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1 [The R.M.C. 803 session was called to order at 1535,  
2 6 December 2016]

3 MJ [COL POHL]: The commission is called to order. All  
4 parties are again present. The three detainees are also  
5 present.

6 Any other defense counsel want to be heard on this  
7 issue? Mr. Harrington? Ms. Bormann?

8 LDC [MR. HARRINGTON]: No.

9 LDC [MS. BORMANN]: Just a quick note about the job of a  
10 judge. In our system of checks and balances, judges are  
11 required to apply the law to facts. That is what Mr. Hawsawi  
12 and I think, what all defense counsel in this case ask you to  
13 do, not substitute judgment, not make a determination about  
14 whether or not something causes grave national security issues  
15 or less than grave national security issues, but look at the  
16 law and apply the law to the facts.

17 When that request is made, it is incumbent upon an  
18 independent judiciary to do just that. You have the executive  
19 order here which requires that to be classified. To claim  
20 classification, the government has to propound a certain set  
21 of facts. Something has to be owned, controlled by or  
22 produced for the United States Government. That's requirement  
23 number one.

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1           If the government wanted to classify me saying the  
2 following: Mr. Bin'Attash should not be found not guilty,  
3 that is clearly not a statement that is owned by, produced for  
4 or controlled by the United States Government. Whether it  
5 caused grave damage to the national security of the United  
6 States would really be irrelevant, because when you applied  
7 the law to the facts, you would have determined that it didn't  
8 satisfy the first provision under the executive order.

9           That is, I think, what all counsel are asking you to  
10 do, and that's what I am asking you to do.

11          MJ [COL POHL]: So you are not -- just so it is clear  
12 because you are articulating a slightly different position at  
13 least from what I heard before, is simply as you look at the  
14 executive order, there are procedural requirements contained  
15 in there.

16          LDC [MS. BORMANN]: There are procedural requirements,  
17 there are factual ----

18          MJ [COL POHL]: The one you just talked about.

19          LDC [MS. BORMANN]: That's one. There are actually  
20 several others.

21          MJ [COL POHL]: A similar issue came up with the ICRC in  
22 the fact that originally the ICRC reports, the government  
23 asked me to treat it as classified information. And one of

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1 the issues I think I asked them, is it U.S. government-owned  
2 information.

3 LDC [MS. BORMANN]: It's not classified. It simply can't  
4 be.

5 MJ [COL POHL]: Then we got to that point, but, again,  
6 when we talked about this before I said properly classified,  
7 the procedures which you are talking about as opposed to the  
8 value judgments, the interpretive guidance, whatever you want  
9 to call it on this other side.

10 LDC [MS. BORMANN]: I think Ms. Lachelier invited you to  
11 look at the process.

12 MJ [COL POHL]: Okay.

13 LDC [MS. BORMANN]: And I am going to quote you back from  
14 yourself in 2012. You said, "Ms. Bormann, I am a process  
15 guy." I said, "Gotcha." And what I am asking you to do is be  
16 a process guy here. Put the government to -- to require the  
17 government to meet the standard of classified information and  
18 follow their own procedures. Thank you.

19 MJ [COL POHL]: Mr. Harrington, anything?

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

21 MJ [COL POHL]: Trial Counsel?

22 TC [MR. SWANN]: Your Honor, our pleading is at Appellate  
23 Exhibit 018UU dated 24 April 2015.

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1           Having sat on the bench several years myself, I  
2 always hated it when someone stood up and told me I did not  
3 have the authority to do what the defense asks you to do. So  
4 I will repeat it: You don't have the authority to get into  
5 the classification realm in this particular instance.

6           The OCA, these are individuals that are trained.  
7 They have a complete understanding of the intelligence world.  
8 They reach out to other interested individuals, and they come  
9 back and they make a determination.

10           In this particular instance, this document ----

11           MJ [COL POHL]: Hold a second.

12 [Conferred with courtroom personnel.]

13           MJ [COL POHL]: Go ahead.

14           TC [MR. SWANN]: In this particular instance, this  
15 document was filed and unfortunately there was a spill. It is  
16 not my attempt to say that the defense did anything wrong  
17 here, but when it was subsequently reviewed, it was determined  
18 to contain classified information.

19           Now, not knowing exactly what portions of the  
20 particular document was classified, you directed the United  
21 States to have the document portion marked, which I did, and  
22 the document came back -- two of the documents came back at a  
23 classification level, and I believe the 018TT came back

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1 unclassified, the underlying document, but all of the  
2 attachments are classified.

3           So with respect to 018TT, there will come a point  
4 when 018TT will be posted on a website. There is nothing  
5 wrong for the defense to simply ask or have the various  
6 portions of the other documents simply redacted, and we will  
7 post those on a website as well, in addition to that, of  
8 course, properly redacted. The defense is more than able to  
9 send the document to us, and if it is properly redacted, then  
10 we will go ahead and make it releasable to their client.

11           When I told you, you didn't have the authority, I  
12 don't do that lightly, but I just simply remind the court that  
13 the National Security Act of 1947, implemented by executive  
14 order, the original classification authorities in these  
15 instances are charged with the responsibility, the protection,  
16 the proper classification of information which reasonably  
17 could be expected to result in damage to the national  
18 security, and as such the determination whether to classify  
19 information and the proper classification thereof is a matter  
20 committed solely to the executive branch. I cite  
21 Department of the Navy v. Egan, a Supreme Court case, 1988.

22           There is a further-on list of cases that also come to  
23 the same conclusion. A defendant cannot challenge that

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1 classification. A court cannot question it, citing United  
2 States v. Aref, citing United States v. Zacarias Moussaoui,  
3 and United States v. Musso.

4 MJ [COL POHL]: How do you respond to Ms. Bormann's  
5 argument that the challenge really isn't to the classification  
6 decision as opposed to the classification procedures? For  
7 example, let's say there is a document, information that does  
8 not meet the criteria in the executive order that's still  
9 classified, can I ----

10 TC [MR. SWANN]: If it didn't meet the criteria and it's  
11 gone through an OCA and they have made that determination --  
12 because they make these determinations every day: This is  
13 classified, this is unclassified.

14 MJ [COL POHL]: No, but what I am saying is like the ICRC  
15 records. Let's just use those for examples. Those are owned  
16 by a foreign NGO. I'm assuming it's a foreign NGO.

17 If for some reason they tried to classify -- an OCA  
18 marked that as a classified document, is there any judicial  
19 remedy to revisit that because it doesn't meet the standards  
20 in the executive order?

21 TC [MR. SWANN]: I think -- as I understand it, I think  
22 this issue, this very issue, is before the court with respect  
23 to Appellate Exhibit 335, if I recall correctly.

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1           What you did initially with respect to some of the  
2 ICRC documents is you went through, took a look at all of  
3 those documents and decided what -- and it was roughly about  
4 200 pages, if I recall correctly, that you provided to the  
5 defense.

6           The issue I think you might be addressing is with you  
7 now on a new set of documents, as I understand, that were  
8 provided to you.

9           MJ [COL POHL]: No, I think the -- I don't want to  
10 conflate some of the things with the ICRC. What I am saying  
11 is the issue with the ICRC when it first came up was,  
12 Your Honor, we want these treated as classified documents, and  
13 I said are they classified? And that issue clearly -- that  
14 went away very quickly, and that became a privilege issue.

15          TC [MR. SWANN]: Yes. And I'm not taking anything ----

16          MJ [COL POHL]: So we are not fighting. But what I am  
17 saying is, as Ms. Bormann says, the executive order says the  
18 information is owned by, produced by or falls under the  
19 control of the United States Government.

20           If the information does not meet that criteria, but  
21 for some reason is marked CLASSIFIED, TS or whatever, is there  
22 any judicial review of that part of the decision? Because I  
23 think we are getting -- again, we are getting wrapped around

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1 the judgment call of how much damage -- if damage and how much  
2 damage. I am not talking about that.

3 I am talking about the threshold requirements. For  
4 example, the original classification authority must be the  
5 classifying individual or entity. That's usually not -- but  
6 it does say it has got to be owned by the United States. And  
7 if it is not owned by the United States but is stamped somehow  
8 CLASSIFIED, is that judicially reviewable?

9 TC [MR. SWANN]: It is not.

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

11 TC [MR. SWANN]: With respect to some of the arguments  
12 that were made today with respect to the viability of United  
13 States v. Grunden, a 2 MJ case, that case is not applicable  
14 here. Certainly the case of the marine that he cited, I don't  
15 believe has been cited in any of the pleadings, Clayton  
16 Lonetree, that's not applicable in this particular instance.

17 These documents were properly classified. They went  
18 through a further classification review, and the decision was  
19 made, at least certain paragraphs, remain classified. As I  
20 have said, you do not have the authority to go beyond that.

21 MJ [COL POHL]: Let me make sure. Was this the thing that  
22 came up last time at the 505(h) that I said needs to be  
23 portion marked? Is that what we are talking about?

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1 TC [MR. SWANN]: Yes, sir. These were portion marked. It  
2 was actually the time before because we argued this at a 505  
3 session last time. They filed the document that was marked  
4 UNCLASSIFIED. It got noticed by someone who said no, wait a  
5 minute, that is classified. It was pulled down or maybe it  
6 didn't even go up. And then at that point in time it was  
7 marked appropriately.

8 And you have a pleading, and we tell you why in our  
9 pleading why it was marked that way. And then because you  
10 wanted them to be able to have an opportunity to argue certain  
11 things in the public, which is appropriate, you asked that we  
12 have this document marked, portion marked, so that you knew  
13 exactly what was in there that was classified.

14 And then you issued appropriate orders, and that's  
15 why she gets to argue this piece in the public, because the  
16 five-page 018TT is not -- not classified. What made that  
17 document classified in its entirety was not the underlying  
18 document but the matters that were attached thereto.

19 MJ [COL POHL]: Okay.

20 TC [MR. SWANN]: Once those matters are removed, then the  
21 document, the motion itself is no longer classified. And that  
22 is what she was permitted to argue in these proceedings.

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

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1 TC [MR. SWANN]: All right. With respect to the argument  
2 made by -- well, let's just take a look at the relief that  
3 they have asked for. The relief is actually in 01800. What  
4 she asked you to do or counsel asked you to do is that they  
5 wanted you to overrule the classification authority, they  
6 wanted you to post it in classified form on a website, and I  
7 have told you that the documents that are not classified will  
8 be posted to the website appropriately. And the other  
9 documents that have both unclassified information and  
10 classified information will be properly redacted, and at some  
11 future date we will be able to give that information to the  
12 accused.

13 Now, I did take offense to what the good Major said  
14 trying to equate what occurred with respect to two  
15 co-conspirators who committed serious violations of the law,  
16 and that somehow the United States is trying to cover up  
17 matters by using our classification authority.

18 I will say the following, that there were good men  
19 and women who were asked by the President of the United States  
20 to conduct a terribly difficult mission at a time when nearly  
21 3,000 -- well, when 3,000 men, women and children had been  
22 killed and that the possibility existed for further attacks on  
23 this nation.

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1           And I would say the following, knowing what I know  
2 and what I have been subjected to over the last, what, 12  
3 years now, and what I have seen: Despite what one might  
4 think, I think and I know that lives were saved, and I sleep  
5 comfortably because of the very people that counsel impugned.

6           Thank you. Nothing further.

7           MJ [COL POHL]: Ms. Lachelier, you said you want to be  
8 heard again?

9           ADC [MS. LACHELIER]: Judge, I want to bring the argument  
10 back to center, and that is center being what we were looking  
11 for in 018TT, and what we were asking you to do.

12           We are not asking you to review the propriety of the  
13 substantive decision of classifying. They have classified it  
14 as -- they have classified 01800 in part. What is not  
15 classified in that motion can be posted, can be public. That  
16 part they haven't complied with. They said they are going to.  
17 We will see.

18           But what we are asking you to do and what you do have  
19 authority to do is to determine, and we cited cases to this,  
20 in effect our motion, is to determine whether the process for  
21 classifying, not the substantive decision, but the procedures  
22 they are using are arbitrary and capricious. And why can you  
23 make a finding that it is or why is it that that's within your

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1 jurisdiction, your purview?

2           It is fairly easy to determine when, Judge, you  
3 yourself came up with an example of a spill that occurred with  
4 a government motion that was filed, that was filed -- I think  
5 you said three weeks ago. I think it was it a little longer  
6 ago than that and that caused a spill, so there are  
7 instances ----

8           MJ [COL POHL]: It was a while ago. It was three weeks  
9 after it was filed was when the alleged spill was discovered.

10          ADC [MS. LACHELIER]: Right. We are not asking you to get  
11 into the merits of -- and I think Ms. Bormann underscored  
12 that. We are certainly not asking you to get into the merits  
13 of the classification decision. The government loves to cite  
14 Navy v. Egan. It's not applicable to what we are asking you  
15 to do.

16           The cases we cited, the FOIA cases, the Freedom of  
17 Information Act cases, the judges went into the merits of  
18 whether the government was properly invoking the exemption  
19 that allowed them to redact certain information that would be  
20 releasable under FOIA.

21          MJ [COL POHL]: What part of the executive order  
22 procedurally was not complied with? You say arbitrary and  
23 capricious. That sounds like a decision being made.

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1           ADC [MS. LACHELIER]: See, this is actually -- actually  
2 this is part of the dilemma that you have is that the  
3 executive order is not the only guide. The executive order is  
4 the broad outline of how things should be done. The guide is  
5 the guidance.

6           You have to find without the guidance that they are  
7 arbitrarily and capriciously applying the guidance. That is  
8 what we are asking for in some way because -- and, Judge, let  
9 me finish, if you don't mind ----

10          MJ [COL POHL]: I am going to let you finish. I am just  
11 sitting back.

12          ADC [MS. LACHELIER]: Okay. Sorry.

13                 The number of times that we face a spill in these  
14 cases, the number of times that we face a question about  
15 whether or not something is classified, the very -- 00 is the  
16 best illustration we have what the government did was  
17 arbitrary and capricious because we still to this day do not  
18 know how or why that is classified. So we are not asking you  
19 to get into the merits, but how -- how it was classified is  
20 important to your process, to know when the proceedings should  
21 be closed.

22                 I'll give you another illustrative example how there  
23 are so many instances in this case where they are applying the

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1 process arbitrarily and capriciously. And we know it is  
2 arbitrary and capricious. If you don't want to order the  
3 guide and the guidance produces, fine, but you can notice that  
4 the process is arbitrary and capricious.

5           One example, the records that the government produced  
6 for Mr. al Hawsawi, medical records that were in discussion  
7 yesterday. We got a classified version, and then a few days  
8 later we got a redacted unclassified version that we could  
9 show Mr. al Hawsawi. We don't know why certain things were  
10 redacted or not, we just know we got a version that was  
11 redacted and that that was unclassified.

12           Omitted from those records was the photograph of  
13 Mr. al Hawsawi's injury. That stayed classified. So again we  
14 don't know why.

15           TC [MR. SWANN]: Just to let her know, she is going to get  
16 a picture that is unclassified.

17           ADC [MS. LACHELIER]: That will probably have the  
18 substance of the actual injury redacted. We don't know and we  
19 are going to get something that is probably redacted and  
20 labeled unclassified of his own very injury, and we won't know  
21 why.

22           You received pleadings that then you had to have your  
23 computer scrubbed. We filed 00 and we had to have our

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1 computer scrubbed because they said it's classified. And I  
2 can't name the pleading. It's on the public record. I won't  
3 name it. I will give the judge a copy so that he has a copy  
4 because it is a government pleading, and it's unclassified.  
5 But because I don't know the rules, I don't want to mention  
6 which one on the open record. If I may approach?

7 MJ [COL POHL]: Sure. But if it's labeled unclassified, I  
8 have got to make a record of what the appellate number is, but  
9 I will take the hit on that.

10 Trial Counsel, this is part of the 434 pleadings.

11 TC [MR. SWANN]: I think that's part of the referral  
12 package that we were asked to obtain.

13 ADC [MS. LACHELIER]: They are attachments to a pleading  
14 the government filed. Again, I don't want to name the  
15 pleading.

16 MJ [COL POHL]: Why not?

17 ADC [MS. LACHELIER]: Because I am not sure I would be  
18 confirming or denying information in that pleading, although  
19 it's on the public record, based on frankly what they did to  
20 00, I don't know. And I'm not being facetious here, Judge.  
21 I'm serious.

22 MJ [COL POHL]: That's up to you when you want to take  
23 that approach. When I have a piece of paper that's handed to

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1 me by the United States Government that says UNCLASSIFIED FOR  
2 PUBLIC RELEASE and is attached to a government pleading ----

3 ADC [MS. LACHELIER]: I can tell you which number then,  
4 Judge. That's fine.

5 MJ [COL POHL]: No, I mean, we don't need to add it  
6 because it is already in the ----

7 ADC [MS. LACHELIER]: I marked your copy, Judge, with the  
8 pages that are relevant to my point.

9 MJ [COL POHL]: Oh, okay.

10 ADC [MS. LACHELIER]: Sorry, I didn't specify that. For  
11 the other parties, it's pages 43 through 53.

12 MJ [COL POHL]: All these say UNCLASSIFIED FOR PUBLIC  
13 RELEASE, right?

14 ADC [MS. LACHELIER]: Yes, Judge.

15 MJ [COL POHL]: Just for the record purposes, again we  
16 don't need to make it a separate exhibit, this is pages 31 to  
17 54 of AE 434A, Attachment C. Is it just one attachment?

18 ADC [MS. LACHELIER]: It's Attachment C. There are  
19 several attachments to the pleading itself. The only one that  
20 was relevant to my point here is that attachment.

21 MJ [COL POHL]: Okay. So what's it illustrating to me?

22 ADC [MS. LACHELIER]: So pages 43 ----

23 LDC [MR. CONNELL]: Before you move on from making your

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1 record it's not 434A, it's 434A (Government Supplement).

2 TC [MR. SWANN]: Let me do the following. I know what  
3 it's marked, but I think you need to understand ----

4 ADC [MS. LACHELIER]: If the government has a responding  
5 argument that's fine, but ----

6 MJ [COL POHL]: Let me ----

7 TC [MR. SWANN]: I know what it's marked. It's marked  
8 UNCLASSIFIED FOR PUBLIC RELEASE, but this is a piece of paper  
9 that she actually wrote back in 2000 ----

10 ADC [MS. LACHELIER]: With the guidance we had at the  
11 time.

12 MJ [COL POHL]: It's going to be easier if you let  
13 Mr. Swann finish and then, Ms. Lachelier, I will give you a  
14 chance, and maybe I will even get a word in edgewise.

15 Go ahead, Mr. Swann.

16 TC [MR. SWANN]: It's a document that she wrote before she  
17 was signed into an MoU and an understanding and read into  
18 various programs. So it would be -- I think it's unnecessary.  
19 You have got the document in front of you. You can read, but  
20 for her to at this time now start talking about what's  
21 contained on page 43 there ----

22 ADC [MS. LACHELIER]: It's a government filing at this  
23 point, Judge.

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1 TC [MR. SWANN]: I don't think it's a government filing.

2 MJ [COL POHL]: Ms. Lachelier, hold on.

3 I got it as an attachment to a government filing.

4 What's your point, Mr. Swann?

5 TC [MR. SWANN]: My point is this is a document that she  
6 said that she wrote ----

7 MJ [COL POHL]: Okay.

8 TC [MR. SWANN]: ---- back in 2008.

9 MJ [COL POHL]: So?

10 TC [MR. SWANN]: She now knows a whole host of other  
11 things based on being read into a whole host of other things.  
12 What I am trying to say is that the nature of that document,  
13 it would be unnecessary for her to have to address that here  
14 in this open setting.

15 ADC [MS. LACHELIER]: And Exhibit ZZZ, Judge, are why  
16 there are problems with the arbitrariness, and we are doing it  
17 on our feet now in court.

18 MJ [COL POHL]: Mr. Swann, let me see if I got this right.  
19 I have something that the government has marked UNCLASSIFIED  
20 FOR PUBLIC RELEASE. It's Appellate Exhibit 434A (Government  
21 Supplement).

22 You are referring to a piece of paper that was  
23 generated in '08, apparently, and because eight years later

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1 the author of said document may be exposed to other  
2 information that somehow this is not going to be a spill of  
3 some ilk, that I treat it as a classified piece. You are kind  
4 of making her argument for her, aren't you?

5 TC [MR. SWANN]: Sir, it's the confirmation of the  
6 information based on what she knows that may well -- may well  
7 be a spill.

8 ADC [MS. LACHELIER]: And going back to my ----

9 MJ [COL POHL]: You are doing okay here ----

10 ADC [MS. LACHELIER]: I get it, Judge.

11 MJ [COL POHL]: ---- so don't ----

12 So, Government, as you know, I understand the need to  
13 respect classified information. But she wrote something in  
14 '08 to the convening authority but it's your position that if  
15 she refers to it now in 2016, that somehow that makes it a  
16 potential spill?

17 TC [MR. SWANN]: Yes.

18 MJ [COL POHL]: How are we going to go forward, then?  
19 Because now what you are telling me is we have an unclassified  
20 public releasable document that we can't refer to in court  
21 today because it's eight years after it was referred to? Does  
22 that make this argument on 434 then a classified argument?

23 I understand your theory about confirmation. I got

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1 that. I got that. Okay. But as is being said here is you  
2 now have me into a world where I am not sure of what the left  
3 and right boundaries are now.

4 TC [MR. SWANN]: And I think the easiest way is she can  
5 make the argument in a closed session, but -- because this is  
6 her document. She is confirming certain things. I don't know  
7 how she got the information, but she is confirming certain  
8 things. Remember, she represented somebody before.

9 MJ [COL POHL]: Okay. Let me ask you this, Mr. Swann. By  
10 what you have said so far and the fact this is a public  
11 releasable document, wouldn't the spill have already just been  
12 done?

13 TC [MR. SWANN]: We have not talked about what part of the  
14 document. She has not mentioned those portions of the  
15 document. I mean, if she wants to -- she's already told you  
16 it's on page, a certain page, all right? But there is no need  
17 to go any further for her to make her argument other than in  
18 classified session.

19 MJ [COL POHL]: The commission will be in recess.

20 [The R.M.C. 803 session recessed at 1607, 6 December 2016]

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