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1 [The R.M.C. 803 session was called to order at 1051,
2 7 December 2016.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present.

5 Before we get to 434, we discussed before the break
6 about other things we can to add. Right now, as I see it,
7 we've got 434 403, 286J. The government had recommended we
8 then proceed with 177, 284, 394, 432, 465, to which I heard
9 the defense wish to be heard on whether or not some of these
10 are good to go or not.

11 LDC [MR. CONNELL]: Sir, I'll be heard on two of them.
12 One of them is 432. It's not actually accurate that that
13 hasn't been argued. It was argued on 12 October 2016,
14 submitted on the briefs, that can be found in the
15 unofficial/unauthenticated transcript at page 13838.

16 MJ [COL POHL]: Trial Counsel, why do we have to do it
17 again, then, assuming that's true?

18 CP [BG MARTINS]: Your Honor, on reconsideration, we don't
19 see there's anything left on that either.

20 MJ [COL POHL]: Okay. Thank you, Mr. Connell and General
21 Martins?

22 CP [BG MARTINS]: Your Honor, if I could, we had mentioned
23 in that discussion 308PP.

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1 MJ [COL POHL]: I believe that one is not fully briefed.

2 CP [BG MARTINS]: Right. And what I wanted to say was in
3 conference with Mr. Connell and Lieutenant Colonel Thomas, we
4 would seek an extra week to provide a reply on that, and they
5 don't object.

6 MJ [COL POHL]: Okay.

7 CP [BG MARTINS]: We want to be able to submit it a week
8 from today rather than today.

9 MJ [COL POHL]: Okay. Given the lack of an objection and
10 off the record Mr. Connell indicated there is no objection,
11 such an extension is granted. Make sure when you file the
12 pleading that it's on the first page so the court reporters in
13 my office knows that the extension has been granted.

14 CP [BG MARTINS]: Thank you, Your Honor.

15 MJ [COL POHL]: No problem.

16 LDC [MR. CONNELL]: Sir, the one other suggestion that I
17 want to be heard on that the government had is 465. It's not
18 actually correct that that one is fully briefed either. The
19 government's reply is due tomorrow, on the 8th of December.
20 Of course, they can waive their reply if they want.

21 But I would request the opportunity to prepare on
22 that. I have slides that I would like to prepare, but
23 obviously it's not -- I didn't expect to do it. We're not

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1 even fully briefed.

2 MJ [COL POHL]: Yeah, okay. Well, as a general rule if
3 it's on the docket order -- it doesn't necessarily have to be
4 on the docket order, it does have to be fully briefed. And if
5 it is not fully briefed, even if government waives it, you're
6 not prepared to go forward on it now?

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

8 MJ [COL POHL]: We won't do 465.

9 Ms. Bormann?

10 LDC [MS. BORMANN]: Thank you. I have a suggestion to add
11 first before I get to the other issues, and that's AE 315.
12 It's been pending a long time, and I'm prepared to argue that.
13 It's not on the docketing order, but it's fully briefed.

14 It's just sort of a scrivener's error issue. It's to
15 correct the last -- the English spelling of my client's last
16 name, which is properly pronounced Attash instead of Attash.
17 And the government opposed it despite the fact that ----

18 MJ [COL POHL]: We'll add it. Do you have any objection
19 to adding that, Trial Counsel? It seems to be relatively --
20 no? Okay.

21 LDC [MS. BORMANN]: On AE 177 and AE 394, though, I have
22 either a request to do one of two things. As you know, Judge,
23 we're shorthanded this week. We're missing Mr. Schwartz, and

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1 beside myself, Mr. Schwartz has been involved with this case
2 the longest.

3 AE 177 and AE 394 both require extensive factual
4 backgrounds, one involving IT infiltration by un -- that's
5 177 -- by unidentified people into the defense spaces that I
6 am not up to speed on and had not prepared, because it was
7 Mr. Schwartz's.

8 And AE 394, which deals with ICRC letters, there is a
9 significant issue in that, and that is Mr. Schwartz -- and I
10 don't remember if it was in the October session or the July
11 session, had asked you to determine whether or not he could
12 argue a certain portion of that. He had begun the argument,
13 but there was an outstanding issue of whether or not the
14 content of an ICRC report could be argued that was helpful in
15 the argument on this issue. I'm not even sure what that was
16 at this point. I could look back at the transcripts and try
17 and figure it out.

18 But I'm not going to be prepared to do that today or
19 tomorrow. Mr. Schwartz is on an OCONUS investigation. And if
20 the court insists on going forward on these instead of putting
21 them off for four weeks, which is what I would suggest, we
22 could try and have Mr. Schwartz make the argument via
23 telephone. Those are the options.

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1 MJ [COL POHL]: He's not going to appear by telephone.
2 But when you asked for his -- to excuse him from being here,
3 and then you also asked that a whole slew of motions not be
4 argued because he wasn't here, and I said okay, he doesn't
5 have to be here, but we're not -- the other part was turned
6 down.

7 LDC [MS. BORMANN]: Right.

8 MJ [COL POHL]: So you're asking me to reconsider that
9 ruling on these two issues only?

10 LDC [MS. BORMANN]: Right. So what happened is we made
11 the decision that one -- and unfortunately, the rest of the
12 parties are sort of at a loss as to what the issue is, but the
13 one issue is more important to effective assistance than the
14 other issue was.

15 So I tried to get up to speed on the other remaining
16 motions, which I did, and we are fully ready to argue. But on
17 these two particular ones, the factual backgrounds on them and
18 the fact that, at least with AE 394, he began it, because it's
19 also related to another ICRC issue, I'm simply -- I would try,
20 but I'm going to miss stuff, and that's not fair to
21 Mr. Bin'Attash.

22 So I would ask that one of two things occur. And
23 like I said, we're back here four weeks from now, so we're not

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1 talking about, you know ----

2 MJ [COL POHL]: I'm not back here in four weeks from now.

3 LDC [MS. BORMANN]: Five weeks? The end of January.

4 MJ [COL POHL]: I don't know how it works. It's the 23rd
5 of January.

6 LDC [MS. BORMANN]: Five weeks.

7 MJ [COL POHL]: More than four. I gotcha.

8 LDC [MS. BORMANN]: Something more than four, less than
9 six.

10 MJ [COL POHL]: We will be back late January, okay. I
11 understand your point. And understand, I'm treating it as a
12 motion for reconsideration, Ms. Bormann. I'm going to give it
13 to you this once and one time only. Any other time a counsel
14 asks not to be here, that's not going to upset the docket at
15 all.

16 LDC [MS. BORMANN]: I understand, and I appreciate it.
17 Thank you.

18 MJ [COL POHL]: My notes on 284 indicate that there was a
19 supplement filed and, therefore, it's not fully briefed. Is
20 am I accurate with that?

21 TC [MR. RYAN]: Yes, sir. The defense filed a supplement.
22 We do not need to respond to it.

23 MJ [COL POHL]: You're ready to go even considering the

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1 supplement? What I am saying is they filed a supplement. You
2 would normally -- that would normally give you more time to
3 respond, but you want to go ahead and argue 284 and not
4 respond in writing to the supplement?

5 TC [MR. RYAN]: It's a couple hundred pages, Judge, the
6 supplement, but I am going to be prepared. I will ask over
7 the lunch hour to take a look at it and make sure I didn't
8 miss anything.

9 LDC [MS. BORMANN]: Judge, if I may, I think it's our
10 supplement, so I may have missed that.

11 MJ [COL POHL]: Missed that in what way? You don't want
12 to argue that one either?

13 LDC [MS. BORMANN]: If I may just have a moment?

14 MJ [COL POHL]: Sure.

15 [Pause.]

16 LDC [MS. BORMANN]: Judge, we did supplement the end of
17 November, and the briefing schedule has not yet gone through
18 its cycle. This is -- I'm not prepared to argue it because I
19 didn't think it was going to be added to the call, since we
20 just filed a supplement ----

21 MJ [COL POHL]: I got it.

22 LDC [MS. BORMANN]: ---- that contains a long report and
23 other matters.

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1 MJ [COL POHL]: I understand your position. Just to be
2 clear, this is a different issue than the other one because,
3 as my docket order says, both sides prepared to argue any
4 motion where the briefing cycle has been completed. In this
5 case the briefing cycle has not been completed. Even though
6 the government is waiving its response to do it in accordance
7 with the order and practice, I won't require that one to be
8 argued.

9 So that only leaves us with 315. Defense, do you
10 have any others you wish to add? And, Trial Counsel, if
11 anything else comes up, let me know.

12 That brings us to 434.

13 Before we get into 434 -- and I don't want to stop
14 and start again -- is there a classification issue with 434?
15 Trial Counsel?

16 MTC [MR. TRIVETT]: No, sir.

17 MJ [COL POHL]: Okay.

18 DDC [LtCol GLEASON]: Good morning, Your Honor.

19 MJ [COL POHL]: Good morning, Colonel Gleason. How are
20 you today?

21 DDC [LtCol GLEASON]: I am good. Thank you.

22 MJ [COL POHL]: Go ahead.

23 DDC [LtCol GLEASON]: This is a reminder. 434 was a

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1 defense motion to compel discovery regarding Mohammad
2 al Kahtani, who the government has alleged to be the 20th
3 hijacker in this case.

4 We argued the motion in the October session, and
5 since that time the government has provided us the referral
6 binder that was provided to Ms. Crawford in this case, and the
7 government has supplemented with a notice to the commission.

8 Your Honor, I just wanted to point out that the
9 three, as far as the defense is concerned, the three
10 outstanding discovery issues that haven't been satisfied are
11 all the video recordings and statements made during the
12 interrogation of Mr. al Kahtani was one; the second is all
13 records of the interrogation methods used on Mr. al Kahtani
14 during these interrogations; and the third is the records
15 related to the torture and treatment of Mr. Kahtani.

16 We believe these three categories are material to the
17 preparation of the defense for three reasons. The first is
18 defense's obligation in a death penalty case to fully
19 investigate the case.

20 And in this case specifically, since the government
21 is alleging that Mr. al Kahtani is the would-be 20th hijacker
22 and they are alleging that he has a direct relation with
23 Mr. al Hawsawi, it is incumbent upon us as defense counsel to

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1 fully investigate his role in this case, to include all
2 statements he's made while he's been in custody and the
3 circumstances under which those statements were made.

4 Secondly, Your Honor, we need to -- as defense
5 counsel, need to determine whether -- we need to determine
6 whether to call Mr. al Kahtani as a witness in our case and
7 evaluate that fully, or if Mr. al Kahtani is not available,
8 whether we are going to try to introduce any of his statements
9 as hearsay statements.

10 MJ [COL POHL]: Is he represented by counsel?

11 DDC [LtCol GLEASON]: He is, Your Honor. In that case it
12 would trigger Military Commission Rule of Evidence 304(a)(3),
13 I believe, and -- as well as Military Commission Rule of
14 Evidence 803. It brings in the conditions under which those
15 statements were made, if they're made under torture, any other
16 conditions or mistreatment, Your Honor.

17 The third reason, Your Honor, why this is material to
18 the preparation of the defense ----

19 MJ [COL POHL]: Let me back up.

20 DDC [LtCol GLEASON]: Yes, sir.

21 MJ [COL POHL]: Any statements he made in violation of the
22 statute would not be admissible that were coerced?

23 DDC [LtCol GLEASON]: That's our understanding, yes, sir.

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1 It seems that Congress is pretty clear that any statement made
2 under conditions of torture were not admissible.

3 MJ [COL POHL]: I thought you said you may want to
4 introduce these statements.

5 DDC [LtCol GLEASON]: Your Honor, based on the Military
6 Commission Rule of Evidence, there's two that invoke
7 statements that are made or potentially made under torture.
8 One is 304(a)(3), which provides the degree of coercion
9 inherent in production of a statement from a person other than
10 the accused is offered by either party is disputed, such
11 statement may only be admitted if the military judge finds
12 that the statement was not obtained through the use of torture
13 or cruel or inhumane or degrading ----

14 MJ [COL POHL]: I'm just trying to understand, and again
15 it's kind of a side issue. Just the way you mention it though
16 is, are you saying -- do you want to introduce statements
17 taken under coercion?

18 DDC [LtCol GLEASON]: What we're saying at this stage in
19 the case, Your Honor, we need more information to make that
20 determination, make that evaluation. We don't intend to use
21 any statements that were made under torture or coercion, but
22 we need to understand the context of the statements that were
23 made by Mr. al Kahtani ----

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1 MJ [COL POHL]: Okay.

2 DDC [LtCol GLEASON]: ---- and the context under which
3 those statements were made in order to make that
4 determination, whether we would like to use his testimony at
5 some point in this case.

6 MJ [COL POHL]: Okay. Got it. Go ahead.

7 DDC [LtCol GLEASON]: Additionally, Your Honor, as we
8 point out in our motion, the treatment of Mr. al Kahtani is
9 relevant for mitigation purposes. The members, if we get to
10 sentencing, they'll have to make a determination of whether it
11 was fair and equitable for the convening authority to dismiss
12 charges against Mr. al Kahtani, and whether it's fair for
13 Mr. al Hawsawi to face potentially the death penalty in this
14 case.

15 In order to properly make that determination, the
16 members will need to evaluate the conditions of torture that
17 Mr. al Kahtani endured and compare those with the conditions
18 of torture that Mr. al Hawsawi endured, and determine if it is
19 fair and equitable to have Mr. al Hawsawi face the death
20 penalty when Mr. al Kahtani has faced no punishment and has
21 not been referred to a commission.

22 And that, subject to your questions, Your Honor ----

23 MJ [COL POHL]: I have no questions. Thank you.

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1 DDC [LtCol GLEASON]: Thank you.

2 MJ [COL POHL]: Any other defense counsel wish to be heard
3 on this issue?

4 Ms. Bormann.

5 LDC [MS. BORMANN]: We've requested information as part of
6 a discovery request to the government, and we just received a
7 reply within the last two weeks on that. Much of what we
8 requested -- some of what we requested overlaps with Mr. Ruiz
9 and Mr. al Hawsawi's case, but we requested different
10 materials under different theories of defense which relate to
11 our ex-parte filing in AE 275.

12 So we'll be filing our own motion to compel based
13 upon their denial of our requests.

14 MJ [COL POHL]: Okay.

15 LDC [MS. BORMANN]: So at this point, I mean, I hesitate
16 to ask to unjoin because it doesn't really matter. I just
17 don't want to be barred from arguing what we're going to put
18 forward by being estopped by the court because of ----

19 MJ [COL POHL]: Now, as I understand the discovery
20 process, although you guys are joining all the motions,
21 there's individual discovery related to just an individual
22 client. And if you file a discovery request of your own, then
23 you get ----

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1 LDC [MS. BORMANN]: Right.

2 MJ [COL POHL]: Now, if it's the exact same thing that's
3 been denied in a different ruling on that, that's one thing.
4 But if it's something different, I understand.

5 LDC [MS. BORMANN]: No, no. I mean, we did ask for
6 statements, but we asked for significantly more and
7 significantly different materials.

8 MJ [COL POHL]: No, I understand, particularly on the
9 mitigation case it's going to be accused specific.

10 LDC [MS. BORMANN]: Thank you.

11 MJ [COL POHL]: No problem. I see no other defense
12 counsel standing, so I'm assuming they don't have anything
13 further to add.

14 Trial Counsel?

15 MTC [MR. TRIVETT]: Subject to your questions, sir, we
16 argued our position and it's also articulated in our
17 supplement.

18 MJ [COL POHL]: Okay. Was there any contention about what
19 you've not given them, just so I'm clear? I mean, Colonel
20 Gleason indicated there are things you have not given them.

21 MTC [MR. TRIVETT]: We did provide two reports that have a
22 tremendous amount of information on how he was treated while
23 in DoD custody. I do not disagree that's not every single

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1 report in DoD custody.

2 MJ [COL POHL]: I got it. Thank you.

3 LDC [MR. NEVIN]: Could I?

4 MJ [COL POHL]: Sure, Mr. Nevin.

5 LDC [MR. NEVIN]: This would not be further argument. I
6 just wanted to ask you to clarify the conversation you just
7 had with Ms. Bormann, because this is an issue that's arisen
8 for me in the past -- for us in the past.

9 If another team makes a request for discovery of A, B
10 and C, and then some part of it is refused, and they come to
11 you and file a motion to compel discovery, and then you rule
12 on the question of whether A, B and C have to be provided,
13 does the military commission take it that the record is
14 complete with respect to Mr. Mohammad as well, or do I also
15 need to file a request for discovery for A, B and C?

16 MJ [COL POHL]: It depends, is the best I can tell you, is
17 that it depends on the nature of the original discovery
18 request, whether it was joined in. If there's an additional
19 basis for discovery, whether or not it should have been filed
20 originally -- I don't want to do piecemeal litigation, if I
21 can avoid it.

22 LDC [MR. NEVIN]: Right.

23 MJ [COL POHL]: But on the other hand, I do understand

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1 there may be circumstances that there -- that the same piece
2 of information may have a different basis from somebody else.

3 LDC [MR. NEVIN]: Right.

4 MJ [COL POHL]: But I would certainly encourage that if
5 that -- and you guys do it. I mean, somebody, Mr. Harrington
6 files a discovery request, automatic joinder. But there is
7 other -- you may put in, in addition, here is a basis for us,
8 okay? That's the way it should work, but I could envision a
9 time that maybe it didn't work that cleanly.

10 If that's what you're asking me, is should it all go
11 in at one time, the answer is it should. Is that an
12 absolute -- are you then estopped from doing it later on?
13 Best I can say is: It just depends.

14 LDC [MR. NEVIN]: I guess maybe I was asking the other
15 side of the question.

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

17 LDC [MR. NEVIN]: Which is, if Mr. Harrington has asked
18 for A, B and C, and I'm not talking about coming in and saying
19 what about C1, C2. I just want A, B and C too, maybe even the
20 exact words he used, no additional arguments, am I joined to
21 his request for discovery, or do I need to also make the
22 request for discovery?

23 MJ [COL POHL]: No, no. The automatic joinder requests

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1 apply to discovery rules as everything else.

2 LDC [MR. NEVIN]: Thank you, Your Honor.

3 MJ [COL POHL]: Understand, there is an exception to that.
4 And the exception would be if there's something specific to a
5 particular defense team that they want to protect from the
6 other defense teams, then I think -- but on its face it's
7 automatic joinder.

8 Do you understand there could be a scenario where one
9 team wants to keep it themselves and not share?

10 LDC [MR. NEVIN]: Right.

11 MJ [COL POHL]: But that would be, I think, on the --
12 you'd see that from the pleading itself, and if the pleading
13 was done that way -- or let's say it's filed ex parte, you
14 know, where you are not notified of it, then I'm not going to
15 hold it against you that you don't know what you don't know.

16 LDC [MR. NEVIN]: Right. And I might have a different
17 theory for the material being discoverable.

18 MJ [COL POHL]: Exactly, so it's kind of hard to go
19 forward with any, you know, firm rule.

20 LDC [MR. NEVIN]: Thank you.

21 MJ [COL POHL]: That's the best I can tell you.

22 Colonel Gleason.

23 DDC [LtCol GLEASON]: Your Honor, I just want to clarify

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1 for the record. Sounds like Mr. -- based on the discovery we
2 have received, it's been a very small sampling of
3 Mr. al Kahtani's interrogations, and we have received very
4 little about how he was tortured, other than the prosecution
5 referencing us to the Church Report and one other report that
6 was done.

7 MJ [COL POHL]: You filed a -- after the government gave
8 you this, and you may have, may not have. That's why I'm
9 asking the question. After the government provided you the
10 discovery, have you filed an additional motion to compel of
11 what they have not given you?

12 DDC [LtCol GLEASON]: We have not, Your Honor.

13 MJ [COL POHL]: Please do that so I know exactly what you
14 are talking about.

15 DDC [LtCol GLEASON]: Yes, sir.

16 MJ [COL POHL]: Because it's hard for me to glean as well
17 as you can of what you didn't get, what you think you need.

18 DDC [LtCol GLEASON]: Appreciate that, sir.

19 MJ [COL POHL]: General Martins, you're standing.

20 CP [BG MARTINS]: Your Honor, this goes to kind of a
21 general approach on handling specific discovery requests, and
22 I just want to make sure that on the fly we haven't
23 reconfigured basic principles of law.

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1 MJ [COL POHL]: I don't think we did.

2 CP [BG MARTINS]: But we understand a discovery request,
3 if it's then incorporated by reference into a motion to
4 compel, as defining the relief sought.

5 MJ [COL POHL]: Right.

6 CP [BG MARTINS]: And it's often very specific to a
7 particular accused. And we want to endorse what you said,
8 which was it depends. And the automatic joinder rule that we
9 have in this jurisdiction doesn't surmount or change the
10 requirement to ask for specific relief, and that that motion
11 to compel may not apply automatically, even though someone
12 files some joinder to a lot of work done by a particular
13 counsel to get some discovery.

14 MJ [COL POHL]: And, again, particularly we're talking
15 about some of this stuff, it's accused specific.

16 CP [BG MARTINS]: Right.

17 MJ [COL POHL]: So I got that. I don't think I said
18 anything -- what is your concern that we may be changing
19 the rule?

20 CP [BG MARTINS]: That we're opening up a world where late
21 in the game somebody can just say, hey, I was automatically
22 joined to this, now give me all of that specific discovery.

23 MJ [COL POHL]: No. What I am saying is if Mr. Harrington

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1 filed a discovery request, okay, and the government responds
2 back to them, okay, unless it's something specific to their
3 team, why wouldn't it go to everybody?

4 CP [BG MARTINS]: It depends.

5 MJ [COL POHL]: It depends.

6 CP [BG MARTINS]: We've got to read -- we've got to read
7 the request.

8 MJ [COL POHL]: That's right.

9 CP [BG MARTINS]: It's got to be material to the
10 preparation of their defense.

11 MJ [COL POHL]: I got it. That's why I say "it depends."
12 I don't think I've created a new big rule. It depends.

13 CP [BG MARTINS]: That's the rule.

14 MJ [COL POHL]: Read the motion.

15 CP [BG MARTINS]: Read the motion, read the relief.

16 MJ [COL POHL]: Is it specific to Mr. Bin'Attash or is it
17 specific to everybody, or is it general to everybody? And I
18 don't know I can say more than what I just said.

19 If Mr. Harrington -- I'm using him as an example --
20 if he files a discovery request that Mr. Nevin automatically
21 joins in, but you look at it only because of what you've got
22 for the theories of discovery ----

23 CP [BG MARTINS]: Correct.

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1 MJ [COL POHL]: ---- okay, it's got to be in the motion.

2 If the theories of discovery only apply to
3 Binalshibh, then Mr. Nevin doesn't provide you his, then
4 you're responding to Mr. Harrington, not to Mr. Nevin.

5 CP [BG MARTINS]: I hear you. I just didn't want to give
6 increased new force to this automatic joinder that would
7 not ----

8 MJ [COL POHL]: No, I don't think I've changed anything.
9 I didn't intend to.

10 Ms. Bormann. You caused all this mess.

11 LDC [MS. BORMANN]: Because I'm now mystified, so I'm just
12 going to try and clarify.

13 This was my understanding, and correct me when I go
14 terribly wrong. My understanding was, when I file a discovery
15 request, let's say it's for information related to the RDI
16 program, which relates to all five of these men, that when the
17 government gives me -- when is hopeful, but when at some point
18 the government gives me the discovery, it would apply to all
19 five of these men, whether or not those men's lawyers actually
20 requested it in a separate discovery request. So that way we
21 don't have to duplicate effort on the defense side ----

22 MJ [COL POHL]: Let me give you what I think is an example
23 of this.

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1 LDC [MS. BORMANN]: Okay.

2 MJ [COL POHL]: You request the OLC memos, discovery and
3 treatment of Mr. Bin'Attash.

4 LDC [MS. BORMANN]: Right.

5 MJ [COL POHL]: Okay. Your theory of relevance on the OMC
6 memos relevance and discoverability, I'm talking about.

7 LDC [MS. BORMANN]: Right, because they're all RDI.

8 MJ [COL POHL]: But the theory of discovery -- and I'm
9 using short-form terms here, so understand, discovery,
10 relevance, is material to the preparation of defense, only
11 applies to your request as it relates to your client.

12 LDC [MS. BORMANN]: So on the separate issue of Mr. --
13 let's take it -- get it a little clearer, I think.

14 OLC memos apply to all five, it doesn't matter which
15 defense counsel requests them, the government should realize,
16 look, if they're discoverable to one, they're discoverable to
17 all.

18 MJ [COL POHL]: Again, if they give you the OLC memos and
19 for some reason they don't give it to them, you give it to
20 them.

21 LDC [MS. BORMANN]: Exactly.

22 MJ [COL POHL]: Funny, I didn't think it was a problem,
23 but apparently I wasn't aware. But go ahead.

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1 LDC [MS. BORMANN]: Let's say something as sensitive as
2 medical records, I request Mr. Bin'Attash's medical records.

3 MJ [COL POHL]: It goes to you.

4 LDC [MS. BORMANN]: Exactly. And that's the way we've
5 been treating it.

6 MJ [COL POHL]: I have no problem with that. If you want
7 to share, that's up to you.

8 LDC [MS. BORMANN]: Right, Mr. Bin'Attash, right.

9 MJ [COL POHL]: What I think General Martins was saying is
10 that they're judging discovery requests based on material to
11 preparation of the defense from the requester. And that's
12 still the rule. And so if it's specific to your client,
13 they're not going to interpret it as for Mr. Nevin or
14 Mr. Mohammad. But if it's the theory -- I think the OLC memos
15 versus treatment of an individual, I think that's what the
16 concern was, and so there's been no change on that.

17 LDC [MS. BORMANN]: If it's a macro level applying to all
18 five, the fact that one requested it is good enough.

19 MJ [COL POHL]: The government's response is based on the
20 basis of discovery. If the basis of discovery is specific to
21 a client, they will judge it to that client. If the basis of
22 discovery applies to all five, they will judge it that way.
23 If you don't need all five, you don't need all five requests.

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1 But specific to a client, because, otherwise, they can't make
2 a discovery determination. Okay?

3 LDC [MS. BORMANN]: I appreciate it. Thank you.

4 MJ [COL POHL]: No problem.

5 Brings us to 403.

6 LDC [MR. CONNELL]: Sir, the government's response in 403
7 says that they're producing discovery under their ten-category
8 construct.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: That makes sense for me to wait and
11 see what we get.

12 MJ [COL POHL]: Keep it on the docket, okay.

13 CP [BG MARTINS]: Sir, can I give a quick status on that?

14 MJ [COL POHL]: Sure.

15 CP [BG MARTINS]: We are reviewing oral history material,
16 and this does fit within the ten categories. I would like to
17 direct to Attachment C of Appellate Exhibit -- AE 30800, so
18 this is a reference to where we have already produced it
19 within a request for substitutions and other relief.

20 So it's Tab 125 of Attachment C to Appellate
21 Exhibit 30800, and I went personally and eyeballed it just to
22 make sure when this status request came up that I recently
23 looked at it.

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1 MJ [COL POHL]: 30800, Tab?

2 CP [BG MARTINS]: Tab 125, and that's -- the Bates numbers
3 for how you've marked it are 2058 to 2201 covers all the oral
4 history materials.

5 MJ [COL POHL]: Okay.

6 CP [BG MARTINS]: So we've reviewed and provided you a
7 request for ----

8 MJ [COL POHL]: While we're talking about this -- no, I
9 got it. Okay. Thank you.

10 CP [BG MARTINS]: And we would request the ability to
11 explain, you know, how we've done that and our methodology at
12 the earliest opportunity under 949p-4(b), our ex-parte
13 conference.

14 MJ [COL POHL]: Okay. That brings us to 286J. I believe
15 Mr. Connell wanted to, I believe, revisit this one.

16 LDC [MR. CONNELL]: Yes, sir. It hasn't been visited at
17 all yet.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: 286 is the motion -- 286 base motion
20 is a motion to compel the production of the SSCI report and
21 its underlying information. 286J is specifically a request
22 not to have anything produced to the defense, but to have the
23 SSCI report produced to the military commission ex parte and

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1 under seal for its preservation. That situation has become
2 even more important in light of political events.

3 So a little brief history. On 2 April of 2014 we
4 filed AE 286, the motion to compel the SSCI report. That was
5 before the redacted executive summary had been released to the
6 public.

7 On 9 December 2014, the Senate Select Committee on
8 Intelligence released its redacted summary. In the speech
9 which accompanied the release, Senator Feinstein said that the
10 full study is, quote, more than ten times the length of the
11 executive summary and includes comprehensive and excruciating
12 detail. She also said that it includes, quote, a review of
13 each of the 119 known individuals who were held in CIA
14 custody.

15 This is especially significant because the focus of
16 the executive report is on the conduct of the CIA rather than
17 their conduct with respect to individual prisoners.
18 Mr. al Baluchi, for example, is mentioned very rarely in the
19 report and mostly in footnotes.

20 On the following day, on 10 December of 2014, the
21 Senate Select Committee on Intelligence distributed the
22 original report to the President, the Director of National
23 Intelligence, the Director of the CIA, the Attorney General,

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1 the Secretary of Defense, the Secretary of State, the Director
2 of the FBI, and the Inspector General of the CIA.

3 Following a political transition in the legislature,
4 on 14 January of 2014 -- excuse me, '15, Senator Burr, the new
5 Chairman of the Senate Select Committee on Intelligence
6 wrote -- requested a return from the executive branch of those
7 copies. That is Attachment B, Bravo, to AE 286J.

8 This issue came to the military commission, and in
9 286L, the government wrote on 13 February of 2015, I quote,
10 the United States Department of Defense can nonetheless assure
11 the commission that it will preserve the status quo regarding
12 the full SSCI report, absent either leave of the commission or
13 resolution of this litigation in the prosecution's favor.

14 There are three reasons that I suggest things that
15 have changed that make it no longer possible for the military
16 commission to treat that as the end of the issue, and instead
17 the military commission should order the Department of
18 Defense's copy, if nothing else, of the report to be placed in
19 its custody, sealed. I'm not saying you have to read it, but
20 just for preservation purposes.

21 The first is that one of the eight copies in the
22 existence of the executive branch has been destroyed. The CIA
23 Inspector General has reported it has destroyed its copy,

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1 acknowledged this. It was initially reported on 16 May of
2 2016 by Michael Isikoff of Yahoo News, acknowledged by the CIA
3 Inspector General that it has, it says, inadvertently
4 destroyed its copy of the report. That inadvertent
5 destruction demonstrates the risk posed to the report even
6 without bad faith on the part of any actor.

7 Second thing that has changed is that we have seen
8 the events which are reflected in this morning's argument
9 regarding AE 425, that the United States Government, through
10 what it describes as a mistake, has decommissioned or
11 destroyed a black site without notice to the defense, under an
12 ex parte undisclosed order despite similar assurances, and in
13 fact, not only similar assurances but an order, which was a
14 public order, issued by the military commission in AE 080G.

15 We truly only found out about that issue because of
16 my personal slavish and nerdy devotion to the filings
17 inventory. Thank you, Trial Judiciary. Otherwise, I suspect
18 we still would not know.

19 The third issue is that due to political changes,
20 there is likely -- there will be a new administration.

21 This brings us to the issue which is briefed in
22 AE 286 (AAA Supplement), the question that you asked me about
23 the relationship between the executive and legislative

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1 branches with respect to legislative information.

2 The document itself falls, is discoverable under
3 701(c), the scope of which is, quote, possession, custody or
4 control, a disjunctive description of three types of
5 relationship that the executive branch can hold to the
6 document.

7 That's different from the Freedom of Information Act
8 standard. In fact, there are two cases, one from the
9 D.C. Circuit and one from the D.C. District which I cite in
10 AAA 3rd Supplement. The one which is relevant here is
11 Safavian at 233 F.R.D. 12, a District case from 2005, which
12 describes the difference between the criminal standard,
13 Federal Rule of Criminal Procedure 16 in that example, but
14 uses the same possession, custody or control language that
15 701(c) does, and how that's different from the legislative
16 FOIA standard, which is simply control.

17 The new administration has made statements promising
18 waterboarding or worse, and there are many reasons to believe
19 that it is hostile to preservation of the report -- since both
20 the legislature and the executive will be under control of
21 persons who have expressed their displeasure with the report,
22 there is a real reason to suspect that the report could be
23 destroyed either inadvertently, as the CIA Inspector General

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1 has claimed, or as part of a political strategy.

2 The only remaining issue is the question of the
3 legislative privilege, and that is dealt with by a
4 D.C. Circuit case, Christoffel v. United States, at 200 F.2d
5 734, D.C. Circuit 1955. Christoffel explains the answer to
6 the question that the military commission posed to me on the
7 record, which was: What about legislative privilege? And, in
8 effect, legislative privilege works no different than
9 executive privilege, in that Congress has a privilege not to
10 disclose information if it chooses not to.

11 But Congress is the one who decides whether to assert
12 that privilege and whatever implications may come from it.
13 And it is routine, in fact, for Congress to, upon a request,
14 to waive its legislative privilege. One example that we cited
15 in the briefs, found at, which was Senate Resolution 600 in
16 the congressional record at S, like Sierra, 6443 at the 111th
17 Congress, Second Session, July 28, 2010, was an example of the
18 Senate Select Committee on Intelligence, from the judicial
19 branch, a subpoena to produce certain information, agreeing to
20 produce the information.

21 In this situation, legislative privilege does not
22 need to come into play because a copy of the report is in the
23 possession and custody of the Department of Defense, even if

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1 it remains under legislative control while it is there. It is
2 still in the possession of the Department of Defense, bringing
3 it under 701(c). It is still in the custody of the Department
4 of Defense, bringing it under 701(c). Even if it is a
5 legislative record, as the D.C. Circuit has held, that applies
6 only to one of the three prongs under 701(c).

7 Even -- so there are really two resolutions to the
8 separation of powers question. Resolution number one is that
9 there is no separation of powers question. The Secretary of
10 Defense is the person who enacted Rule 701(c). The Secretary
11 of Defense knows what it means and is responsible, has custody
12 of the document and would -- there's no separation of powers
13 question in the direction that a copy of it be turned over
14 under seal to the military commissions.

15 Second, if there is a separation of powers issue,
16 because of the continuing legislative control -- which the
17 Supreme Court may review, but we'll cross that bridge when we
18 come to it. Because of the continuing legislative control,
19 the proper answer is to send a communication to the -- to
20 Congress asking if it will -- if it intends to assert its
21 legislative privilege or waive its legislative privilege.

22 It cannot do anything about that until it's asked,
23 and its early indications are mixed that it has provided a

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1 copy to the Department of Defense and then it asked for it
2 back. And the government has pushed back against that
3 and said that it will not.

4 MJ [COL POHL]: Just to be clear, and I may have my dates
5 slightly off here, but as I recall, it was declassified
6 December of '14, the executive ----

7 LDC [MR. CONNELL]: The executive summary, yes.

8 MJ [COL POHL]: After the elections in November of '14,
9 when there was going to be a change of party in the Congress.

10 LDC [MR. CONNELL]: Yes.

11 MJ [COL POHL]: Okay. When that change took place -- and
12 the dissemination was done at that time.

13 LDC [MR. CONNELL]: Yes, sir. On 10 December.

14 MJ [COL POHL]: When the change took place and the other
15 party became in charge, that's when they said give it back to
16 me.

17 LDC [MR. CONNELL]: Yes, sir, that's right.

18 MJ [COL POHL]: Then we had FOIA litigation on whether
19 it's a legislative record, or whatever it is.

20 LDC [MR. CONNELL]: With respect to the public.

21 MJ [COL POHL]: One can always ask. I have no problem
22 asking various things. I have a problem ordering things
23 unless I have authority to order or sanction if the order is

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1 not complied with.

2 But so requesting it to be provided is -- waiving the
3 privilege, assuming it exists -- is just send a letter, dear
4 whomever. But you think the -- you think there's a chance
5 that they will waive it, or you just don't know until you ask?
6 I mean, because the party who requested it back is still the
7 party in power today and still the party ----

8 LDC [MR. CONNELL]: There are many political
9 considerations that would go into a congressional decision
10 about legislative privilege.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: One of those, no doubt, is the example
13 of the My Lai massacre trials, when Congress asserted its
14 legislative privilege and one individual was discharged from
15 custody because Congress asserted its legislative privilege.
16 In that situation it was conservative members of Congress who
17 did not like the Mi Lai prosecutions and interfered with them.

18 But given that example, one of the considerations
19 which Congress would no doubt take into consideration is the
20 relevance of the SSCI report to this prosecution and the
21 effect of its invocation of legislative privilege on this
22 prosecution.

23 So it is by no means clear to me that the legislative

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1 body would say, that it would assert its privilege at the risk
2 of damaging this prosecution. It might say, yes, military
3 commission, here you go, we would like to see that prosecution
4 proceed as fast as possible, and we'll do anything that is in
5 our power as Congress to make that happen. I don't know. I
6 don't know the answer.

7 MJ [COL POHL]: I understand. So you're asking me to do
8 maybe two things, or at least one of two things. One is
9 request it from Congress, okay?

10 LDC [MR. CONNELL]: Yes.

11 MJ [COL POHL]: Okay. Or -- and/or order the Department
12 of Defense to maintain its copy?

13 LDC [MR. CONNELL]: Yes.

14 MJ [COL POHL]: Okay. Assuming they still have a copy.

15 LDC [MR. CONNELL]: So someone used the phrase
16 epistemological limit yesterday, and I thought there are some
17 things that we can never know. I can't know whether the
18 Department of Defense has destroyed its copy or not. But I
19 assume good faith on all the actors.

20 I take the CIA Inspector General at its word that its
21 destruction was inadvertent, and hopefully there has not been
22 a series of accidents across the entire executive branch that
23 resulted in destruction.

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1 MJ [COL POHL]: What if they simply complied with Senator
2 Burr's request and said, here, take it back?

3 LDC [MR. CONNELL]: If they did that, or did they do that?

4 MJ [COL POHL]: I don't know whether they did or not.

5 LDC [MR. CONNELL]: They said they inadvertently ----

6 MJ [COL POHL]: I know that one, but I'm saying the other
7 people they distributed it to. And when the parties change,
8 they say give it back to me, right?

9 LDC [MR. CONNELL]: He did say that, yes, sir.

10 MJ [COL POHL]: We don't know whether that -- I know the
11 government, I believe, represented they reviewed this report,
12 but I don't know if they reviewed a DoD version -- rephrase
13 that.

14 LDC [MR. CONNELL]: They reviewed a Senate SSCI version.

15 MJ [COL POHL]: But what I am saying is, was that the
16 Senate version of the report or the one in the ----

17 LDC [MR. CONNELL]: Yes, it was the Senate version.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: But what the government has also
20 promised in AE 286L was that the Department of Defense will
21 preserve the status quo. I don't know that it can ----

22 MJ [COL POHL]: What's the date of that pleading?

23 LDC [MR. CONNELL]: February of 2015.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: So which is my point as to why an
3 order is necessary at this time and a promise is not
4 sufficient.

5 MJ [COL POHL]: I'm with you. When you say preserve the
6 status quo, because that postdates the request for it to be
7 returned.

8 LDC [MR. CONNELL]: Does that mean maybe they tricked us?

9 MJ [COL POHL]: I don't know if it was a trick or mistake
10 or something else. What I am just saying is preserving the
11 status quo, unless you know what is the status quo, you don't
12 know what they're preserving.

13 LDC [MR. CONNELL]: Maybe you can ask them.

14 MJ [COL POHL]: Maybe it will come up. Anything further?

15 LDC [MR. CONNELL]: Thank you.

16 MJ [COL POHL]: Thank you.

17 Mr. Nevin?

18 LDC [MR. NEVIN]: Your Honor, I think it's implicit in
19 what Mr. Connell said to you, but I'll just say it and say it
20 briefly: The importance of this information is really hard to
21 overstate.

22 Everything that we've learned about the report
23 inferentially from the summary and other sources is that the

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1 chapter of the report that deals with Mr. Mohammad will be
2 absolutely vital mitigating evidence and extremely important,
3 right up there with the ability to review the black sites
4 themselves. They show medical experimentation. They show
5 torture. They show extremely important facts that can be
6 offered in mitigation on behalf of Mr. Mohammad.

7 And I wanted to be able to say that directly to Your
8 Honor on that question. Thank you.

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

10 Mr. Harrington.

11 LDC [MR. HARRINGTON]: Judge, I join with what Mr. Connell
12 and Mr. Nevin said, but I think in the recent historical
13 context the release of that report in December of 2014, the
14 executive summary changed the dynamics of this case
15 completely.

16 We were in a position of scrambling and fighting for,
17 attempting to get information from the prosecution. They, in
18 doing their job, are limiting as much as they can what is
19 turned over to us; we understand that.

20 But when the executive summary was released, it
21 changed the attitude of everybody, not only in the
22 United States, but in the world, because it put into the
23 public events that happened, even in a summary form. That

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1 changed not only what people knew, but also the character and
2 the nature of the arguments that we are able to make in this
3 case.

4 We are not asking that the 6,000 pages be distributed
5 to the rest of the world. We are only asking that the 6,000
6 pages be preserved at this point in time and be made available
7 to us to use in this -- everybody keeps saying to me all the
8 time, this capital case, this death penalty case.

9 But if there is any issue that needs to be addressed
10 by a capital jury in their decision that they make, whatever
11 decision that may be, assuming that this gets to that point,
12 all of that information needs to be out in front of everybody.
13 Thank you.

14 MJ [COL POHL]: Thank you, Mr. Harrington.

15 Mr. Ruiz?

16 LDC [MR. RUIZ]: Judge, I want to adopt and join in the
17 statements of colleagues, counsel, on this particular issue
18 and just highlight for you that Mr. al Hawsawi's team, we
19 originally requested this full report as late back as
20 25 September 2013, is when we first submitted our discovery
21 request to the prosecution for materials contained in the
22 SSCI, now known as the torture report.

23 That information, of course, was never disclosed or

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1 provided to us by the prosecution. It came through the public
2 release of those documents. And, of course, as the court is
3 well aware, we also were able to obtain additional information
4 obtained not through the prosecution but through FOIA releases
5 of CIA documents. And that is the sum and substance of all
6 useful information we really have in this case.

7 I think it's worthy to note none of that came from
8 the prosecution or through disclosures in this case. It came
9 from public releases of documents we are now seeking to
10 preserve. So I echo the request to take all available means
11 and efforts to preserve this information because it is clear,
12 at least to me, that the prosecution has no intent of
13 providing this information, and hasn't to date.

14 So we ask you to preserve this to the greatest degree
15 possible, and to do so, Judge, as expeditiously as you can.
16 Thank you.

17 MJ [COL POHL]: You're welcome.

18 Ms. Bormann.

19 LDC [MS. BORMANN]: I echo the concerns of Mr. Connell and
20 the arguments of all the other counsel. But one thing
21 specifically related to Mr. Bin'Attash needs to be made of
22 record.

23 We have requested from the government all of the

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1 documents involving footnote 724 of the SSCI report, and
2 that's found at page 122 of 499, and I'm going to read to you
3 what it says: Senior interrogator -- they're talking, just to
4 put in context, about how it is that the CIA got in the way of
5 itself in this push to torture people to the limit.

6 And it starts -- it's the second sentence, it says:
7 Senior interrogator, name redacted, provided the example of
8 Khallad Bin'Attash who told the OIG -- standing for the Office
9 of Inspector General -- was determined by the chief of base at
10 Detention Site Blue not to, quote/unquote, warrant the CIA's
11 enhanced interrogation techniques.

12 According to the, blank, redacted, debriefer, blank,
13 another name blanked out, called Alec Station, A-L-E-C, told
14 them to, quote/unquote, go to the mat in advocating for the
15 use of the CIA's enhanced interrogation techniques, claiming
16 that it Bin'Attash was holding back information. Then it
17 says: See interview of, name redacted, Office of the
18 Inspector General, April 30th, 2003.

19 The reason I bring that to your attention is because
20 if the full report is destroyed, inadvertently or
21 intentionally, we will lose at least the information collected
22 by the Senate, footnoted in footnote 724.

23 And understand the United States, the people on the

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1 ground, the CIA, that Mr. Swann called the good people of the
2 CIA yesterday who tortured people, those people on the ground
3 at Detention Site Blue, whatever Detention Site Blue is, where
4 Mr. Bin'Attash was being held, were saying Mr. Bin'Attash
5 didn't need to be subjected to torture, to EITs. And the
6 people back in the United States, whoever they are, names
7 redacted, said we're not believing you, good people on the
8 ground in the CIA. We want you to go to the mat anyway. That
9 is evidence of misconduct and it is outrageous government
10 conduct, and it mitigates the death sentence here.

11 If you do not order that the government do everything
12 in their power to preserve that evidence, I will be standing
13 before you at some point in the future asking that death be
14 removed as a possible sentence because mitigating evidence was
15 destroyed.

16 More importantly, it isn't just the SSCI full report
17 that needs to be preserved. What we asked you to do in this
18 motion is to preserve the underlying 6 million pages of
19 documents relied upon by the Senate in composing the full SSCI
20 report. And so we're asking that you order Congress and the
21 CIA to preserve those two things to the greatest extent
22 possible.

23 Subject to any questions.

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

2 LDC [MS. BORMANN]: Thank you.

3 MJ [COL POHL]: Let's hear from the government first.

4 LDC [MR. NEVIN]: I just wanted to ask when you rule, that
5 you rule sufficiently in advance of January the 21st, that
6 your ruling is not overtaken by events. Thank you.

7 MJ [COL POHL]: Trial Counsel?

8 CP [BG MARTINS]: Your Honor, to provide a little context
9 and inject a few facts into the discussion: February 2015 we
10 gained access to the full Senate Select Committee on
11 Intelligence report, a study of the CIA's former rendition,
12 detention and interrogation program, and we have been
13 reviewing it in spaces in the Senate. We've been looking at
14 the Senate's report. It is the government's position that
15 this is a legislative branch document -- they own it -- and
16 that we are reviewing it.

17 Some context: They didn't interview government
18 personnel. They relied upon executive branch documents that
19 we have access to. And notwithstanding insinuations and
20 claims by counsel to have prompted us to go do things, we have
21 been reviewing all reports in our possession, custody and
22 control and the definition of that and the appropriate
23 understanding of that to provide all noncumulative, relevant,

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1 helpful information, including the material that's classified
2 that they're footnoting and referring to, that is, the Senate
3 is.

4 So we are very mindful of that and did complete the
5 review prior to our delivery on our promise last December to
6 comply with the ten categories by 30 September, comply with
7 our obligations in the sense of having provided either defense
8 directly or the commission for substitution and other relief,
9 the materials. So we are very much about that task.

10 Counsel is now asking for some pretty extraordinary
11 things for the commission to do. To the extent he's asking
12 for the Senate to keep its copy, that is a legislative branch
13 document. I thought your questions were nuanced in terms of
14 the commission's authority in terms of ordering another branch
15 of government -- or a branch to do something.

16 MJ [COL POHL]: Anything wrong with requesting them to
17 provide it?

18 CP [BG MARTINS]: Your Honor, we would submit that we
19 are -- we have examined it. Counsel for the accused Ali Abdul
20 Aziz Ali, noted by the others, noted that the report is
21 valuable because it is a record of what they looked at.

22 And, in fact, the requests that come in are in the
23 nature of the one Ms. Bormann related, of looking at a

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1 footnote and saying we want these documents. We have looked
2 at these documents and we are reviewing them and are providing
3 them to you. You have many of them in your 308 filings now.

4 So we would submit that the commission write a
5 letter -- you're conceiving of something that's in the nature
6 of some kind of mandamus relief?

7 MJ [COL POHL]: No. No. What I am saying is if you
8 operate from the -- two things I want to ask you, but the
9 first one, just on this issue: If you operate from the
10 premise that it's a legislative-owned document, for which a
11 court doesn't have authority to order them to produce it,
12 okay, then one suggestion -- but they can choose to waive
13 their legislative privilege and provide it.

14 Wouldn't be -- mandamus is an order. I'm not talking
15 an order. I'm simply saying ----

16 CP [BG MARTINS]: Our response to the motion states that,
17 you know, this is -- it is a legislative branch document.
18 Without apology or need to qualify, there is no right, with
19 classified information, to an original document. There's a
20 right to the information, and through the classified
21 information procedures process, we are complying with that.

22 We have access to that report and we have reviewed
23 it. We have gone back several times, as we've gone and looked

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1 at the original documents and wanted to make sure we are
2 looking at everything necessary.

3 MJ [COL POHL]: Okay. But what you're -- let me make sure
4 I've got this straight, is you've looked at the document.
5 Anything that is discoverable under Yunis, or whatever it is,
6 it's the government's position that that's being provided, I'm
7 assuming, through somewhere in the 308 series?

8 CP [BG MARTINS]: Yes. It's part of the ten categories.

9 MJ [COL POHL]: All right. But I'm just trying to figure
10 this out. Is then the -- is the original document, then,
11 subject to a 505 review?

12 CP [BG MARTINS]: The document is opinions and analysis of
13 the legislature.

14 MJ [COL POHL]: No, I'm saying opinions and
15 conclusions ----

16 CP [BG MARTINS]: Right, but the facts underlying ----

17 MJ [COL POHL]: But what we're talking about here, I want
18 to make sure I understand your position on this. You said
19 you're reviewing the Senate version of this, the legislative
20 original of this.

21 CP [BG MARTINS]: The full document.

22 MJ [COL POHL]: Right, the Brady material and the Yunis
23 material, for want of a better term. And you're saying it's

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1 being provided mostly in the 308 series.

2 CP [BG MARTINS]: Yes.

3 MJ [COL POHL]: But you're not saying the 308 series is a
4 505 substitute for the Senate report?

5 CP [BG MARTINS]: Oh, no.

6 MJ [COL POHL]: Okay.

7 CP [BG MARTINS]: Yeah, we're making requests under 308
8 for substitutions and other relief.

9 MJ [COL POHL]: Now, when you said in February that the
10 Department of Defense maintained the status quo, does that
11 mean the Department of Defense still has a copy of it, to your
12 knowledge?

13 CP [BG MARTINS]: We are reviewing the original document
14 based on -- and it is a -- and as it is a legislative
15 document, we felt that was the appropriate thing to do and
16 that's what we're doing. I can't give you a status on
17 non-final, non-authoritative drafts and so forth. That's ----

18 MJ [COL POHL]: No, as far as I know -- that's not what
19 I'm talking about. What I am talking about is the Senate in
20 December disseminated to various entities, for whatever -- and
21 they have their reasons for doing that. And then in January
22 the new Senate said give me those back.

23 Mr. Connell is arguing -- and for the sake of

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1 argument, not necessarily that I agree with the theory, that
2 if the Department of Defense still has its copy, then there's
3 an argument that it's discoverable under the rules promulgated
4 by the Secretary of Defense that deals with, as he says,
5 control and custody. Okay. Now ----

6 CP [BG MARTINS]: There may be an argument there.

7 MJ [COL POHL]: Okay. But what I am saying -- but the
8 argument is predicated on a certain factual predicate that
9 will resolve it if they don't have it.

10 CP [BG MARTINS]: And I'm not prepared to tell you. It's
11 a legislative document where there were communications from
12 the chairman of that committee.

13 MJ [COL POHL]: But you can tell me you can go back to the
14 Department of Defense and say do you have a copy?

15 CP [BG MARTINS]: Your Honor, it's a legislative copy.
16 I'm giving you the government's argument that this is not an
17 executive branch document.

18 MJ [COL POHL]: I understand what you are saying. But
19 you're saying, Your Honor, I'm not going to -- it's a
20 legislative document, and therefore Mr. Connell's argument
21 about custody and control is irrelevant. And I'm not saying
22 one way or the other, but if it's not there, then I don't have
23 to reach it.

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1 CP [BG MARTINS]: I don't think you have to reach it
2 anyway, because what he's asking for is in the nature of
3 mandamus relief. He certainly doesn't have a clear and
4 indisputable right to this. He has a clear and indisputable
5 right to what we are going about every day trying to provide
6 him.

7 And under the Supreme Court's decision in Cheney
8 which you've cited on a couple of occasions on the
9 requirements for mandamus relief, which is what he's asking --
10 he's asking you to tell officials to do stuff. There has to
11 be a clear and indisputable right.

12 MJ [COL POHL]: General Martins, the government sometimes
13 makes this stuff much more difficult than it needs to be. If
14 you simply tell me that the Department of Defense does not
15 have this document, then I don't need to worry about it.

16 CP [BG MARTINS]: Your Honor, for a number of reasons, it
17 is a legislative document, and I have gone to the legislature
18 to make sure we have reviewed it, so ----

19 MJ [COL POHL]: Okay. Okay. I understand your position.
20 I'm just saying on all this discovery stuff, if the government
21 simply said we don't have it, we're now done. And what you're
22 saying is, Judge, I'm not going to tell you whether they have
23 it or not because we're going to win on the motion.

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1 CP [BG MARTINS]: Your Honor, I think that has certain
2 implications, that kind of approach, to the whole thing. We
3 are going and looking at everything that's in the possession,
4 custody and control of the government. We've gone, indeed, to
5 the Senate study and looked at it there.

6 The casual notion that we can go around and order
7 officials without a clear and indisputable right ----

8 MJ [COL POHL]: I'm not asking anybody to order anything.
9 I'm just saying does it exist in the Department of Defense?
10 That's all I'm asking. If the answer is no, then the issue is
11 gone. If the answer is yes, then we go to the
12 substantive ----

13 CP [BG MARTINS]: I'm not prepared to answer the question.
14 I can determine if there's a way to find that information.
15 I'm telling you ----

16 MJ [COL POHL]: I got it. I hear you.

17 CP [BG MARTINS]: Our basis is that they've got the
18 information. We provided it to you in the 308 series, and we
19 should litigate that.

20 MJ [COL POHL]: Okay.

21 CP [BG MARTINS]: Thank you.

22 MJ [COL POHL]: Thank you.

23 Anything further?

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1 LDC [MR. CONNELL]: Your Honor, three points. The first
2 one is that in many ways the separation of powers question is
3 an illusion. 99 percent of judicial orders or quasi-judicial
4 orders are interbranch. What ordinarily happens is part of
5 the judicial branch orders someone in the executive branch to
6 produce something.

7 We're just shifting the players. Someone in the
8 executive branch is issuing an order to either someone in the
9 executive branch or someone in the legislative branch.

10 MJ [COL POHL]: I'm not sure that's as easy a shift as you
11 make it out, but I understand your point.

12 LDC [MR. CONNELL]: Sure.

13 The second thing is I don't know where mandamus came
14 into it at all. We actually have a rule on this, which is
15 703(f)(4)(B), evidence not under control of the government --
16 assuming that we mean little G government there and not big G
17 Government. But assuming it means -- if it means evidence
18 under the control -- if government means the United States
19 Government, then under 7(f)(4)(A) [sic], all you have to do is
20 notify the custodian. Under 703(f)(4)(B), if government means
21 prosecution, then evidence not under the control of the
22 government may be obtained by subpoena.

23 That's what we're talking about here. And if the

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1 military commission issues a subpoena, then Congress can
2 either assert its legislative privilege and accept the
3 consequences of doing so, or it can waive its legislative
4 privilege. There is not a default that it is going to assert
5 its privilege. It's like every other privilege in the world,
6 like classified information privilege, like attorney-client
7 privilege. It has to be asserted in order to be effective.

8 The third point is that in many ways the government
9 has just made our argument for us. The head of the Office of
10 the Chief Prosecution just told you that it does not know --
11 that he does not know whether the Department of Defense has
12 kept the promise, which was reflected in 286L, that he simply
13 does not know.

14 And that is exactly the situation that we are moving
15 to preserve this report for, because people acting in good
16 faith who simply decide not to take cognizance of a situation
17 may allow critical evidence to the defense to be destroyed.

18 MJ [COL POHL]: Thank you.

19 Mr. Nevin, anything further?

20 LDC [MR. NEVIN]: Yes, Your Honor, just two things. The
21 similarity to the argument we had earlier today about the
22 destruction of the black site, which is at issue in 425, is
23 striking.

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1 Again, I heard you ask the Chief Prosecutor a simple
2 question: Does Department of Defense still have possession of
3 this report? And I heard him three or four times give you
4 non sequiturs in response to that. He's a very bright man,
5 and he understands exactly what you were asking, and he
6 wouldn't answer. And I don't know why.

7 But particularly when earlier today ----

8 [Installation alert heard in courtroom.]

9 MJ [COL POHL]: Cell phone? What?

10 LDC [MR. CONNELL]: That was the noon signal, sir.

11 LDC [MR. NEVIN]: I think that's the noon signal maybe.

12 MJ [COL POHL]: Okay. Or the noon signal.

13 Go ahead, Mr. Nevin.

14 LDC [MR. NEVIN]: Yeah, particularly in the context of

15 425 ----

16 MJ [COL POHL]: I understand.

17 LDC [MR. NEVIN]: It's baffling to me why counsel can't
18 answer that question.

19 But second, there was an -- there were some remarks
20 underlying what the chief prosecutor said, and I want to be
21 clear about one thing. I heard him saying irrespective of
22 whether we have the report in hand or whether we have it in
23 our control or whether that's a legislative document, we --

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1 that report is underlaid by executive branch documents and we
2 are reviewing those.

3 But don't let there be any doubt that the report
4 itself is also important mitigating evidence. Because you
5 have a group of people with expertise who have made a detailed
6 study, experts that is, who have come to particular
7 conclusions about what happened and what the legal
8 implications of that are and the findings of it.

9 And in the context, if we get there, of a capital
10 sentencing proceeding, all of that will be admissible and
11 relevant and important for us to argue. And if that's taken
12 away from us, it changes the game significantly.

13 Thank you, Your Honor.

14 MJ [COL POHL]: Thank you.

15 General Martins, anything further?

16 CP [BG MARTINS]: No, Your Honor. You have our argument.
17 Thank you.

18 MJ [COL POHL]: Thank you. Okay. I was going to break
19 for lunch, but the only thing left on the docket is 315, and
20 that should be relatively brief. So let's do that since it's
21 the last thing on the docket for today.

22 LDC [MS. BORMANN]: Judge, I'm not sure we have it in --
23 generally we only bring things on our cart that are scheduled

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1 for the day.

2 MJ [COL POHL]: Okay. We'll do it after lunch. No need
3 to rush.

4 LDC [MS. BORMANN]: Sorry.

5 MJ [COL POHL]: The commission will be in recess until
6 1330. The commission is in recess.

7 [The R.M.C. 803 session recessed at 1202, 7 December 2016.]

8 [END OF PAGE]

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