt Col THOMAS]: Yes, sir.

23 MJ [COL POHL]: It says something found in a legal bin

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1 which do not bear the markings referred to above, so
2 segregated it in a sealed container ----

3 DDC [Lt Col THOMAS]: That part was done.

4 MJ [COL POHL]: ---- i.e., an envelope, labeled with the
5 date, time, identification of the U.S. guard personnel by whom
6 it was observed, retained by the noncommissioned officer who
7 supervised the inspection. Now we could argue whether it
8 should be the evidence custodian or somebody else, but all
9 that was basically done.

10 DDC [Lt Col THOMAS]: Yes, sir.

11 MJ [COL POHL]: In such an event, the attorney -- this is
12 the part that fell down.

13 DDC [Lt Col THOMAS]: Right.

14 MJ [COL POHL]: Okay. So basically I already have an
15 order how to handle this to protect you and protect the guard
16 force.

17 DDC [Lt Col THOMAS]: Yes.

18 MJ [COL POHL]: Why do I need to change this?

19 DDC [Lt Col THOMAS]: Well, we need to codify in there the
20 practice that they have actually begun, so what boots on the
21 ground are doing and what the document says ----

22 MJ [COL POHL]: So I should change my order to what they
23 are doing as opposed to having them change what they are doing

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1 to what's in my order?

2 DDC [Lt Col THOMAS]: In part, Your Honor. Because they
3 should be complying with your order. And this is a continuing
4 problem, but we want to add something to the order that
5 reflects a best practice that they appear to have discovered:
6 Stamp it and return it.

7 MJ [COL POHL]: But how do they -- then if it is in the
8 bin, in your scenario right now ----

9 DDC [Lt Col THOMAS]: Yes.

10 MJ [COL POHL]: ---- they take a look at something that's
11 unmarked, you want them to take that, go over, put a stamp on
12 it without reading it and give it back to the detainee, and
13 therefore everything in the legal bin will be treated as legal
14 material regardless, with no type of review of it?

15 DDC [Lt Col THOMAS]: Or they could comply with how it is
16 on page 19 of your order, which is if the materials are not
17 properly marked, they will be retained by the attorney
18 representative of the SJA and counsel for the accused shall be
19 notified.

20 MJ [COL POHL]: Right.

21 DDC [Lt Col THOMAS]: That didn't happen. It would have
22 given us a chance to go, yep, that's something he wanted to
23 talk to me about.

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1 MJ [COL POHL]: So why don't they just follow the order as
2 written. Why do I have to change it?

3 DDC [Lt Col THOMAS]: Your Honor, I would love that. I
4 keep having to bring those issues up before you time and again
5 but there is a practice that seems to be hipping things run
6 smoothly that could be added, but bring it to you. I think
7 the old adage about the straw that broke the camel's back, we
8 keep bringing these straws forward to you.

9 Once again, someone is look allege at things they are
10 not supposed to, they are handling mail in a manner they are
11 not supposed. I think they are trying, but not following the
12 order. But adding this portion, perhaps it will help them he
13 work every better.

14 MJ [COL POHL]: It sounds to me it is a training issue.
15 That's my Army background. Usually when there is an SOP out
16 there not being followed, the immediate response is we need to
17 work on our training. It doesn't seem very complicated to me.

18 DDC [Lt Col THOMAS]: It is fairly straightforward. When
19 those boots on the ground figure out something that works a
20 little bit better, maybe crazy glue the screw as opposed to
21 having to put it into the wood with a hammer, I will push
22 forward and say, okay, let's include that in the SOP. But
23 following the SOP, as you have said, should be done.

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

2 DDC [Lt Col THOMAS]: Subject to your questions,
3 Your Honor.

4 MJ [COL POHL]: No further questions.

5 DDC [Lt Col THOMAS]: Thank you very much.

6 Any other defense? Mr. Nevin.

7 LDC [MR. NEVIN]: I'm sorry, I just wanted to say that
8 there is Mohammad supplement to 018QQ as well.

9 MJ [COL POHL]: True.

10 LDC [MR. NEVIN]: And it describes a similar situation,
11 but one that's different in some ways in which Mr. Mohammad
12 was removed from his cell and his cell was searched for three
13 days while he waited in another cell, and a number of legal
14 bins, I think something on the order of seven, were inspected,
15 a variety of materials were seized.

16 And, again, I brought it to the military commission's
17 attention because it was being litigated -- it was already in
18 the process of being litigated, and I think we wanted you to
19 know that there was an additional point of reference, let's
20 say, where a problem had arisen, and there was again not -- it
21 appeared that a representative of the SJA's office was not
22 present. I know that counsel for Mr. Mohammad were not
23 promptly notified as the rule requires.

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1 And it does seem that -- I think I heard the military
2 commission say a minute ago maybe it's a training problem. It
3 appears that in any event that the guard force walked right
4 past the rule requirements in that situation. That's laid out
5 in the pleadings, and I don't need to argue it beyond calling
6 the commission's attention to that. Thank you.

7 MJ [COL POHL]: Thank you, Mr. Nevin.

8 Mr. Swann.

9 TC [MR. SWANN]: This issue with respect to Mr. Ali was
10 first filed on 12 February. It was then filed on 18 March.

11 This actual incident -- the filing actually addresses
12 a February 5 and a March incident regarding Mr. Hawsawi. It
13 was supplemented by Mr. Ali's counsel immediately regarding an
14 incident that had taken place some six months before.

15 Now, counsel's understanding of the facts is not that
16 of mine based on what I have read in these particular filings.
17 What occurred on the 14th of August with respect to the Ali
18 pleading -- this is 14 August 2014. This commission was in
19 session and Mr. Ali was present that day.

20 That afternoon at about 1530 the S00 1277 searched
21 Mr. Ali's bins, taking him back to the camp, took three pieces
22 of paper, a sticky note and a folder as he was being
23 transported back to the camp. Nothing was stamped. They

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1 sealed the papers, took them to the camp. Mr. Ali says they
2 are privileged documents, that the SJA was not notified.

3 What the camp did, in realizing that they possibly
4 were privileged documents, they turned around and gave them
5 back to Mr. Ali that same day according to chain of custody
6 documents and stamped them appropriately.

7 Now, my understanding of your order is that when the
8 accused leave this room, there is nothing that leaves this
9 room that's not properly stamped and goes back to the camp,
10 because if they write it, then the order says it doesn't
11 leave, it goes back through the PRT at that particular point
12 in time. And I refer to page 16 of the order, material
13 brought in and out of commissions. The PRT will not inspect
14 what the accused brings with him but can look at material
15 brought out of commissions. An accused cannot take material
16 back to the camp unless the PRT inspects it. Defense counsel
17 are not subject to the inspection in this instance.

18 So what happened here was essentially the camp -- and
19 no good deed goes unrecognized, they went ahead and put
20 Mr. Ali in the same position that Mr. Ali would have been if
21 the document had been properly stamped to begin with. He lost
22 nothing.

23 Now, I don't quite understand what Colonel Thomas was

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1 arguing, because I thought when we addressed 018NNN regarding
2 the seizure of Mr. Hawsawi's material and now the seizure of
3 Mr. Ali's material, I thought the complaint was that an SJA
4 wasn't involved, and that by giving it back to the accused it
5 cut out them in the process because they weren't aware of the
6 incident.

7 Yet I hear him now saying that what he wants to have
8 happen is if the camp sees something that's not properly
9 marked, they are obligated or they want them to be just
10 stamping it and giving it back to the accused. We can't have
11 that.

12 Not knowing -- when this stuff is not marked
13 properly, and this court has spent an enormous amount of time
14 trying to balance the interests between the accused and the
15 United States, you have got a set of rules in place, and in
16 this instance the only thing that happened was that the SJA
17 gave it back to the accused instead of giving it back to the
18 counsel.

19 Now, you heard the Major testify back on the Hawsawi
20 motion the last part of last hearing, and what he told you was
21 that we are out of this business. If that thing is not
22 properly marked, we are not going to make a determination
23 whether it's privileged, just innocently forgot to be marked.

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1 We are not going to make a determination regarding its status
2 at all. We are going to pick it up, put it in an envelope,
3 like the court said do, and give it back to the defense.

4 And his testimony was that since these incidents
5 right here, which was somewhat of a lightning rod for them to
6 have the retraining, and they had it, they have returned to
7 this group of men alone more than 50 times pieces of paper
8 that were in those bins or outside of the bins for the most
9 part, ignoring every rule that you laid down.

10 Now, the camp can't be put in a position of deciding
11 legal versus nonlegal. We are not in that position anymore.
12 The camp told you they are just going to pick it up, stick it
13 in an envelope and give it back to them.

14 MJ [COL POHL]: Back to the defense counsel?

15 TC [MR. SWANN]: Back to a defense counsel through the
16 defense courier, which often happens here, okay? That's the
17 process you put in place. That's the process that I would
18 admit that, again, they did a good deed, but that's what got
19 us here. And unfortunately there are no more good deeds to be
20 had in this instance.

21 So I'm not even sure what the relief was requested
22 there, but I thought the relief was let's go back to just
23 marking it and giving it back to the accused. We can't do

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1 that. You said we couldn't do it to begin with, and we can't
2 go forward doing that in the future.

3 Any instance now going forward is if it's not
4 properly marked -- and what you see in these instances so many
5 times is that one detainee will have what belongs to another
6 detainee. How that happens, I don't know. There are plenty
7 of things that are unmarked. So if it's marked as belonging
8 to 1017, it's going to go back to his lawyer. If it's marked
9 1011, it's going to go back.

10 MJ [COL POHL]: Well, these aren't marked.

11 TC [MR. SWANN]: Sometimes they are stamped with a stamp
12 and you know the material doesn't belong to that particular
13 detainee. They hand things around to one another all the time
14 over there, and it's either in a legal bin or its laying
15 outside a legal bin.

16 MJ [COL POHL]: Basically what I understand the
17 government's position is follow the order as written.

18 TC [MR. SWANN]: Follow the order as written.

19 MJ [COL POHL]: The problem is they didn't follow the
20 order as written, but gave it back to the detainee.

21 TC [MR. SWANN]: In this instance they gave it back the
22 same day. What started the process, you've got young men and
23 women just doing their job, and they see something that was

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1 not marked and it was not marked leaving this room, they
2 picked it up, thought probably it did belong to him and they
3 gave it back to him with a proper stamp so they wouldn't go
4 back the next day and say we found another piece of paper and
5 we don't now what to do with it.

6 Now, with respect to -- well, in Mr. Nevin's
7 instance, what he said was absolutely correct. They went
8 through several bins that day. In essence they are you chain
9 of custody documents attached to the various pleadings in this
10 instance. There were some printed material. There was yellow
11 strips of paper in a foreign language. None of this stuff is
12 marked. Printed material stamped with Mr. Hawsawi's number on
13 it. Other nonlegal material, Time Magazine with
14 Mr. Bin'Attash -- excuse me, Binalshibh's ISN on it, Nation
15 Magazine, all of those things don't mean a great deal because
16 we are not too concerned about Time and Nation, but it did go
17 back to the proper person. This commingling of stuff creates
18 enormous problems over in the camp. So all I am simply saying
19 is stamp it, do the right the first time and we are not going
20 to have this problem.

21 You have heard testimony from the guard who testified
22 the last time from Colorado in the Hawsawi incident. They
23 don't touch stuff if it is properly marked, but if it is not

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1 properly marked, they have got no chance to make that
2 decision. They just send it through a process. The process
3 now is they just give it back to the accused's attorneys.

4 Subject to your questions, sir.

5 MJ [COL POHL]: I have none.

6 Defense, anything further on this issue?

7 DDC [Lt Col THOMAS]: Nothing further from myself,
8 Your Honor.

9 MJ [COL POHL]: Mr. Nevin.

10 LDC [MR. NEVIN]: Yes, sir. I was just looking at this
11 again. The materials in Mr. Mohammad's case were taken out of
12 his legal bins, and then they weren't returned to us. They
13 were at -- at least not immediately. They were provided to a
14 translator who reviewed them to determine what they were, and
15 after that review took place, they were provided to us.

16 So I guess my point is, again -- if rules weren't
17 followed in the way that you had written them, and I agree
18 that there is -- that it's difficult to write a rule that will
19 be the same to every situation or that will answer every
20 problem that arises, because it's a fluid situation and there
21 are many complications, and I understand that.

22 But you do have a situation where material is taken
23 out of legal bins and then it's being reviewed by the guard

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1 force, and I think the presumption that's contained in
2 paragraph 11 -- I believe it's paragraph 11(c), but I could be
3 wrong, but unmarked materials that are found in a legal bin
4 are to be segregated and then seized only after consultation
5 with an assistant SJA and then sealed, put in a package and
6 provided to the defense courier.

7 It seems clear that here they were -- they were
8 reviewed by translators for the purpose of document
9 exploitation. I don't know that in this particular instance
10 anything came of that, but that's not an incorrect -- I'm
11 sorry, that's not the correct procedure that you prescribed,
12 and in another situation it could have -- it could have
13 important consequences.

14 [COL POHL]: From your position, though, it's simply --
15 Colonel Thomas wants me to change the order. You are saying
16 just basically comply with the order?

17 LDC [MR. NEVIN]: I don't want to speak against or for
18 Colonel Thomas' suggested change.

19 MJ [COL POHL]: No, speak for Mr. Nevin.

20 LDC [MR. NEVIN]: I am just saying here, I wouldn't be
21 here if they had complied with the rule, is what I meant to
22 say.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. NEVIN]: Okay?

2 MJ [COL POHL]: Okay.

3 ADC [MS. LACHELIER]: Judge, we deferred our argument on
4 018PP, but the facts are -- because the facts are different,
5 we do want to argue that after 018VV as I mentioned -- sorry,
6 VVV is heard, and we don't necessarily concur in some of the
7 proposals that have been made, so we just would ask that you
8 perhaps defer your ruling until you have heard our argument.

9 MJ [COL POHL]: Okay. Anything further from the
10 government?

11 TC [MR. SWANN]: No, sir.

12 MJ [COL POHL]: Now, is there an unclassified portion of
13 018TT we can argue? Sorry?

14 ADC [MS. LACHELIER]: That's a yes.

15 MJ [COL POHL]: Okay.

16 ADC [MS. LACHELIER]: Judge, is that picking up?

17 MJ [COL POHL]: Yes.

18 ADC [MS. LACHELIER]: As you know, we have deferred this
19 one several times and had a couple of 505s, but there is an
20 unclassified portion that we have maintained we can argue on
21 this motion.

22 And to give you a little background, just to set us
23 back into the place where this all started, we filed 01800 and

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1 asked for relief seeking what is potentially to engage in an
2 investigation, seek what is potentially life-saving evidence
3 for Mr. al Hawsawi's case and develop mitigating evidence in
4 his case through collateral litigation and using, obtaining
5 the assistance of a nongovernmental organization. I'll leave
6 it at that. That was the subject of 01800.

7 After we filed that, about two weeks later -- we
8 filed it in September of 2014. About two weeks later the
9 government came back and said that's a spill, it was
10 classified. So we filed 018TT several months later in
11 December, after asking multiple times that the government
12 explain to us what in 01800 is classified.

13 We got multiple guidance from the government between
14 October 8 when they first notified that 01800 was classified
15 and December when we filed for relief in 018TT before this
16 court. So what we are hearing today, or what I am trying to
17 argue today is, 018TT and the relief that we are seeking on
18 both the review of 00 and more broadly on how the process for
19 reviewing classified materials is handled.

20 So in 018TT, as I said, we gave the judge -- which
21 also we filed classified out of an abundance of caution. It
22 has now come back that TT is not classified. The attachments
23 to TT are classified, and I draw the judge's attention to J in

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1 18TT, Attachment J. We summarize for you, and I am not going
2 to detail it for you here, the different guidance we got over
3 the course of approximately two months trying to tell us what
4 and why 01800 is classified, but each guidance was conflicting
5 with the other and did not provide, frankly, any further
6 guidance to us.

7 As the judge knows, at this point we got 01800
8 reviewed. We got 018TT reviewed. That's why I said TT is
9 not -- came back not classified. O -- actually, let me
10 rephrase that. We did not get 01800 reviewed or TT reviewed.
11 You ordered that they be reviewed. That's how they got
12 reviewed.

13 When we tried to get it reviewed, we just got these
14 multiple guidance that were of no use, and they never really
15 reviewed 01800. They came back to us and said it's pending
16 litigation, it's in litigation, namely this commission, and
17 therefore we will not do a review. And this is the CIA, and
18 they came back and invoked the Freedom of Information Act
19 saying the pending litigation matters. We do not review. So
20 only because you ordered a review of 00 and TT do we have some
21 guidance.

22 Actually, I will rephrase that. We don't have any
23 guidance, we have those two motions that have been reviewed

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1 and that's it, and that's the problem, is we ultimately that's
2 how we got into this issue with 01800. We don't have the
3 guidance we need, and that's how a spill like that occurred.
4 And that's how we wound up and we wind up in front of you
5 asking you to help us get the guidance so that we can properly
6 file these motions.

7 MJ [COL POHL]: What's the relief?

8 ADC [MS. LACHELIER]: The relief from you, Judge, is for
9 findings of fact on 00 and what happened and what transpired,
10 but also conclusions of law as to how the process should be
11 conducted.

12 MJ [COL POHL]: That sounds like an advisory opinion.

13 ADC [MS. LACHELIER]: No, it is not an advisory opinion,
14 it is conclusions of law as to whether the regulations were
15 properly applied with respect to 01800.

16 MJ [COL POHL]: Do you want me to question the procedures
17 that they did the classification?

18 ADC [MS. LACHELIER]: I want you to ensure, and you have
19 authority to ensure, that the rules are properly applied.

20 MJ [COL POHL]: Got it. Let me make sure. As I recall,
21 when this came out, the question was why is a particular thing
22 classified. We're going to leave it as a thing, okay? I
23 thought you were asking me that it shouldn't be classified,

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1 which would mean in essence I would declassify it, but you are
2 not asking me to do that, right?

3 ADC [MS. LACHELIER]: No, and I don't recall ever phrasing
4 anything like it should not be classified. It's that when we
5 filed with the guidance we had, we did the best we could and
6 we still got a spill. And when they came back and supposedly
7 were trying to give us -- well, they weren't trying to give us
8 any guidance. We had to keep asking can you please clarify,
9 can you please clarify, and we got no clarification, and to
10 this day we don't, Judge.

11 MJ [COL POHL]: You have a document, you have information
12 of some kind that has been classified by an OCA, right?

13 ADC [MS. LACHELIER]: The motion. And when they classify
14 a motion after it's filed, they are closing the proceedings.
15 You have oversight over that. That is like closing
16 proceedings. You classify a pleading that cannot be shown to
17 the accused, cannot be shown to the public, that is closing
18 the proceedings. You have absolutely authority to review that
19 process and ensure that that closing of proceedings was
20 properly done.

21 MJ [COL POHL]: Okay. I might take issue whether that's
22 an actual closure of the proceedings under 806, but that's
23 okay.

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1 You take a motion. It goes through the
2 classification review process of some kind, and the OCA says
3 it's classified, okay? Now, I will agree with you that if it
4 is classified information, that it meets the 505(h) standard,
5 then you have to discuss it in a closed proceeding, right?

6 ADC [MS. LACHELIER]: Uh-huh.

7 MJ [COL POHL]: When you say now they say this motion is
8 classified, do you want me to say no, it's not, because the
9 information really isn't -- meets the definition of let's say
10 seriously damaged national security under the SECRET standard?

11 ADC [MS. LACHELIER]: We want you to say that the process
12 they applied, when reviewing 01800, was not the process they
13 were supposed to use. They cannot after the fact -- after the
14 fact and without -- without referring us to the guidance that
15 applies classify something without explaining it to you or to
16 the public in some way. There is just no process for them to
17 be able to just shut down the system that way, and that's what
18 they are doing.

19 MJ [COL POHL]: Okay.

20 ADC [MS. LACHELIER]: There is a review of motions. I
21 mean, it's clear how things are supposed to happen under the
22 rules -- it's somewhat clear under the rules how things are
23 supposed to happen and that there is a review of motions and

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1 everybody is aware of that. But if they are going to classify
2 it, especially after it has been on the system for two weeks
3 in any case -- but that's a factual matter in 01800 -- they
4 have to justify it in some way, and they haven't -- to date
5 haven't.

6 MJ [COL POHL]: Let's go back to a different example. A
7 while ago the government submitted an unclassified motion.
8 Oh, maybe three weeks later somebody decided it was classified
9 and we had another one of our spills. You know what I am
10 referring to?

11 ADC [MS. LACHELIER]: Yes. I think. It seems that
12 happens enough times that I am not sure which one you are
13 referring to, but yes.

14 MJ [COL POHL]: This is a government motion. Three weeks
15 later ----

16 ADC [MS. LACHELIER]: Yes.

17 MJ [COL POHL]: ---- all of a sudden some OCA said he --
18 I'm not going to go through the decision tree, I'm not sure
19 how much is classified, but bottom line, this is classified,
20 it's on your computer, it has to be wiped or remediation has
21 to be taken and when I get back to Fort Benning, make sure my
22 computer is fixed, I am getting a new hard drive. That's the
23 way that worked, but that was three weeks after the fact, and

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1 all we got is an OCA saying this is classified.

2 ADC [MS. LACHELIER]: Right.

3 MJ [COL POHL]: Under that scenario, am I supposed to go
4 back and say, well, why is it now classified?

5 ADC [MS. LACHELIER]: I think that they are ----

6 MJ [COL POHL]: Is that what you are asking me to do?

7 ADC [MS. LACHELIER]: I think the question is not why is
8 it classified. It is what knowledge did you apply, so we can
9 interpret it. We are stuck in the same position. What
10 guidance did you apply and how was it applied here so that we
11 can understand going forward?

12 MJ [COL POHL]: You are asking just for the classification
13 guidance, not necessarily its application?

14 ADC [MS. LACHELIER]: That would be nice to have. It's
15 only been four -- what, five years?

16 MJ [COL POHL]: The trouble is, what I am struggling with
17 here is this sounds to me like we are mixing the idea of I
18 need classification guidance to make sure that the
19 classification decision was correct, and that puts me in the
20 position of saying -- of second guessing the classification
21 decision itself.

22 ADC [MS. LACHELIER]: As to the second question, no,
23 Judge. I understand there is no de novo review, but the

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1 process of how it happens is absolutely within your purview to
2 get to the process of how it happens, both because how it
3 happens ends up closing the proceedings, and I'm afraid to
4 cite the case and be wrong, but I believe it's Nixon v. Warner
5 that said these issues apply to documents just as much as the
6 closure of proceedings, and I can get back to the court on
7 that if you want.

8 So that process of closing the proceedings is
9 absolutely within their purview and the only way to ensure
10 that doesn't happen as often as it is happening or doesn't
11 happen, frankly that we are all better informed, is to get us
12 the guidance. That's all about process, Judge. That's all
13 within your purview. It's all about closure and what rules
14 apply before we have to close.

15 And to highlight the confusion that reigns ----

16 MJ [COL POHL]: Let me ask you this: Have you ever seen
17 classification guidance? A lot of times -- well, let me ----

18 ADC [MS. LACHELIER]: I have seen guidance, something they
19 call guidance, yes. It is not the guidance that I know.

20 MJ [COL POHL]: No, but sometimes it is very generic.

21 ADC [MS. LACHELIER]: Right.

22 MJ [COL POHL]: And then there is an interpretive
23 component to it.

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1 ADC [MS. LACHELIER]: Right. That's understood. But we
2 can't even get there if we don't have the guidance. Just
3 because there is an interpretive component doesn't mean we are
4 not entitled to see what the guidelines are. That's like
5 saying you can't see the statute because it is vague. Well,
6 the statute at least helps me.

7 MJ [COL POHL]: Well, I am not sure that's a good analogy,
8 but that's okay.

9 In talking about findings of fact and conclusions of
10 law, at the end of the day, what do you want? Do you want the
11 classification guidance from all the OCAs?

12 ADC [MS. LACHELIER]: The classification guidance they are
13 applying to these pleadings would be nice, yes. That would
14 be -- I'd venture to guess the court would like to have that.
15 It's at least some guidepost for us to know how to proceed so
16 that we don't continue to have these spills. And it will
17 avoid -- I mean, it also -- it goes to the merits and the
18 substance.

19 I mean, 01800 was genuinely us trying to get relief
20 for Mr. al Hawsawi on a motion we still can't show to him
21 because they haven't redacted it. They just portion marked
22 it, so we don't think we can show it to him until a redacted
23 version is published on the commission website.

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1 So in the end, this goes to the merits. Mr. Hawsawi
2 can't see a motion about getting him relief that's about
3 potentially getting investigative work done that could be
4 lifesaving to him because it's getting mitigating evidence
5 that we're trying to find.

6 So this does have an effect on his Sixth Amendment
7 right to participate and assist in his defense and be aware of
8 what's being done in his defense. So on that front and on the
9 procedural front, that being the Sixth Amendment and the
10 procedural of your right to decide, you, Judge, when the
11 proceedings are closed, I think it is within your purview.

12 I would highlight that 01800 and 018TT, which have
13 now been reviewed and TT is unclassified in its entirety
14 except its attachments. 00 is unclassified except for three
15 paragraphs. Neither of them, even though they were reviewed
16 before October, because we had them at the October hearing --
17 neither of them is on the commission website yet. So the
18 effect -- and you can brush that off as ministerial, Judge,
19 but ----

20 MJ [COL POHL]: No, I am just saying don't -- what's on
21 the website is on the website. I don't control the website.

22 ADC [MS. LACHELIER]: I recognize that.

23 MJ [COL POHL]: Some people think I do.

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1 ADC [MS. LACHELIER]: I am highlighting it because of the
2 impact. This means not only the public, which I may or may
3 not be here to vindicate that right. That's frankly not
4 genuinely my concern. My concern is when it is not available
5 to the public, it's not available to Mr. Hawsawi, and it
6 implicates the Sixth Amendment at that point. So it is still
7 not available and we can't show it to him when it is not, one
8 of them is not classified and one of them is only partially
9 classified.

10 If I can just have a moment?

11 MJ [COL POHL]: Sure. Take your time.

12 [Pause.]

13 ADC [MS. LACHELIER]: Judge, if you are willing to indulge
14 me with a rebuttal after they argue, I will hold off.

15 MJ [COL POHL]: I will give you another chance to talk.

16 ADC [MS. LACHELIER]: Thank you.

17 Anything further from the defense? Mr. Connell?
18 Major Poteet?

19 LDC [MR. CONNELL]: Sir, my contribution is that the
20 military commission has already verbally resolved the
21 unclassified version of classified pleadings issue in AE 055.
22 In October I raised to the military commission the importance
23 of issuing a written order in AE 055 that we could produce,

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1 show to the other members of the community, that is the DoD.

2 And so I would renew our request for a written order
3 in AE 055 which reflects your ruling from the bench. That
4 would solve some of these problems because it would require
5 the DRT, the DoD security classification/declassification
6 review team, to comply with the Regulation for Trial by
7 Military Commission which gives them 15 business days to
8 produce redacted versions of classified pleadings. If 055
9 were issued enforcing that R.T.M.C. requirement, it would go a
10 long way to resolving some of the problems that counsel for
11 Mr. al Hawsawi just identified.

12 MJ [COL POHL]: Thank you. Major Poteet?

13 DDC [Maj POTEET]: Good afternoon, Your Honor.

14 MJ [COL POHL]: Good afternoon.

15 DDC [Maj POTEET]: Mr. Mohammad did not, and our defense
16 team did not draft the pleadings at issue here, but we are
17 joined to them, so -- and we are affected in many ways by the
18 issue that's at hand here even though we drafted neither 018TT
19 nor 018UU. And I note that in the relief requested in 018TT,
20 the pleading does call for and we respectfully request the
21 military judge to rule that 01800 has not been properly
22 classified.

23 Now, what are the further down the road consequences

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1 of such a ruling, a ruling that something has not been
2 properly classified? That is something that could be worked
3 out and perhaps the government could -- after such a ruling,
4 perhaps the government could be heard on, okay, here is yet
5 another justification to properly classify it.

6 MJ [COL POHL]: Why is it not properly classified?

7 DDC [Maj POTEET]: I'm happy to address that. May I
8 first -- and I plan to address that. May I first just cite
9 some authority to say that you even have authority to ask that
10 question, to ----

11 MJ [COL POHL]: I can ask a lot of questions. That
12 doesn't mean I can do anything about it.

13 DDC [Maj POTEET]: Yes, exactly, but ----

14 MJ [COL POHL]: Go ahead.

15 DDC [Maj POTEET]: So the 018TT cites
16 United States v. Grunden 2 MJ 116 1977, a Court of Military
17 Appeals case, and that case does acknowledge "Although the
18 actual classification of the materials and the policy
19 determinations involved therein are not normal judicial
20 functions, immunization from judicial review cannot be
21 countenanced in situations where strong countervailing
22 constitutional issues exist which merit judicial protection."

23 In other cases cited elsewhere in this military

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1 commission, the United States v. Lonetree case, 31 MJ 849, a
2 Navy-Marine Corps Court of Military Review case from 1990
3 which was affirmed in part at 35 MJ 396 by the Court of
4 Military Appeals in 1992, it noted that the military judge,
5 the trial judge, had appropriately conducted his own analysis
6 of the affidavits and the interests at stake in assessing
7 whether the government had set forth valid reasons for the
8 classification of the information and why it could not be
9 revealed in public session.

10 And so in some of these cases they are talking about
11 closing the courtroom, which as counsel had addressed, this is
12 an analogous situation which may not be precisely the same,
13 but it is addressing the court's authority and duties in terms
14 of the propriety of that classification decision. And also
15 the Second Circuit in 2009, Wilson v. CIA, 586 F.3d 171. It
16 required courts to ensure that the information in question is
17 in fact properly classified.

18 So that gets to then Your Honor's question which was
19 why would this not be properly classified, and it's important
20 to note that this addresses black site -- the classification
21 of the black sites and RDI program, so I am going to speak
22 very carefully because ----

23 MJ [COL POHL]: Just talk about generic classification

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1 procedures. Here is my question.

2 DDC [Maj POTEET]: Yes, sir.

3 MJ [COL POHL]: The decision of classification is an
4 executive branch decision -- and I understand I am part of the
5 executive branch for these discussions, but for this
6 discussion I think I will probably be part of the judicial
7 branch. And there are certain proceedings laid out in the
8 executive order that need to be followed, correct?

9 DDC [Maj POTEET]: Yes.

10 MJ [COL POHL]: Once those procedures have been followed,
11 once somebody makes a decision this piece of information,
12 public disclosure would represent an exceptionally grave
13 danger to national security and therefore is classified at the
14 TOP SECRET level, am I to say no, it is not exceptionally
15 grave, it is just some serious damage that should be SECRET?
16 You are you asking me to review that decision, if the
17 procedures were followed properly on the front end?

18 DDC [Maj POTEET]: So it's my understanding that 018TT
19 lays out numerous ways in which those procedures were not
20 properly followed; however, the authorities that I just cited,
21 I believe do say that it's important for the judge in a
22 tribunal, especially where questions have been raised about
23 the propriety of that determination, to examine, to ensure

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1 that it is properly classified.

2 MJ [COL POHL]: Just so I am clear, when you use the term
3 "properly classified," this is my question: There is a
4 properly classified in accordance with the classification
5 procedures, okay? That's one step. And there's properly
6 classified -- could also be used that it's the right label on
7 the information and that it meets the definition of TOP
8 SECRET.

9 Now, are you saying that those cases give me
10 authority to say, well, you know, I don't think this is TOP
11 SECRET, I think it is just confidential or I think it's
12 unclassified and second guess that OCA decision? Do you think
13 those authorities give me that authority?

14 DDC [Maj POTEET]: Your Honor, the executive -- the
15 executive order on classification, 13526, as you have
16 mentioned, it lays out certain requirements. Those
17 requirements also include a list of reasons for which one
18 cannot classify information.

19 It is forbidden to classify information for the
20 following list of reasons, and the first and second, the
21 number one and number two reasons on that list are to conceal
22 violations of law or to prevent embarrassment. And those also
23 would happen to be the most -- the number one and number two

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1 most salient reasons for which the CIA black site and the
2 torture program, the RDI program, have been subjected to
3 classification determinations. Now ----

4 MJ [COL POHL]: How can -- if that's all true, what you
5 are saying is -- I'm not the only court looking at this issue.
6 We have got all sorts of courts looking at these issues. Have
7 any of them concluded that because, for the sake of the
8 argument, elements of the RDI program were in violation of the
9 law; therefore, those elements cannot be classified;
10 therefore, a court is going to say I don't care what you
11 care -- I don't care what the OCA says, they are not
12 declassified -- do you have any court for the 15 years or the
13 ten years that this litigation over the RDI program has been
14 going on or any legislative body has come to that conclusion?

15 DDC [Maj POTEET]: Let me answer your question in two
16 parts, Your Honor.

17 MJ [COL POHL]: Sure.

18 DDC [Maj POTEET]: The first one I do simply want to note
19 that 018TT, as I understand it, and I -- before you today we
20 are not asking you to suddenly utterly declassify the black
21 sites, but we are asking you to take an appropriately
22 skeptical view of the purported classification here, which is
23 of a power of attorney seeking legal representation overseas

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1 signed by the victim of a grotesque sexual assault.

2 MJ [COL POHL]: But the basis for me to do that is those
3 two exceptions you talked about. Why I am struggling here, as
4 you can probably tell ----

5 DDC [Maj POTEET]: Yes.

6 MJ [COL POHL]: ---- is if it was so easy -- wrong word,
7 it was so legally defensible that if something were classified
8 and the information was classified was illegal, as some say
9 the RDI program was or elements of it at least, were illegal,
10 then it strikes to me that we would have long before 2016 some
11 court or legislative body say, okay, that's not classified
12 properly; instead of having to go back as, for example, the
13 Senate had to do just on the SSCI report, it had to go back to
14 get it declassified, the summary.

15 DDC [Maj POTEET]: So that's the second part of my answer
16 to Your Honor, is that we have seen over time that there is an
17 understandable but extraordinary level of reluctance to push
18 the line. Like I said, it's extraordinary but it is also an
19 understandable level of reluctance because it is the national
20 security of the United States that we are talking about.

21 And those of us who have taken an oath to support and
22 defend the Constitution of the United States absolutely do not
23 want to endanger the national security of the United States,

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1 not the slightest, and that -- I'm sure that includes every
2 member of Congress and every member of the judicial branch and
3 judges within the executive branch, and including members of
4 the defense here. There is no desire to endanger the national
5 security of the United States.

6 However, at the same time, we have seen -- simply
7 during the ongoing nature of this case, since 2012, we have
8 seen a change in the classification rules over time where we
9 started off, we had presumptive classification. Every word
10 out of Mr. Mohammad's mouth was presumed to be classified at
11 the highest levels, and then ----

12 MJ [COL POHL]: Not really -- we come back to that, but
13 let's not -- it wasn't classified information. It was handled
14 that way. No OCA said that was classified. I understand why
15 they did it, but it's a wrong terminology, it's misleading
16 terminology, we got rid of it. But that information was not
17 classified because no OCA classified it.

18 There has been a lot of changes, particularly the
19 SSCI report has been declassified.

20 DDC [Maj POTEET]: Yes.

21 MJ [COL POHL]: That's all been declassified by the OCA,
22 not by a judge, not by the Senate, not by anybody else.

23 DDC [Maj POTEET]: And of course the Senate, I don't -- I

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1 can't cite to authority that the Senate could have
2 declassified it. I have heard arguments that they could have
3 entered it into -- unredacted they could have entered it into
4 the Congressional Record, which would not necessarily be an
5 act of declassifying it, just an act of disclosing it, making
6 something public.

7 But they did negotiate, apparently for an extensive
8 period of time, with the executive branch, with that
9 apparently, with what little leverage they had with the
10 executive branch, to get it as little redacted as possible.
11 And that was a big change in this case. Your Honor ordered
12 after that point for the government to issue us new guidance
13 in light of that.

14 Because we had one set of guidance, the issuance of
15 the redacted executive summary of the SSCI report showed that
16 that guidance was apparently no longer the rules that we are
17 operating under thanks to the successful negotiation by
18 Senator Feinstein of the redacted executive summary that was
19 allowed to be declassified.

20 Also recently, we have been told that the identities
21 of any personnel who work at black sites is very highly
22 classified. However, recently the Department of Justice seems
23 to have taken a very different position, at least as to

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1 certain identities, and I'm not going to mention them by name
2 here because it is still not clear to me whether that position
3 as has been taken in FOIA litigation or in civil litigation in
4 federal courts in the United States applies here in this
5 courtroom. It's not clear to me. But that position has
6 changed. It used to be the identities were completely
7 classified.

8 MJ [COL POHL]: But, again, these are all executive branch
9 decisions. That's what I keep coming back to. Whether it's
10 Department of Justice, Department of State, Department of
11 Defense, the Central Intelligence Agency, whoever, these are
12 executive branch decisions on something to be declassified.

13 And you are asking me to substitute my judgment for
14 theirs, and, again, I am looking for an example of where a
15 nonexecutive branch -- and I understand my status as an
16 article -- I've got that, but bottom line a nonexecutive
17 branch entity of any kind says that's not TOP SECRET, that's
18 confidential.

19 The Senate didn't think they could do it with their
20 own stuff -- rephrase that. It's somebody else's stuff.
21 Their own report. They spent all this time negotiating, as
22 you stated, and so if they don't think they have that
23 authority of their own -- of that kind of information, but you

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1 think I do?

2 DDC [Maj POTEET]: Your Honor, I don't say that you have
3 the authority to declassify something, but -- and, in fact, I
4 believe that the Manual for Military Commission addresses the
5 subject, and one reading of it is to say straight up that you
6 don't have the authority to declassify something. But I do
7 believe that you have the authority to say that something has
8 not been properly classified.

9 And someone may say that's a distinction without a
10 difference, but I don't think so. I think, like I said at the
11 outset, that that decision, the ruling as requested in 0018TT
12 that something has not been properly classified would not
13 leave the government at that point without the ability to seek
14 further remedies.

15 MJ [COL POHL]: Go ahead.

16 DDC [Maj POTEET]: If I may, I would like to articulate
17 some of the interests at stake consistent with
18 United States v. Grunden, which addressed situations where
19 strong countervailing constitutional issues may exist.

20 The interests at stake here -- well, you identified,
21 Your Honor, the potential for damage to U.S. national
22 security, which is the justification for classification. It
23 should be kept in mind that there is much information that is

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1 expected or known that its release is likely to cause damage
2 to national security, but is disclosed anyway. When American
3 soldiers in Mahmoudiyah, Iraq raped an Iraqi child and
4 murdered her family and burned their bodies, the U.S.
5 Government didn't cover that up, even though the fallout from
6 that was prior to the investigation and prosecution of that
7 case, the neighbors of that case in Mahmoudiyah had assumed
8 that the deaths had resulted from the insurgency until the
9 prosecution of the American perpetrators was publicly revealed
10 during the prosecution. That case actually led directly to an
11 increase in Iraqis joining the insurgency and engaging in
12 deadly and violent attacks against Americans and against the
13 U.S. supported government of Iraq.

14 But we are Americans and a nation that's founded on
15 ideas and principles instead of ethnicity, but a nation that's
16 founded on ideas and principles gravely damages itself when it
17 betrays those ideas and principles. We do far more damage to
18 our national security by covering up crimes, our embarrassing
19 actions because that is hypocrisy, and hypocrisy is one of the
20 a gravest dangers to the national security of a country that
21 is founded on ideas and principles.

22 The Executive Order 13526 controls classification
23 today. It is not carte blanche authority for a chosen few

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1 agencies or individuals to classify whatever they want. It
2 does lay out very specific rules. The soldiers in Mahmoudiyah
3 agreed with each other to commit the crime and afterwards they
4 agreed with each other and promised each other not to reveal
5 it. That promise to conceal a crime is not enforceable, it is
6 not valid and it is even a crime in and of itself. It's its
7 own independent crime.

8 The executive order and classification have been
9 updated and adjusted over many years and reissued by
10 presidents, but the language prohibiting classification to
11 reveal violations of law or to prevent embarrassment, that
12 language has been reissued verbatim through -- for many, many
13 decades of these executive orders.

14 These men and many others, as detailed in the Senate
15 Select Committee on Intelligence executive summary, they were
16 tortured brutally. Some of them, including Mr. Mohammad and
17 Mr. Hawsawi were subjected to forcible sodomy and Mr. Mohammad
18 was subjected to ----

19 TC [MR. SWANN]: Your Honor, I am going to object to all
20 of this. Let's get back to 0018TT if we can, please.

21 DDC [Maj POTEET]: I'm identifying the constitutional
22 issues at stake, and I am going to identify why this
23 information makes this an even stronger constitutional

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1 interest.

2 MJ [COL POHL]: Go ahead. Objection overruled.

3 DDC [Maj POTEET]: They were subjected to so-called mock
4 execution or near execution by drowning and much more. They
5 were subjected to illegal incommunicado detention, denied
6 access to legal representation, ICRC.

7 The black site detention program and the torture was
8 illegal. It was a violation itself of United States and
9 international law, and it was a violation of the laws and
10 international obligations of other relevant countries, the
11 U.S. operation of the black sites; but also any pledges not to
12 reveal anybody who assisted in them. Those pledges -- like
13 the promise of soldiers to not reveal their crime, those
14 pledges themselves are illegal. Those pledges cannot be ----

15 MJ [COL POHL]: You are equating the OCA decision to
16 classify the identities of people involved in the RDI program
17 to a pledge between two murdering co-conspirators?

18 DDC [Maj POTEET]: Your Honor, if the ----

19 MJ [COL POHL]: Is that what you just did?

20 DDC [Maj POTEET]: Your Honor, if -- if an agreement among
21 parties to a crime not to reveal their crime is itself
22 illegal, then -- then an agreement ----

23 MJ [COL POHL]: So following that logic train, then the

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1 whole RDI program, under your view, is improperly classified,
2 and I should have just order the government to just do -- we
3 don't have to do this long 505 summary process, just give the
4 unredacted data to the defense. Is that what you are telling
5 me?

6 DDC [Maj POTEET]: Your Honor, it is not what is requested
7 or laid out in 018TT.

8 MJ [COL POHL]: I know. We have gotten far afield from
9 that. It's the concept that's going through here because you
10 are really asking me to second guess the OCA's classification
11 decision because, in your view, they are classifying stuff
12 that should not be classified, i.e., illegal acts or
13 embarrassing acts.

14 DDC [Maj POTEET]: That's the executive order. 13526 says
15 that an OCA cannot classify something because -- in order to
16 conceal a violation of law or to prevent embarrassment to any
17 individual or agency.

18 MJ [COL POHL]: Major Poteet, I don't want to cut you
19 short, but if you are almost done, I will let you complete.
20 Otherwise, we will take our afternoon recess.

21 DDC [Maj POTEET]: I am almost done.

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

23 DDC [Maj POTEET]: Your Honor, in the record in this case,

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1 there was an explicit request from the CIA and the White House
2 to the Department of Justice, which was one of the reasons for
3 the OLC memos that we were discussing previously for
4 prospective immunity from prosecution for torture. So that
5 was explicitly -- that was expressly one of the reasons why
6 they were looking for this. So it's not a hypothetical that
7 concealing violations of law could be one of the reasons why
8 this is classified. It has been expressly articulated by
9 those who would seek to benefit from that.

10 The U.S. Government has never told these men in what
11 countries they were held at the black sites. The U.S.
12 Government has not told defense counsel, even with security
13 clearances and read-ons, they have not told us in what
14 countries these men were held at black sites.

15 These men never signed a nondisclosure agreement at
16 the point that the U.S. Government exposed them purportedly to
17 classified information. Their own knowledge is not U.S.
18 Government-owned information. It is their own information.
19 But like I said, the government never told them what countries
20 they were held in. They have their own impressions of that,
21 of the answer to that issue.

22 But for all of these reasons, the U.S. Government's
23 claim that this information at issue here in 018TT could

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1 possibly be classified is very weak at best, and that's
2 different than overthrowing the classification of the entire
3 RDI program. At issue here is is it possible to classify a
4 power of attorney signed by a sexual assault victim seeking
5 legal representation in order to obtain relief.

6 The arguments in favor of the defense here are quite
7 strong. In addition to the public's right of access to these
8 military commission proceedings, including 01800, there is the
9 right of a defense team in a death penalty case to develop
10 important mitigating evidence as articulated in both 018TT and
11 01800, and there is also the important interest of the right
12 of a sexual assault victim to seek legal representation.

13 Your Honor, the rules of construction, the
14 requirement to try to construe regulations and statutes in
15 accordance with the constitution, if they possibly can, in
16 this particular context at 018TT show that the justification
17 for finding something was properly classified is exceptionally
18 weak, if it exists at all.

19 The reasons -- the constitutional interests at stake
20 in this are very serious, and accordingly 018TT should be
21 granted.

22 MJ [COL POHL]: Thank you, Major Poteet.

23 We will recess now until 1535. The commission is in

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1 recess.

2 [The R.M.C. 803 session recessed at 1505, 6 December 2016.]

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