

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 [The R.M.C. 806 session was called to order at 0913,  
2 16 November 2018.]

3 MJ [Col PARRELLA]: This commission is called to order.  
4 This session has been closed pursuant to Rule for Military  
5 Commission 806 for the purpose of arguing classified material  
6 as indicated in the previous closure orders.

7 Trial Counsel, if you could please account for the  
8 members of the prosecution who are present.

9 CP [BG MARTINS]: Good morning, Your Honor. Present for  
10 the United States, Brigadier General Mark Martins, Mr. Robert  
11 Swann, Mr. Edward Ryan, Mr. Clayton Trivett, Mr. Jeffrey  
12 Groharing, Ms. Nicole Tate, Major Christopher Dykstra. Also  
13 in the courtroom at counsel table, Mr. Dale Cox, Mr. Rudolph  
14 Gibbs, and Staff Sergeant Clifford Johnson. Securing the  
15 doors are Mr. Pascual Tavaréz and Staff Sergeant Antony Kiser.  
16 All personnel have the necessary clearances.

17 MJ [Col PARRELLA]: Thank you, Trial Counsel.

18 Defense Counsel, if you can please account for the  
19 members of the defense team that are present.

20 LDC [MR. NEVIN]: Your Honor, for Mr. Mohammad, who is not  
21 present, David Nevin, Lieutenant Colonel Poteet,  
22 Ms. Radostitz, Lieutenant Commander Cole, Mr. [REDACTED], all with  
23 the appropriate clearances.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 MJ [Col PARRELLA]: Thank you.

2 Ms. Bormann?

3 LDC [MS. BORMANN]: Judge, good morning. On behalf of  
4 Mr. Bin'Attash, myself, Cheryl Bormann; Mr. Edwin Perry;  
5 Mr. William Montross; Captain Brian Brady; and our single  
6 intelligence analyst who also is performing the duties of  
7 defense security officer, Mr. [REDACTED].

8 MJ [Col PARRELLA]: Thank you.

9 Mr. Harrington.

10 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,  
11 James Harrington, Lieutenant Mishael Danielson, Alaina  
12 Wichner, and Douglas Oliver, all with the appropriate  
13 clearances.

14 MJ [Col PARRELLA]: Just to clarify, Ms. Bormann, you may  
15 have said this, and I apologize if you did, but all of your  
16 team have the appropriate clearances and read-ons?

17 LDC [MS. BORMANN]: You know, I didn't, but that is  
18 exactly the state of affairs, yes.

19 MJ [Col PARRELLA]: Thank you.

20 Mr. Connell.

21 LDC [MR. CONNELL]: Good morning, Your Honor.

22 MJ [Col PARRELLA]: Good morning.

23 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi, myself,

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

1 James Connell; [REDACTED]; Alka Pradhan; Benjamin  
2 Farley; Lieutenant Colonel Sterling Thomas; and [REDACTED] -- DISO  
3 [REDACTED] All have appropriate clearances and tickets.

4 MJ [Col PARRELLA]: Thank you, Mr. Connell.

5 Mr. Ruiz?

6 LDC [MR. RUIZ]: Judge, Lieutenant Commander Furry,  
7 Ms. Susan Lachelier, Lieutenant Colonel Jennifer Williams,  
8 Major Joseph Wilkinson, Mr. Sean Gleason, Mr. [REDACTED], and  
9 [REDACTED], and Mr. [REDACTED], and myself, all on behalf  
10 of Mr. al Hawsawi. And we all have appropriate clearances.

11 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

12 I also note that the Chief Defense Counsel, Brigadier  
13 General Baker, is present. Sir, if you would please indicate,  
14 or account for any members of your team and whether they have  
15 the appropriate read-ons.

16 CDC [BGen BAKER]: Sir, it is just me, and I have the  
17 appropriate clearances and read-on.

18 MJ [Col PARRELLA]: Thank you.

19 Mr. Nevin.

20 LDC [MR. NEVIN]: Your Honor, with the military  
21 commission's permission, Lieutenant Colonel Poteet needs to  
22 leave the courtroom at about quarter to ten to attend to other  
23 business.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 MJ [Col PARRELLA]: That's fine. Thank you.

2 LDC [MR. NEVIN]: Thanks, Your Honor.

3 MJ [Col PARRELLA]: Okay. Mr. Connell, I think at the  
4 close of, or towards the end of yesterday's session you  
5 indicated that you would have a proposed order of march for  
6 the commission; is that correct?

7 LDC [MR. CONNELL]: Yes, Your Honor. I understand that  
8 the government has an issue that they wish to bring up, but

9

10

11

12

13

14

15

16 MJ [Col PARRELLA]: Okay. I understand.

17 Brigadier General Martins.

18 CP [BG MARTINS]: Your Honor, I wanted to discuss two

19

20

21 LDC [MS. BORMANN]: General Martins, I think I can save  
22 your breath. We are going to withdraw those. We don't want  
23 to take the position that we should be asking for rulings on

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

1 the fly and not give public notice. So we already [REDACTED]  
2 notice; it's III, I believe, on the same series. So we are  
3 withdrawing the ones we filed yesterday.

4 MJ [Col PARRELLA]: Okay. Thank you, Ms. Bormann.

5 And in light of that, General Martins, does that moot  
6 your issue?

7 CP [BG MARTINS]: Yes, Your Honor, it does. There may be  
8 [REDACTED] I'm not sure. If it  
9 arises, Your Honor, we'll address it, but that resolves the  
10 immediate issue.

11 MJ [Col PARRELLA]: Thank you. And just to make sure  
12 we're all tracking, it's still the position of the commission  
13 that we're going to go ahead and [REDACTED]

14 [REDACTED] I know the commission already took unclass argument on  
15 [REDACTED] but in light of the parties' request, we will go ahead  
16 and defer any closed argument on those two series.

17 Okay. Absent any other objections to the proposed  
18 order of march, the commission will adopt this order of march  
19 as proposed by Mr. Connell, and we will start with the [REDACTED]

20 [REDACTED]

21 ADC [MS. PRADHAN]: Good morning, Your Honor.

22 MJ [Col PARRELLA]: Good morning, Ms. Pradhan.

23 ADC [MS. PRADHAN]: Your Honor, briefly before I begin

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 350, you very considerately on Monday morning invited us to  
2 give you the correct pronunciations of our names. And if I  
3 may, on the understanding that not everybody always gets it  
4 right even when you have known me for a long time, the  
5 pronunciation of my last name is Pradhan, with a soft T-H.

6 MJ [Col PARRELLA]: I understand. I appreciate that. I  
7 will not promise that I will always get it right, but I will  
8 endeavor to do my best. Thank you.

9 ADC [MS. PRADHAN]: I understand, Your Honor. I grew up  
10 in Ohio. I'm used to it.

11 Your Honor, with regards  which  
12 again I will take together, in open session, of course, we  
13 have to protect classified information and so we made certain  
14 representations in the hypothetical that we don't have to make  
15 here in closed session. 

16  
17  
18  
19  
20  
21  
22  
23

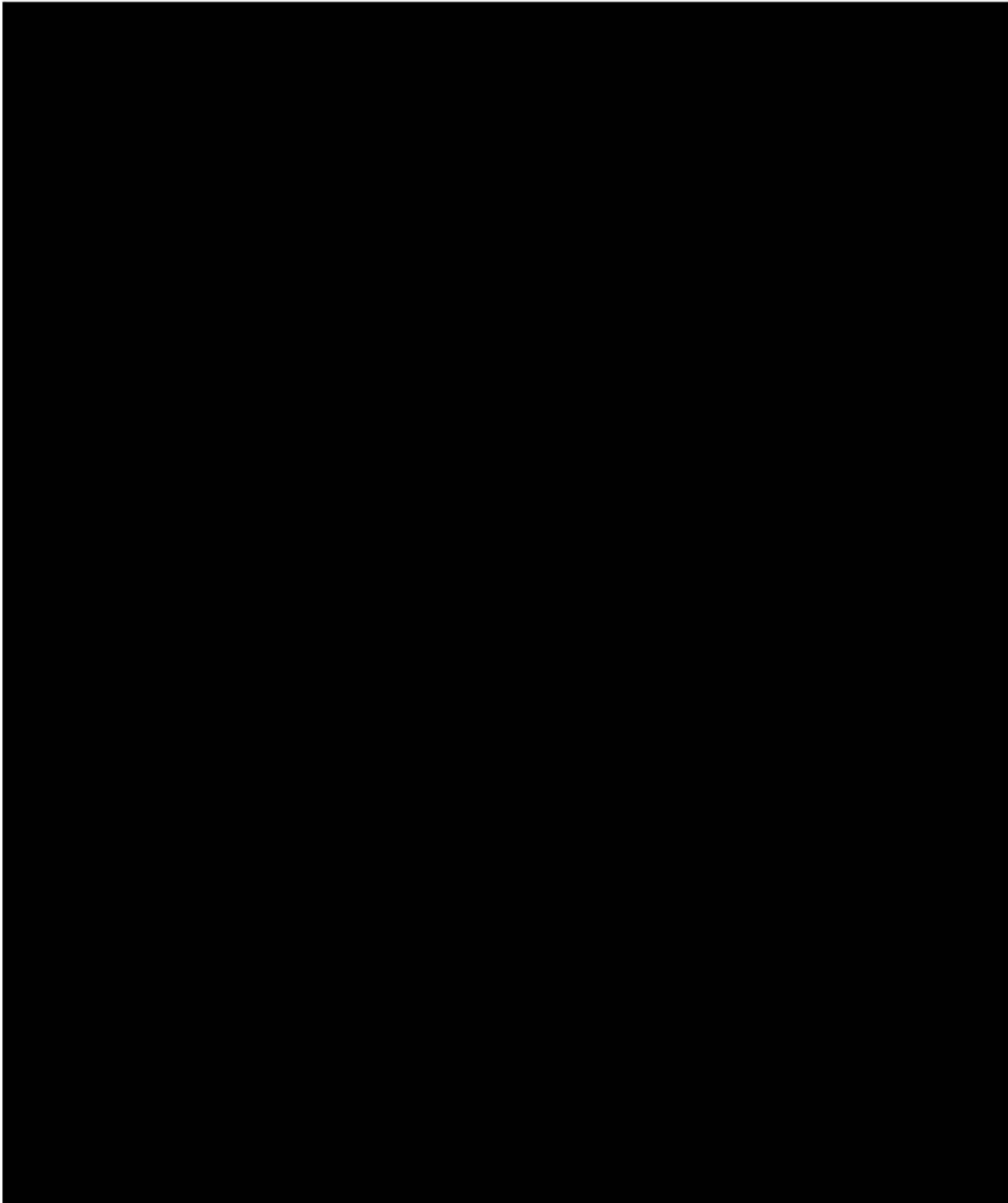
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23



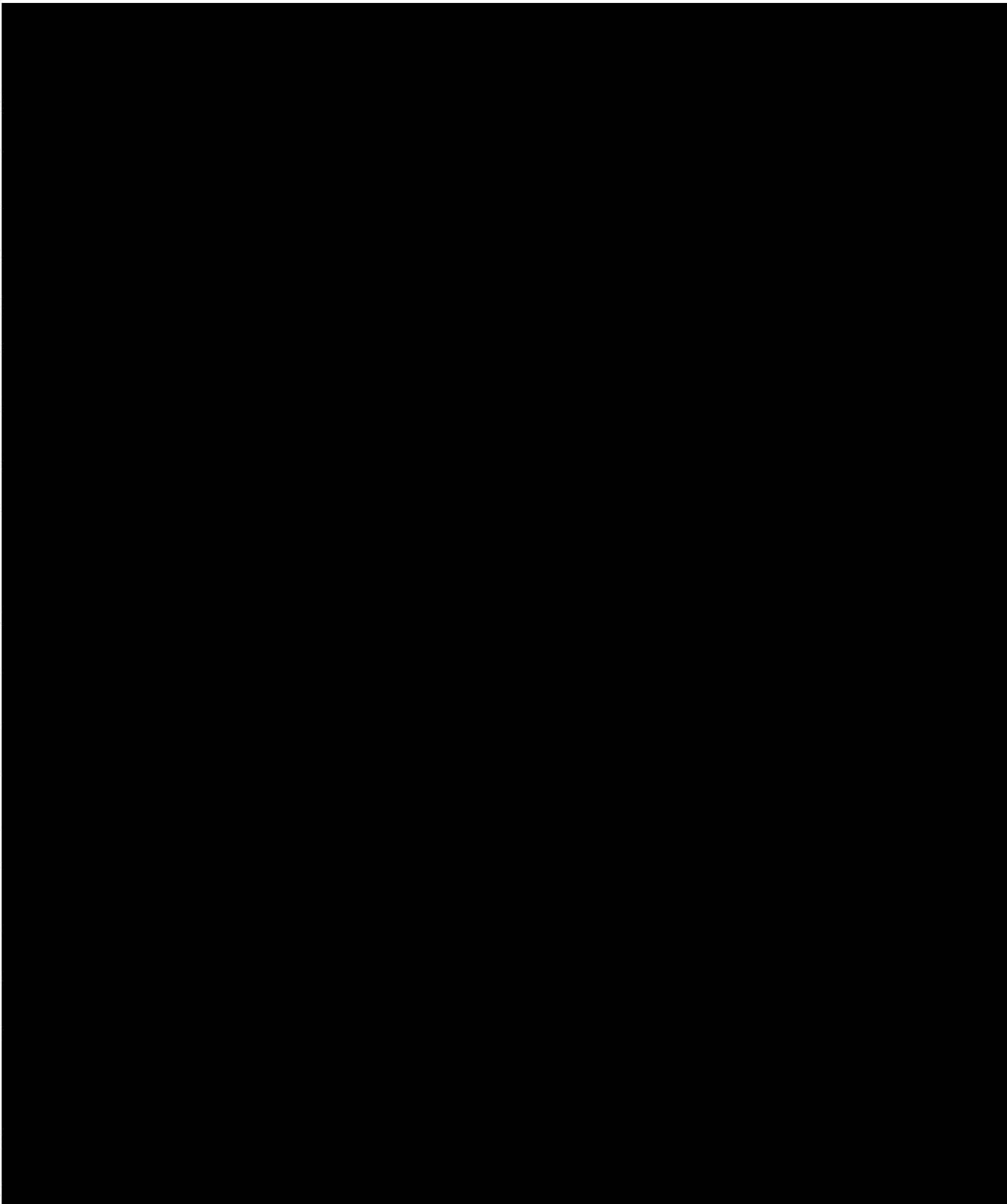
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

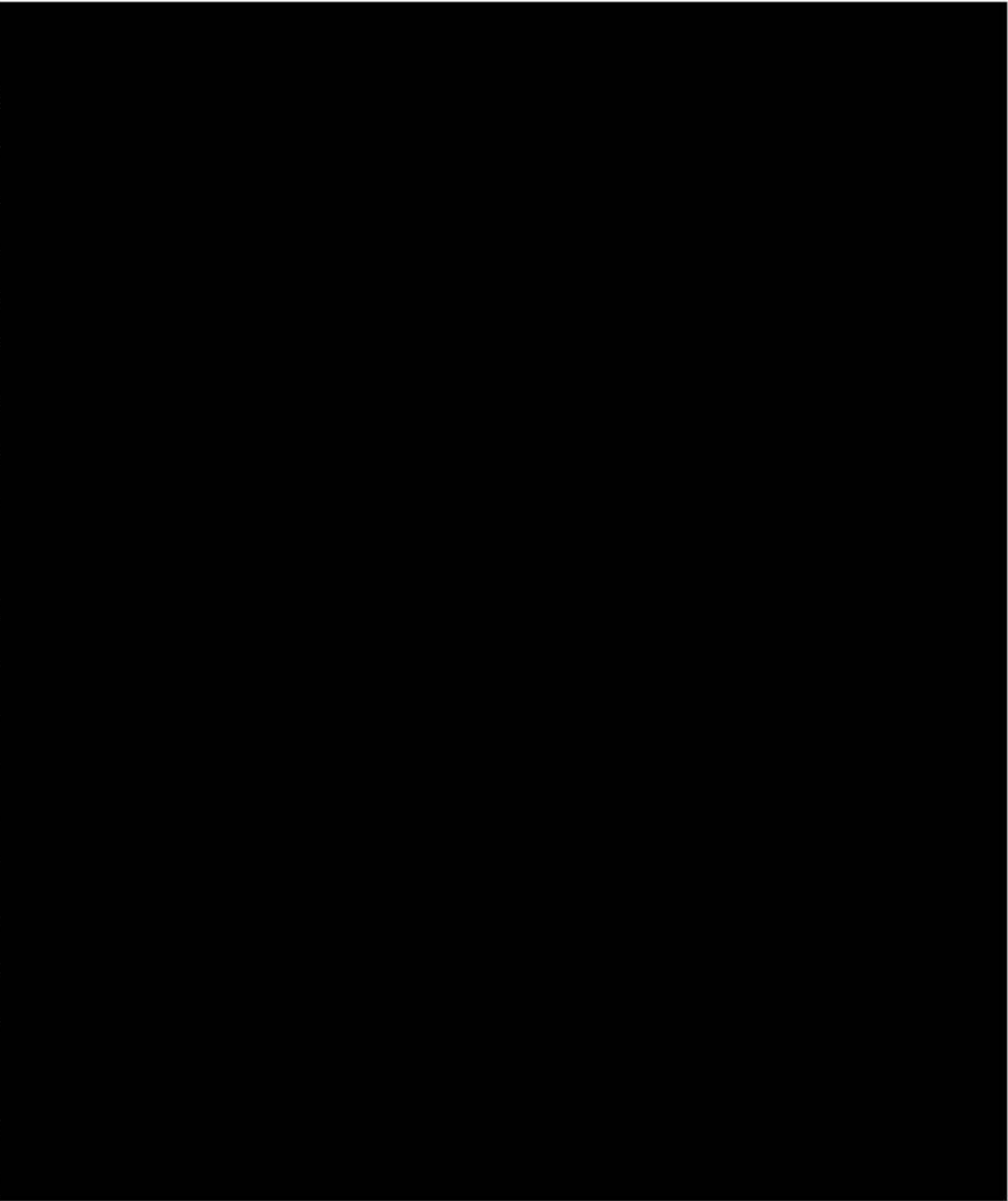
~~// TS//SI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

The second area of inquiry, Your Honor, which I touched upon briefly in open session,

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1

2 MJ [Col PARRELLA]: And in that respect, there are sort of  
3 two areas of inquiry as I see it.

4

5

6

7

8

9

10

11

12 So why should the commission at this stage order a deposition  
13 into that? In other words, there is sort of established  
14 procedures about interviewing or attempting to interview  
15 individuals who had a direct and substantial role in that  
16 black site time.

17 Why should the commission specifically order a  
18 deposition and allow that sort of inquiry, sort of side  
19 stepping the otherwise established process with respect to  
20 this individual?

21 ADC [MS. PRADHAN]: Your Honor, for two reasons. First,  
22 obviously, the deposition is for also the purposes of

23 But setting

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1 that aside, I understand Your Honor's question to be why do we  
2 need a deposition under oath from this individual about  
3 conditions in the black sites? And the reason for that is

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 The other point of reference that I will go into some  
14 detail about when we discuss [REDACTED] is that there is -- there are  
15 serious concerns about [REDACTED]  
16 [REDACTED]  
17 [REDACTED] which, as the  
18 military commission can imagine, is a serious area of concern  
19 when we talk about the statements that led to the  
20 [REDACTED] statements.

21 MJ [Col PARRELLA]: So if that's the case, in either the  
22 [REDACTED] or some future series that involves an issue about  
23 something that occurred at the black site, couldn't the

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 defense simply request him as a witness? And if he meets the  
2 standard, you know, that's established in the law for his --  
3 for that testimony to become relevant and necessary, the  
4 commission could order it.

5 I guess, why are we -- you know, we're opening up an  
6 area here. [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 ADC [MS. PRADHAN]: Well, Your Honor, we need to know --  
10 there may very well be reasons, right? It is certainly not  
11 out of the realm of possibility -- in fact, it is probable --  
12 that there are incidences that [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 The military commission, I'm sure, appreciates the  
17 sort of [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 [REDACTED]  
2 Secondary to that, Your Honor -- and I apologize if  
3 this wasn't clear, but secondary to that are the additional  
4 considerations that [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 MJ [Col PARRELLA]: Thank you. I understand.

10 ADC [MS. PRADHAN]: Thank you, Your Honor. Subject to  
11 your questions.

12 MJ [Col PARRELLA]: I have none. Thank you.

13 Mr. Nevin.

14 LDC [MR. NEVIN]: Your Honor, just to add two small  
15 matters to what Ms. Pradhan said, first is just to call your  
16 attention to the fact that we, I think in this session we

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 will say, and the military commission may not be aware of  
21 this: When we meet with members of the guard force at Echo II  
22 and when we went to -- when my team made a visit to Camp VII,  
23 these men and women do not identify, do not identify

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 themselves to us by name. They have pseudonyms that they use  
2 even in conversation with us, so -- all apart from being on  
3 the record. So we hear -- and I understand that this, the  
4 idea behind this is to protect these people's safety.

5  
6  
7  
8  
9

10 that's -- when you get down to it, that's what we are trying  
11 to get to the bottom of. And so you might say in this

12  
13

14 Now, why would he do that? So all around us are

15  
16

17 It raises a whole raft of questions about -- fair questions, I  
18 submit -- about why he decided to do that, what was in it for  
19 him, who suggested that he do it, and so on.

20 And second, I understand the military commission to  
21 have asked about -- to have been asking about Protective  
22 Order #4, the protocol for contacting these witnesses. Two  
23 things about that.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 [REDACTED]  
2 [REDACTED]  
3 witness who had direct and substantial contact, and I believe  
4 that his testimony would show that. And so it is at the  
5 outset anomalous or odd to me that he is not in the list of  
6 persons who are considered to have had direct and substantial  
7 contact.

8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 I think it's fundamentally unfair. I assume that the  
23 reason for the UFI system and process in the first place is to

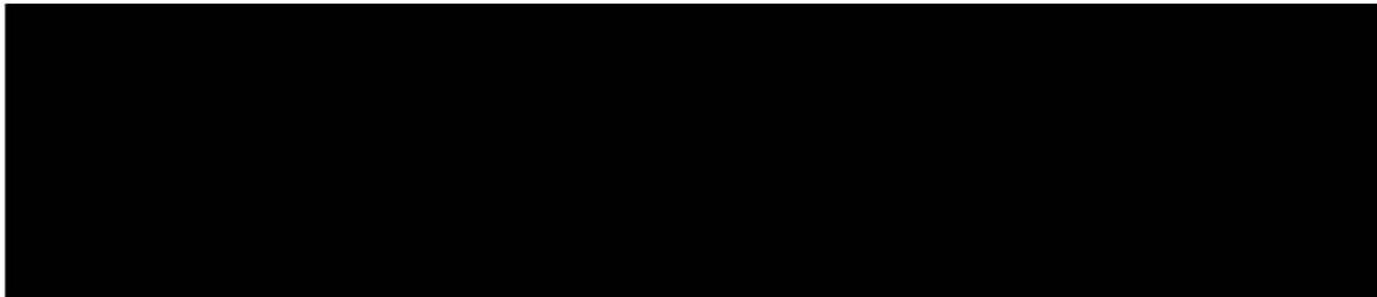
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



But here is a guy who has revealed his identity. And I think you can ask why, certainly, as I said before. But in addition, I think it's fundamentally unfair to say having revealed my identity, wait, now I want to have the protection of the protocol of Protective Order [REDACTED], which is designed to protect my identity.

I would submit to you that he, I mean, I think for want of a better way to put it, has waived, or has been overcome by events with respect to the purposes for Protective Order #4 and that protocol.

Thank you.

MJ [Col PARRELLA]: Thank you, Mr. Nevin.

Ms. Bormann?

LDC [MS. BORMANN]: We withdrew the [REDACTED] because the others had noticed all of the information we were going to argue anyway. So I want to talk a little bit about the one we did notice, which is the work that he did for us. It is attached to our filings in [REDACTED]. It is ex parte because it is privileged material. I would ask

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 you to review it.

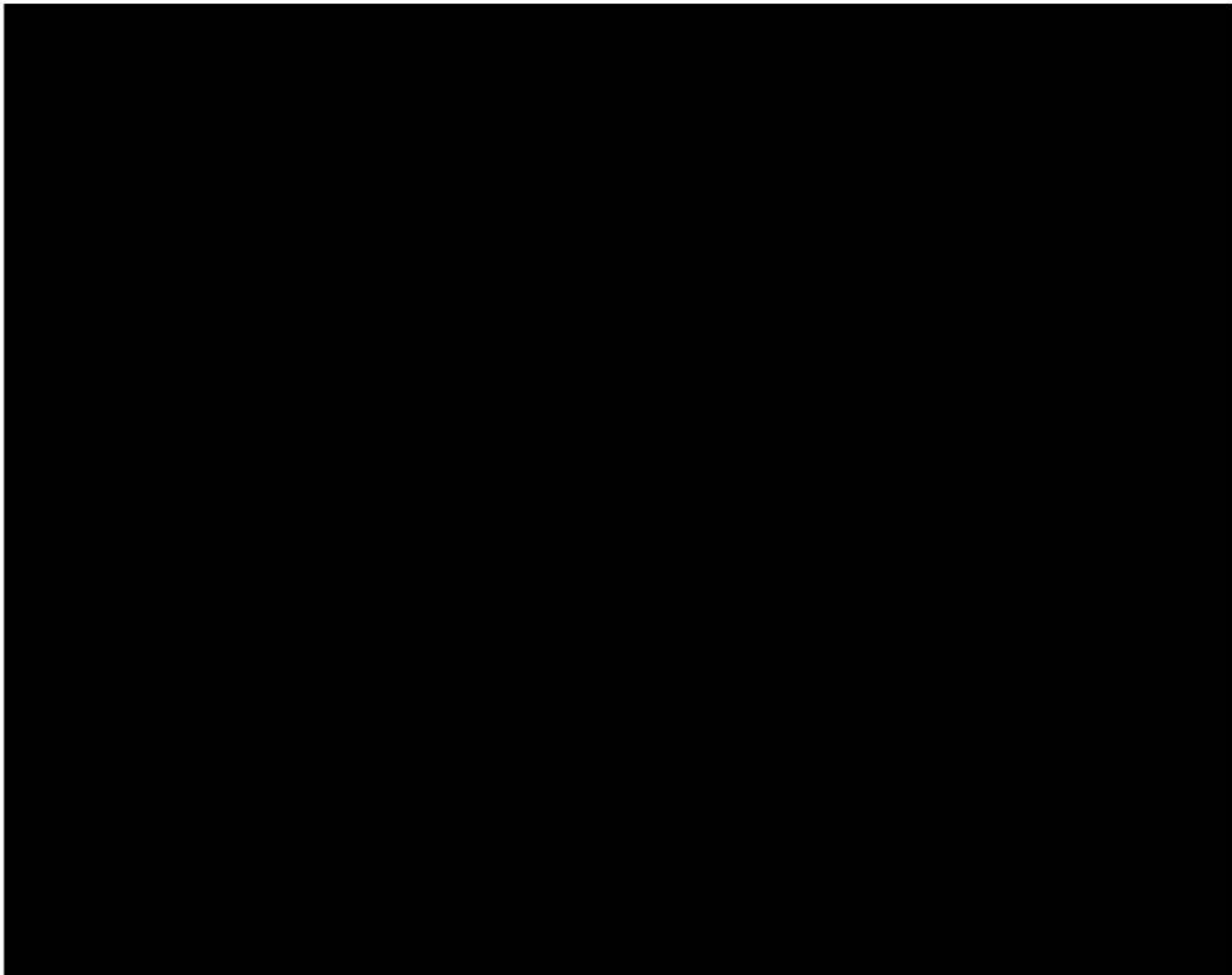
2 MJ [Co1 PARRELLA]: And the classification of that is  
3 what, Ms. Bormann?

4 LDC [MS. BORMANN]: I believe TS.

5 MJ [Co1 PARRELLA]: TS. Thank you.

6 LDC [MS. BORMANN]: The situation that -- this was  
7 unprecedented. We were sitting here in court and we were -- I

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

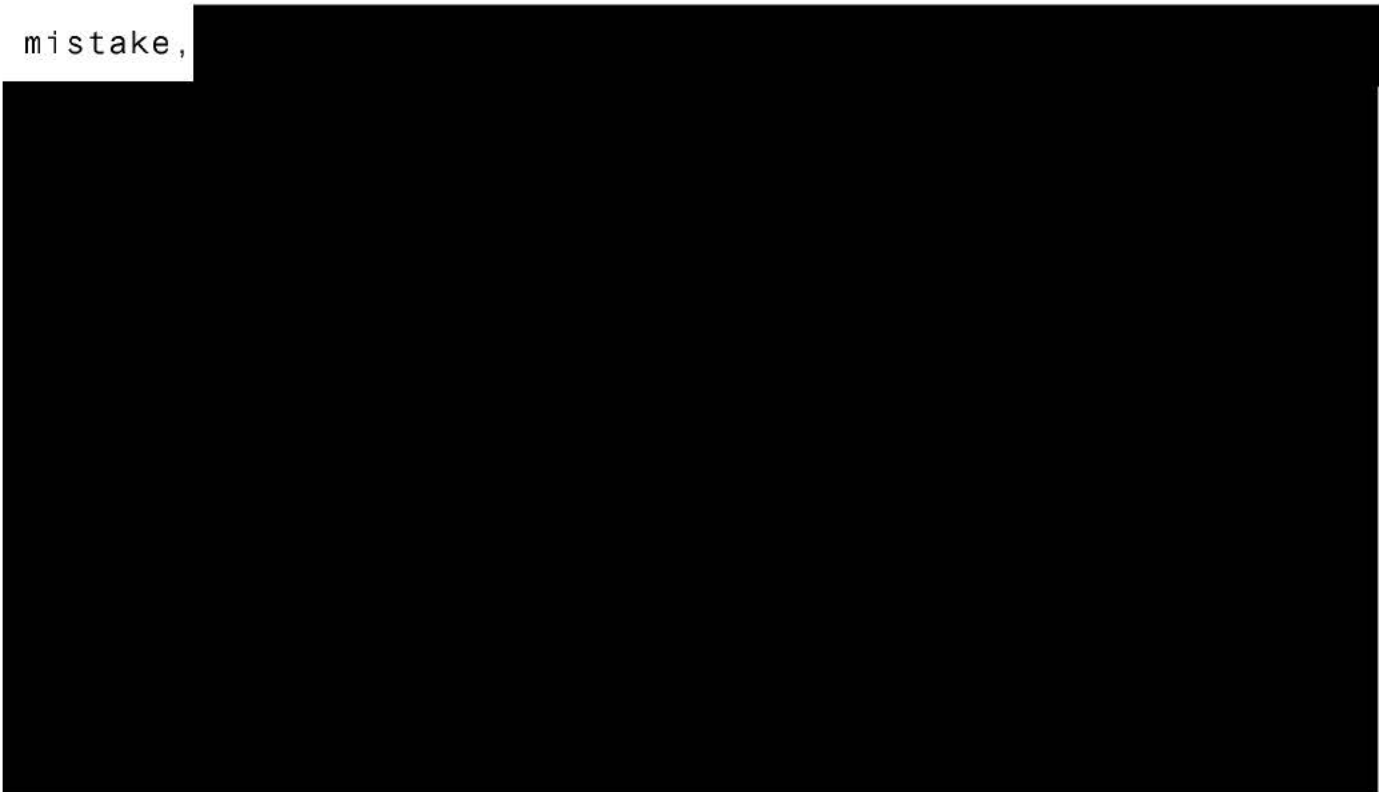


So we walked back and we're like -- I didn't believe

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 it. You know, frankly, you're like, okay, they made a  
2 mistake,



3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13 So you asked Ms. Pradhan how it is and why it is that  
14 we want to talk about during the deposition not only what he  
15 did with the materials that



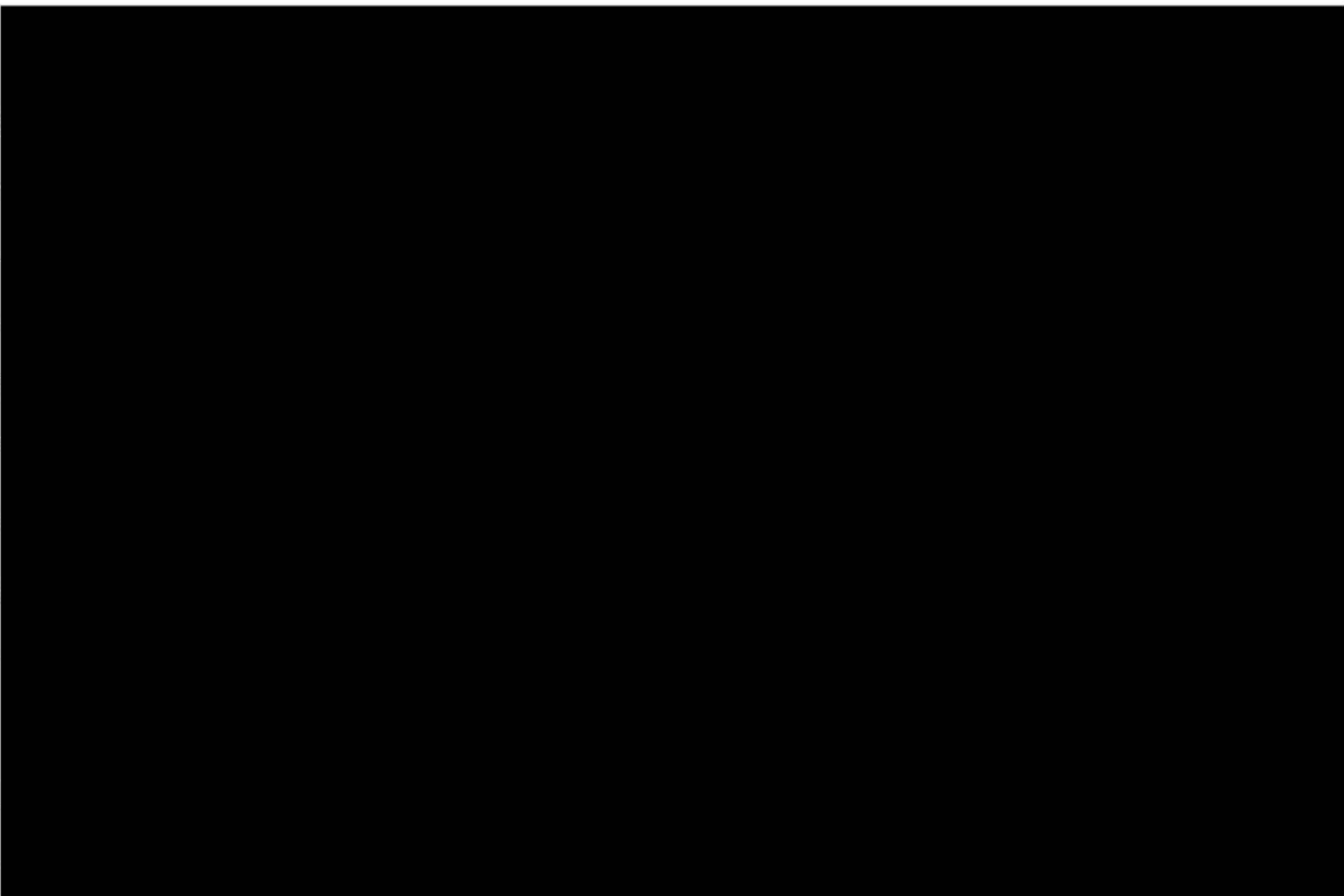
16  
17  
18  
19  
20  
21  
22  
23 So there has to be some belief system based upon what

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13



14           With that, I'm not saying -- I'm not saying that the  
15 government, G -- small G, sitting over to my right knew that.  
16 I don't think they did. I think they were as surprised as any  
17 of us by this.

18           But the bottom line is we don't know any of the  
19 answers to any of this until we have a   
20  That's what  
21 we're asking for. It's what we've been asking for the entire  
22 time.

23           And so for all of those reasons, I'm asking that you

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 grant the request. Do you have any questions?

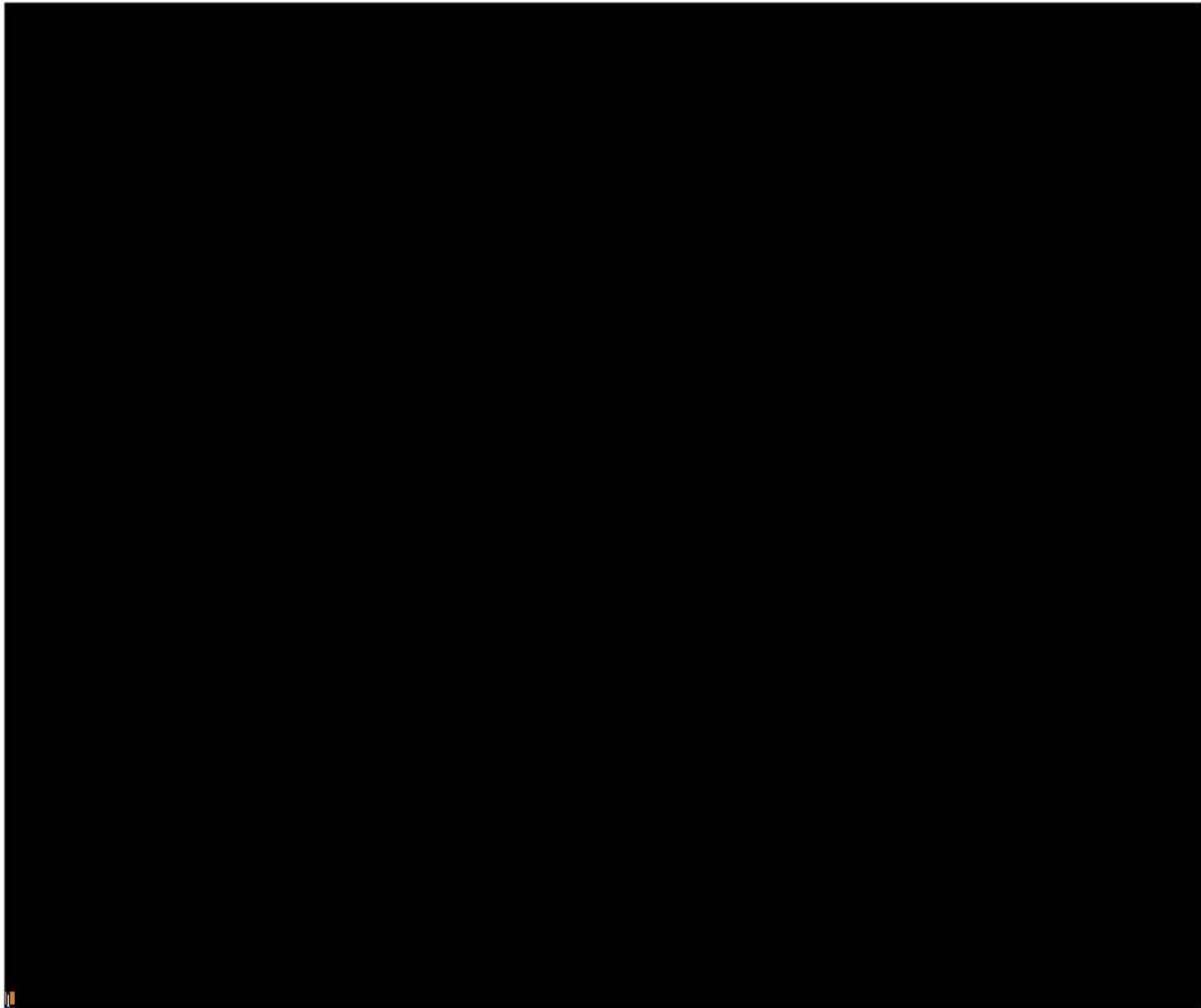
2 MJ [Col PARRELLA]: I do not. Thank you.

3 LDC [MS. BORMANN]: Thank you.

4 MJ [Col PARRELLA]: Mr. Harrington, good morning.

5 LDC [MR. HARRINGTON]: Good morning, Judge. Judge, just  
6 because of your newness to the case, I think it might help for  
7 me to give you just a little bit of background here.

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

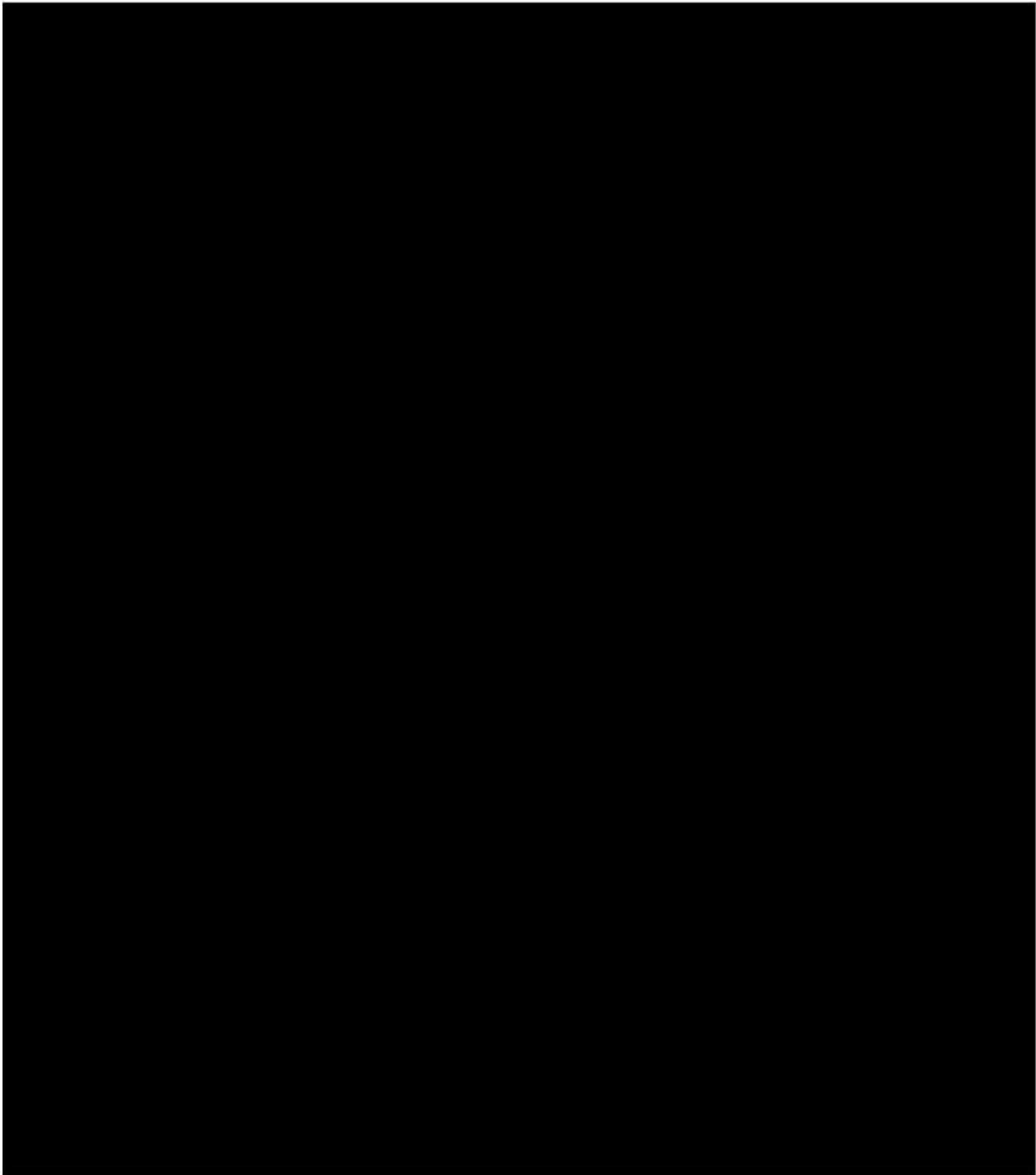


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



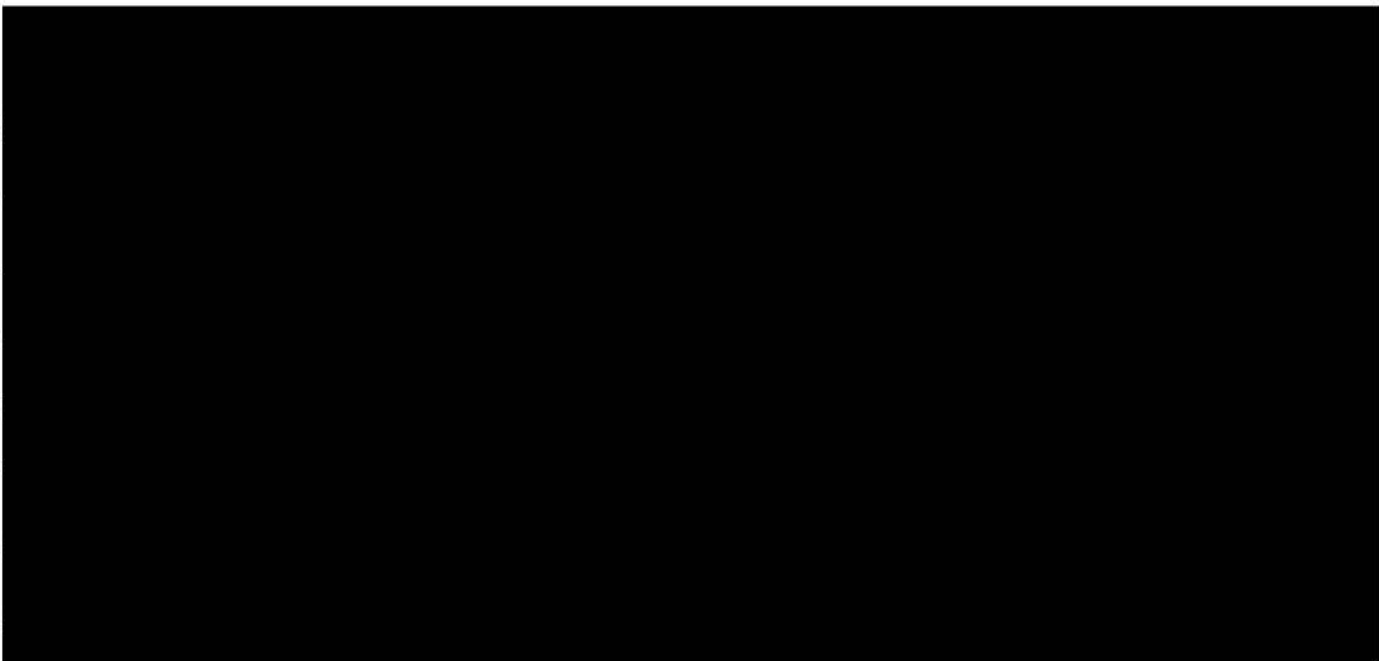
And one of the things, Judge, the reasons that we

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

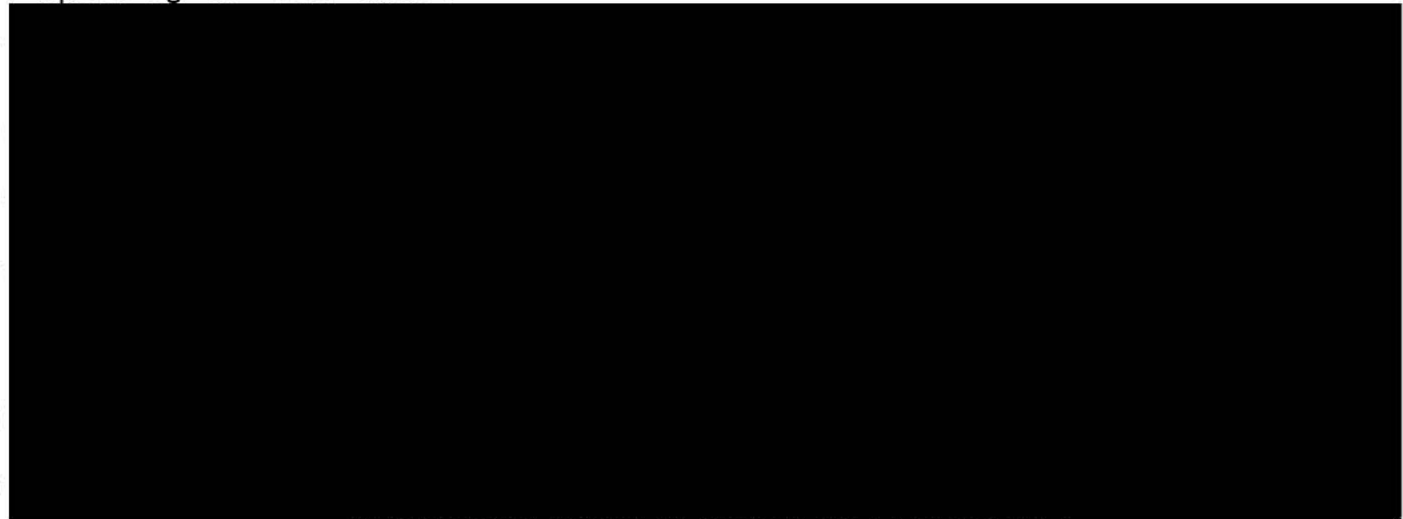
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9



10           But putting him under oath puts him in a different  
11 position. And if he has in his mind morally that it's okay to  
12 do that, to lie because he has been sanctioned to doing that,  
13 now he's in a different position when he is under oath. And  
14 he may well tell the same lies again, but there's a potential  
15 problem for him in doing that, which may well lead to an  
16 opening of the door.

17  
18  
19  
20  
21  
22  
23

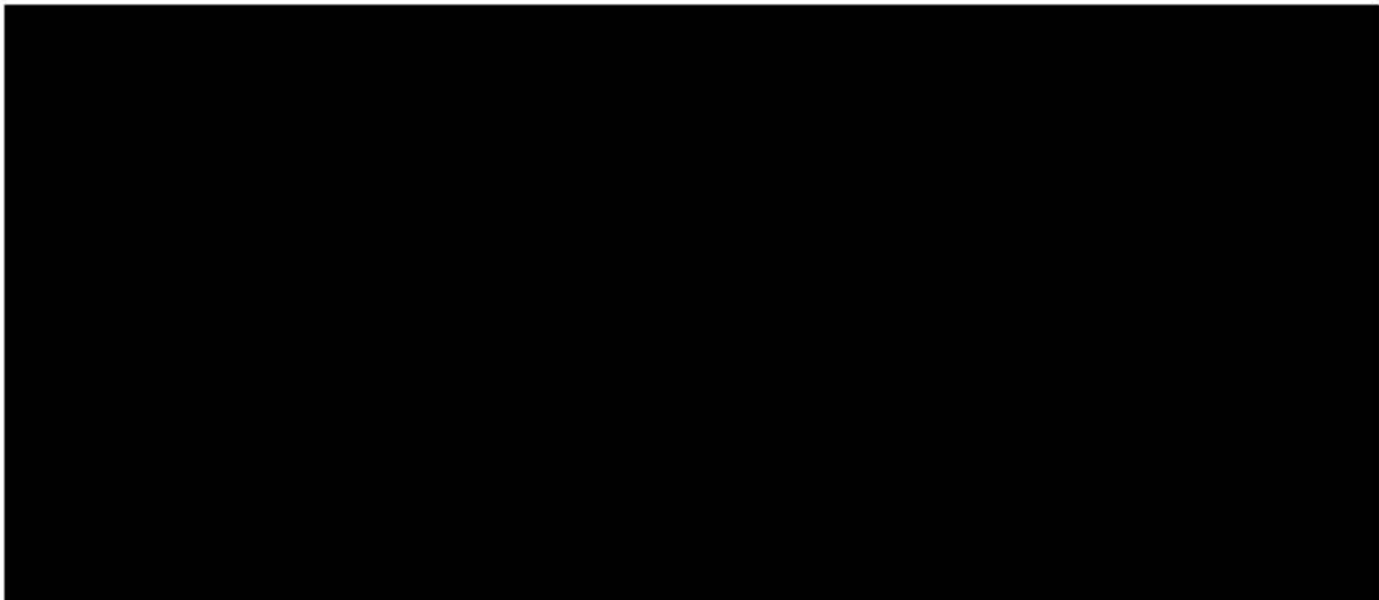


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



And then again, I'm standing here telling you things, as you said yesterday, it's just a proffer; and I realize that. But it's also a situation where, in addition to what I have just told you, there are many, many other things that need to come out -- come from me as a witness in this case so that it just enhances the need for our team to have independent counsel in order for us to properly participate and represent our client.

MJ [Col PARRELLA]: Thank you, Mr. Harrington.

LDC [MR. NEVIN]: Judge, excuse me. Lieutenant Colonel Poteet needs to leave to take care of other matters. It's been our practice that we stop everything when the door gets opened. I don't know if you want to ----

MJ [Col PARRELLA]: That's fine. We can do that.

LDC [MR. NEVIN]: Okay.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 MJ [Col PARRELLA]: Okay. I will note for the record that  
2 Lieutenant Colonel Poteet has left the courtroom. Sir, you  
3 may argue.

4 DC [LCDR FURRY]: Good morning, sir. [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 And that was filed ex parte under seal. And it's not  
8 [REDACTED] but when  
9 you read that ex parte under seal attachment, that it contains

10 [REDACTED] you

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 MJ [Col PARRELLA]: So assuming -- okay. So I guess the  
15 question is, what is it that you're seeking from this motion?  
16 Are you seeking -- I understand you are seeking the  
17 deposition, the discovery, but to what end?

18 DC [LCDR FURRY]: [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

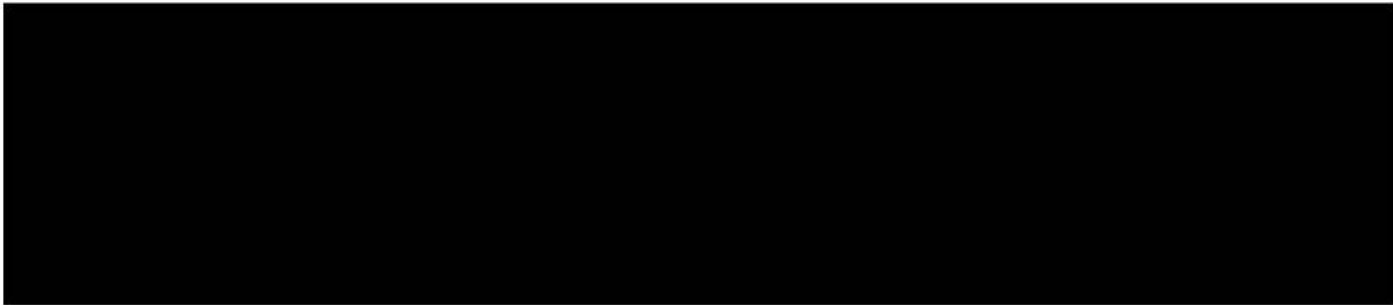
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

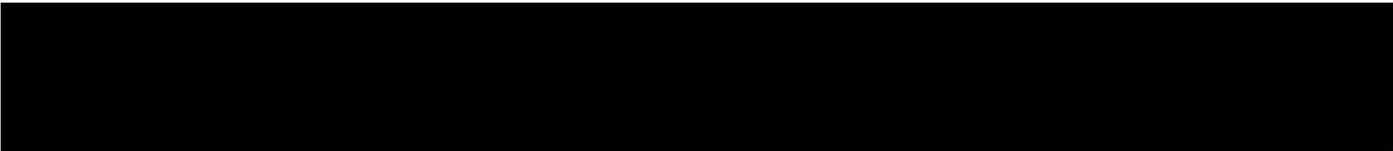
~~// TS//SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



MJ [Col PARRELLA]: Why?

DC [LCDR FURRY]: Because it's -- on its face it is just



So with that understanding, these are very natural questions that go to the -- Mr. al Hawsawi's rights to effective assistance of counsel and how that happened.

MJ [Col PARRELLA]: Well, I mean, I can understand you



But what I don't see is, with the argument that you're making as to why,



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8

DC [LCDR FURRY]: Sir, it has to go to the

9 He put these -- he put these questions at issue. The  
10 defense didn't. That's the relevance of that, sir.

11 MJ [Col PARRELLA]: Okay. Thank you.

12 DC [LCDR FURRY]: May I have a moment, please?

13 MJ [Col PARRELLA]: You may.

14 DC [LCDR FURRY]: Nothing further. Thank you.

15 MJ [Col PARRELLA]: Mr. Ryan. Good morning.

16 TC [MR. RYAN]: Good morning, Your Honor. Judge, I heard  
17 from four of the five counsel who just argued the phrase "we  
18 don't know" repeated more than once, and I think that's  
19 telling.

20 The defense continues to offer you questions and a  
21 great deal of speculation of all sorts of possibilities when  
22 they have a burden to offer you exceptional circumstances.

23 I address the same arguments right now and factors

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

1 that were addressed on Wednesday, but do so now in the context  
2 of classified information entered into the record for the most  
3 part by the defense, with maybe one exception.

4 The primary motion, Your Honor, that you must rule  
5 upon that is filed in this series, and from which I suggest  
6 all the others flow, [REDACTED]

7 [REDACTED]  
8 In [REDACTED] filed, as I said, way back then when things  
9 were very fresh, the defense relied on some specific factual  
10 assertions. Certainly lying, which has remained a theme, but  
11 back then it was lying with untruthfulness being under a

12 [REDACTED].

13 In [REDACTED] they say, "Because it is possible that [REDACTED]  
14 [REDACTED] the  
15 military judge should offer" -- order, I'm sorry -- "order a  
16 deposition, under penalty of perjury, [REDACTED]

17 [REDACTED]  
18 Mr. Harrington, I think, just repeated that argument  
19 and I was somewhat surprised, because going back a good deal  
20 of time now Military Judge Pohl suggested to the  
21 prosecution -- did not require it [REDACTED]  
22 might be a good first step. And I'll tell you, we resisted  
23 initially but then ultimately turned [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

[REDACTED]

[REDACTED] It does appear in the  
record. It has been in discovery. It contains no  
requirements [REDACTED] So that

[REDACTED]

On the other hand, Your Honor, from a real life human  
standpoint, I suggest that his untruthfulness is quite  
understandable, and the defense does nothing to suggest that  
this was not the case.

Consider this: The man, Your Honor -- and  
Ms. Bormann, I think, did an ample job of describing what it  
was like, and it was a strange moment for sure.

[REDACTED]

I also ask you to consider, Judge,

[REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1                   Secondly, Your Honor, [REDACTED] which is a classified

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19

20 there's nothing like that in the evidence. And, in fact,  
21 Chief Prosecutor Martins specifically refuted those ideas back  
22 at the time that this all happened.

23           MJ [Col PARRELLA]: So, Mr. Ryan, assuming I ----

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 TC [MR. RYAN]: Yes, sir.

2 MJ [Col PARRELLA]: Let's just assume that I agree with  
3 you that there is no exceptional circumstance. [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 TC [MR. RYAN]: Well, Judge, first of all, I would suggest

9 [REDACTED] and the

10 concern, I guess, would remain valid. But in the -- to the  
11 extent that it hasn't happened already, I would submit there  
12 is no need to worry that it is going to happen in the future.

13 MJ [Col PARRELLA]: Well, I guess that's the first

14 question. How do we know that it hasn't happened? [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 TC [MR. RYAN]: To the extent this commission is concerned  
20 about such factors, this commission could certainly order the  
21 prosecution to gather information without, obviously, getting  
22 close to being in a position of learning anything, but  
23 specifically involving the convening authority to report back

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 to Your Honor that ----

2 MJ [Col PARRELLA]: I don't think it's so much the  
3 commission's concern as I think -- maybe -- would you agree  
4 that the defense counsel has some ethical obligation to make  
5 inquiry about this, [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 TC [MR. RYAN]: The defense is certainly -- do they have  
9 an obligation was your question, sir?

10 MJ [Col PARRELLA]: Correct.

11 TC [MR. RYAN]: They have an obligation to protect it.  
12 Now, once something has happened, I'm not aware of an actual  
13 dictate that says you must find out every detail of what did  
14 happen ----

15 MJ [Col PARRELLA]: Sure. But knowing the scope ----

16 TC [MR. RYAN]: I'm sorry to interrupt, sir. Especially  
17 under the circumstances.

18 MJ [Col PARRELLA]: That's okay. So knowing the scope of

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 TC [MR. RYAN]: Yes, sir.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 MJ [Col PARRELLA]: So I guess what I'm asking the  
2 government is, if not a deposition, how do we get this  
3 assurance?

4 TC [MR. RYAN]: I would suggest, Your Honor, you are in a  
5 position to put forth directives -- and again, I think the  
6 proper entity is the convening authority -- to gather  
7 information as to the events, to the extent that's what you  
8 want, but also to gather assurances from persons involved as  
9 to -- if not assurances, [REDACTED] that  
10 may have occurred. Although I represent that we are aware of  
11 none, [REDACTED].

12 MJ [Col PARRELLA]: So something along the lines of, I  
13 guess, the commission directing a declaration?

14 TC [MR. RYAN]: Yes, sir.

15 MJ [Col PARRELLA]: Okay. Thank you.

16 TC [MR. RYAN]: Yes, sir.

17 Your Honor just indicated that if you were to agree  
18 with me as to the lack of exceptional circumstances, if that  
19 is where Your Honor is, then I'm in no need of speaking any  
20 further. However, if Your Honor is still looking at this with  
21 an open question in your mind, I would like to continue my  
22 argument.

23 MJ [Col PARRELLA]: Yes, please continue.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 TC [MR. RYAN]: All right. In [REDACTED], again, Judge, the  
2 defense paints, in addition to the whole issue of maybe he had  
3 [REDACTED] the defense also paints the  
4 predictive picture of what I have kind of taken to call the  
5 Jason Bourne scenario.

6 They say, quote [REDACTED]

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

[REDACTED]

And again, this was filed very soon after the  
incident, when I imagine everyone was operating under far  
greater suspicions.

But as to that claim -- and again, this is the motion  
that you have to decide [REDACTED]  
[REDACTED] and to the best of

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 anyone's understanding or awareness, [REDACTED]

2 [REDACTED]

3 So their claim that lying and a chance of running  
4 equals exceptional circumstances I suggest on the facts falls  
5 flat, Your Honor.

6 But in addition, I also want to point out that this  
7 is inconsistent -- their claim of exceptional circumstances in  
8 this situation is inconsistent with prior defense positions.

9 Mr. Bin'Attash, Mr. Ali, and Mr. Mohammad, in their  
10 own pleadings in the [REDACTED], and thus all five by joinder,  
11 took a position that said that witnesses were not likely to be  
12 unavailable when they were in their eighties with general  
13 health concerns. You were told the other day that my  
14 statement about this motion was wrong. Well, it was not  
15 wrong.

16 LDC [MS. BORMANN]: Judge ----

17 TC [MR. RYAN]: Well, it was not wrong. I know because I  
18 lost this motion, and it broke my heart.

19 LDC [MS. BORMANN]: Judge ----

20 MJ [Col PARRELLA]: Mr. Ryan, hold on one second.

21 LDC [MS. BORMANN]: Objection. This is not classified  
22 argument.

23 TC [MR. RYAN]: Agreed, Judge, but there is plenty of room

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 for us to match the classified facts with unclassified.

2 MJ [Col PARRELLA]: To the extent it's required to give  
3 context, proceed, but let's also be sensitive that this is  
4 just for closed argument. We have previously, and the  
5 commission has heard ample unclassified argument.

6 Please continue, Mr. Ryan.

7 TC [MR. RYAN]: That's fine, sir, and I will move off it  
8 right now.

9 I will simply say that [REDACTED], both of  
10 which were orders from Military Judge Pohl, there was specific  
11 findings regarding unavailability and exceptional  
12 circumstances that the defense urged on his Honor and his  
13 Honor accepted, which I suggest is inconsistent with the  
14 positions they are taking now.

15 [REDACTED]  
16 Judge, and usually it's in the context of we don't know and  
17 it's possible that this happened, it's possible that that  
18 happened. There is evidence of it in this record in  
19 classified form.

20  
21  
22  
23

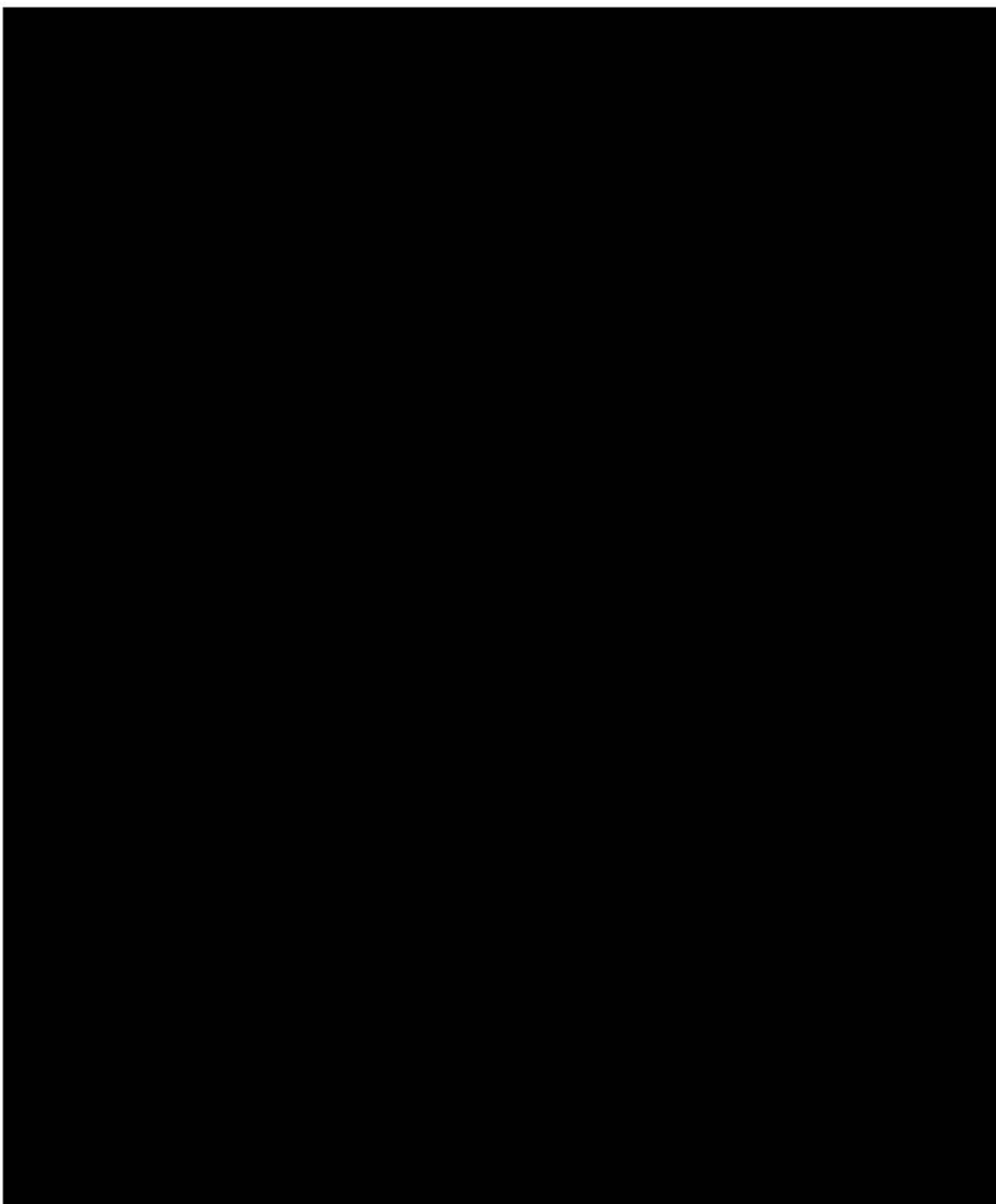
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

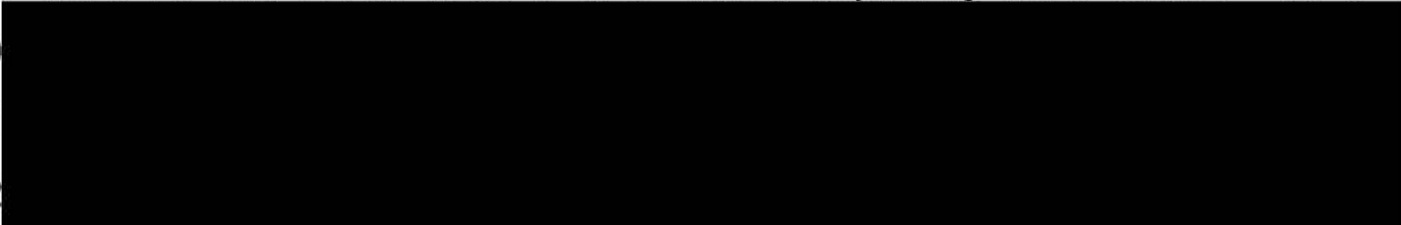
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1           So here's how it's relevant, Judge. All of those  
2 factors show that this wasn't a moment in time



3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

17           Now, in all the time I've been sitting in this  
18 courtroom listening to the accused make statements at times,  
19 this is the first time I ever heard anything this clear. It's



20  
21  
22

23           At the same time, learned counsel states, "Judge, we

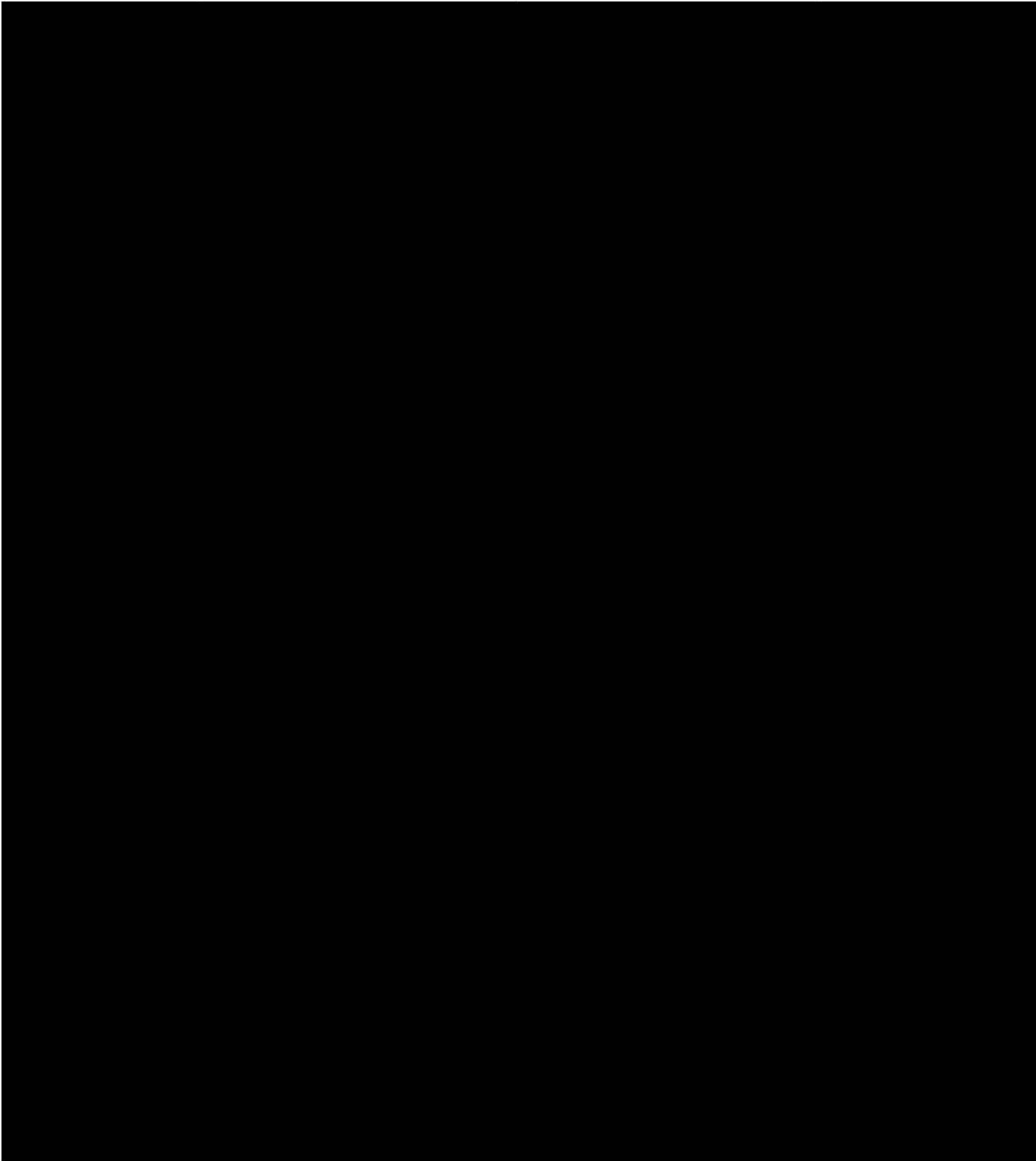
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

1 have exactly the same issue. My client" -- meaning

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1

2

3

4 MJ [Co] PARRELLA]: So how do I know that?

5

6

7 TC [MR. RYAN]: [REDACTED] Your Honor, contains the information

8 from the prosecution, which also contains the statement,

9 repeated by General Martins previously, [REDACTED]

10

11

12

13 MJ [Co] PARRELLA]: And I've read that, and I understand

14 that's from the prosecution. But as I understand how this

15 went down, [REDACTED]

16

17 TC [MR. RYAN]: Yes, sir.

18 MJ [Co] PARRELLA]: So the question was: [REDACTED]

19

20 TC [MR. RYAN]: It has not, sir.

21 Subject to your questions, Your Honor.

22 MJ [Co] PARRELLA]: No questions. Thank you.

23 Ms. Pradhan or anybody else have anything further?

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

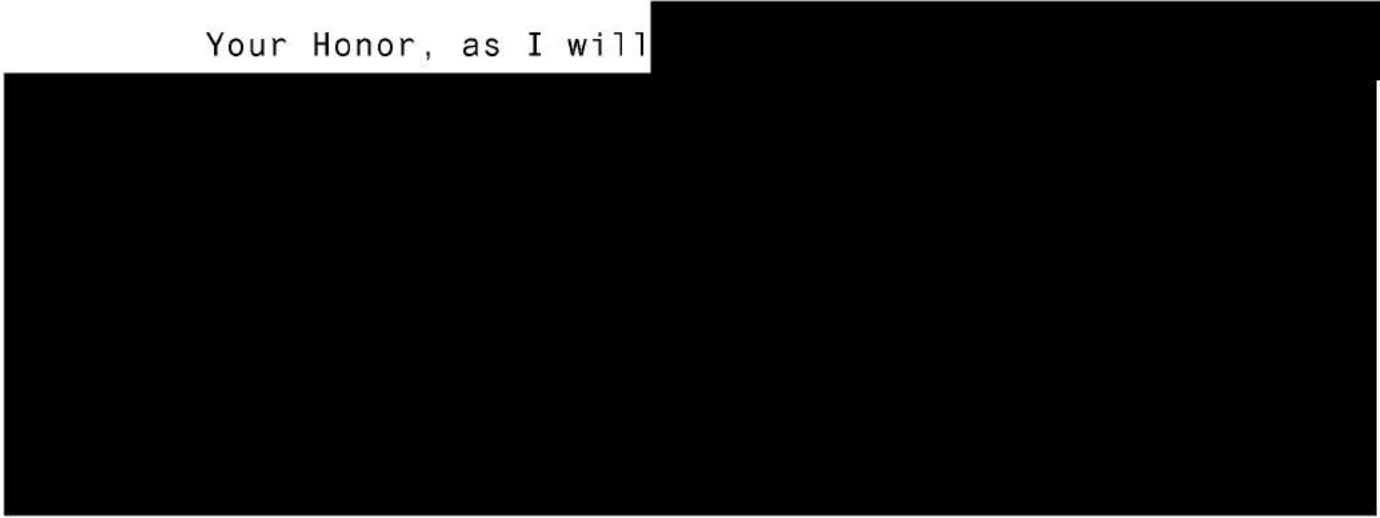
~~// TS/SCI //~~



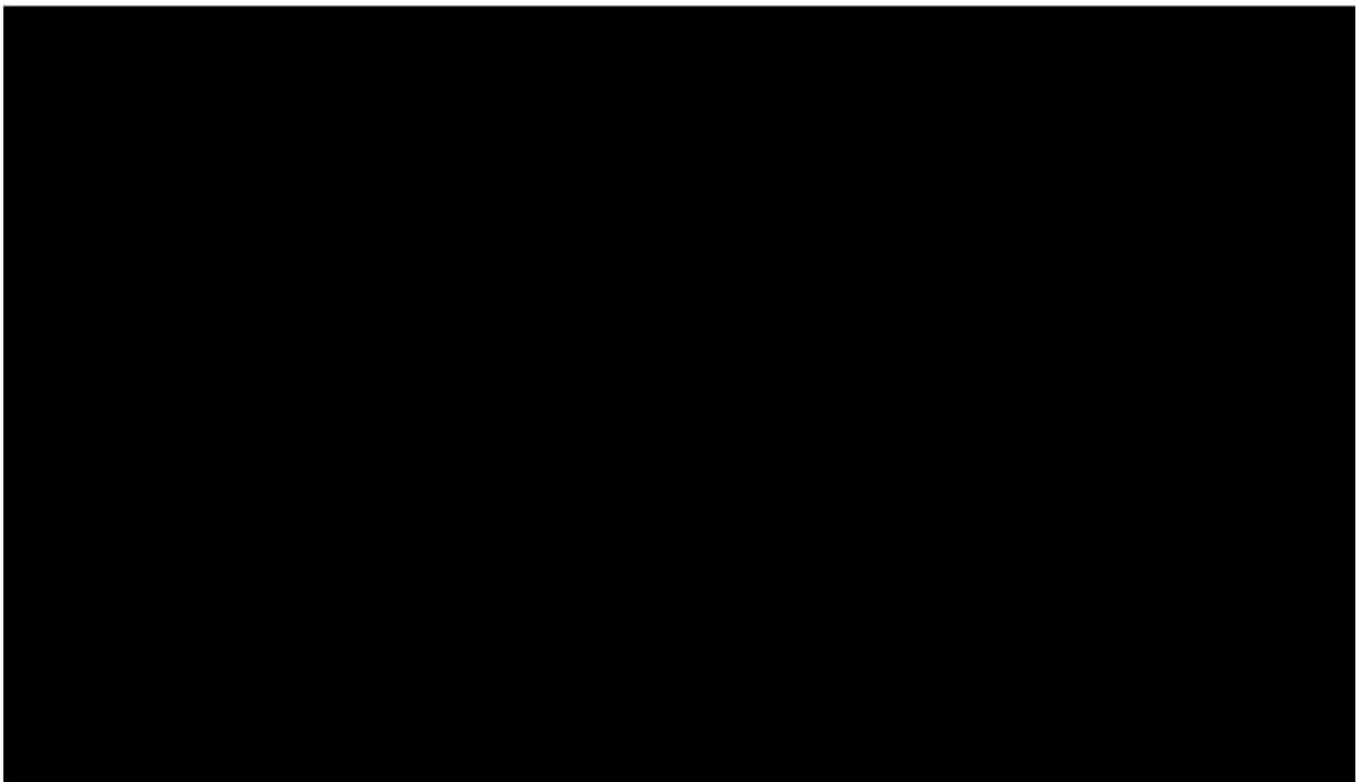
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 ADC [MS. PRADHAN]: Just a few very brief points,  
2 Your Honor.

3 Your Honor, as I will



10 This is the 9/11 case. It's not some case somewhere  
11 else. And this is not the only incident that has happened  
12 like this.

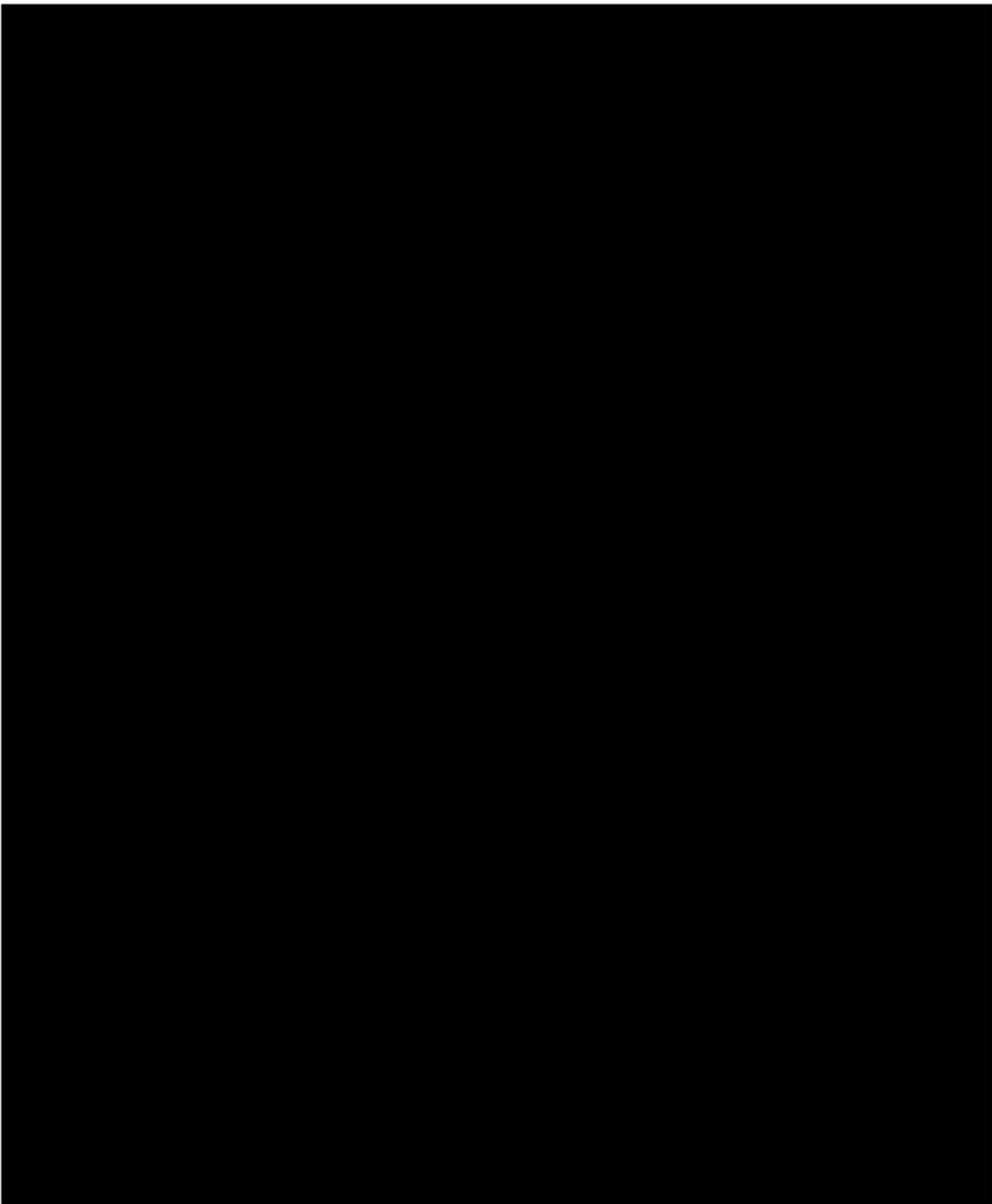


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23



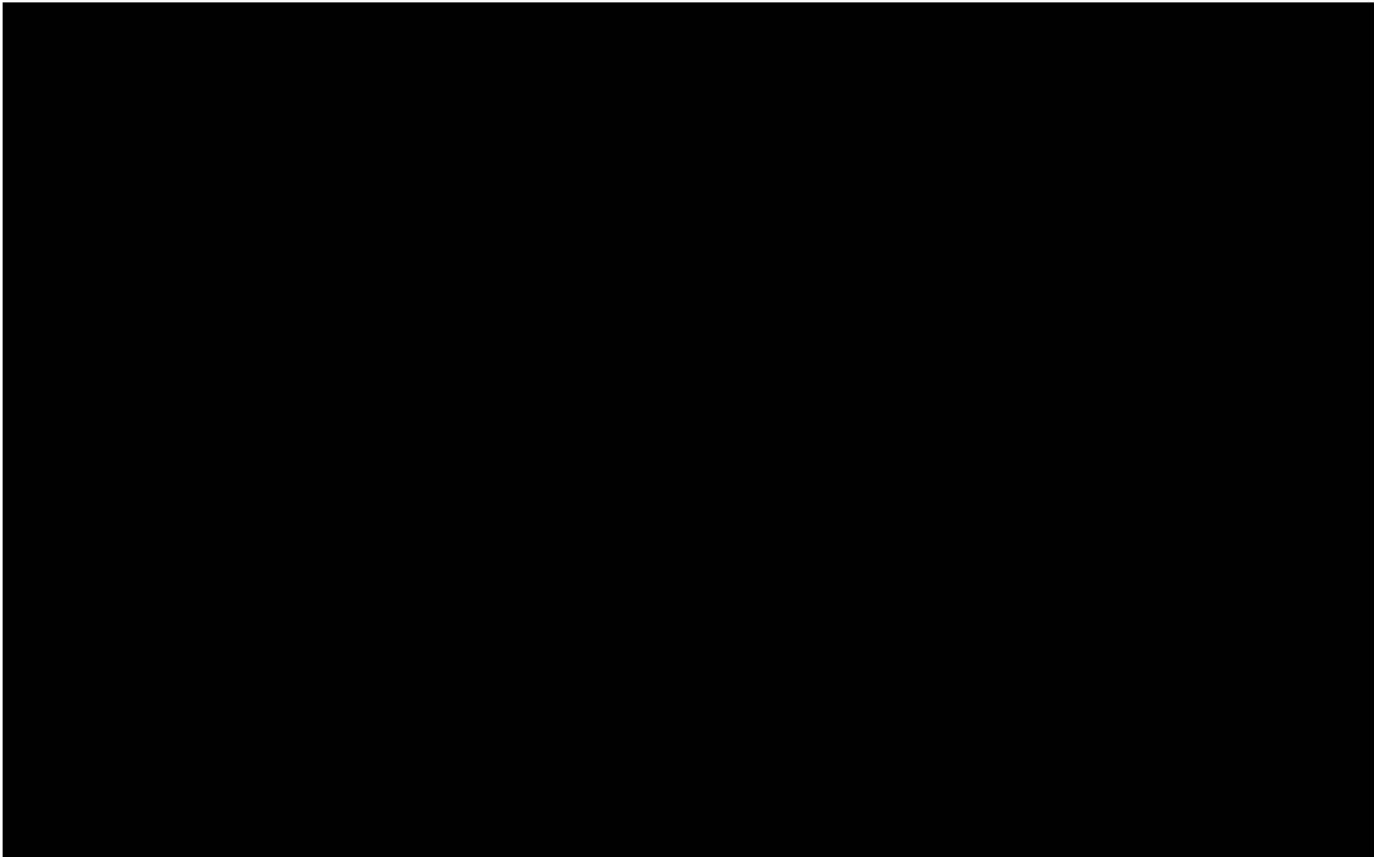
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

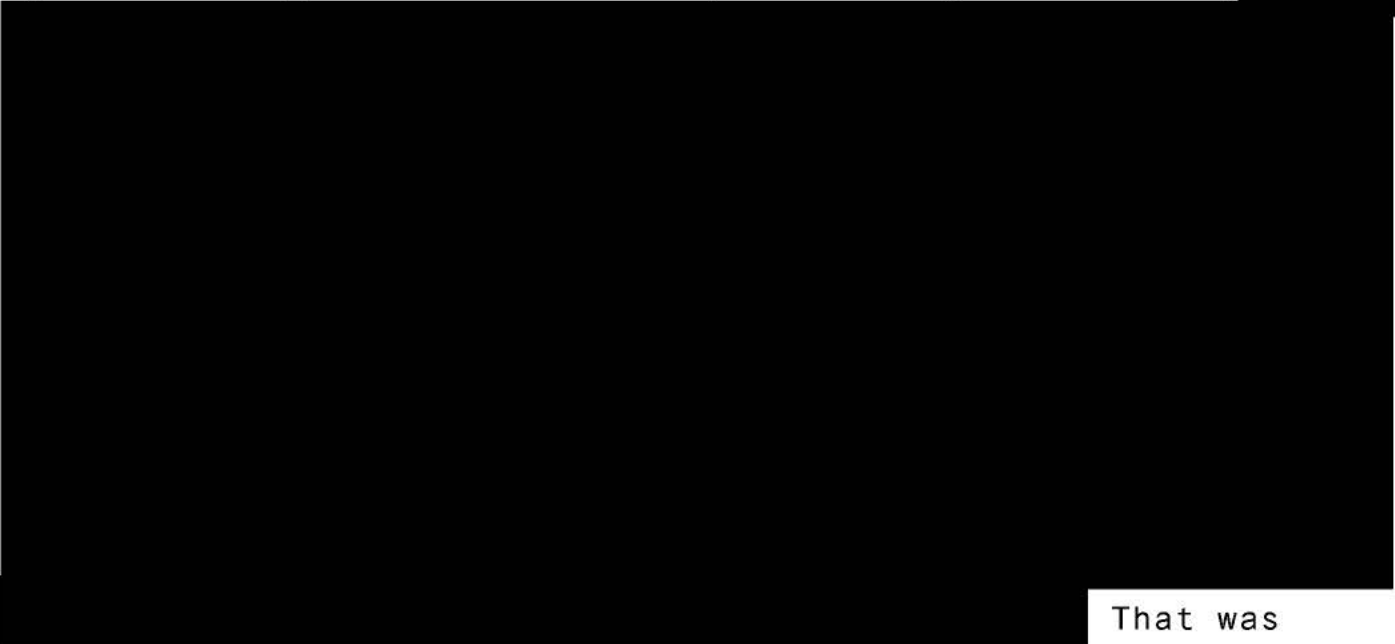
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



Finally, I'm frankly not quite sure why the government opposes so strenuously the taking of testimony



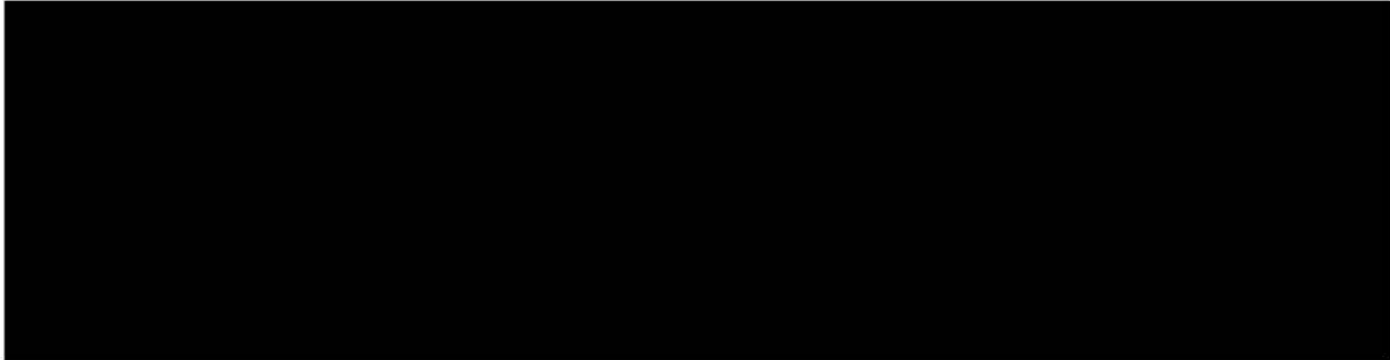
That was

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



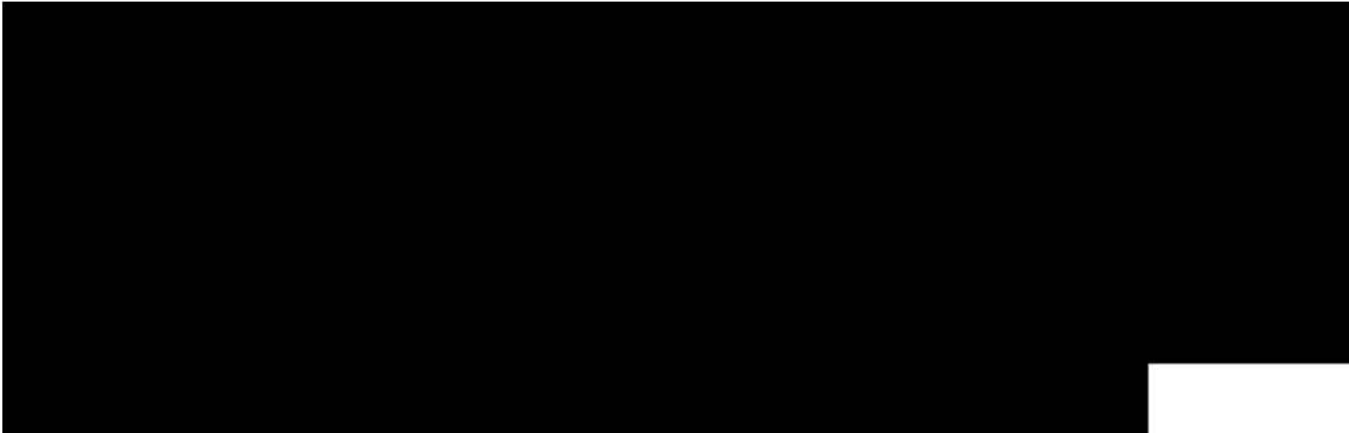
Subject to your questions.

MJ [Col PARRELLA]: Thank you.

Mr. Nevin?

LDC [MR. NEVIN]: Thanks, Your Honor. And I know we talked about it in the open session, the fact that the rule doesn't speak to unavailability exclusively as other -- some other criminal rules do; it speaks to exceptional circumstances. And I made the point that you don't get an awful lot more exceptional than that.

On that score, I heard Mr. Ryan saying that -- referring to this as the Jason Bourne scenario, sort of ironically. In other words, I take it the point is, what?



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11

[REDACTED]

But nonetheless, this is -- and, you know, we found smoke detectors -- microphones disguised as smoke detectors in our meeting rooms.

[REDACTED]

12 But we said this in the pleadings, and I would be  
13 glad to say this in open court because I don't think it's  
14 classified: Mr. Mohammad was told, "You will never be free of  
15 us. You will never get away from us."

16  
17  
18  
19

[REDACTED]

Remember what we told you? So I think there's a lot under the surface here that we just need to get to the bottom of.

22 And as I listened to the reference to General  
23 Martins' statement that no agency in the government -- I

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



I took that to heart. I went back and looked at the language, and I think [redacted] but I think Judge Pohl said something similar at an earlier time; and I'm going to try to get to the bottom of what is in my recollection about why that was permissible. But I think the same thing would apply here. And I don't mean that I think counsel is misrepresenting on purpose. I don't mean that at all.

But what I mean is, again, it's only as good as the information that counsel has been given. And I think the way you get to the bottom of this is you have [redacted]



But this is what they say about the oath, that -- in cross-examination, that it's, you know,

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 that language about the most effective engine for getting at  
2 the truth.

3           So it may not be perfect, but it's a tool that we  
4 have. And I think under the circumstances, under the  
5 exceptional circumstances, clearly 40 years of practice, if  
6 you told me I was going to be reciting the occurrence of  
7 things like what I just recited to you, I would have said  
8 you're crazy before I got to this environment.

9           These are -- we practically have an exceptional  
10 circumstance every day, but this is what we have in terms of  
11 how to get to the bottom of this and the military commission's  
12 obligation to make this a regularly constituted court that  
13 tries to protect its processes. And so ----

14       MJ [Col PARRELLA]: Thank you, Mr. Nevin.

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

16       LDC [MS. BORMANN]: We rely on the comments of other  
17 counsel. I have nothing further.

18       MJ [Col PARRELLA]: Thank you, Ms. Bormann.

19           Mr. Harrington?

20       LDC [MR. HARRINGTON]: Judge, I'm not going to beat the  
21  
22  
23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3

4 Mr. Ryan just said that we have the nondisclosure  
5 agreement. We do have a nondisclosure agreement. I didn't

6  
7

8 and perhaps the nondisclosure agreement is what did it. We  
9 don't know that. But that's the point about having this

10 deposition.

11

12 Mr. Ryan gave us a scenario that he's been outed,  
13 he's trying to protect his family, whatever it is,

14  
15  
16

17 We presented to you what we believe happened, and we  
18 need to explore that under oath.

19

20 You just asked Mr. Ryan did the CIA ever do a declaration?  
21 Anybody from the CIA do a declaration? Did they come forward  
22 with anything to explain this? This is not some mythical  
23 little problem in the air. This is -- this is really serious

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SI //~~

1 stuff.

2           You asked before, you know, to what purpose do we go?  
3 How about outrageous governmental misconduct? [REDACTED] put  
4 [REDACTED] put it with the other things that Mr. Nevin just  
5 said. When do you reach the point that you have outrageous  
6 governmental misconduct? That's a legitimate motion to be  
7 filed in any court in this country, including the military  
8 commissions.

9           Judge, in the black sites it's acknowledged that the  
10 government used psychological manipulation to try and get the  
11 information which they needed. The CIA readily admits that.  
12 They had the enhanced interrogation program to do that, to  
13 acquire information. It was a consistent tactic.

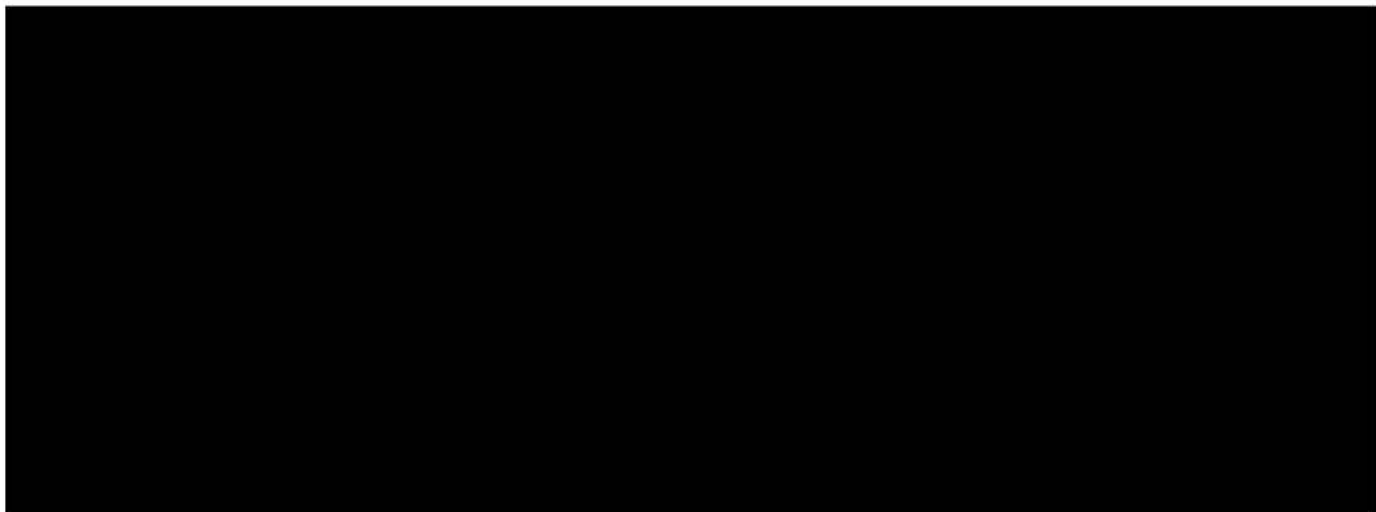
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7



8           But again, Judge, I don't see any other way that we  
9 at least begin to get to the bottom of this without that  
10 deposition. Thank you.

11         MJ [Col PARRELLA]: Thank you, Mr. Harrington.

12           Lieutenant Commander Furry?

13         DC [LCDR FURRY]: Nothing further, sir.

14         MJ [Col PARRELLA]: Thank you.

15           Okay. We are going to go ahead and take a recess.  
16 Before we do, a couple of things I would ask as we move  
17 forward here.

18           Number one, just a reminder to keep your argument, to  
19 the extent possible given necessary context, related to  
20 classified argument, in other words, the documents that you  
21 provided notice on classification. And secondly, I think it  
22 would be helpful for the commission, as well as probably for  
23 those transcribing, if you identified the classification level

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 of the material before you argued it.

2 With that, let's go ahead and take a 10-minute  
3 recess. This commission is in recess.

4 [The R.M.C. 806 session recessed at 1025, 16 November 2018.]

5 [The R.M.C. 806 session was called to order at 1042,  
6 16 November 2018.]

7 MJ [Col PARRELLA]: This commission is called back to  
8 order. All parties present when the commission recessed are  
9 again present.

10 We will now take up [REDACTED]. Good morning,  
11 Mr. Montross.

12 DC [MR. MONTROSS]: Good morning, Your Honor.

13 As Your Honor recalls, 360 involves the one discrete  
14 videoconference or video communication that was not  
15 transmitted to my client's family. We are seeking the answer  
16 to the eternal question of why not.

17 In open session I attempted to delineate the  
18 labyrinth of confusion surrounding classification of this  
19 video, and its trek from presumptive TS to unclassified to sua  
20 sponte reassessment, to now its current designation as secret.

21 Here in the closed session, I want to detail a little  
22 bit more about the twists and turns in this classification  
23 procedure that itself is classified.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1           Judge, after we filed [REDACTED] which was the motion to  
2 reconsider asking for an explanation about why the video was  
3 deemed "not appropriate for transmission," we filed another  
4 pleading in this series called 360D, as in David; and that was  
5 seeking a motion to show cause why the government should not  
6 be held in contempt or otherwise sanctioned for failing to  
7 turn over the videos that Judge Pohl had ordered.

8           That filing was deemed a spill, and the reason it was  
9 deemed a spill is because in that filing I talked about the 7  
10 December 2014 video [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18           So when talking about the 7 December 2014 video,  
19 [REDACTED]  
20 [REDACTED] that we have been  
21 provided at that point in May of 2018. All forbidden.

22           The problem was that other people, trial counsel, had  
23 mentioned it multiple times in their pleadings that -- the

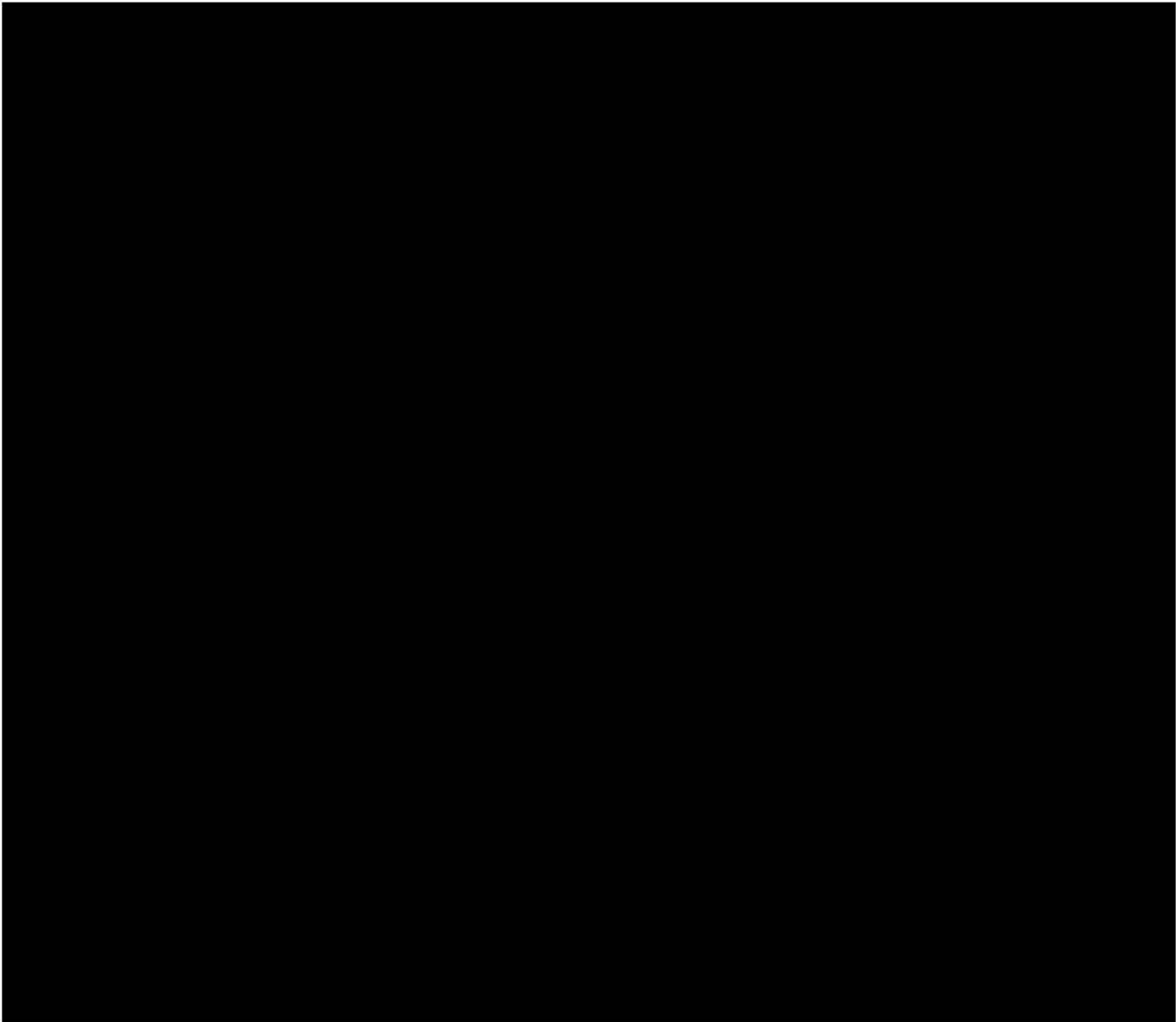
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 7 December 2014 video, and, lo and behold, Judge Pohl said it,  
2 too, in one of his rulings. So we had a problem. We had a  
3 spill.

4 On July 24th, 2018, here in court pretrial  
5 proceedings, the CISO provided new guidance related to AE 360.



6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

23 So this is the kind of level of insanity that we are

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 dealing with, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] In the 505(g) notice that we  
5 provided for this -- well, let me take one step back.

6 In the open session, Major Dykstra did acknowledge,  
7 at least what I heard, that there were some issues here with  
8 this particular communication. [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 So we addressed that briefly in our pleading, in  
15 (WBA Sup), which is the subject of the 505(g) notice, Judge.  
16 It was directing Your Honor to the classified portions of  
17 (WBA Sup).

18 And what I would tell Your Honor, okay, [REDACTED]

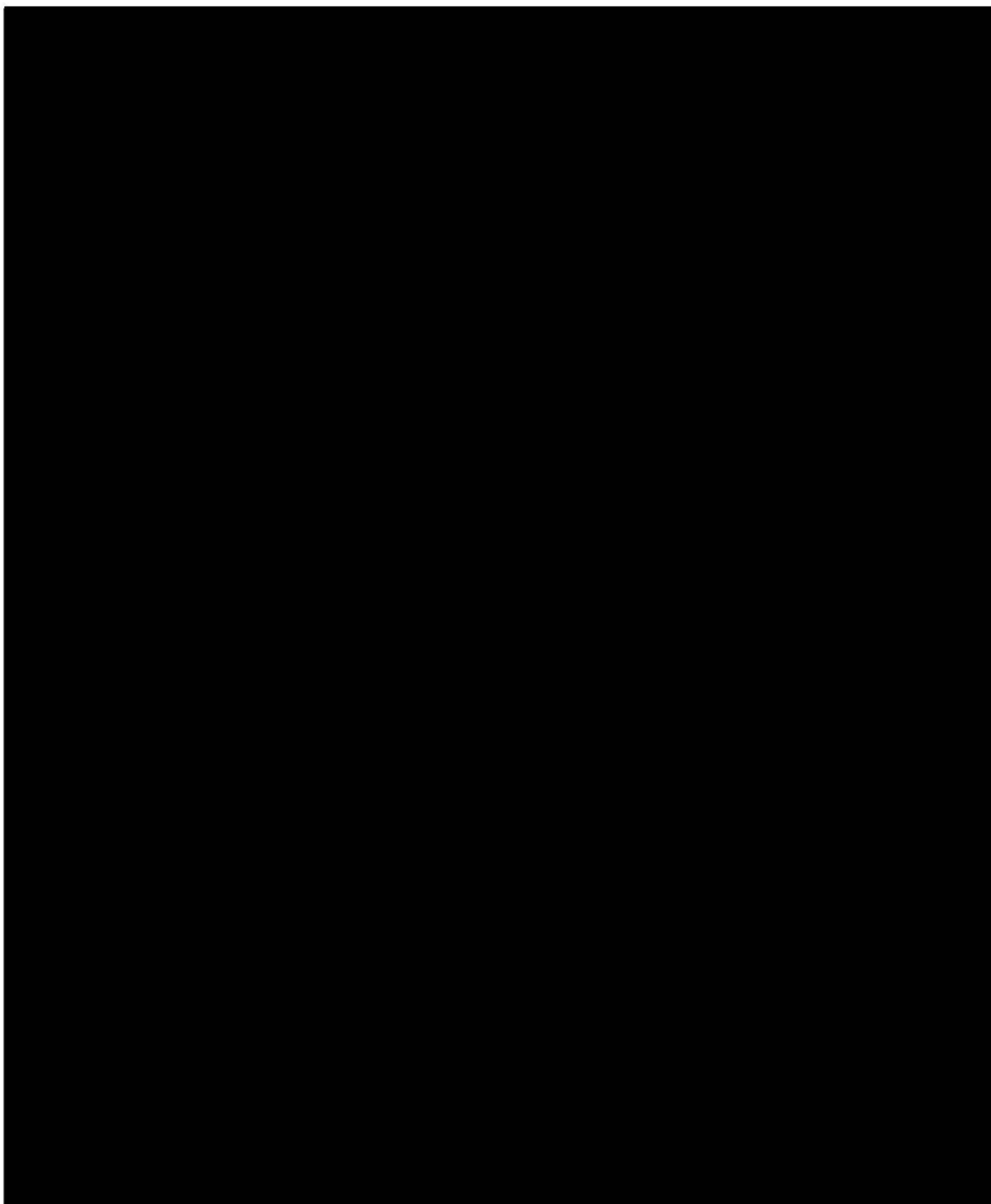
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

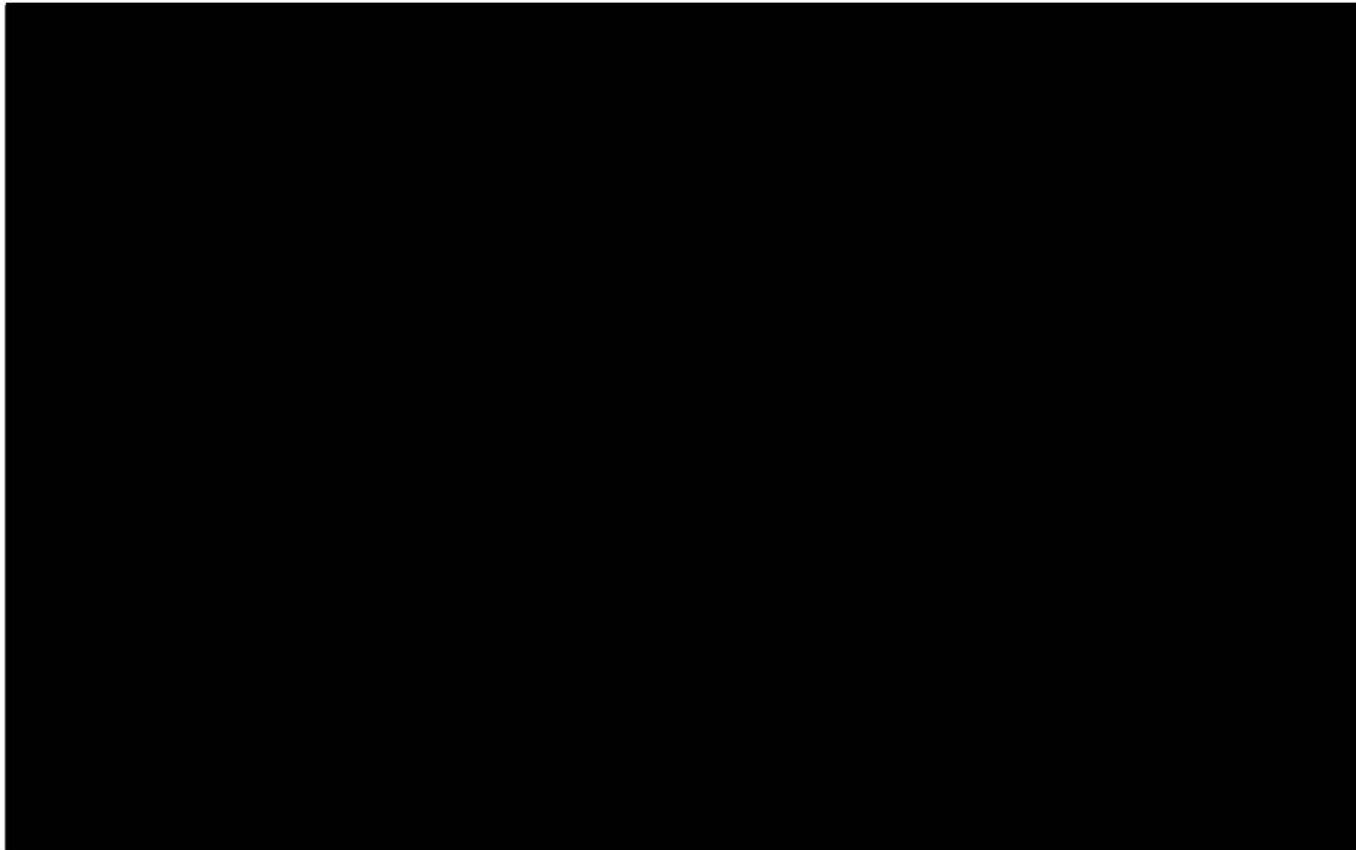
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

1           And if you wish, in the interests of expediency, I  
2 have one brief point on 399 that's related to this, and I can  
3 handle that right now if Your Honor would be amenable to that.

4           MJ [Co] PARRELLA]: Let's go ahead.

5           DC [MR. MONTROSS]: Okay. On 399 I had represented in  
6 open session and encouraged this commission to please not  
7 consider the government's defense, right, that the program,  
8 the video communication program, was both efficient and a fair  
9 substitution for in-person visitation. And I asked the court  
10 not to consider that defense because I didn't have the  
11 evidence and the ammunition to refute that.

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

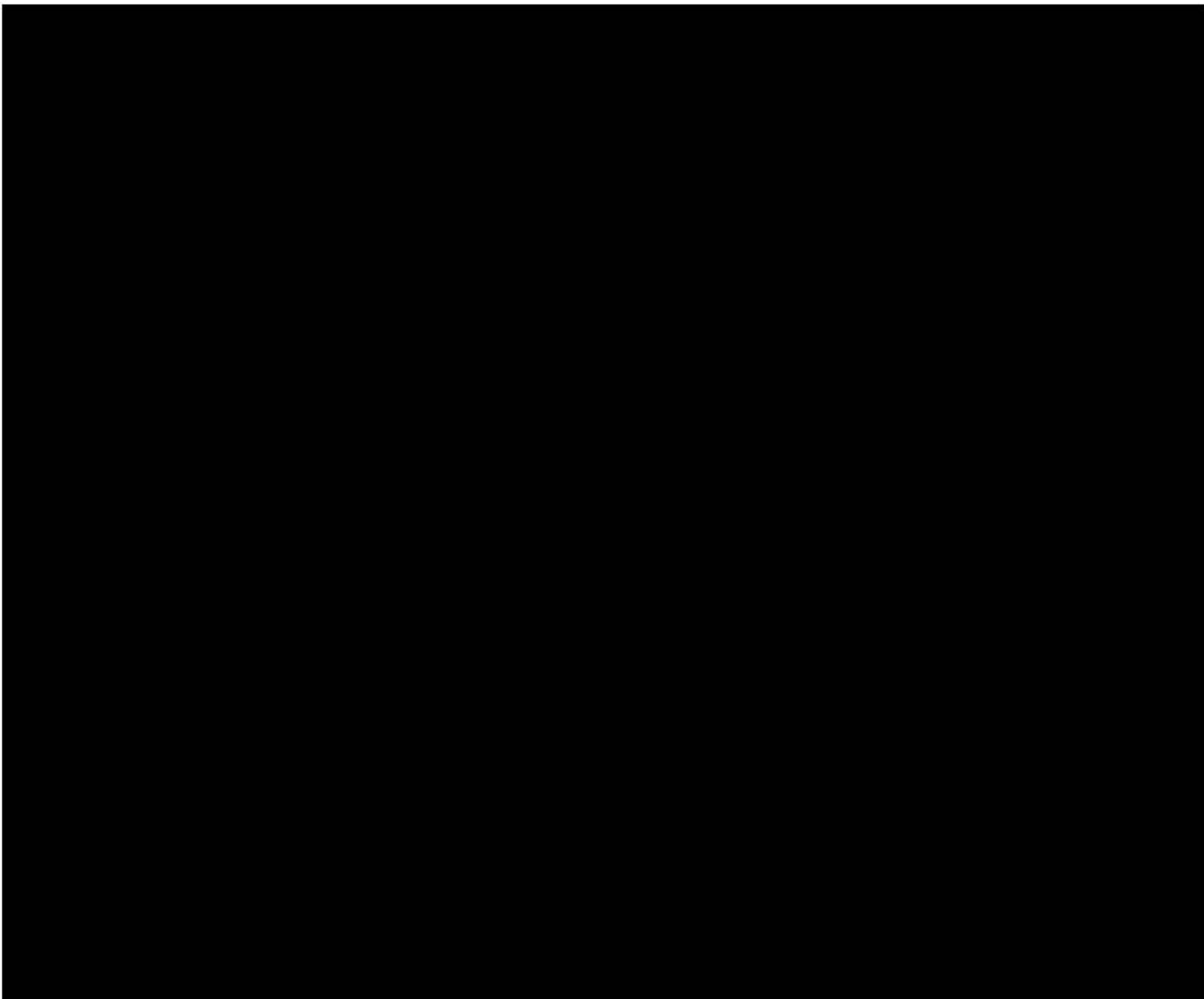
1 therefore, are not subject to being used as evidence by me in  
2 order to defeat their claim that the program is an efficient  
3 substitute for real in-person visitation.

4 And [REDACTED] is yelling at me. If I could have one  
5 moment, Your Honor?

6 MJ [Col PARRELLA]: You may.

7 [Pause.]

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

1 Mr. Bin'Attash. I just raise my hands in frustration at this  
2 point.

3 Subject to your questions, Judge.

4 MJ [Col PARRELLA]: I guess my question, Mr. Montross,  
5 let's go back to [REDACTED] I understand your frustration with the  
6 classification guidance that you've expressed to the  
7 commission, particularly with that one particular video, and  
8 it seemed to have gone from presumptive TS to Unclass and back  
9 to Secret.

10 But as you know, the commission is not a  
11 classification, you know, authority, so what exactly do you  
12 want the commission to do? You want paperwork relating to  
13 that one video to explain why it was or was not released. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 I'm not -- obviously I'm not a classification  
22 authority either. He has no derivative classification  
23 authority. He attempts to divine -- [REDACTED] I'm referring

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 to -- what is the classification status. I have no contact  
2 with OCAs.

3 What I want you to do, Judge, is I want you to order  
4 the government to provide either the OCA guidelines or JTF to  
5 provide the basis for the refusal to transmit the  
6 7 December 2014 video and to explain to me why.

7 MJ [Col PARRELLA]: Well, it seems the basis would be the  
8 fact that it was classified. So really what you're looking  
9 for -- I mean, it sounds to me, I guess, my point is it sounds  
10 less like a discovery request and more like a request for  
11 classification guidance.

12 DC [MR. MONTROSS]: I desperately need classification  
13 guidance, yes.

14 MJ [Col PARRELLA]: Okay. I understand. Thank you.

15 DC [MR. MONTROSS]: Thank you.

16 MJ [Col PARRELLA]: Mr. Nevin.

17 LDC [MR. NEVIN]: No, Judge.

18 MJ [Col PARRELLA]: Mr. Harrington?

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

20 MJ [Col PARRELLA]: Mr. Connell.

21 LDC [MR. CONNELL]: No, thank you, Your Honor.

22 MJ [Col PARRELLA]: Mr. Ruiz.

23 LDC [MR. RUIZ]: I don't have anything, Judge. Thank you.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SCI //~~

1 MJ [Col PARRELLA]: Trial counsel.

2 ATC [Maj DYKSTRA]: Nothing classified, Your Honor.

3 MJ [Col PARRELLA]: Trial Counsel, I have some questions  
4 for you.

5 ATC [Maj DYKSTRA]: And I'm more than willing to answer  
6 your questions, Your Honor.

7 MJ [Col PARRELLA]: Thank you. The first question is, if  
8 you know, how did we go from presumptive TS to Unclass and  
9 back to Secret again?

10 ATC [Maj DYKSTRA]: When we handed it over to them, it  
11 still needed to go through a classification review. We are  
12 just talking about the 7 December 2014 review video.

13 MJ [Col PARRELLA]: That's correct.

14 ATC [Maj DYKSTRA]: All the rest of the ones, we handed it  
15 over to them with the correct classification and so forth.  
16 After that they put it to the classification review. Due to  
17 some bureaucratic processing errors, it didn't go all the way  
18 through the process and got reported back to them  
19 unclassified.

20 When that was discovered, it came back for review and  
21 it went through the entire process, went through all the OCA  
22 process and was determined to be classified at that point in  
23 time. That was determined -- or that was reported back to

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 Mr. Bin'Attash's team.

2 MJ [Col PARRELLA]: I've read the class guidance that was  
3 issued pertaining to 360/399.

4 ATC [Maj DYKSTRA]: Yes, Your Honor.

5 MJ [Col PARRELLA]: I understand -- I think I understand  
6 what's contained in there. What I don't understand is that in  
7 light of reading that guidance

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

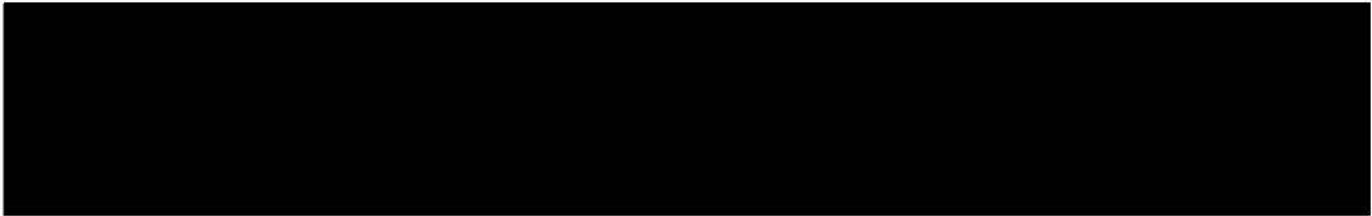
We have kept ourselves walled off from what was put  
forward into that process,

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

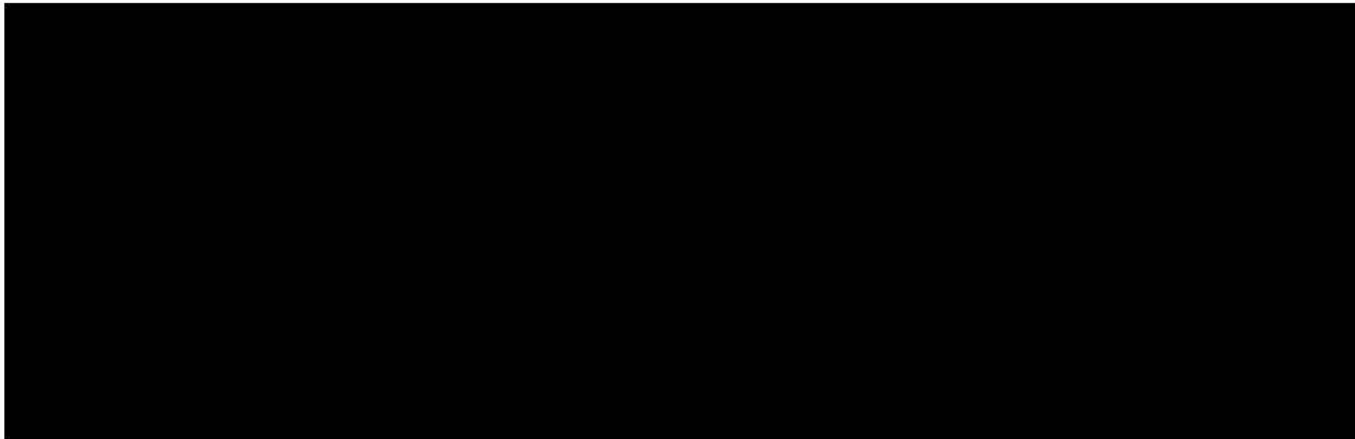


MJ [Col PARRELLA]: I understand. Thank you,  
Major Dykstra.

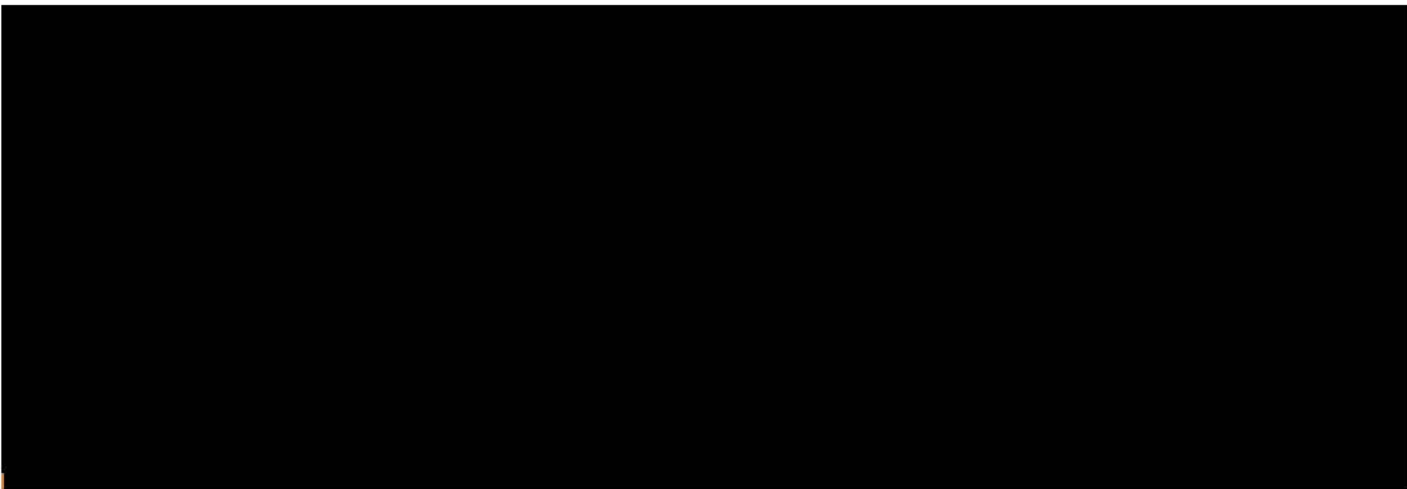
ATC [Maj DYKSTRA]: Yes, Your Honor.

DC [MR. MONTROSS]: May I?

MJ [Col PARRELLA]: You may.



MJ [Col PARRELLA]: I will leave that to your discretion,  
Mr. Montross.

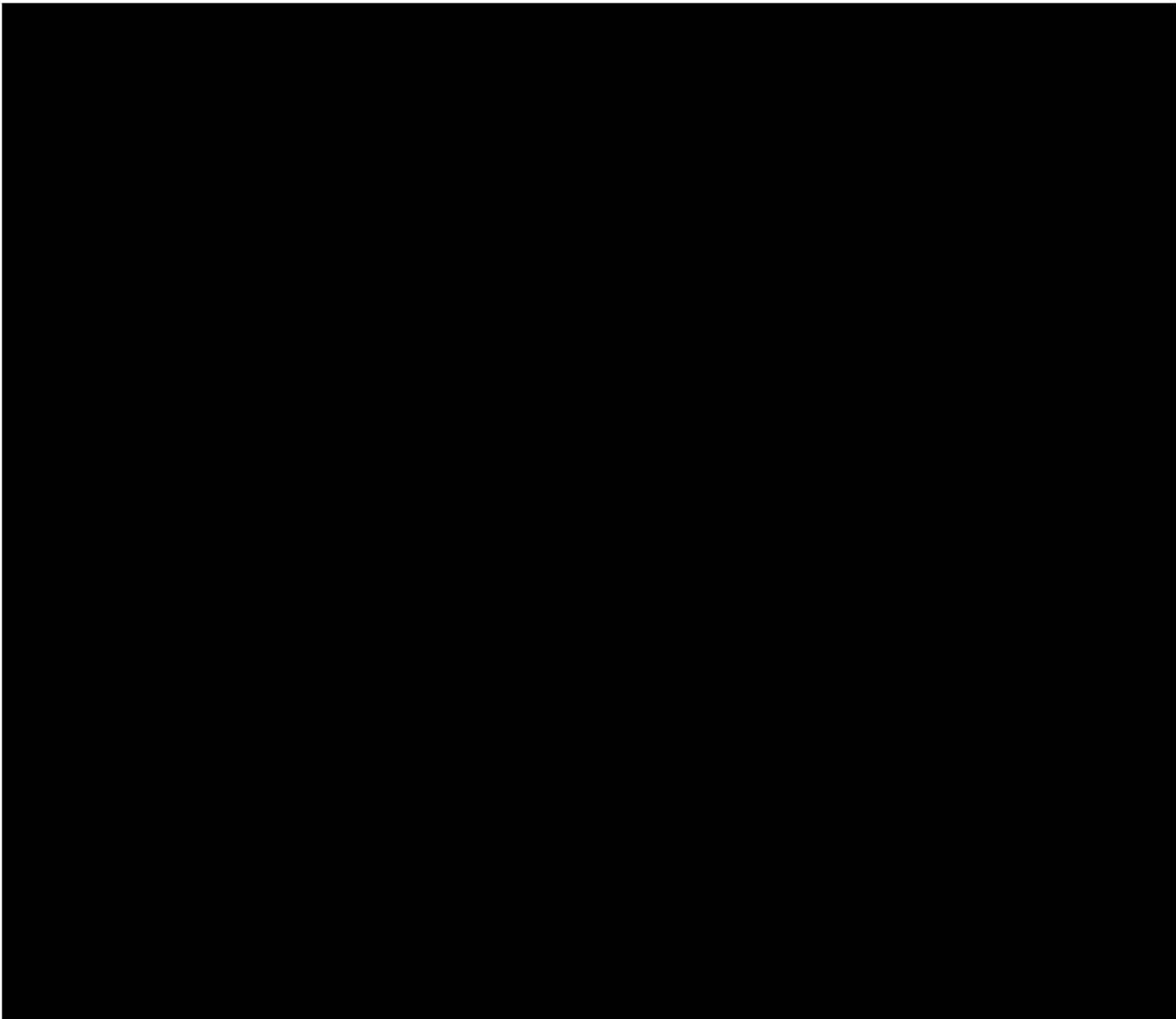


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17



18           So I hear bureaucratic slipup twice now, just on this  
19 one issue.

20           MJ [Co1 PARRELLA]: Thank you.

21           Mr. Ruiz.

22           LDC [MR. RUIZ]: Judge, I just want to add a few comments  
23 to the subject which I think you raised, which was the

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 commission's relationship in regards to classification  
2 matters, and I will just add a few points for your  
3 consideration.

4           It is true that you're not a classification authority  
5 and you cannot direct anyone to change the classification of a  
6 particular document. I think that is more than well  
7 established.

8           However, throughout the course of this litigation we  
9 have from time to time brought to the commission's attention  
10 that you are not powerless. The commission is not powerless  
11 in the face of what appear to be arbitrary or capricious  
12 classification determinations.

13           In fact, I believe we briefed this in 018PP way back  
14 when on this very issue. And the authority that the  
15 commission has and the power that the commission has is to  
16 look at classification of particular documents, and the court  
17 can make a decision or a finding that says the documents  
18 appear to be classified through an arbitrary or capricious  
19 means or there appears to be an abuse of discretion.

20           Throughout -- and obviously you can't change the  
21 classification. But certainly from the standpoint of the  
22 commission, you can look at the facts that are presented. You  
23 can look at varying changes in the classification of documents

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 in the absence of a real explanation to the commission as to  
2 how this comes about.

3 And this is a recurring theme through these  
4 commissions. I just ask that you -- that the record does  
5 reflect that. It is not at my fingertips at this moment, but  
6 it does.

7 The commission can take an active role and can take  
8 an active part in having the government put forth real  
9 explanations. It goes back to what Mr. Montross says, a  
10 classification guidance. Some kind of protocol by which these  
11 decisions are being made and being determined.

12 And why is that important? Because we are here  
13 litigating those very issues before the commission. There is  
14 a real impact in time and energy that is invested into these  
15 types of issues because there are these classification  
16 restrictions that are being made, taken away, made again; and  
17 this is but one very good illustrative example of that  
18 instance.

19 Like I said, I think it's 018PP where we fleshed this  
20 out a little bit more. I'm reaching back into the great  
21 recesses of our memory there, but I will confirm that that's,  
22 in fact, one of the places that we -- that we raised it.

23 So that's all I wanted to add on that point.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 MJ [Col PARRELLA]: Thank you, Mr. Ruiz. Okay.

2 We're going to move on to [REDACTED].

3 TC [MR. GROHARING]: Judge, excuse me, Your Honor. Just  
4 before we start, the prosecution has provided some exhibits on  
5 this motion to the court reporter. It's the defense's motion.  
6 They may want to argue first, but procedurally we should  
7 probably admit those exhibits, make sure they're admitted, and  
8 they're free to comment on them as well.

9 LDC [MR. CONNELL]: Your Honor, this is Ms. Pradhan's  
10 motion but I'm happy to argue this procedural point if the  
11 military commission will allow.

12 MJ [Col PARRELLA]: Sure.

13 LDC [MR. CONNELL]: Your Honor, the day of the closed  
14 hearing is too late to admit -- to give notice of new  
15 information -- new classified information for use in that  
16 closed hearing. The government equivalent to a 5-1(g) notice  
17 under Rule 505 is an (h)(2)(A) notice. The government did not  
18 give notice of this additional material. It has not been  
19 through a 505(h) use, relevancy, and admissibility  
20 determination nor did the defense have the opportunity to  
21 examine it in the context of this motion prior to the hearing.

22 So there would need to be a 505 -- there would need  
23 to be a 505(h)(2)(A) notice, a 505(h) hearing, notice to the

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 public, and then we could take that up.

2 MJ [Co1 PARRELLA]: Trial Counsel, response.

3 TC [MR. GROHARING]: Your Honor, the only information that  
4 would be discussed in this hearing has already been noticed by  
5 the defense. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 The fact that the government provided materials to  
9 the defense in discovery has already been part of the  
10 government's response in the [REDACTED]. The only  
11 portions that would be discussed are the specific texts within  
12 those documents that are contained in the paragraph d.  
13 synopses that are the subject of [REDACTED] I believe, the defense  
14 filing.

15 So the point is, as we've said in our pleadings, we  
16 provided the information to the defense. The only point of  
17 offering the exhibits is actually showing Bates-numbered  
18 versions of the documents we've actually provided to the  
19 defense.

20 MJ [Co1 PARRELLA]: And this is what's been marked as [REDACTED]

21 [REDACTED]

22 TC [MR. GROHARING]: Q, Your Honor.

23 MJ [Co1 PARRELLA]: ---- Q?

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1           So is this information -- information that was -- I  
2 take it it was not previously a part of any other prior  
3 notice. What you're looking to argue is the information  
4 that's highlighted in the yellow portions?

5           TC [MR. GROHARING]: That's correct, Your Honor.

6           MJ [Col PARRELLA]: And could you state one more time,  
7 Mr. Groharing? It didn't sound like you were looking to argue  
8 the substance, but what was the purpose of the ----

9           TC [MR. GROHARING]: We've -- the documents that are the  
10 exhibits are Bates-numbered materials that were provided to  
11 the defense in discovery, and they support the position the  
12 government has taken in the motion that, contrary to the  
13 defense assertions, that the information contained and  
14 specific information that the defense highlights ██████████ that  
15 that information is included in other materials that the  
16 defense has been provided, materials that were approved, the  
17 summaries that were approved by the military judge before they  
18 were provided to the defense.

19          LDC [MR. CONNELL]: Sir?

20          MJ [Col PARRELLA]: If you could, Mr. Groharing, address  
21 Mr. Connell's, I guess for lack of a better word, objection to  
22 the procedural aspect of this; in other words, that this was  
23 not previously run through the 505 process and, therefore, the

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 commission shouldn't take it up at this 806 session.

2 TC [MR. GROHARING]: Your Honor, the only information that  
3 would be discussed -- and that's what we're looking to protect  
4 through the 505 process -- it's the very same information that  
5 the defense noticed and was discussed and was approved by the  
6 military judge to discuss in this hearing.

7 It's the exact same subject matter, so there would be  
8 no need to notice the exact same subject matter that  
9 comes from -- just simply comes from a different document.

10 MJ [Col PARRELLA]: So assuming we could skip the  
11 505(g) -- the 505(h) hearing for the use, relevance, and  
12 admissibility, what's your position as to whether there has to  
13 be a separate closure order with respect to this?

14 TC [MR. GROHARING]: The government's position is that  
15 there would not need to be a -- it's the very same  
16 information. We already have an order that covers the  
17 information. Our position would be that if it went beyond  
18 that information, yes, the commission would have to issue a  
19 separate protective order, if it was information unrelated to  
20 the information in question.

21 But certainly the same, the very same information and  
22 information surrounding that would be appropriately covered by  
23 the commission's prior order.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SGI //~~

1 MJ [Co] PARRELLA]: Okay. Mr. Connell.

2 LDC [MR. CONNELL]: First, Your Honor, we disagree that  
3 it's the same information. Looking at -- you know, having had  
4 it handed to us this morning and examined it, it doesn't look  
5 like the same information to us. But we can argue that when  
6 we get to this.

7 But with respect to the government's position on 505  
8 notices only cover information and then all information would  
9 be swept in, we can bring in a whole bunch of new exhibits. I  
10 love that position. That position is incredible. I wish that  
11 I had had it on the record, and I am going to frame this  
12 transcript.

13 Because we spent most of Wednesday listening to  
14 government objections about how even when we gave notice of  
15 information and then had a subset under that with the exact  
16 documents which we wanted to rely on for the information, and  
17 then identified page numbers within those documents, that **that**  
18 was still not sufficiently specific notice.

19 So I love the idea that 505 notices cover only  
20 information and not documents, and that the government, who  
21 has a similar, arguably even stronger requirement under  
22 505(h)(2)(A) to identify the specific classified information  
23 at issue can -- that information is good enough.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1           And if the military commission rules in the  
2 government's favor on this, then I just want to draw the  
3 party's attention that I would expect the same standard to be  
4 applied to the defense.

5           MJ [Col PARRELLA]: Okay. So at this point let's go ahead  
6 and proceed with your argument, Mr. Connell, [REDACTED]. At this  
7 point I'm going to take it under advisement as to whether I  
8 will allow the government to argue this information in this  
9 hearing.

10          LDC [MR. CONNELL]: Thank you, sir. Given the importance  
11 to going forward in the 505 process of how this works, I do at  
12 some point request a ruling. I understand it's under  
13 advisement.

14          MJ [Col PARRELLA]: No, I understand.

15                Ms. Pradhan.

16          ADC [MS. PRADHAN]: Yes, sir. If you don't mind,  
17 Your Honor, I will just take a moment. I'm going to make use  
18 of the document camera for documents that are in the record  
19 and have been noticed to the military commission, so I just  
20 want to get everything straight.

21          MJ [Col PARRELLA]: Okay.

22          ADC [MS. PRADHAN]: There have been incidences where I  
23 have knocked large amounts of paper off the podium, so --

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1           And just for the military commission's essay,  
2 Your Honor indicated that you wanted the information regarding  
3 the classification level of the documents that we are going to  
4 use. All of the documents that I would like to use and to  
5 display on the document camera that I will be referring to are  
6 classified at the SECRET//ORCON//NOFORN level, but I do expect  
7 to make reference at certain points during my argument to the

8 [REDACTED]  
9 [REDACTED]

10           MJ [Col PARRELLA]: Okay.

11           ADC [MS. PRADHAN]: Your Honor, as a preliminary matter,  
12 [REDACTED] as Your Honor has undoubtedly  
13 noticed, are all interrelated in certain ways.

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17           They're related because the government has  
18 continually argued that investigation is unnecessary either  
19 because they, the government, will facilitate access to

20 [REDACTED]  
21 [REDACTED]

22           Now, [REDACTED] of course -- and I'm not going to argue  
23 the substance of [REDACTED] that's for Mr. Connell. But I do

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 want to just frame some of the issues in [REDACTED]

2  
3  
4  
5  
6  
7  
8  
9

10 So the literal carrying out of a phone interview is,  
11 in the government's eyes sufficient to reach the standard of  
12 investigation required in a capital case, but I'll talk more  
13 in a little bit about the mechanics of the interviews when I  
14 get to my third point on [REDACTED]

15 The important point is that the government does  
16 not -- has not really wanted to delve into the substance of  
17 the conversations we have had with the UFI witnesses and that  
18 is because the substance largely supports our arguments in AE  
19 [REDACTED] RDI discovery cannot be  
20 relied upon.

21 I'm going to walk through [REDACTED] slowly because these  
22 are obviously big and important issues.

23 MJ [Col PARRELLA]: Not too slowly.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 ADC [MS. PRADHAN]: Not too slowly. I don't think I am  
2 capable of going too slowly, Your Honor. No one has ever  
3 accused me of that.

4 But these are big and important issues that I don't  
5 have to repeat that strike the heart of the case.

6 The government will respond with broad remarks about  
7 the breath of their discovery productions. They will respond  
8 by trying to convince the military commission that these  
9 discrepancies are not serious, they are minor, they are  
10 limited in scope. We have heard this before. And the  
11 military commission cannot allow those responses any more.

12 There are a couple of overarching questions that  
13 thread through [REDACTED] that the military commission, I ask  
14 respectfully, should keep in mind regarding RDI discovery as a  
15 whole.

16  
17  
18  
19  
20  
21  
22  
23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

Your Honor, we asked the government to answer this question directly: Under whose authority did they adopt this limited definition? Because it colors the discovery that we have -- that we have received, and it colors the fact that there has been such significant delay in that discovery.

The second overarching question is what is the government's explanation -- really, this is a related question: What is the government's explanation for withholding that evidence until 2018?

They knew that Special Agent Fitzsimmons was in

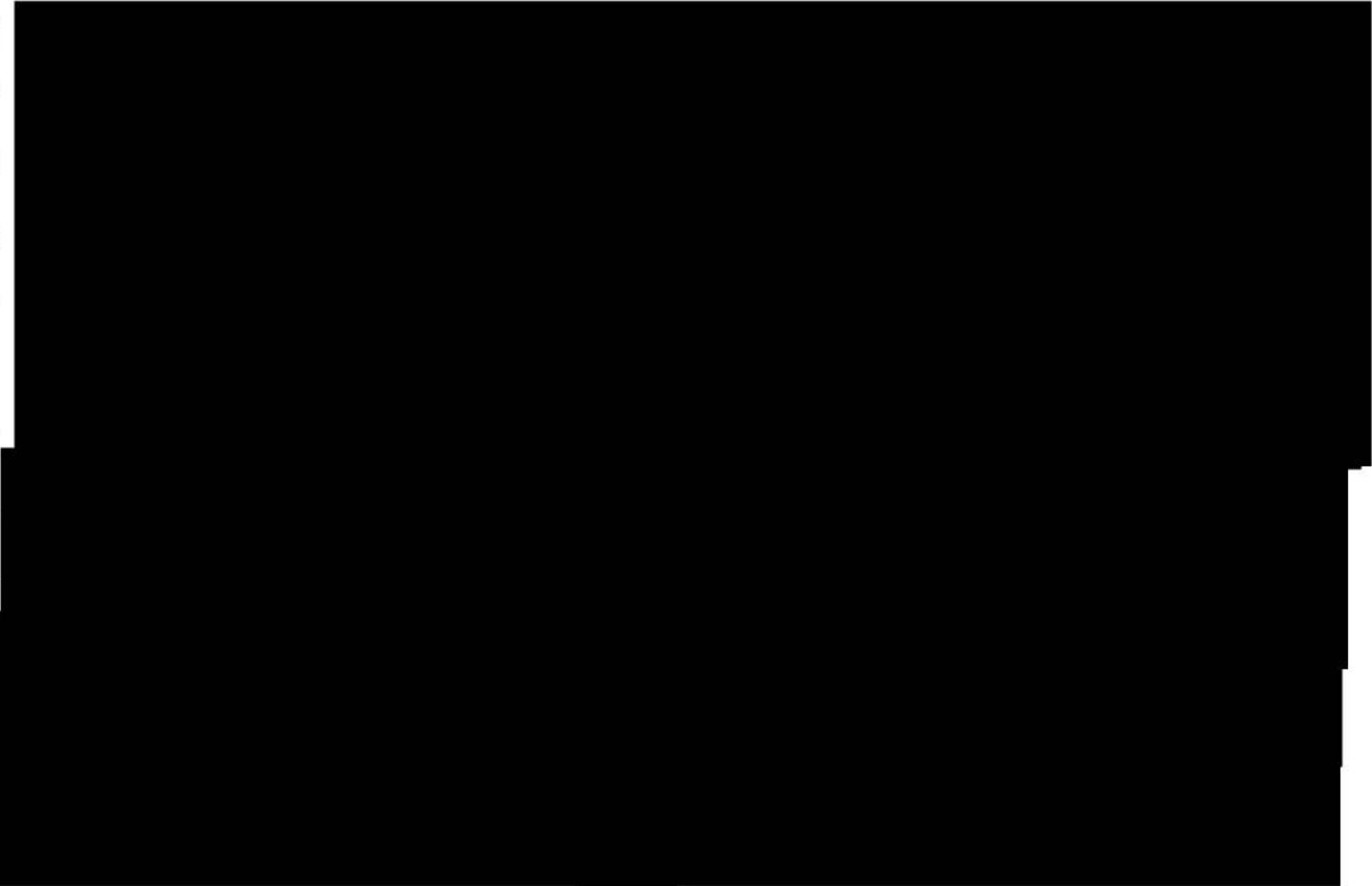
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18



19           That brings me to           our motion to compel the  
20           [REDACTED]           Your Honor  
21           [REDACTED]           We won't go over that  
22 again, but I have -- the roadmap with your permission,  
23 Your Honor, [REDACTED] essentially boils

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

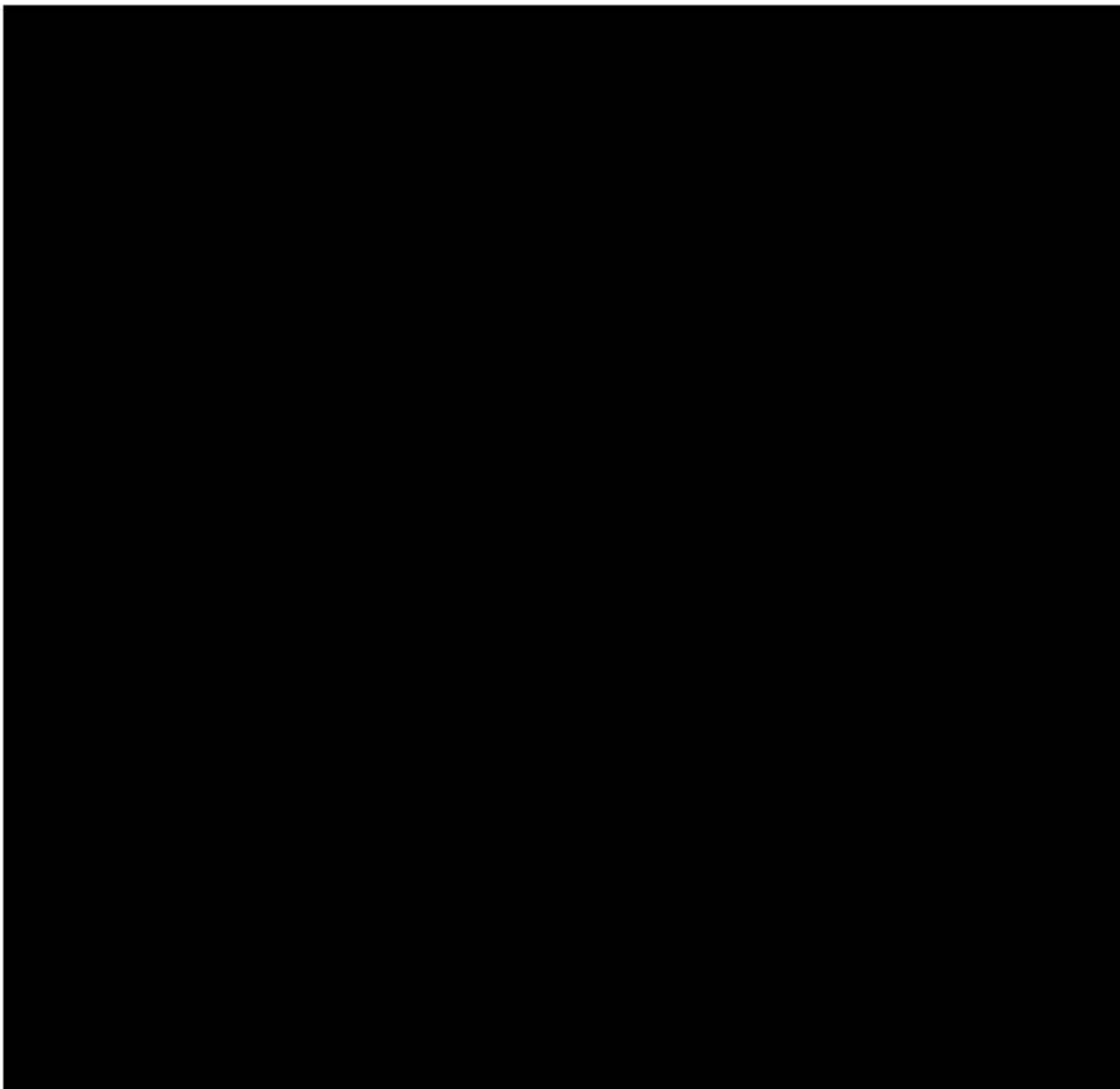
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 down to three main arguments. The first is the government

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20



21 If I may have access to the document camera.

22 MJ [Co] PARRELLA]: You may.

23 ADC [MS. PRADHAN]: Thank you, Your Honor. The document

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 that I'm putting up here is found in the record at [REDACTED]  
2 [REDACTED] And I would like to  
3 call Your Honor's attention to the first full paragraph on  
4 that page. And I apologize for the quality of that copy, but  
5 let me see if I can -- there we go.

6 It says, [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]

12 And as a preliminary matter, Your Honor, I note that  
13 you have not ruled on the government's desire to use  
14 additional information on this, but they did provide further  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]


19 And the point about this, Your Honor, is that medical  
20 experimentation on human beings -- well, on prisoners, is a  
21 crime. There are no two ways about it. There is law and case  
22 law about this, both domestic and international.

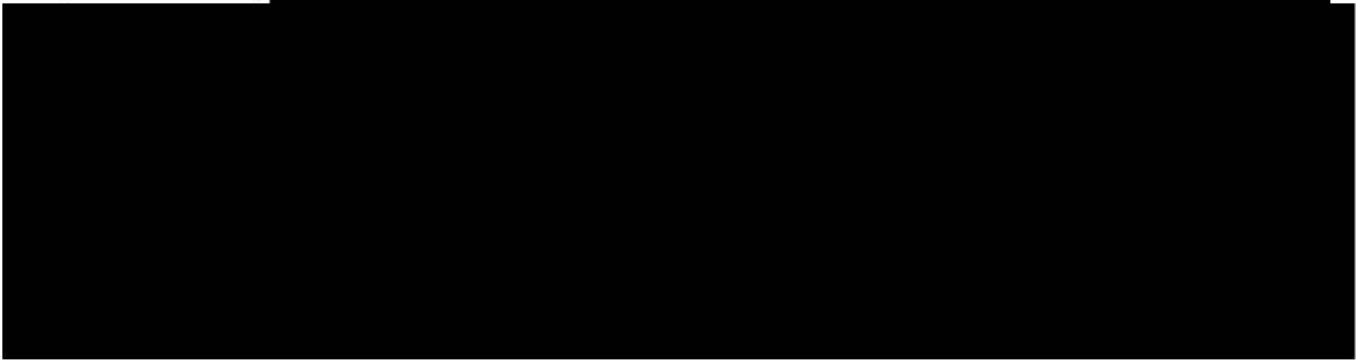
23 Two days ago the ACLU released FOIA report

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

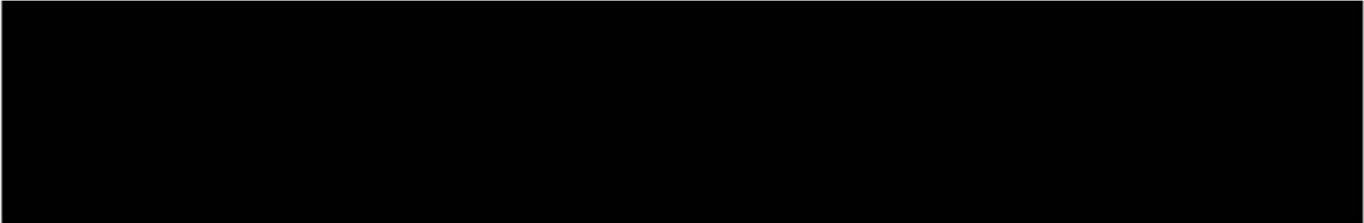
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SCI //~~

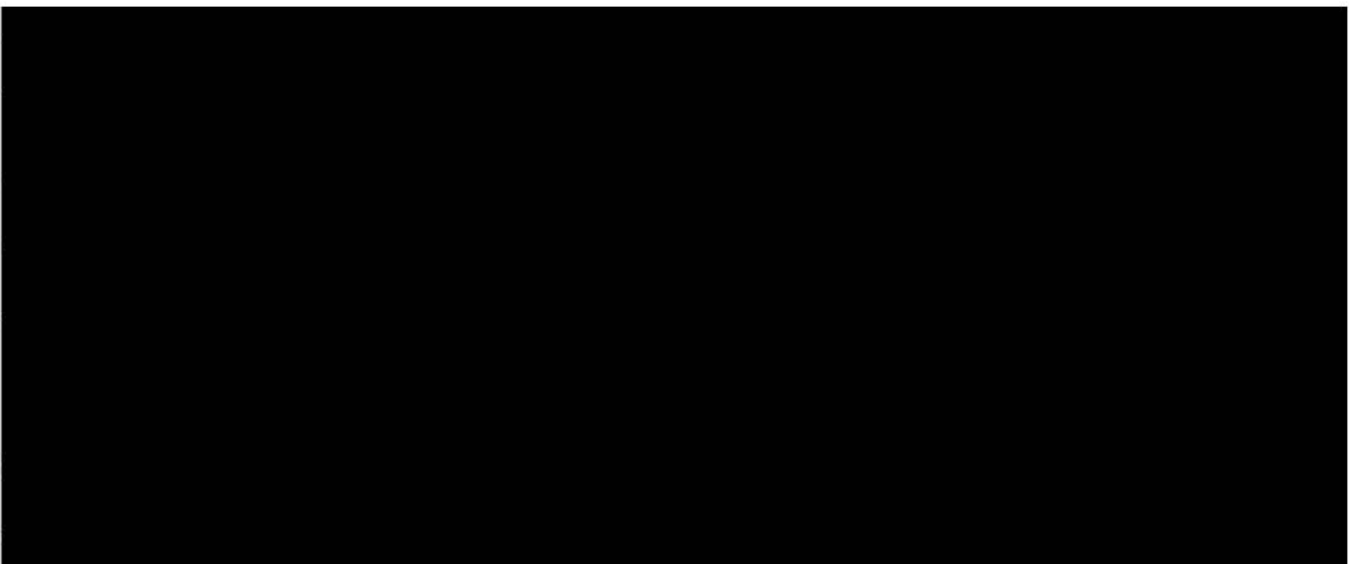
1 acknowledging that the CIA had considered use of an  
2 experimental truth serum on detainees. Now that plan was not  
3 implemented, 

4 

9 information is there available about this? There must have  
10 been other information that speaks directly to this that the  
11 government reviewed in the process of creating this summary.

12 

15 And I'd like to call Your Honor's attention to

16 

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SCI //~~

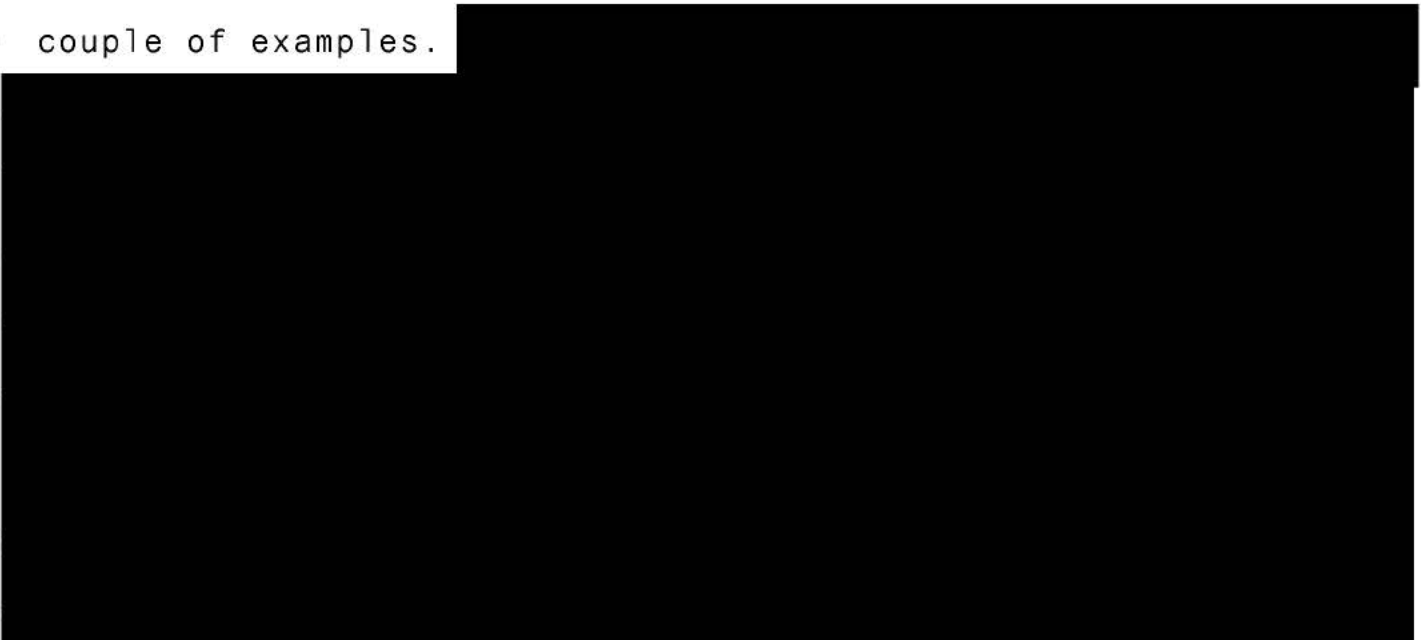
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



Now, the specificity, Your Honor, of the purpose of that OIG interview to ascertain whether the Federal Anti-Torture Statute had actually been violated as early as 2005, that is significant. Who initiated that investigation? Was it triggered by a particular incident? Who else was interviewed in that particular OIG review? And what was the outcome? Was there a report issued on that specific potential violation? Those are all relevant questions to that paragraph, and that is why we would be seeking the information underlying that paragraph.

These are -- again, Your Honor, these are just a couple of examples.

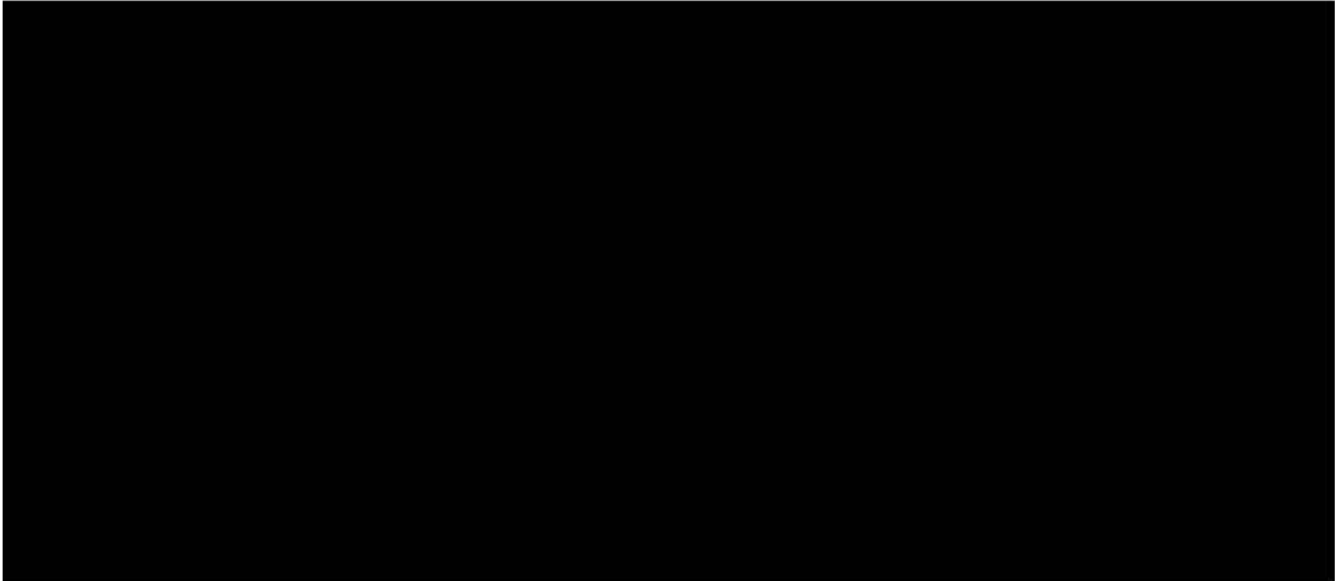


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8



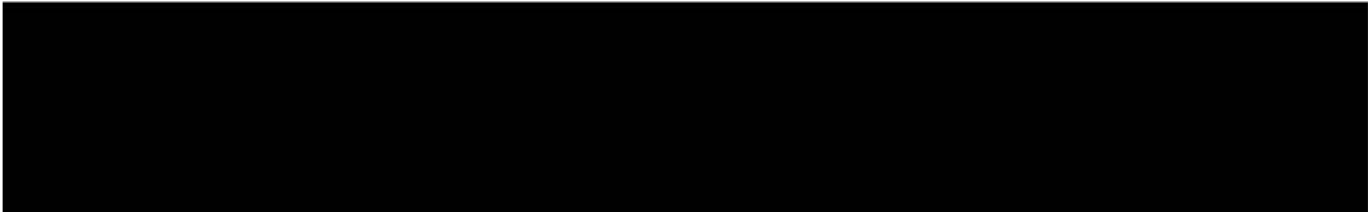
9 TC [MR. GROHARING]: Excuse me, Your Honor, if I could  
10 just interrupt. We are trying to find the documents. We  
11 don't have these in our materials that we discussed at the  
12 prior session, the prior 505(h) session.

13 So we would just ask clarification from counsel:  
14 Which notice did this document come from?

15 MJ [Co] PARRELLA]: Okay. Go ahead and finish your  
16 argument, finish your thought, and then if you could tell the  
17 commission where this information -- which notice it pertains  
18 from.

19 ADC [MS. PRADHAN]: Sure. These were already in the  
20 record, Your Honor, but absolutely.

21  
22  
23

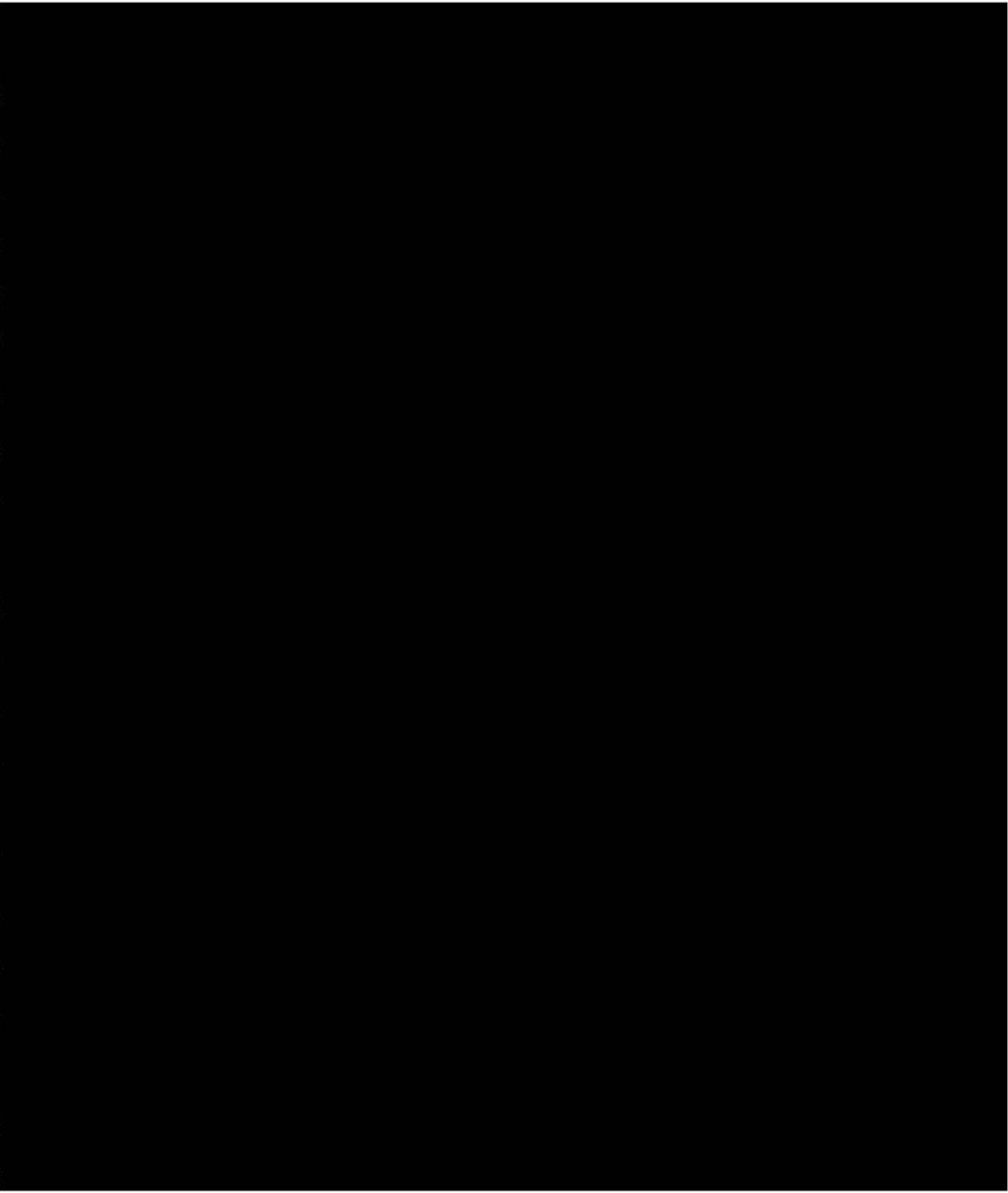


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



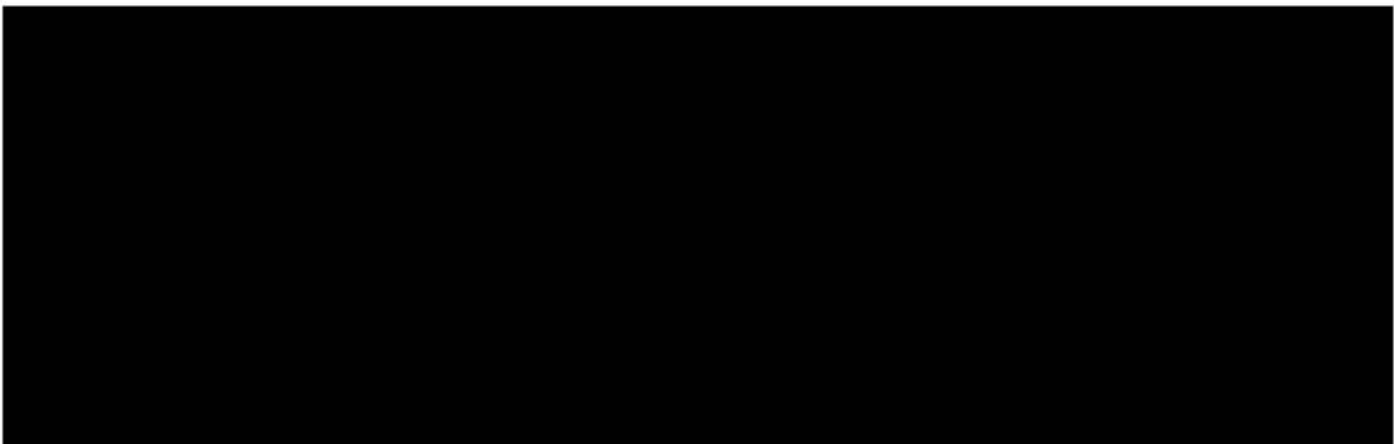
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



May I have a moment to confer, Your Honor?

MJ [Co1 PARRELLA]: You may.

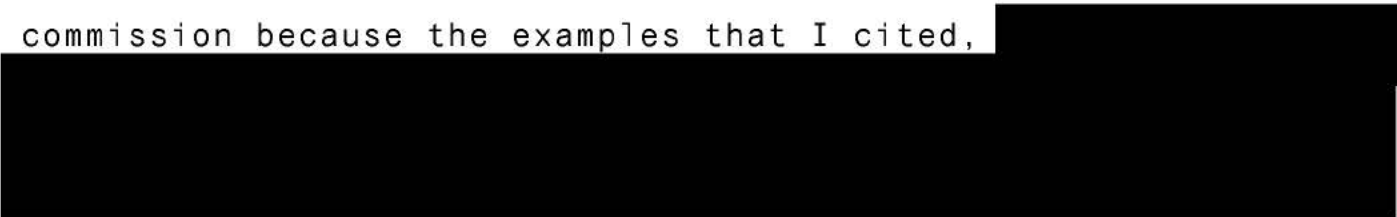
ADC [MS. PRADHAN]: Thank you.

[Pause.]

ADC [MS. PRADHAN]: I apologize, Your Honor, for the confusion.

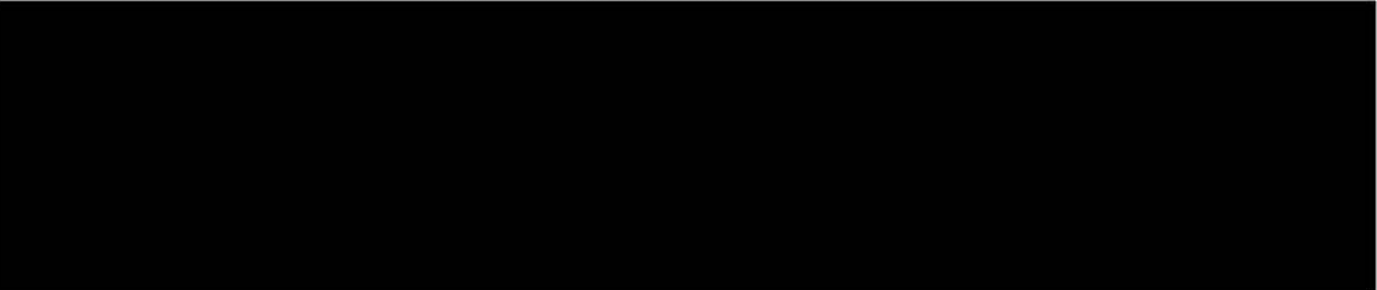
MJ [Co1 PARRELLA]: No problem.

ADC [MS. PRADHAN]: And I apologize to the military commission because the examples that I cited,



MJ [Co1 PARRELLA]: Okay.

ADC [MS. PRADHAN]: Thank you, Your Honor.



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

And in that the drafters of this report state, "We

17 Now, the government can, of course, give us a more  
18 accurate picture of what they used in constructing these  
19 profiles, but it seems clear that certainly these documents  
20 are not all summarized in the discovery produced to us by the  
21 government.

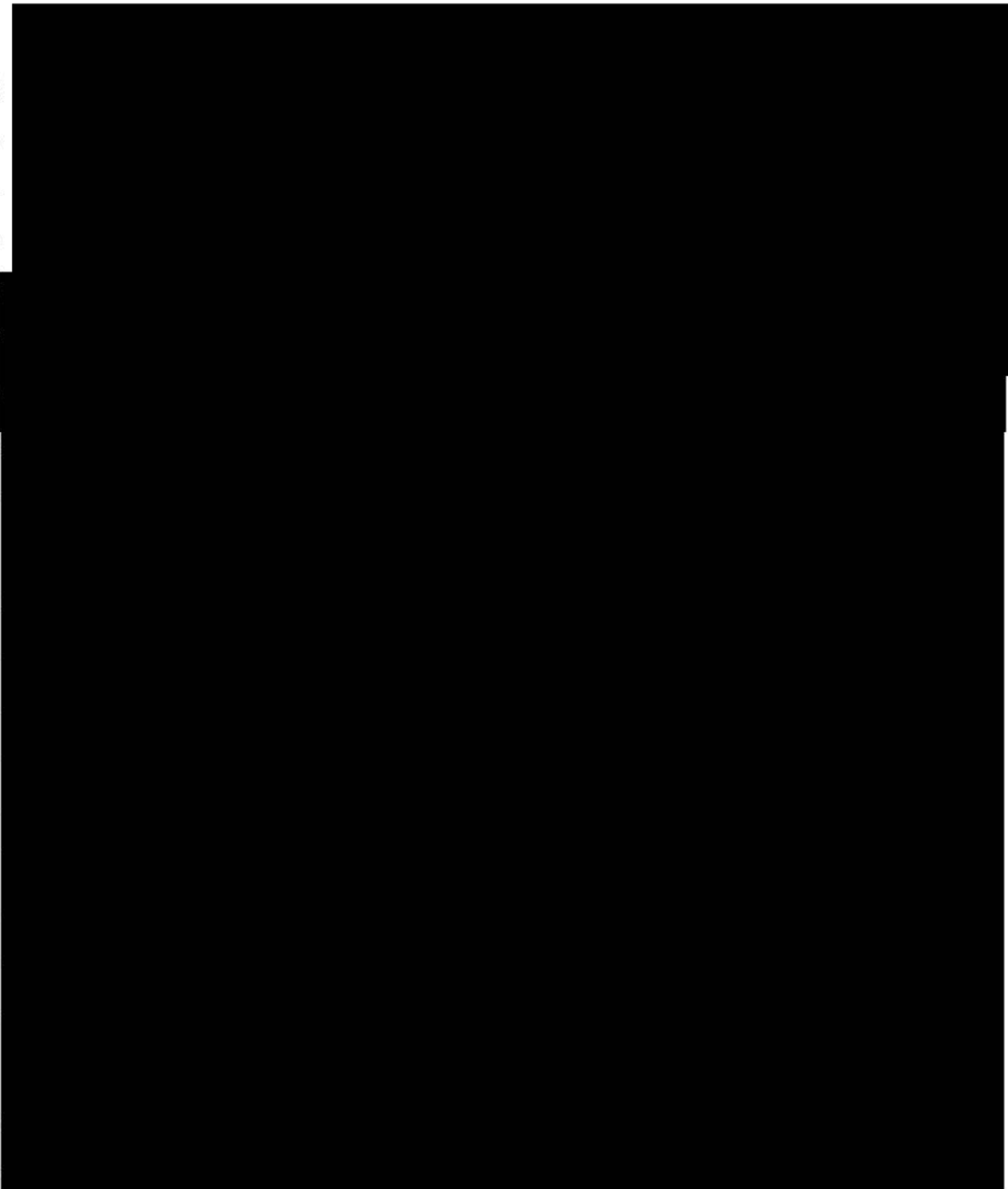
22 Now, moving on to my second point, Your Honor.  
23 Before we conducted UFI interviews, we were able to identify

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1

2

3

Now, this states, Your Honor, in relevant portion --

4

I apologize for the quality of the copy, but that's actually

5

how we received it as well.

6

7

8

9

But skipping ahead,

10

11

12

13

14

15

16

17

18

19

20

21

22

The reasons they decided to torture them are

23

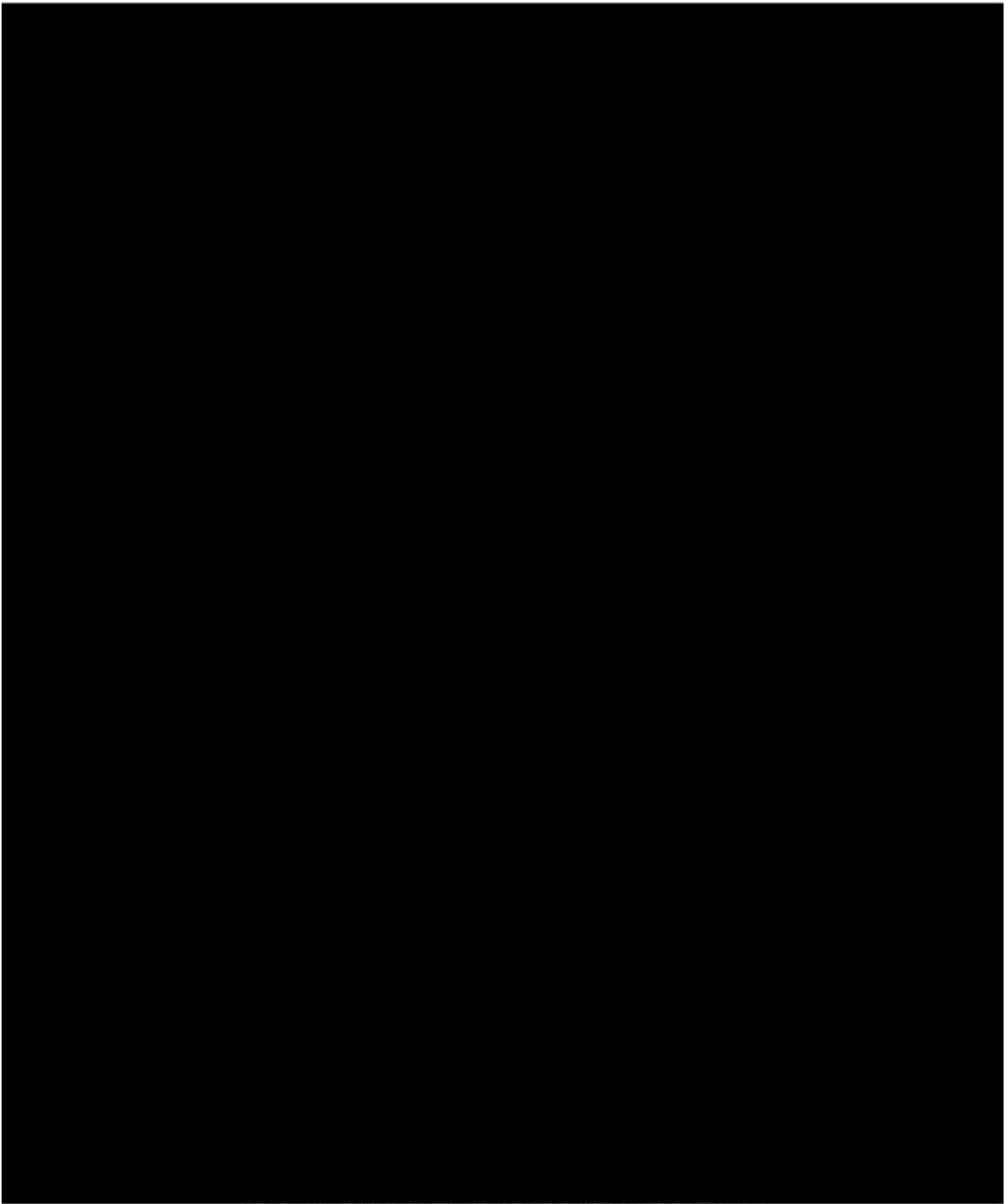
obviously relevant. And let me preempt the government here:

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 [REDACTED] Mr. Connell is, of course, going  
2 to address the protocol in these interviews and other  
3 potential witnesses we want to speak to in some more detail in  
4 [REDACTED]. But because I am the one who conducted [REDACTED] UFI  
5 interviews, I will just say a few words, and this is reflected

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 Now, pursuant to the terms of Protective Order #4 and  
14 considering the prosecution's threats in January of this year,  
15 I read each witness a script at the beginning of each call,  
16 introducing myself and my team members present and emphasizing  
17 that we needed to discuss several restrictions. And the fact  
18 that I did so is memorialized in the declarations, Your Honor,

19 [REDACTED]  
20 [REDACTED]

21 I told them we would not be talking about specific  
22 dates, that we would ask them -- to the extent we asked them  
23 when something happened, it would only be for the month and

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 the year. [REDACTED]

2  
3  
4  
5  
6  
7  
8  
9

10 as does everyone who has conducted investigations, how  
11 chilling it is -- and they discussed this in their  
12 declarations -- to issue such artificial barriers at the  
13 beginning of an interview when you are trying to build rapport  
14 to discuss difficult topics, and most often we have at least  
15 had the benefit of doing it in person. [REDACTED]

16 [REDACTED] and I don't know what the  
17 witnesses have been told about us in advance.

18 The government has sort of proffered certain details  
19 that they told the witnesses that they had the ability to meet  
20 with us in person. We just don't know. We don't know what  
21 they were told ahead of time. We know that most likely CIA  
22 and FBI agents spoke to them ahead of time, similarly to what  
23 they did with Mr. Kiriakou that actually led to Mr. Kiriakou

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

1 refusing to speak to the defense, but we don't know what they  
2 were told ahead of time. So that's the first issue.



3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 [REDACTED] They have a combined 40 years of investigative  
2 experience.

3 Now, I will be honest, Your Honor, after the first

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4

1  
1  
1  
1  
1  
1  
1  
1  
1  
1  
1  
1  
1  
1  
1  
20  
21  
22  
23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 see this -- I apologize,

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

[REDACTED]

Now, Your Honor, the military commission, I'm sure, understands what a huge area of inquiry this is for us when combined with the defendant's torture you have translators who may or may not have translated statements correctly. Incorrect translations could have led to more torture. We know that statements made or translated for the interrogators would lead to their -- to specific types of treatment by the interrogators.

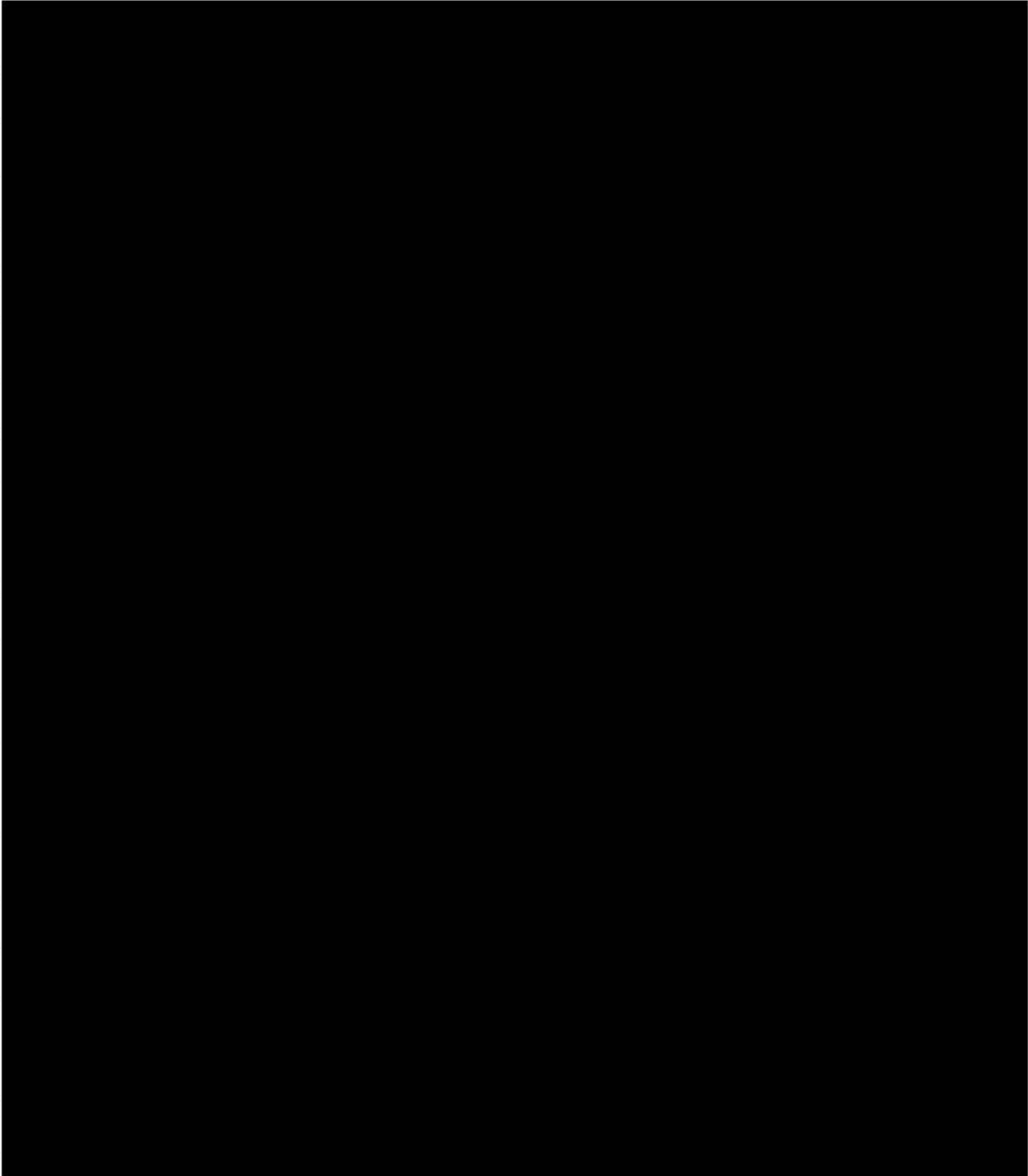
[REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



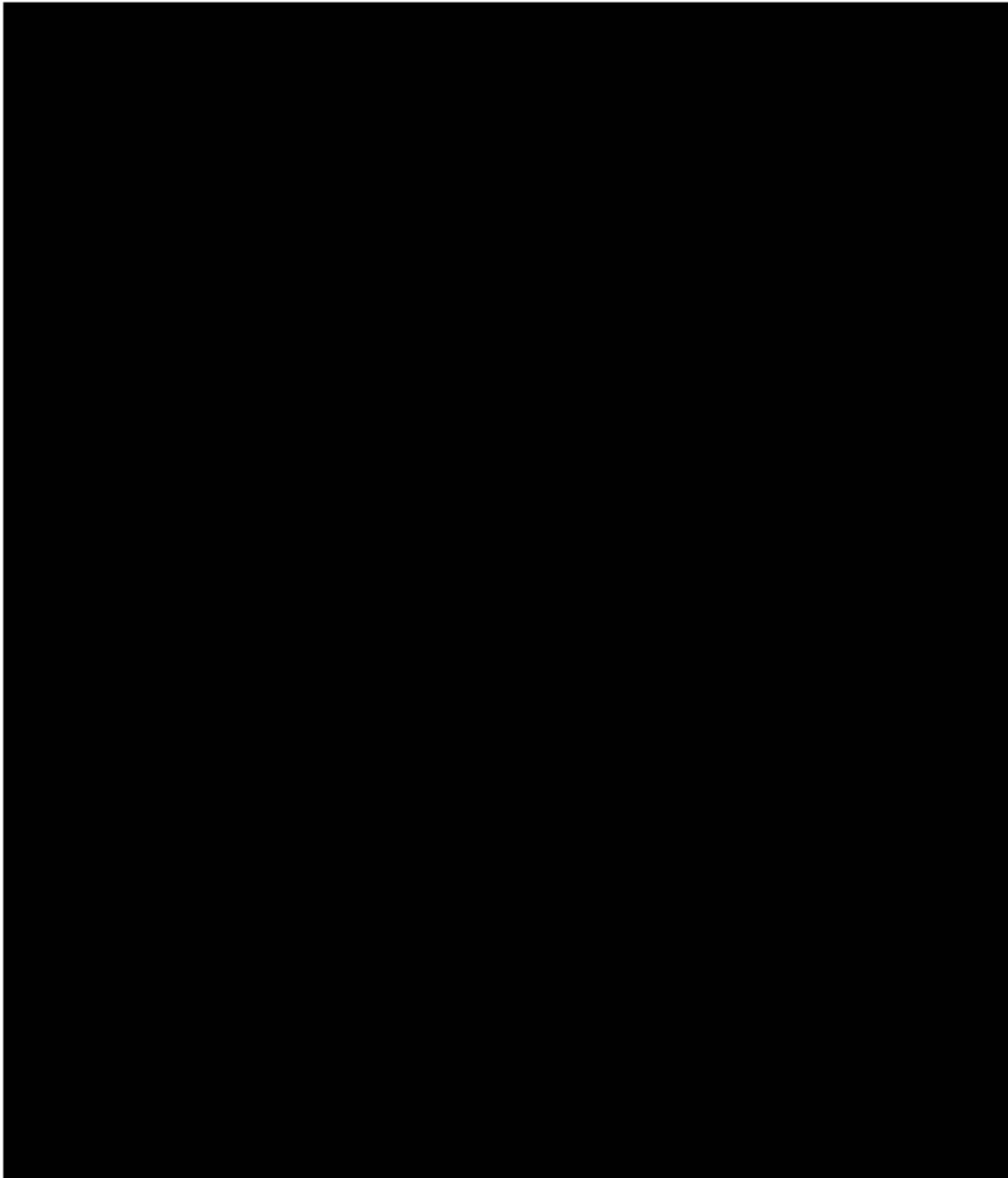
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



So the government either intentionally left this

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

And briefly, yesterday Mr. Groharing seemed to  
downplay the importance of defense interviews with witnesses.  
I think that's probably an understatement.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

1 doesn't say that

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

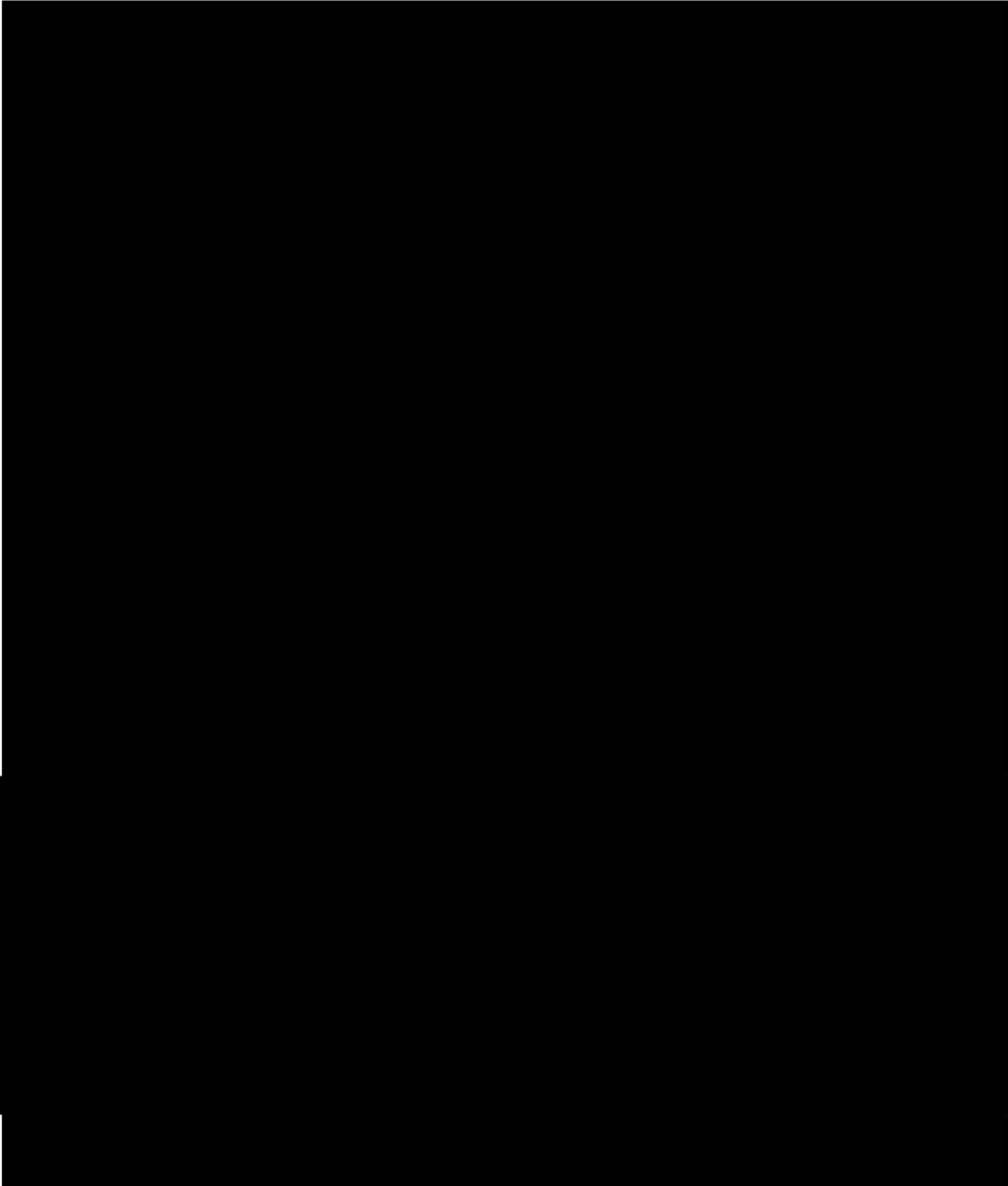
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
1  
1  
1  
1  
2  
2  
2  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

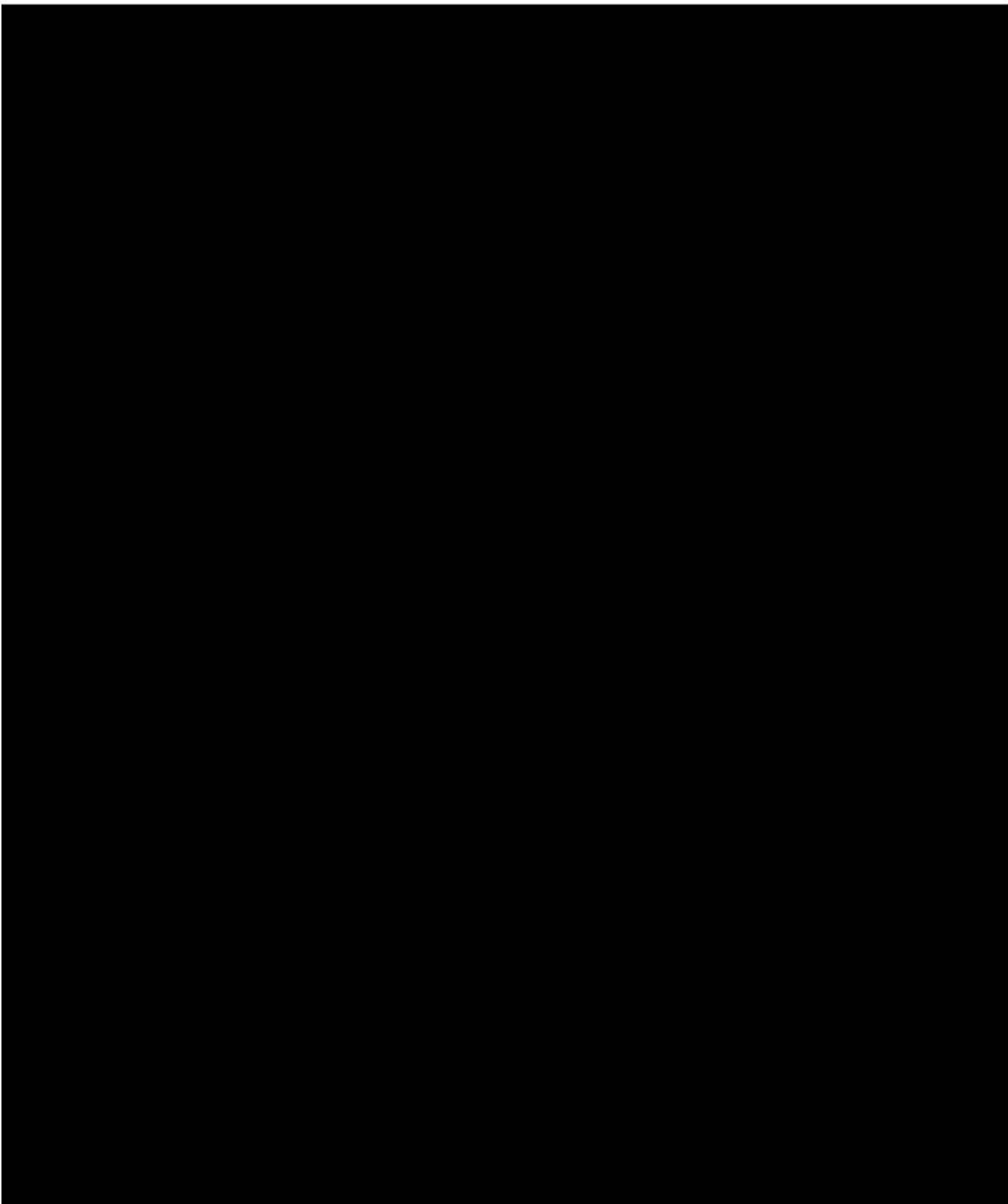
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

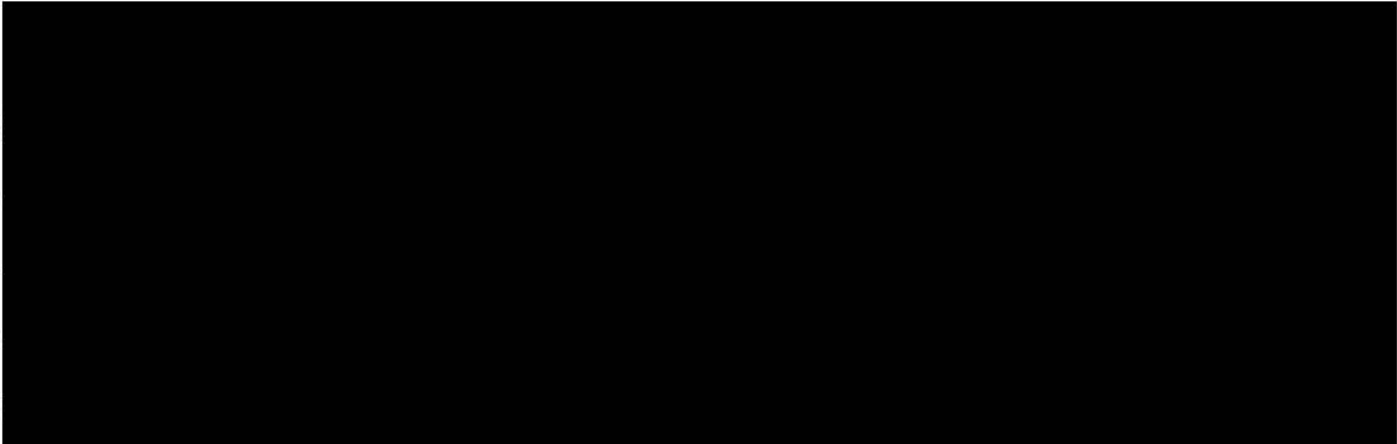


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6

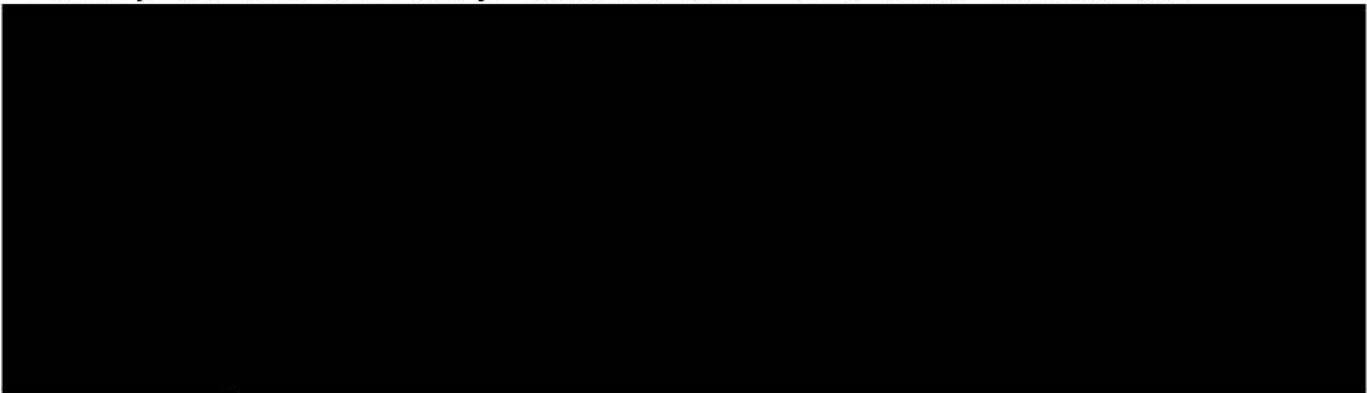


7 I've said this on the record before, and Mr. Connell has said  
8 it, were the some of the most useful discovery that we'd  
9 received.

10 Perhaps the only thing worse than the government  
11 withholding material discovery or giving it out in drips and  
12 drabs over six years of pretrial hearings is the government  
13 handing us discovery with such massive flaws.

14 Someone has to check their work here. They didn't go  
15 through the 505  so it can't  
16 really be the military commission. And that leaves us.

17  
18  
19  
20  
21



22 Subject to your questions, Your Honor.

23 MJ [Col PARRELLA]: I have none. Thank you.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 ADC [MS. PRADHAN]: Thank you.

2 MJ [Col PARRELLA]: Ms. Radostitz.

3 ADC [MS. RADOSTITZ]: Your Honor, I would just like to  
4 amplify a little bit on Ms. Pradhan's point number two, that

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20



21 And then another problem is a real practical problem  
22 as an investigation in a capital case, is that we look for  
23 people who might know something that would be relevant to our

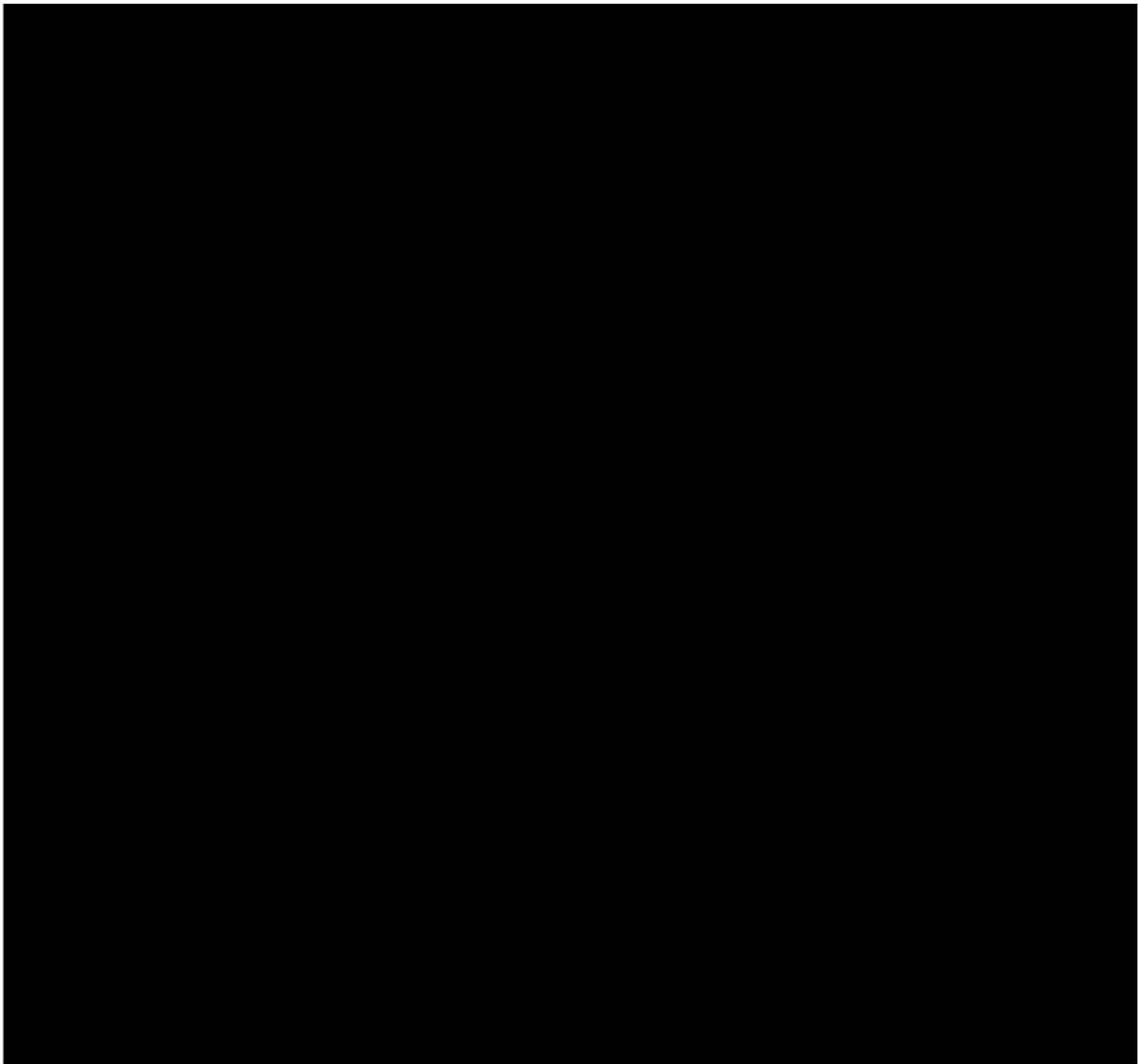
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1 preparation of our defense, and we go out and we find people  
2 who have spoken publicly and we -- I'm going to give an  
3 example.

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21



22 And we don't have a whole lot of time and we don't  
23 have a whole lot of resources and we shouldn't be spending it

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 traveling to go interview a witness that we get there and we  
2 find out we can't actually talk to.

3  
4  
5  
6

7 MJ [Co1 PARRELLA]: Thank you. Ms. Bormann.

8 LDC [MS. BORMANN]: We adopt the arguments of  
9 Ms. Radostitz and Ms. Pradhan.

10 MJ [Co1 PARRELLA]: Mr. Harrington?

11 LDC [MR. HARRINGTON]: Nothing further, Judge.

12 MJ [Co1 PARRELLA]: Mr. Ruiz?

13 LDC [MR. RUIZ]: No additional argument.

14 MJ [Co1 PARRELLA]: Okay. Before you go, Mr. Groharing,  
15 how long would you anticipate?

16 TC [MR. GROHARING]: Not very, subject to your questions,  
17 Your Honor.

18 MJ [Co1 PARRELLA]: Okay. I'm just thinking, before you  
19 go, I know you want a ruling or probably to know the breadth  
20 and scope of your argument. So as I think this through, and  
21 maybe it's just because I'm an optimist think that maybe you  
22 are both right.

23 I don't think the government would need to notice

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

1 information if it has already been noticed. But with that  
2 respect, I guess the question for you, Mr. Groharing, would  
3 be: These documents you provided, what's the specific 505(g)  
4 notice wherein you believe this information was previously  
5 noticed? So that would be the one thing. And I don't know if  
6 you need time to figure that out or if you have that at your  
7 fingertips.

8 TC [MR. GROHARING]: I'd need a little bit of time,  
9 Your Honor, to reference the specific defense notice that I'm  
10 talking about. The information in question comes from  
11 [REDACTED] I just don't have at my fingertips the notice where  
12 the defense asks to discuss that information in closed  
13 session.

14 MJ [Col PARRELLA]: I think where we fall in is that the  
15 commission has noticed that Mr. Connell's 505(g) notices are  
16 typically very precise, so if the government's information  
17 doesn't fall within one of the precise areas noticed, then I  
18 think his objection has validity.

19 And that sort of weighs in favor of the defense being  
20 particular, because I guess in that sense you're limiting the  
21 extent to which the government can then stand up and say it  
22 falls within that information already noticed.

23 Some of the other notices, however, are much broader,

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 and I think the commission, at least at this last 505(h)  
2 hearing, was pretty generous in some of those rather broad  
3 notices. So to the extent it falls within one of those, then  
4 I'm inclined to say that it is fair, fairly noticed, and the  
5 government should be able to get up and argue it here today.

6 Okay. So with that I think what we'll do is we'll go  
7 ahead and take an hour recess for lunch and come back, and  
8 then that that will give the government an opportunity to take  
9 a look and see if it falls within that gamut.

10 The commission is in recess.

11 LDC [MR. CONNELL]: Sir, may I ----

12 MJ [Col PARRELLA]: I'm sorry, let's hold on one second.

13 LDC [MR. CONNELL]: I just want to throw out the idea that  
14 possibly a 30-minute lunch might be sufficient. I know that a  
15 lot of people have a lot of things to do and pack out and  
16 other things and we all want to move as best we can, so I'm  
17 just throwing out that idea.

18 MJ [Col PARRELLA]: We're going to stay with an hour.  
19 Thank you.

20 [The R.M.C. 806 session recessed at 1207, 16 November 2018.]

21 [The R.M.C. 806 session was called to order at 1314,  
22 16 November 2018.]

23 MJ [Col PARRELLA]: All right. This commission is called

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 back to order. All parties present before the commission  
2 recessed are again present.

3 Mr. Groharing. And if you could start off by just  
4 addressing the issue we discussed about the notice.

5 TC [MR. GROHARING]: Yes, Your Honor. Over the recess we  
6 looked, and I stand corrected. I don't believe there is a  
7 notice.

8 The information in question comes from [REDACTED].  
9 I was under the impression that that motion was part of one of  
10 the defense notices that was approved, but I don't believe  
11 that is the case. I don't believe there's a notice that  
12 covers the motion in toto.

13 And so I agree in that respect with Mr. Connell as  
14 far as that's not information that either the defense or the  
15 government has noticed for discussion in this closed session,  
16 so I don't intend to reference the subject matter contained  
17 either [REDACTED] as far as the classified  
18 information in there, or in the exhibits that I've offered to  
19 the commission.

20 I would ask the commission to consider those  
21 exhibits, though, on the motion, but I don't need to discuss  
22 them, other than just a general reference to orient the  
23 commission on why they are significant to the motion.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 MJ [Col PARRELLA]: I understand.

2 TC [MR. GROHARING]: May I proceed, Your Honor?

3 MJ [Col PARRELLA]: You may. Please.

4 TC [MR. GROHARING]: Your Honor, I think we should start  
5 with the relief requested [REDACTED] And that's, the defense  
6 requested the original documents that formed the basis for  
7 [REDACTED].

8 There has been a lot of confusion throughout the  
9 filings as far as what these documents are. And just to be

10  
11  
12  
13  
14  
15  
16  
17

18 The synopses in question that we have discussed this  
19 morning are noncompulsory products that were originally  
20 prepared by the government and proposed to the military judge  
21 in its original [REDACTED] but later withdrawn.

22 And the government did not request the military judge  
23 approve those summaries for provision to the defense.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 Nevertheless, we went ahead and provided them to the defense  
2 to aid in their understanding of the materials and how these  
3 people fit into the overall discovery with respect to the RDI  
4 program.

5 I'll talk a little bit about how they were created.  
6 There are a number of products that the government produced  
7 pursuant to the [REDACTED] the [REDACTED]

8  
9

10 And then with respect to d., again, as I said, in

11  
12  
13  
14  
15  
16  
17

18 So when we prepared the synopses, those were prepared  
19 using the same batch of information that we used to populate  
20 the other products. So there are -- there is information from  
21 statements. [REDACTED]

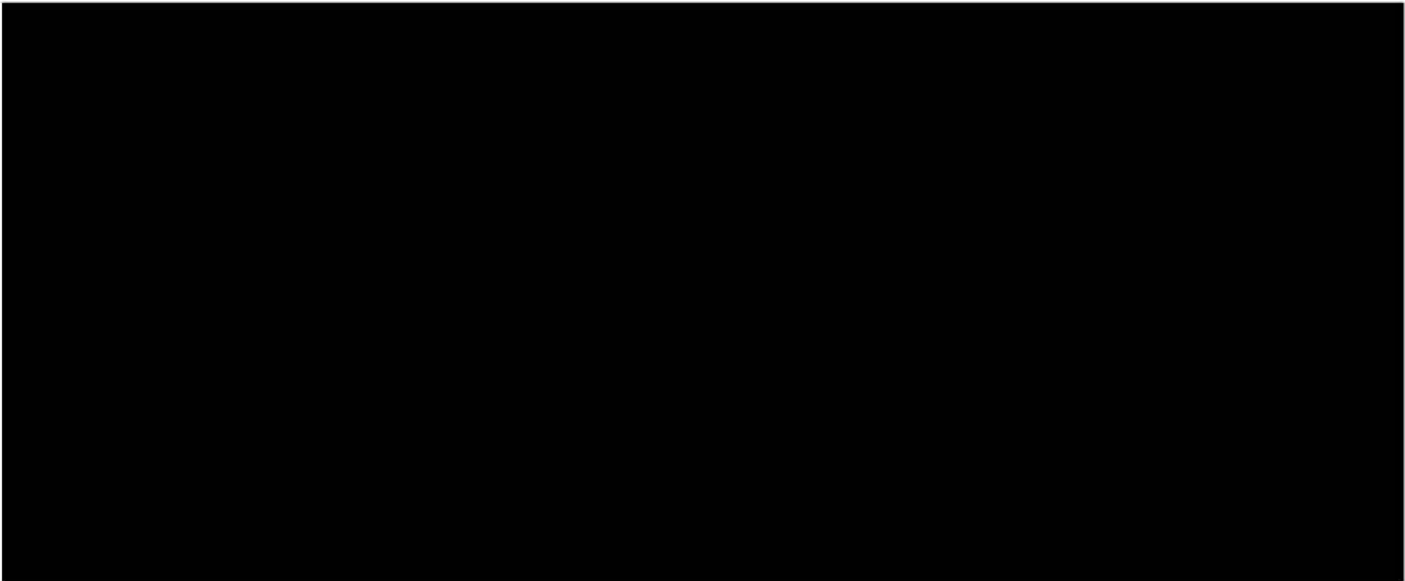
22  
23

[REDACTED] That comes from counting up the

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8

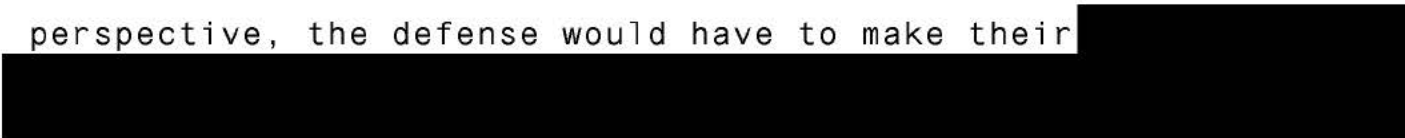


9           They weren't meant to be all inclusive by any  
10 stretch. They weren't meant to be comprehensive by any  
11 stretch, but just something to orient the defense with respect  
12 to how that person generally fit into the program.

13           And so to the extent there are complaints that they  
14 are not comprehensive, they weren't meant to be. That's not  
15 the purpose for which we prepared them, and the government  
16 certainly isn't required to prepare them for that purpose.

17           MJ [Co] PARRELLA]: So in the absence -- I understand that  
18 point, and that was a question that I had, that they're not  
19 meant to be all inclusive or comprehensive.

20           So what's the mechanism, from the government's  
21 perspective, the defense would have to make their



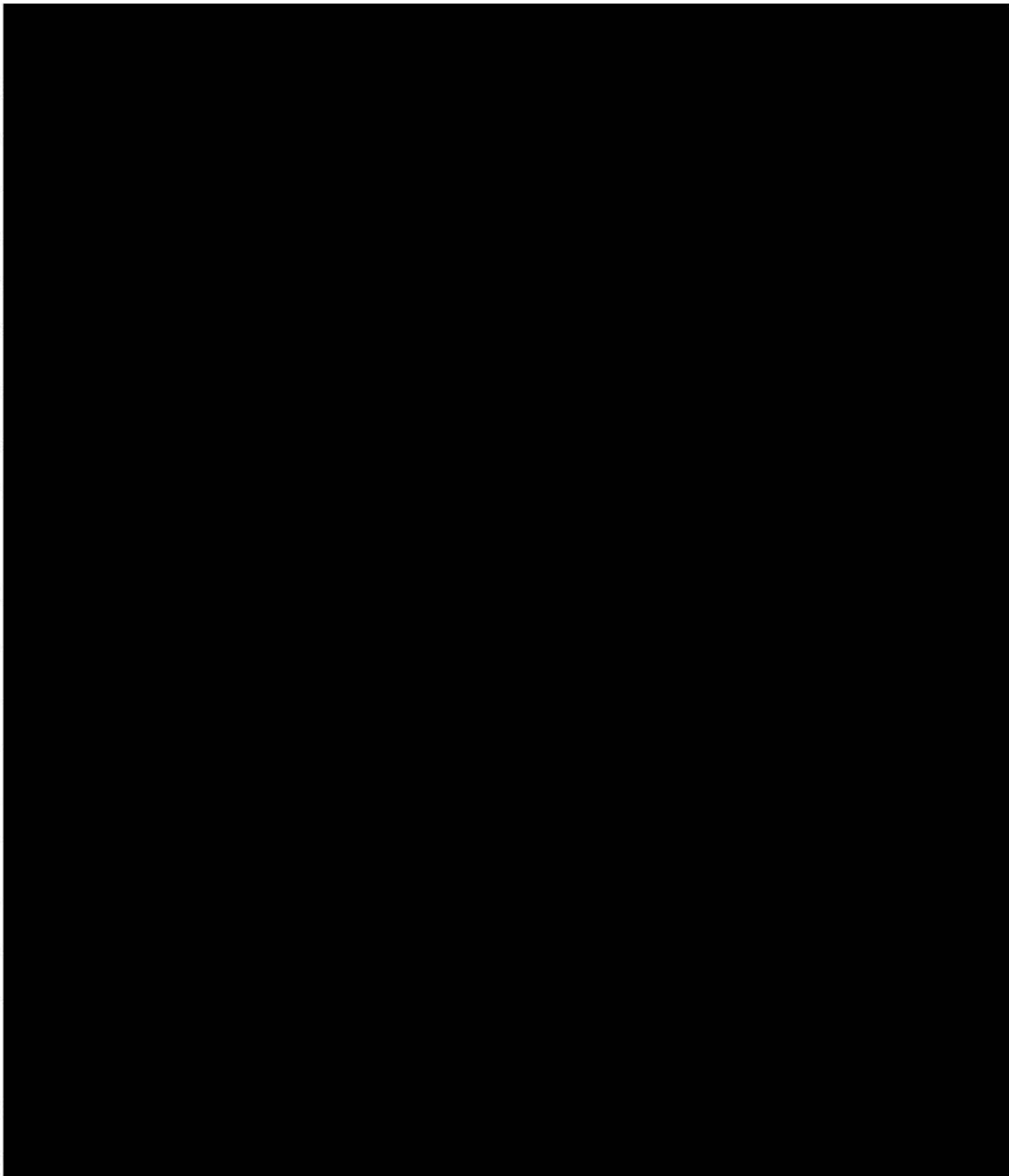
23           TC [MR. GROHARING]: Well, certainly they could take all

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

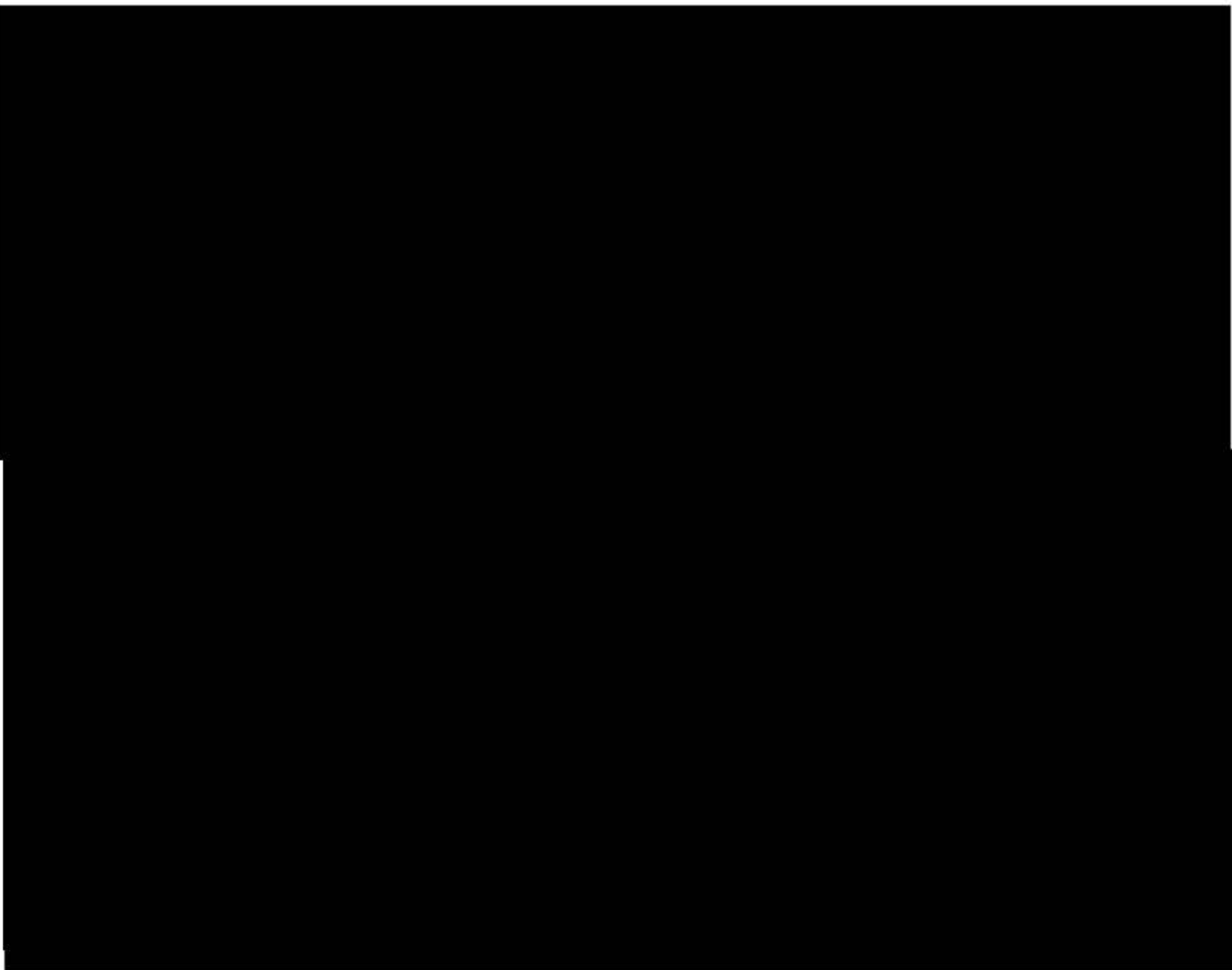
~~// TS//SI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

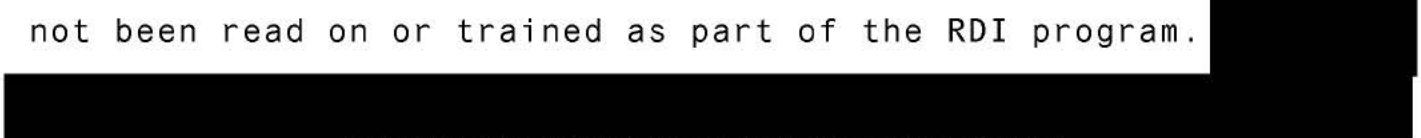
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



Jim Fitzsimmons -- who we've talked a lot about him,



At that point Jim Fitzsimmons did not have -- he had not been read on or trained as part of the RDI program.

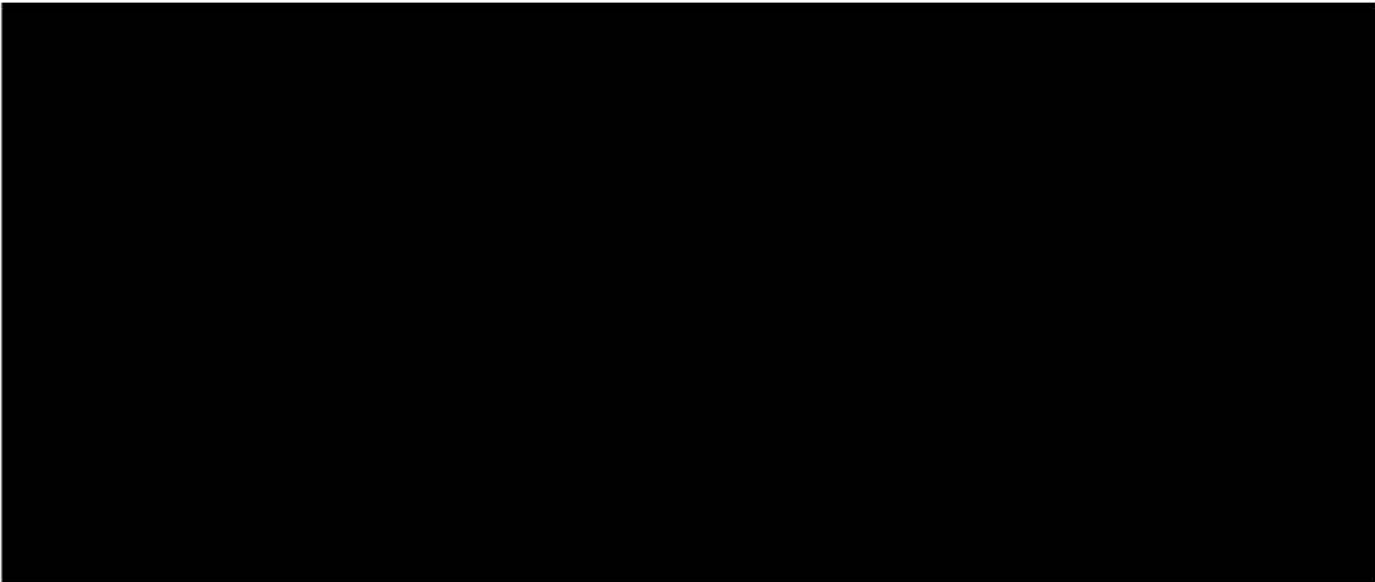


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8



9           They have -- I would say that the only reason they  
10 know about Special Agent Fitzsimmons is because of the  
11 discovery that we've provided the defense.

12           As early as 2014 we provided discovery to the  
13 defense, documenting that Special Agent Fitzsimmons was



17           These materials that the government provided to the  
18 defense are cited by the defense. I would just point  
19 Your Honor to [redacted] That's the report that  
20 the government provided to all the defense, I believe, in  
21 [redacted] documenting Special Agent Fitzsimmons' interviews of



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 MJ [Col PARRELLA]: Mr. Groharing, the synopses that you  
2 have provided the defense, Ms. Radostitz brought up a point  
3 that they are only provided to the respective accused. Is  
4 that the case? Or are they provided to counsel for all of the  
5 accused?

6 TC [MR. GROHARING]: [REDACTED]

7 [REDACTED] So that was not done -- that  
8 discovery was not any different for any of the teams.

9 MJ [Col PARRELLA]: Okay. And then you said discovery was  
10 provided, regarding the FBI, to the defense and to the  
11 commission. Where was -- when was it provided to the  
12 commission? [REDACTED]

13 TC [MR. GROHARING]: Your Honor, I believe -- one moment,  
14 Your Honor. I can get you the precise -- Your Honor, its's  
15 [REDACTED] I believe it's in the defense pleading.

21 [REDACTED]  
22 [REDACTED]  
23 government has provided significant additional information

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6

7 MJ [Col PARRELLA]: Is that related to why we are delaying  
8 538 and 561?

9 TC [MR. GROHARING]: Yes, Your Honor.

10 MJ [Col PARRELLA]: I understand.

11 TC [MR. GROHARING]: So one of the arguments of the  
12 defense was with [REDACTED]

13 [REDACTED] That was intentional. These aren't things, as I've  
14 said, that were created and we were just summarizing and  
15 turning over -- or they aren't things that existed and we  
16 summarized and turned over. These are things that we created  
17 ourselves, and specifically with the purpose of providing them  
18 for the individuals we identified as being direct and  
19 substantial for the defense. So that's intentional.

20 [REDACTED]  
21 [REDACTED] or I think more appropriately, more information,  
22 they should make a discovery request. They should ask the  
23 government for specific additional information regarding the

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 particular matter. But the government has no obligation to

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 And just to be clear, those were materials that we  
8 provided directly to the defense; they didn't go through the  
9 505 process. Those aren't summaries that were approved by the  
10 military judge and then we provided them.

11 So we addressed in our motions -- we provided  
12 responses to specific defense claims [REDACTED]

13 [REDACTED] we addressed that in our  
14 filing [REDACTED] Both of those individuals were

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 They did appear enough in the materials that we  
20 provided a UFI so that the defense could make sense of the  
21 discovery that they had. But if you look at either of those,  
22 and we addressed this in our filing, neither had any  
23 meaningful contact with any of the accused in this case.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SI //~~

1           The government did acknowledge, in response to the AE  
2           [REDACTED] and that  
3           [REDACTED] We addressed  
4 that in our filing.

5           I would note, though, Your Honor, that although the  
6           [REDACTED]  
7           [REDACTED]  
8           [REDACTED]  
9           [REDACTED]  
10           [REDACTED]

11           What I would respectfully suggest in those type of  
12 instances, that the defense could have just asked us and we  
13 would have explained the discrepancy and would have been able  
14 to explain to them why they have different -- differing  
15 information.

16           [REDACTED]  
17           [REDACTED]  
18           [REDACTED]  
19           [REDACTED]  
20           [REDACTED]  
21           [REDACTED]  
22           [REDACTED]  
23           [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6

7 So that's not, absent some other connection ----

8 MJ [Co] PARRELLA]: Hold on one moment, please.

9 [Pause.]

10 MJ [Co] PARRELLA]: Okay. Mr. Groharing, you may  
11 continue.

12 TC [MR. GROHARING]: So, Judge, I was just saying, absent  
13 some other connection, an allegation of abuse related to  
14 another detainee is not something that the government would  
15 necessarily provide in this case. Obviously, if it was  
16 closely related to our accused it may become relevant.

17 But particularly with this one, the broomstick  
18 incident with respect to Mr. Ali is not something that the  
19 government is disputing at all. [REDACTED]

20 [REDACTED] that we provided to the defense. To the extent  
21 that individuals talked about that incident to the [REDACTED]

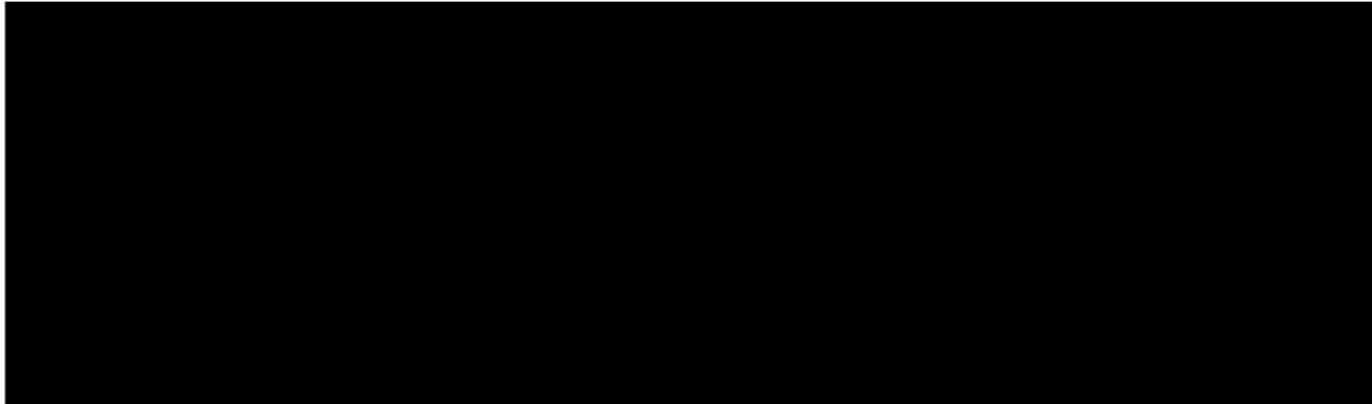
22 [REDACTED] we provided that to the defense, and we don't dispute  
23 in any way that that happened.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

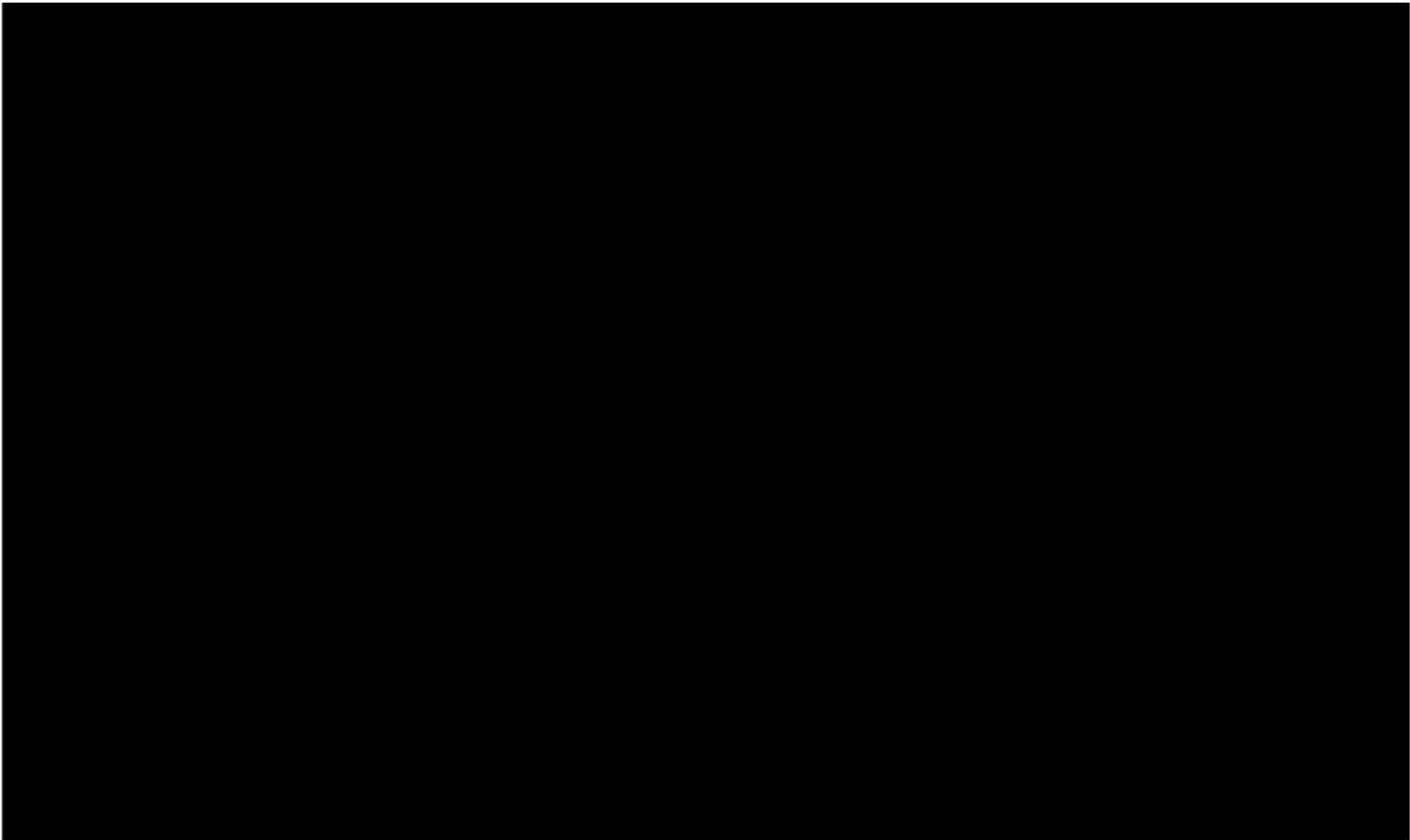
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



And so the government, when making these summaries, has to go with what we have. And so to the extent that information is incorrect in original materials, that information could end up in the defense summaries. We don't audit every piece of information in the original materials of the CIA when making these summaries.



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 we've provided to the defense. We've provided 185 statements  
2 regarding these investigations. And many statements from  
3 within those materials are contained in the d. synopses. And  
4 I think that's where some of the confusion comes in.

5 Just moving specifically to [REDACTED] and, Judge, that  
6 was a reply filed by the defense. The government does offer

7 [REDACTED]  
8 [REDACTED] portions of those. And they go through the  
9 [REDACTED] And information within those documents is  
10 highlighted, such that Your Honor will be able to see exactly  
11 the information the defense claims they do not have in

12 [REDACTED]  
13 Again, these are matters that the government suggests  
14 should be brought to the attention of the prosecution directly  
15 by the defense. I think most of these perceived discrepancies  
16 are easily explained, and we're happy to do that.

17 In this case we were able to find all the references  
18 [REDACTED] and have now pointed the commission's and  
19 the defense's attention to them. We could have done that  
20 without the need of any time of the commission or any filings  
21 necessary. I would commend that practice to the defense, and  
22 we are happy to engage in it as necessary.

23 So, Your Honor, the request for relief is for all

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 [REDACTED]  
2 summaries -- I'm sorry, synopses. That information has been  
3 provided to the defense in other materials that they have, and  
4 so there is no reason to go and revisit the original materials  
5 and consider providing the original materials to the defense.  
6 That request should be denied.

7 And the government would just suggest that to the  
8 extent the defense has questions, they raise those with us,  
9 and we are happy to answer them.

10 MJ [Col PARRELLA]: Thank you, Mr. Groharing.

11 Okay. Ms. Pradhan.

12 ADC [MS. PRADHAN]: Thank you, Your Honor. I just want to  
13 note that of the dozens of examples of major discrepancies  
14 that you find [REDACTED]  
15 Mr. Groharing really only addressed a couple of those today.

16 And again, what I said at the beginning of my  
17 arguments remains true, that the government stood up,  
18 minimized the few very small discrepancies, and didn't really  
19 address the big ones.

20 MJ [Col PARRELLA]: Okay. Let me get to, I guess, an  
21 underlying question that I have.

22 ADC [MS. PRADHAN]: Yes, sir.

23 MJ [Col PARRELLA]: The government has represented that --

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SGI //~~

1 I mean, these synopses were comprised, arguably  
2 gratuitously -- there wasn't necessarily an overt  
3 requirement -- but were comprised of information that has been  
4 provided to the defense. So in other words, they took the  
5 substitutions provided to the defense, put together this index  
6 to assist in making sense of it.

7           So I guess what else is it -- I mean, I understand  
8 that you want the underlying documents. But my predecessor  
9 already approved those substitutions. So if you don't like  
10 the synopses, why couldn't you just make your own synopses?

11           And I guess you demonstrated to the court, through  
12 the use of these vivid examples, that you are able to sort of  
13 understand where there is holes in the synopses and where you  
14 may need additional information, and in some aspects you have  
15 gathered that information.

16           So I guess, you know, it sounds like a motion for  
17 reconsideration is, I guess, where I'm going here.

18           ADC [MS. PRADHAN]: Not at all, Your Honor, and let me  
19 explain why. Because we're talking about several different --  
20 I think the government used the word "chart." I think we're  
21 talking about several different things here.

22           So we do -- it is our position that the information  
23 [REDACTED] and you heard

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 that argument in open session, so I won't repeat it here  
2 today. Because otherwise the only discovery that the  
3 government has provided, [REDACTED]

4 [REDACTED]  
5 MJ [Col PARRELLA]: Okay. But they represented too though  
6 that it is not an all-comprehensive, complete synopsis of  
7 those substitutions, those approved substitutions.

8 ADC [MS. PRADHAN]: I understand, Your Honor. But to be  
9 clear, [REDACTED]  
10 maintain are not compulsory, that we believe are compulsory,  
11 were not approved by the military commission; they were not  
12 subjected to the 505 process. So they have not been reviewed  
13 or compared with any other discovery that the defense has  
14 gotten.

15 And that is precisely why we are here, because the  
16 government produced those directly to us. They didn't put it  
17 through a 505.

18 MJ [Col PARRELLA]: But the process to get to that, what  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 ADC [MS. PRADHAN]: No, Your Honor, and the reason is

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 this: Judge Pohl did certainly go through the 505 process to

2

3

4 What we are saying is that that discovery, all of  
5 those documents, do not contain all of the documents that  
6 underlie the profiles that the government produced directly to  
7 us; that there is other information in the universe of  
8 documents that the government used to create those profiles  
9 that are actually not in the discovery that Judge Pohl  
10 approved.

11 MJ [Col PARRELLA]: Okay. So let's say that that's true.  
12 So if anything, then they gave you more than what was  
13 required, correct?

14 ADC [MS. PRADHAN]: That's not our position, Your Honor.  
15 Our position is

16

17

18

19

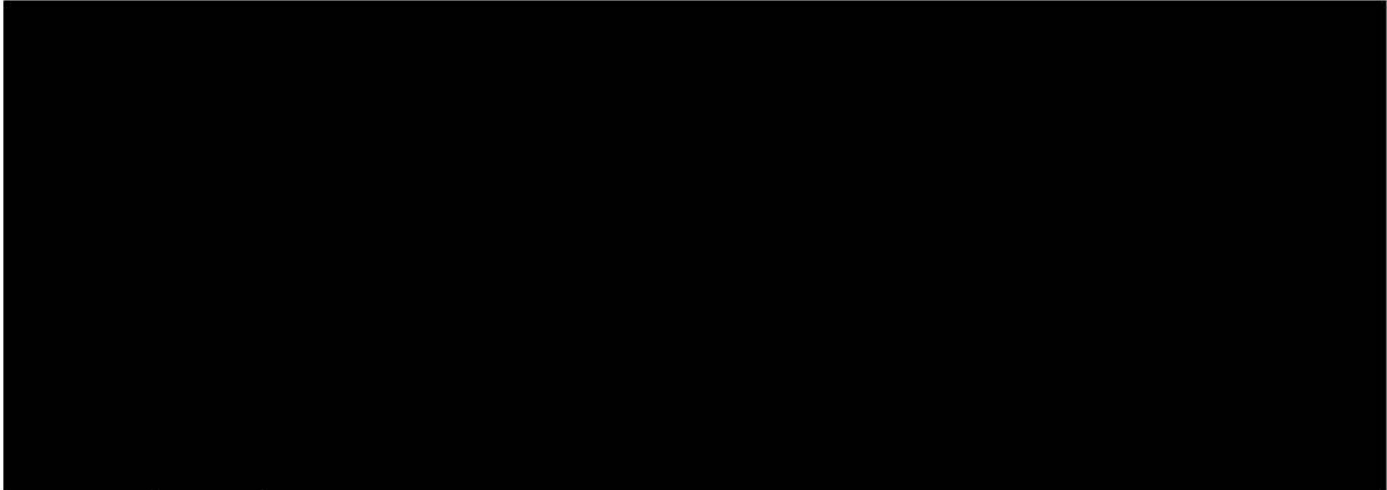
20 So that's my first point, is that they are -- they  
21 are obliged to provide us more information than what was just  
22 in that chart, right? And that's actually reflected in the  
23 record by statements -- in statements from Judge Pohl in, I

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

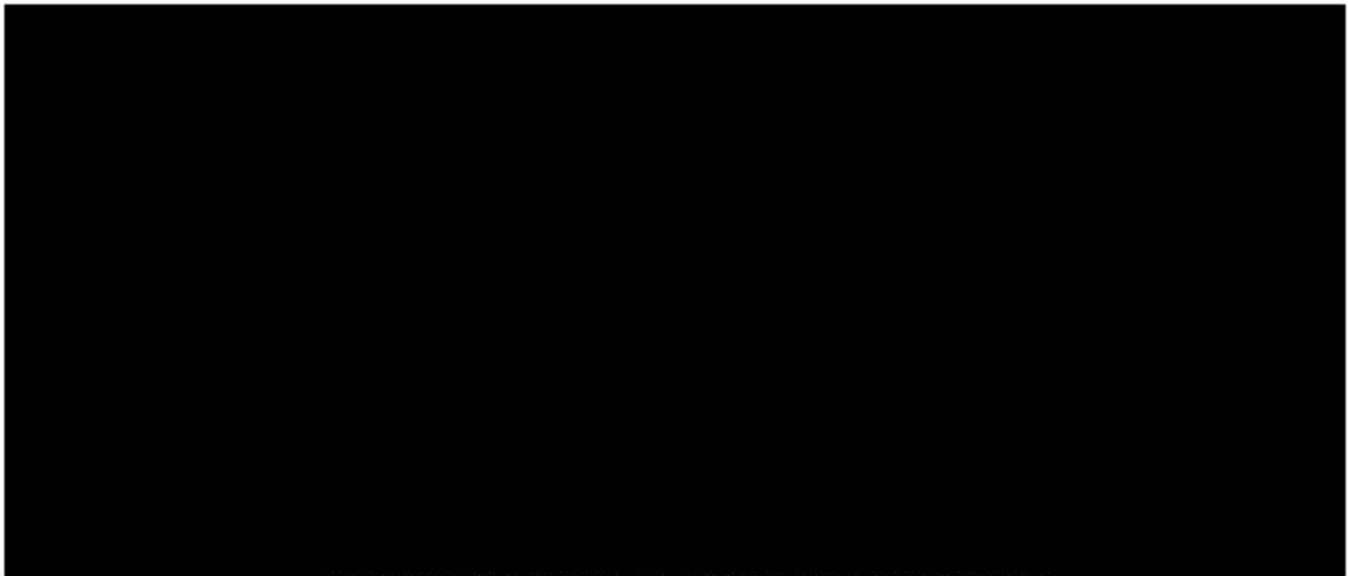
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 believe, January and again in March when he stated why can't  
2 you give the defense something that says on this date these  
3 were the people who were there, this is what they were doing  
4 to them, right?



5  
6  
7  
8  
9  
10  
11  
12 A, for [redacted] the universe of documents that have to exist, and  
13 that comprise some of the examples I provided to the military  
14 commission in my original argument today. Some of the  
15 examples of the documents that have to exist, that the



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1

2

3

4 Now, they may not be obliged to produce this  
5 information to us, and that's a question for the military  
6 commission. But having produced it, they are obliged not to  
7 produce inaccurate information to us.

8 MJ [Col PARRELLA]: Well, but they represented to you at  
9 the time they gave them -- there is no guarantee on there that  
10 they are all inclusive, comprehensive. I mean, the government  
11 stated that here today in open court.

12 ADC [MS. PRADHAN]: Yes, sir.

13 MJ [Col PARRELLA]: And certainly the defense would be  
14 free to come up with their own better product, add to the  
15 product, change the product.

16 ADC [MS. PRADHAN]: Yes, sir.

17 MJ [Col PARRELLA]: But it seems the government has  
18 represented that everything that was used to come up with the

19

20 provided to the defense, whether that be the portion that did  
21 go through the 505 process that Judge Pohl approved, or some  
22 other original document that didn't, but they chose to give to  
23 the defense anyway.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 ADC [MS. PRADHAN]: Well, and again, Your Honor, I have  
2 two responses. And the first is that it is our -- it is our  
3 position that that is simply not true; that is simply false.  
4 We do not have all of the documents that the government had

5

6

7 And if you listen to the examples that Mr. Groharing  
8 provided, he certainly didn't cover all of the gaps. I mean,  
9 there is -- you know, there are -- there may be summaries that  
10 contain additional information about some of the discrepancies  
11 that we noticed, but either those are so -- those are  
12 summaries as to the completely unrecognizable from what they  
13 appear to be in the profile, so we couldn't possibly put them  
14 together, or they simply have not been produced to us.

15 MJ [Col PARRELLA]: So what about Mr. Groharing's point?  
16 I mean, you have provided several examples. Some he has  
17 explained or provided an explanation, some not.

18 Before coming to the commission and seeking relief,  
19 why not seek clarification from the government? I mean, the  
20 discovery process in this case is somewhat unique; I think you  
21 would agree?

22 ADC [MS. PRADHAN]: Yes, sir.

23 MJ [Col PARRELLA]: Why not seek clarification?

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 ADC [MS. PRADHAN]: Your Honor, we have spent six years  
2 submitting discovery requests to the government for precisely  
3 this sort of information. I don't have the number offhand,  
4 but I know that we have -- we have said it in oral argument  
5 before, the number of discovery requests pertaining

6

7

8

9 I think when the government keeps making this  
10 argument, as if we are in some sort of domestic mediation, as  
11 if I should just call them up and say, hey, I found 57 errors  
12 in this one particular page of the RDI index, could you please  
13 explain every single one of them ----

14 MJ [Col PARRELLA]: I mean, I understand that it's an  
15 adversarial process. But there's also an aspect where, you  
16 know, the adversarial process exists when the parties can't  
17 come to an agreement.

18 I mean this is essentially, as I understand it --  
19 this is evidence, this RDI evidence, this will be defense  
20 evidence. This is evidence the defense wants to be the  
21 proponent of. So it's in the defense's interests to come up  
22 with as complete and accurate and vivid a description or an  
23 account of this time that the accused were in the program.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SGI //~~

1           So I don't know that you've answered the question as  
2 to when there can be clarification. I certainly understand  
3 there's going to be times where we are going to be here in  
4 court litigating this. But when we don't have to, why? You  
5 know, why not go seek some clarification?

6           Because if I were to believe Mr. Groharing's account,  
7 he's provided at least an explanation here in the few minutes  
8 that we've been sitting here in court as to why, I guess, that  
9 retort some of your examples.

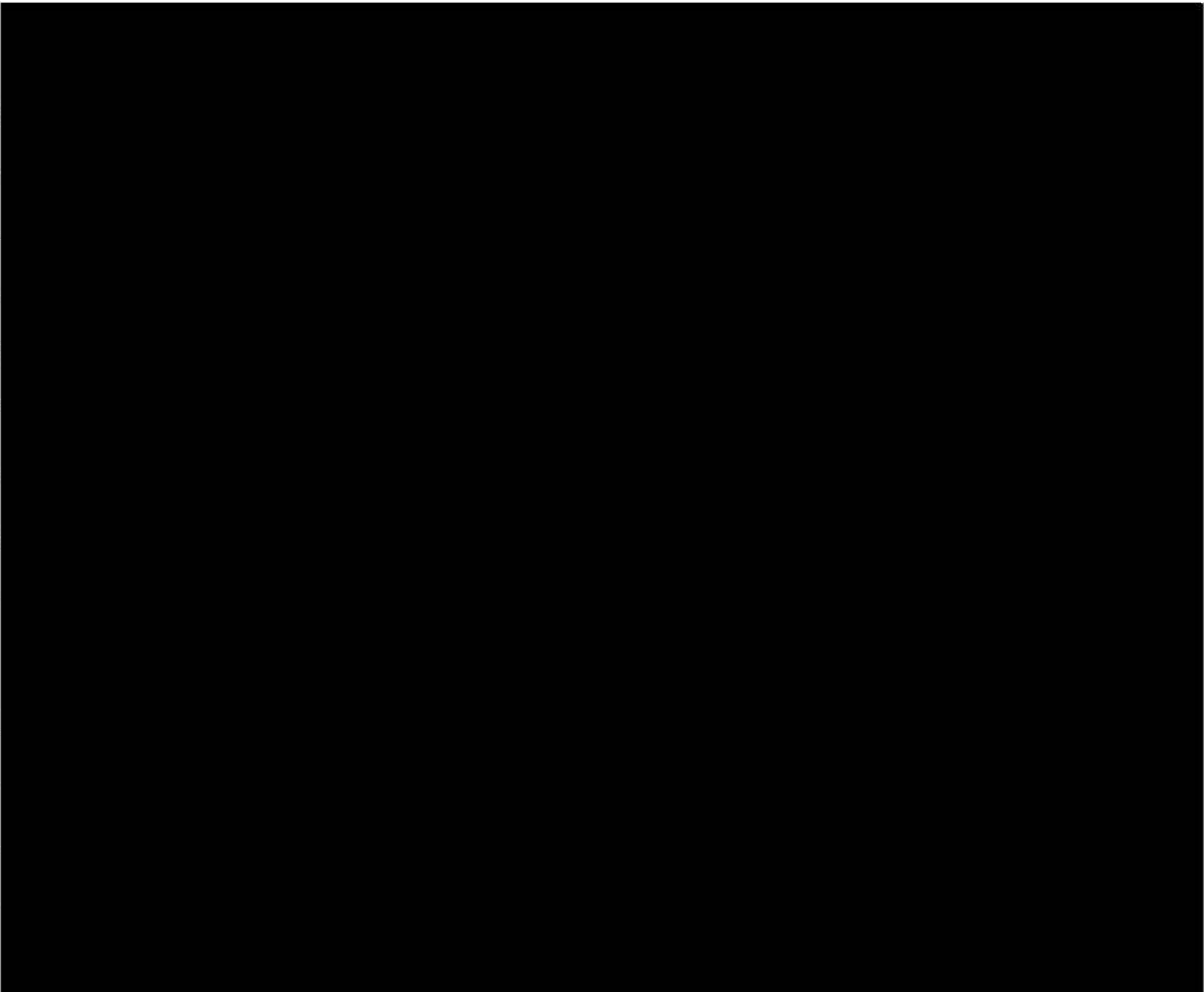
10          ADC [MS. PRADHAN]: A few of them, Your Honor, and I  
11 answer -- I have two answers to that. The first is the sheer  
12 number of discrepancies. And I'm calling them discrepancies.  
13 But our position has been, [REDACTED] that  
14 certain information has simply been intentionally stripped  
15 from them. And we believe that the purpose of that -- and we  
16 have briefed this fully and included it in oral argument,  
17 Your Honor. Our position is that the purpose for that is --  
18 was to obscure the role of the [REDACTED].

19               So the first answer to your question is the sheer  
20 number of discrepancies that were included in both the RDI  
21 index, as we'll talk about in a little more detail [REDACTED] I  
22 don't know that I need to go into a lot after this, but a  
23 little bit -- and the sheer number of discrepancies between

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16




17           And so that was our first -- that was our first  
18 method of analysis, Your Honor, was exactly -- it was using  
19 the government's rationale that, hey, we're giving you these  
20 profiles. They're based on other information you already  
21 have. We said okay, let's go through the information we  
22 already have. And we found mistake after mistake after  
23 mistake after mistake. And I use the word "mistake" loosely.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

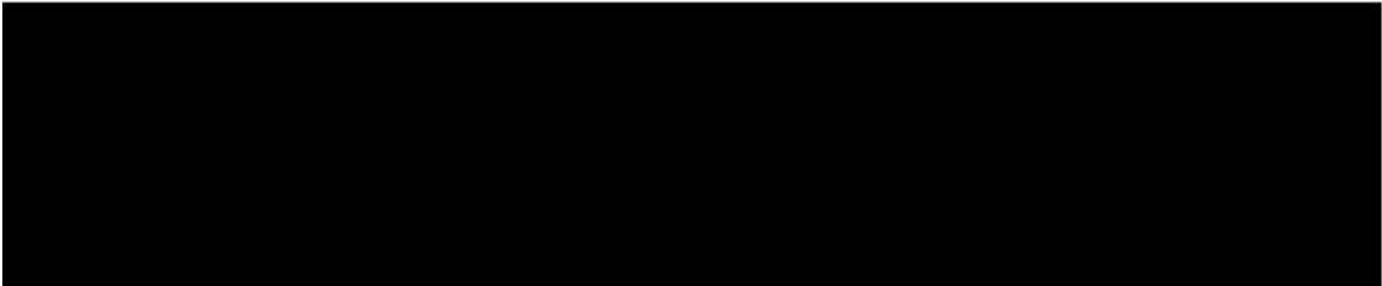
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1           But we found so many discrepancies that it's -- I  
2 mean, at the very least it wasn't in the interests of our time  
3 to go back and sit on the phone with Mr. Groharing for a week  
4 and go through each one of them.

5           But the second reason, I submit to you, Your Honor,  
6 and the reason we would not go to the government with this, is  
7 precisely that question of intent. The government has, for a  
8 number of years, intentionally withheld discovery from the  
9 defense. This is -- it's irrefutable.

10           And the primary topic on which the government has  
11 withheld discovery   
12 You heard them yesterday talk about those statements as the  
13 centerpiece of their case. Anything that undercuts the  
14 centerpiece of their case was going to be withheld as long as  
15 possible.

16           Now, I know Mr. Groharing referred to the fact that  
17 he -- that the one-page document referring to Mr. Fitzsimmons

18   
19  
20  
21

22 It was produced as a chain-of-custody document, all right, and  
23 buried in a whole lot of other documents.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1           And so, you know, it's that kind of disingenuous  
2 representation that led us to litigation when faced with a  
3 basket of errors or discrepancies, of mistakes of this  
4 magnitude. That is what led us to litigation [REDACTED]

5 [REDACTED]  
6           And so, you know, I would just ask Your Honor to  
7 refer -- and I know the military commission has already  
8 referred -- has already read the pleadings. I would ask you  
9 to go back to [REDACTED] our initial analysis of the RDI index, and

10  
11  
12

13           It is not our intention to come here and waste the  
14 military commission's time with small errors. It's when you  
15 start to put together hundreds of errors, in the case of the

16  
17

18 potentially the most valuable evidence we could have. That's  
19 when we come before the military commission and we say, look,  
20 there is something seriously wrong, either with how the  
21 government is analyzing the information that they have, or  
22 with the underlying information itself, right?

23           There's a mistake in one or the other. I don't know

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 where that is. The only way to figure that out is to have the

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]

5 Because standing here in front of you right now, I  
6 don't have that ability, and I have been through all of this  
7 discovery. We have spent enormous amounts of time going  
8 through everything, [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]

12 I know Mr. Groharing talked a little bit about  
13 cross-referencing and implied that perhaps we hadn't done that  
14 cross-referencing. And to that I say not only have we done  
15 that, but it is also impossible to Control-F what isn't there.  
16 We can't find information that is not in the profile. We

17 [REDACTED]  
18 And a lot of that we didn't know until we were able to  
19 cross-reference, until we were able to interview people. We  
20 didn't know that.

21 You know, now we hear, oh, we have this additional  
22 information. The only time we get admissions of errors, aside  
23 [REDACTED] is when the government

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 stands up here and gives us two or three small corrections,  
2 and doesn't address the bigger issue, right? They are not  
3 addressing the bigger issue of have we actually summarized

4 [REDACTED]  
5 [REDACTED]

6 Now, Your Honor, you said something yesterday about  
7 proffers, and not wanting to accept too many proffers on the  
8 record. And that is precisely what the government is doing  
9 here. They are proffering that they have been through -- you  
10 know, that they -- that everything they used is summarized for  
11 us. We are telling you that is not the case.

12 And they are also saying that they went through --  
13 for example, [REDACTED]

14 [REDACTED]  
15 [REDACTED] This is a significant incident. We've  
16 briefed it in our supplement, and we pulled up, I think, five  
17 different sources from the discovery, everything we could find  
18 talking about that incident, because it was a significant  
19 incident.

20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~1  
2  
3  
4

5 Now, the government stands here and says I went back  
6 and looked at the documents. It was somebody else. There is  
7 zero indication in anything we have been given that there was  
8 ever another incident like that, right? So either the  
9 government is misrepresenting, or there is some sort of  
10 mistakes in the original documents. The only way for us to  
11 know is by seeing the original documents.

12 And I know I talked a little bit in my original -- in  
13 my argument earlier today about how even if that didn't  
14 happen, that particular incident was not Mr. al Baluchi, the  
15 fact that it happened more than once and on more than one  
16 detainee, by the same interrogator, is extraordinarily  
17 significant. It's extremely significant.

18 The experimentation of techniques on Mr. al Baluchi  
19 is something that is [REDACTED] as  
20 they weigh whether or not our laws were violated with respect  
21 to Mr. al Baluchi. And so if that technique was experimented,  
22 either on him or on someone else, we need to know that.  
23 That's going to figure in our eventual chronology.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1           So, you know, when we -- as I stand before you today,  
2 we can go back and forth on these small discrepancies, and I  
3 suspect we can do it for a very long time; but it doesn't  
4 address -- it doesn't address the reason for litigating this,  
5 which is the volume of them, and how the government could have  
6 gotten so many things wrong in both these summaries and the

7

8

9           And I just want to note that there is still, still no  
10 explanation from the government as to why they have chosen to

11

12 definition, when no government agency shares that

13 definition -- why the government in this room,

14

15

16           MJ [Col PARRELLA]: Ms. Pradhan, let's -- I don't think  
17 this was even addressed by the government, so the purpose of  
18 the rebuttal argument is obviously to hit the points that he  
19 brought up. So let's just wrap it up, please. You brought  
20 that up, and I noted that.

21           ADC [MS. PRADHAN]: That was my last point, Your Honor.


22 But I will just note that Mr. Groharing did go into some  
23 explanation of why Mr. Fitzsimmons was not included, and

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 that's 


2 MJ [Co1 PARRELLA]: Got it. I understand. Thank you.

3 ADC [MS. PRADHAN]: Thank you, Your Honor.

4 MJ [Co1 PARRELLA]: Thank you.

5 Ms. Radostitz.

6 ADC [MS. RADOSTITZ]: Your Honor, I want to apologize,  
7 because I want to respond to your question to Mr. Groharing.

8 I was conflating 

9  
10  
11  
12  
13  
14  
15  
16

17 And that was -- so that's our confusion, is those two  
18 different things. It turns out one doesn't exist, and I  
19 wasn't -- I wasn't thinking about the fact that maybe it just  
20 doesn't even exist.

21 MJ [Co1 PARRELLA]: I understand.

22 ADC [MS. RADOSTITZ]: So I want to apologize for that.

23 And then I want to make one other point, which is

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

1 that Judge Pohl often said that when he's looking at  
2 substitutions -- he's not looking at what the government isn't  
3 seeking to substitute.

4 So he only knows that they've got these documents and  
5 they want to give us these documents. What he doesn't know is  
6 are there 100 other documents that they're using and they have  
7 made a determination that they're not relevant or they're not  
8 material or whatever.

9 And so that's where this isn't a reconsideration,  
10 because what we're asking for is for us to be able to look at  
11 all the documents that they considered and put into these  
12 synopses, is that those are documents that haven't gone  
13 through the 505 process.

14 Those are the only two points I wanted to make.

15 MJ [Col PARRELLA]: Thank you.

16 Ms. Bormann?

17 LDC [MS. BORMANN]: Thank you. Just a couple of things to  
18 answer your question to Ms. Pradhan. I think you said -- it's  
19 sort of why can't we all get along?

20 So Judge Pohl started in 2012 with that same thing  
21 and hasn't asked that for many years, and maybe it's because  
22 he has presided over, and had presided over a long morass of  
23 us trying to get information.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1           And so I'm just going to bring your mind back [REDACTED]  
2 what was argued earlier by Mr. Montross. [REDACTED]  
3 Judge Pohl issued -- we requested discovery, nicely, kindly.  
4 We sent something, we get no response. Eventually we get a  
5 response that says no.

6           We file a motion to compel. We have to litigate it.  
7 And then Judge Pohl agrees with us, and we get an order. And  
8 then it takes two years of us [REDACTED]  
9 [REDACTED] of defense resources e-mailing, prodding,  
10 asking nicely, just to get what has already been ordered to be  
11 provided.

12           So that horse left the barn a long time ago. 2011, I  
13 began requesting discovery pre-referral, because we had to  
14 submit a mitigation report, and now we are here. So yes, we  
15 continue to submit discovery requests, just like Mr. Groharing  
16 says.

17           When we do that, and then we have to file a motion to  
18 compel, the government complains that we are filing too many  
19 motions. But we continue to do this in spite of the fact that  
20 it seems to get us nowhere.

21           I have a question regarding the exhibits that are  
22 [REDACTED] provided by the government to me  
23 earlier. Are those being made part of the record? Because

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

1 I'll tell you why.

2           Judge Pohl informed me in a very direct way about two  
3 years ago that providing exhibits on the day of oral argument,  
4 where the parties had not seen them and could not comment  
5 about them, and then asking the judge to consider them without  
6 the other party being able to comment upon them, was not to be  
7 used regularly.

8           And what the government has done here is provided  
9 some highlights. I don't know what they're about. They  
10 haven't been supplemented into the record. They appear to be  
11 from discovery that they had in their possession during the  
12 pleading period in this case.

13           And so if the court's acceptance of exhibits is going  
14 to be changed from what Judge Pohl did, I'm happy to go along  
15 with that program.

16           MJ [Col PARRELLA]: I'm not changing any procedure. The  
17 government had them marked because they intended to talk about  
18 them, and then Mr. Groharing said that over the lunch break he  
19 reviewed it, realized it wasn't noticed, and wasn't going to  
20 argue it.

21           So I'm going to keep them marked in the record, just  
22 simply so it's a complete record, so we know what it was. And  
23 if the appellate court wants to look at what we were

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 discussing, they can see that it's in the record. But I'm not  
2 going to consider it as part of their argument, if that's what  
3 you mean.

4 LDC [MS. BORMANN]: Great. That's what I wanted to know.  
5 Thank you.

6 MJ [Co1 PARRELLA]: You're welcome.

7 ADC [MS. LACHELIER]: Just two quick points, Judge. Just  
8 by way of history, in 286 series -- we draw your attention to  
9 286 series, which was originally filed in April 2014. This  
10 was a motion to compel the Senate report. At that point it  
11 had not yet been publicly released.

12 Eventually the government [REDACTED] which was  
13 their proposal for this [REDACTED] The record is  
14 replete with Judge Pohl saying this is just a first volley --  
15 my words, not his -- but instances where Judge Pohl made clear  
16 that [REDACTED] was just supposed to be the  
17 first pass at discovery of the SSCI report, of materials  
18 underlying the SSCI report.

19 So the [REDACTED] which includes,  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 And to echo Ms. Bormann's statements about the record

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

1 of attempting to get discovery from the government: The SSCI  
2 report -- we can speculate, but I think it's fair to say the  
3 government was never going to release the documents underlying  
4 that report until the Senate released it.

5 And why can we say that? Because, as Ms. Bormann  
6 alluded to, she submitted a discovery request to the  
7 government back in 2011. We submitted a discovery request  
8 asking for these types of documents back in 2013 at least.

9 So the requests have been out there and pending with  
10 the government. And the only reason they have been brought to  
11 even the [REDACTED]s because of the litigation  
12 that we have had to engage in to get them here, and because  
13 they were forced to with the public release of the Senate  
14 report.

15 And then the other point I wanted to go back to was  
16 something Mr. Groharing mentioned, that they can only give us  
17 what's as good as what they get from the CIA, or whatever  
18 agency they're dealing with.

19 I don't know where that passes for appropriate. If a  
20 police officer hands a lawyer a report that has blatant  
21 omissions or a lie in it, certainly the government is going to  
22 be sanctioned for that. So they should not be able to get  
23 away with that kind of passing the buck to the CIA. The CIA

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 can then do whatever they want with what they produce, and we  
2 get what's left. So at some point sanctions would be  
3 appropriate if and when we ask for them.

4 MJ [Col PARRELLA]: Well, I didn't take it as that they  
5 would deliberately pass something they knew to be false. What  
6 I took it as is that in the volume of documents, they simply  
7 can't, you know, audit the veracity of everything that another  
8 agency puts into their reports. So not that they would do it  
9 deliberately but ----

10 ADC [MS. LACHELIER]: No, and I'm not alleging they would  
11 do it deliberately, but turning a blind eye to the fact that  
12 maybe their practices on the agency side are not perfect, or  
13 not as good as they should be, should not be the standard.  
14 And the agency should not be able to use the government as a  
15 Chinese wall to say we took care of it, we handed it to a  
16 prosecution that doesn't know better. And that's what's going  
17 on.

18 MJ [Col PARRELLA]: Okay. I understand.

19 We're going to go ahead and move on [REDACTED] I think  
20 we've heard -- given the overlap, we have heard some of this.  
21 But if we can keep that in mind as we present our arguments so  
22 we're not repeating it.

23 ADC [MS. PRADHAN]: Thank you, Your Honor. Your Honor is

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1 absolutely correct. In the interest of time, I will be as  
2 brief as possible on this.

3 I just want to highlight really a couple of examples  
4 regardin [REDACTED] We have already argued the base motion and the  
5 reply in open and closed session in March, and I went through  
6 numerous examples.

7 And I would, as I said, refer Your Honor back to  
8 [REDACTED] which is really the largest analysis that we conducted  
9 of the original RDI index, much of which, as we relate in our  
10 second supplement, is still relevant to the second RDI index.

11 But I just want to give you two examples of  
12 conflicting and missing information that have cropped up that  
13 triggered the two supplements that we filed, including the  
14 second RDI index.

15 The first example is the example that I skimmed  
16 across in open session of Mr. al Baluchi's torture. I want to  
17 recall that Mr. Montross correctly identified this pattern,  
18 that the government offered no specific rebuttal to my

19

20

21 [REDACTED] They got away with standing up in open session  
22 and broadly stating that, hey, [REDACTED]

23 [REDACTED] without actually having to

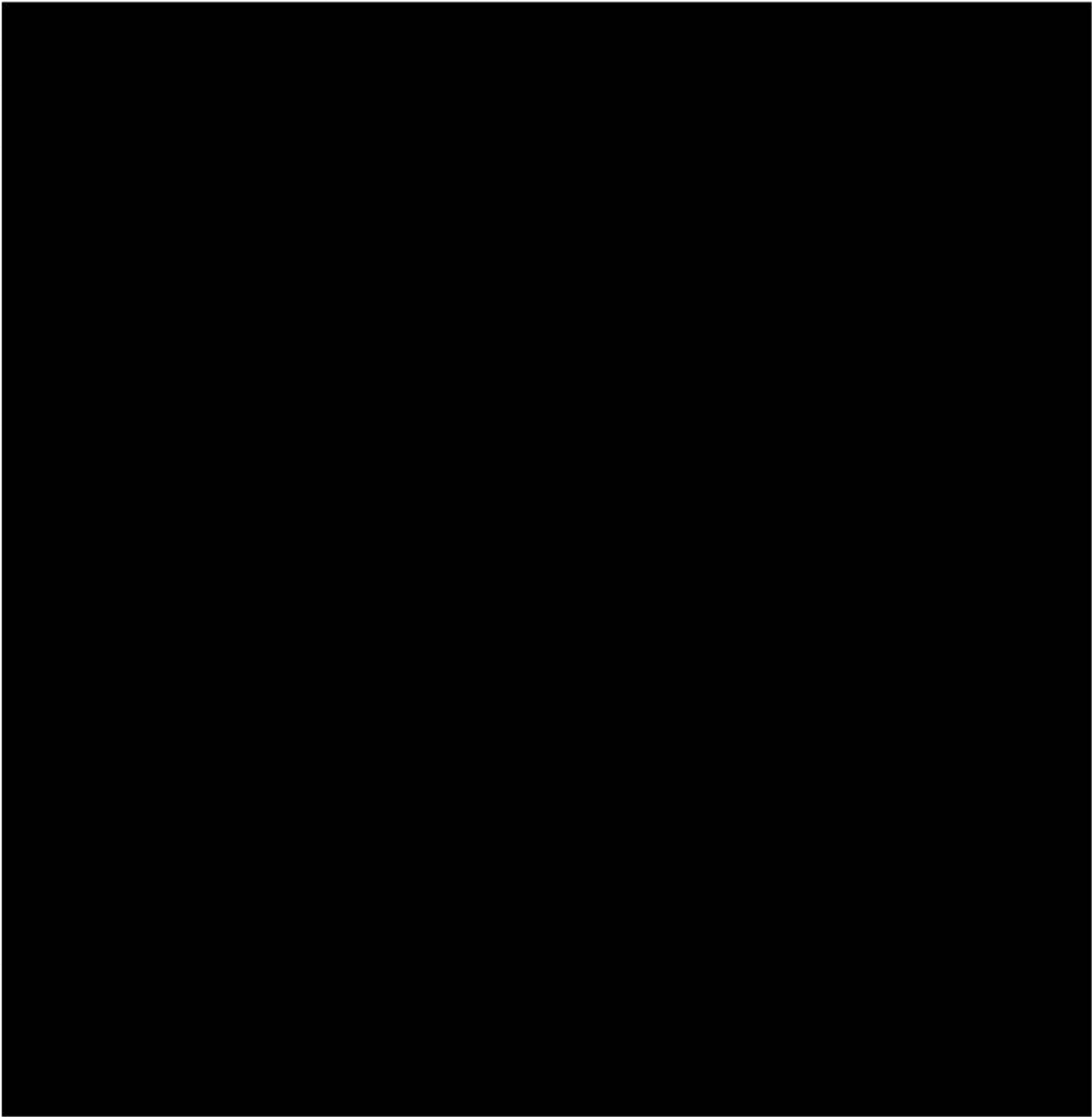
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SI //~~

1 drill down and respond to my point.

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21



22 Now, recall also the example of D95, who may or may  
23 not -- we can't drill down on exactly whether he was -- have

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 been in the room when Mr. al Baluchi had the stick put behind  
2 his knees.

3 So those are the issues that we're having with  
4 actually figuring out who was in the room. [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 Because if you look at the actual summaries that are

10 [REDACTED] to the occasions of

11 Mr. al Baluchi's -- what they refer to as the application of

12 [REDACTED]

13 [REDACTED]

14 MJ [Col PARRELLA]: I don't have Bates numbers,

15 Ms. Pradhan.

16 ADC [MS. PRADHAN]: I apologize, Your Honor. But we have

17 actually -- these are all attached to either [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 You can't tell from those summaries who is doing  
22 what. There is absolutely no way to tell who is observing,  
23 who is applying the techniques, who's checking him, who is

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 asking questions, who is writing things down. And so that's  
2 our problem.

3 There's no -- there's also no way, even if you go  
4 outside of those two summaries in which the -- that actually  
5 describe the application of the EITs, there's no way to  
6 connect those descriptions of Mr. al Baluchi's torture with  
7 the statement summaries that surround those [REDACTED]

8 [REDACTED] Those are the  
9 statements that he apparently made under torture. There's no  
10 way to connect those.

11 So clearly some of them were taken during his  
12 torture. But we, again, can't figure out which personnel were  
13 asking questions. And that would be relevant, [REDACTED]

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 I don't know why it seems so difficult to identify  
20 who was in the room, but this is a basic, basic question and  
21 one that we took up with Judge Pohl. And Judge Pohl, you  
22 know, also seemed to express some frustration with the  
23 government that we still did not have the tools relevant to do

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SCI //~~

1 that.

2 Now, the second example, briefly, Your Honor, is that

3 which we

4

5

6

7

8

9

10

11

22

Those are the two examples I have for you,

23 Your Honor. Needless to say, the overarching questions that I

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 wanted to raise for you -- that I did raise for you at the  
2 beginning of my argument [REDACTED] apply equally to the argument  
3 [REDACTED].

4 And really the only -- we believe the only conclusion  
5 the military commission can come to is that at this point in  
6 the discovery process, six years in, and several years -- you  
7 know, again, I don't mean to beat this in, but there is some  
8 significant -- there is some significant frustration with the  
9 fact that several years after we were meant to have all of the  
10 discovery produced under [REDACTED] we

11 [REDACTED]

12 [REDACTED]

13 So at this point we say that if the government  
14 doesn't want to provide a chronology for us, if they don't  
15 want to provide exhaustive information about the individuals,  
16 that is -- you know, we don't believe they are fulfilling  
17 their discovery obligations in that.

18 But we still need this information if we are going to  
19 go to trial. And so the only way to get that information and  
20 to put together a proper defense is to have those original  
21 documents, because the summaries are just not reliable.

22 MJ [Col PARRELLA]: Thank you.

23 ADC [MS. PRADHAN]: Thank you.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SC1 //~~

1 MJ [Co1 PARRELLA]: Mr. Nevin?

2 LDC [MR. NEVIN]: No, thank you, Your Honor.

3 MJ [Co1 PARRELLA]: Ms. Bormann?

4 LDC [MS. BORMANN]: Nothing further, Judge.

5 MJ [Co1 PARRELLA]: Mr. Harrington?

6 LDC [MR. HARRINGTON]: Nothing, Judge.

7 MJ [Co1 PARRELLA]: Mr. Ruiz?

8 LDC [MR. RUIZ]: Nothing, Judge.

9 MJ [Co1 PARRELLA]: Trial Counsel.

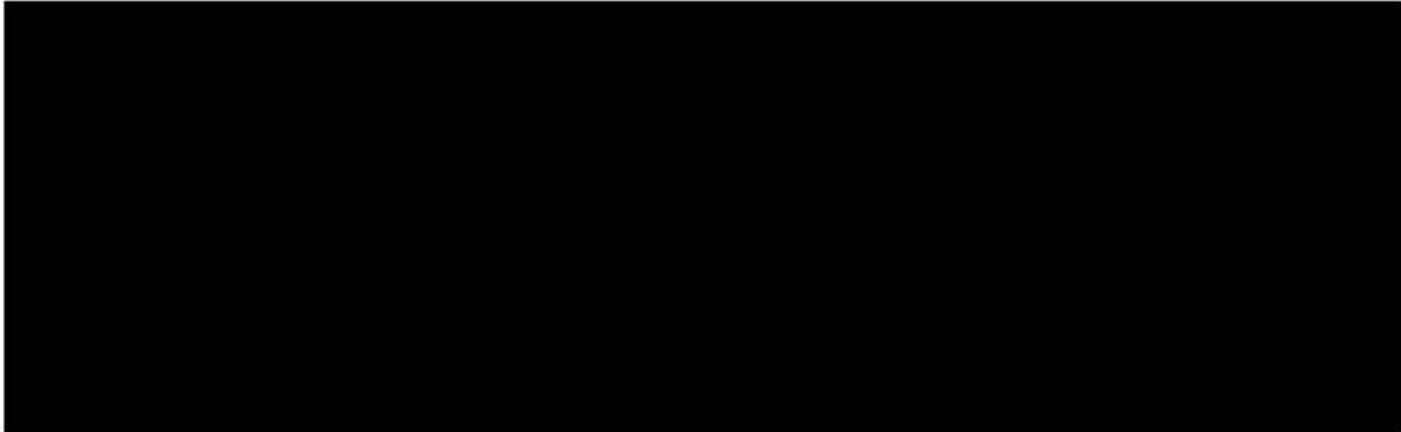
10 TC [MR. GROHARING]: Just a few points, Your Honor. We  
11 talked about this an awful lot already, but it might help for  
12 everyone's benefit just to help everyone understand the  
13 process of how this works.

14  
15  
16  
17  
18  
19  
20  
21  
22  
23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SC1 //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

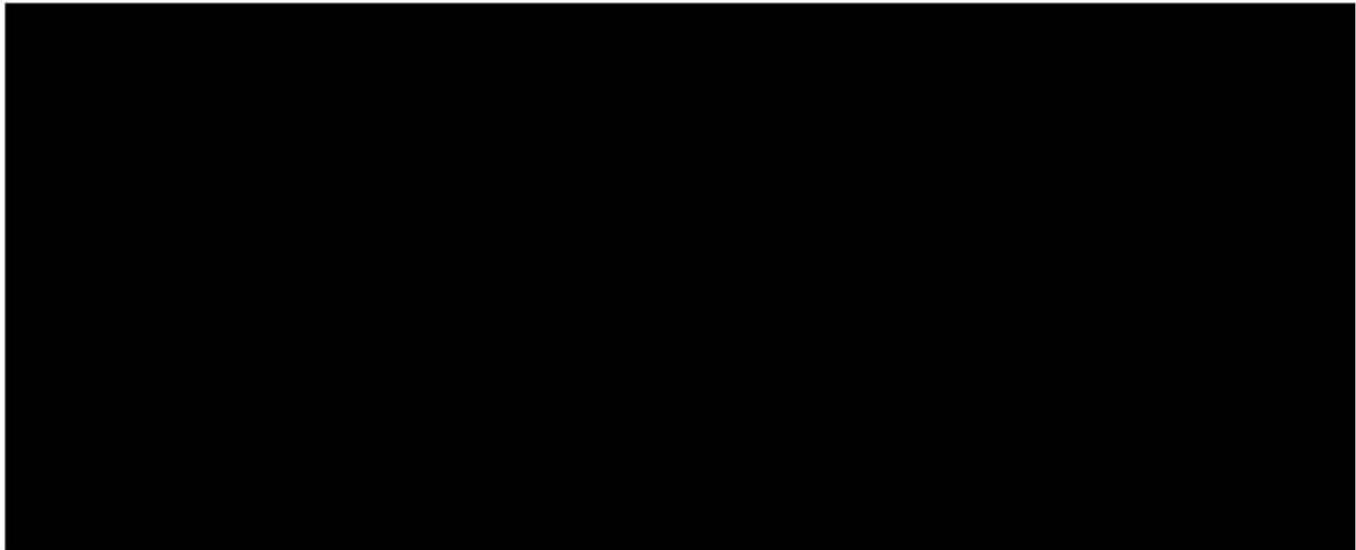
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



That couldn't be completed until we had all the discovery approved that we could give to the defense so we could put the Bates numbers on the documents. We did not date the materials for reasons that we've explained to the military judge in the ex parte proceedings.



But also on the index, we then put -- to the extent



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1           Is all of the discovery consistent? No, it can't be,  
2 because all of the original information is not consistent. I  
3 think Judge Pohl certainly understood that. He had seen all  
4 the originals, and I think the military judge likely  
5 understands that as well.

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10           So counsel is right now situated to understand when a  
11 particular statement was made in relation to particular  
12 conditions of confinement. [REDACTED]

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]

16           Again, it can't be perfect, just by the nature of the  
17 information that we are starting with. Sometimes dates will  
18 be wrong on original documents. And if the defense gets  
19 something that doesn't look right on the index, they should  
20 bring it to our attention, and we'll make as much sense of it  
21 as we can, and we are happy to do that, just like I mentioned  
22 before with respect to the synopses.

23 [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1

2

3 MJ [Col PARRELLA]: With respect to that -- and I think  
4 the question, you know, that Ms. Pradhan posed to the  
5 commission is:

6

7

8

9 TC [MR. GROHARING]: Exactly.

10 MJ [Col PARRELLA]: So what about other folks that were in  
11 the room?

12 TC [MR. GROHARING]: And what we've said, when we have  
13 provided the indices to the defense, was that if the defense  
14 believed they needed to speak

15

16

17

18

19

20 So we are amenable to that process. No one's ever  
21 invoked that process to make such a request. But we indicated  
22 that in September 2017 when we provided the RDI indexes to the  
23 defense.

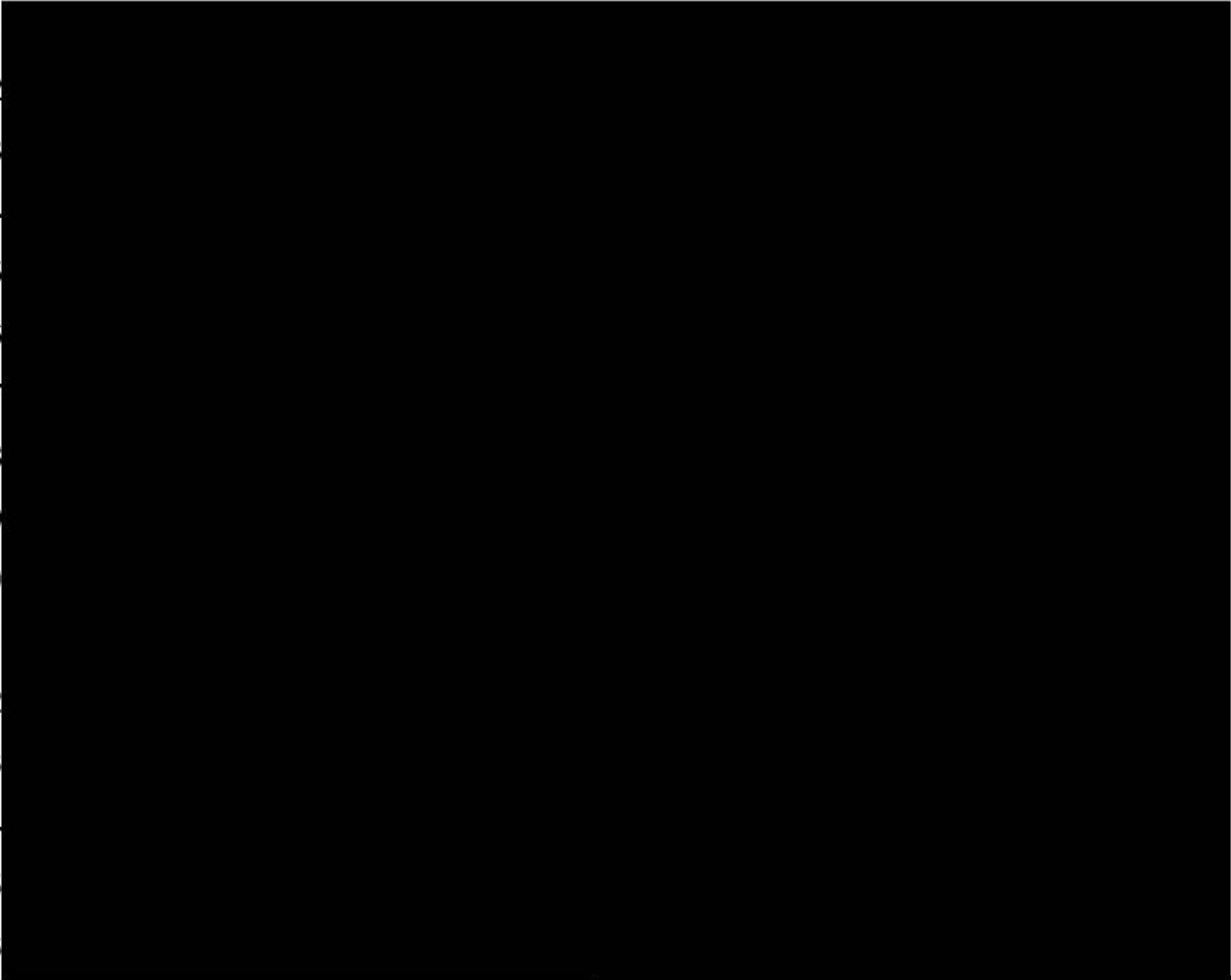
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



But it cannot be that

We don't get specific requests. It's we want everybody who was in the room on every occasion. And that cannot be the standard. "Direct and substantial" must mean something just beyond present.



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~


~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

1

2

3 And, Judge, this ties into the argument we're having

4  Again, the matters for which they're seeking

5 additional information are matters that really aren't in

6 dispute in the first place. And so you should consider that

7 when you consider the defense arguments in particular on this

8 case asking for all original information that the government

9 summarized and the military judge approved that was provided

10 to the defense.

11 This is a motion to reconsider, just as Judge Pohl

12 correctly pointed out when we litigated this multiple sessions

13 ago. And we would ask that the commission deny the defense

14 motion.

15 Absent additional questions, Judge, that's all I

16 have.

17 MJ [Col PARRELLA]: With respect to the specific example

18

19

20

21

22 TC [MR. GROHARING]: That's correct, Your Honor. The

23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 We looked at the direct and substantial contacts. That  
2 analysis, [REDACTED]

3  
4  
5  
6  
7  
8

9 We have given reports to the defense. At some point  
10 it's on the defense to come back [REDACTED]

11  
12  
13

14 But absent that, we don't believe that there are any  
15 additional people that have been specifically identified that  
16 we need to provide the defense. But at this point it's on  
17 them. And again, it has to be a specified request. It cannot  
18 be -- again, that's what we get is, every single person and  
19 every single event. It has to be a targeted, specific request  
20 and we will field those and respond to those as we get them  
21 and litigate them as necessary.

22 MJ [Col PARRELLA]: So if you get the request [REDACTED]

23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

[REDACTED]

TC [MR. GROHARING]: So in that case, Judge, if the defense makes that request, [REDACTED]

[REDACTED]

I would clarify that with the defense. Assuming that's what they want, and consistent with what's now Protective Order #4, we would pass along that request, [REDACTED]

[REDACTED]

But it would start as a request for more information. Presumably they would want to know more about what happened at the event, [REDACTED]

[REDACTED]

MJ [Col PARRELLA]: Thank you, Mr. Groharing.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

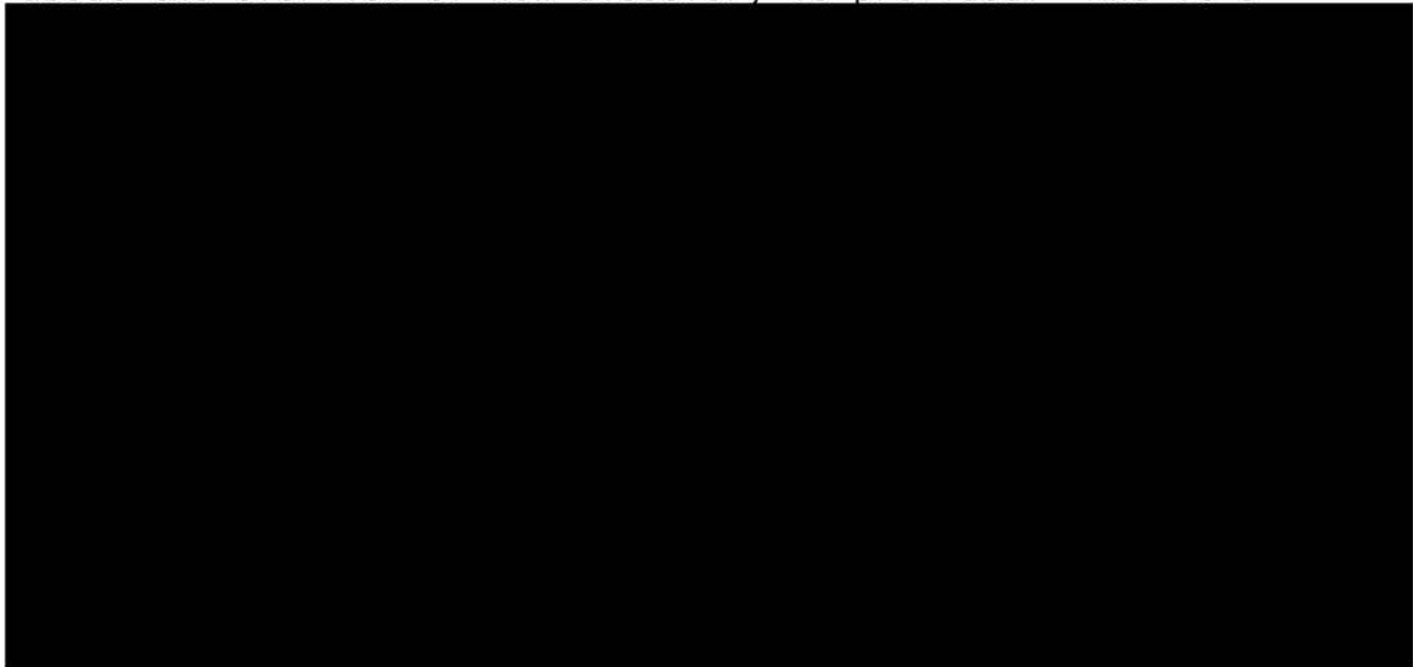
~~// TS/SCI //~~

1 LDC [MR. NEVIN]: Could I be heard, Your Honor?

2 MJ [Col PARRELLA]: You may.

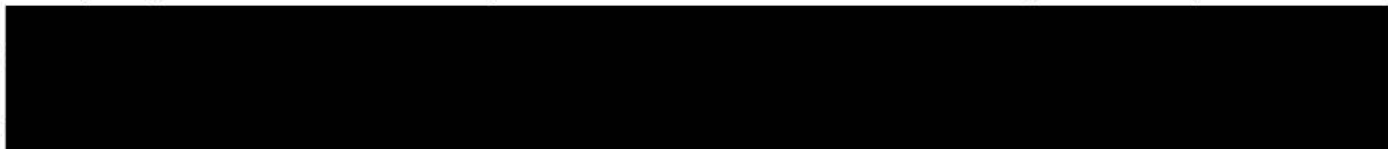
3 LDC [MR. NEVIN]: Thank you. And just to respond to the  
4 last bit of colloquy that you had with Mr. Groharing, because  
5 this wasn't raised in the first round of arguments about this.

6 But this has been a persistent problem, and an  
7 approach that we've taken in motions to compel, and talking  
8 about the overview of how discovery is provided. And it's --



9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

18 And the counsel suggests, well, if there is someone  
19 you want to talk to, come forward and tell us. Well, of  
20 course, the question is: How would we know that? And I'm not  
21 saying it would be impossible to know it, but generally



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1

2

3

4           But I've done this, I don't know, probably literally  
5 hundreds of times. It's a bar fight. It's a shooting. It's  
6 a misdemeanor trial that we are getting ready to have, or  
7 maybe it's a felony. We're going to go and talk to everybody  
8 that we can find who was in the bar, let's say, and we're  
9 going to ask them, and here is what happens.

10           This guy sees this. This guy here was looking down  
11 and didn't see that. This guy over here saw the next second  
12 after. And when you talk to everybody, what you get is --

13

14

15

16           I don't know if this is the right time or the right  
17 mechanism to present this issue to you for resolution, but  
18 your question raised it -- your question to Mr. Groharing  
19 raised it.

20           And I just wanted to speak to this now to have this  
21 in your random access memory, that this is a deficient process  
22 on its face. I mean, by -- from the outset, this does not  
23 give us the ability to understand and paint a complete

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 picture.

2 There are people out there -- I promise you, there

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 And just as we were talking about yesterday, the need to get

7 to these details, the way you get to them is you talk to

8 everybody. And we are not in a position to do that.

9 So I just wanted to say that. Thank you, sir.

10 MJ [Col PARRELLA]: Thank you, Mr. Nevin.

11 Mr. Montross.

12 DC [MR. MONTROSS]: Thank you, Your Honor. In my moldy

13 [REDACTED] so I don't have it at hand. I

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 So seemingly their definition of "direct and

23 substantial contact" is so restrictive and so narrow that

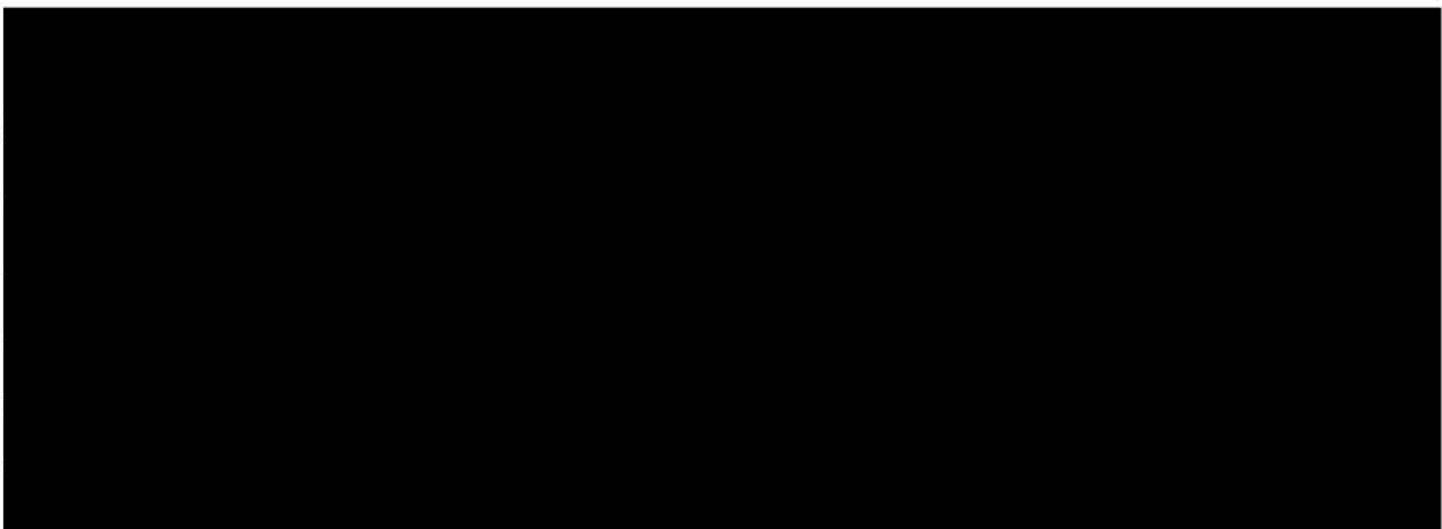
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1  
2  
3  
4  
5  
6  
7



8           You now, I've done capital work in Alabama, and I  
9 thought discovery was bad in Alabama, okay? At least when my  
10 client was beaten in Alabama by a police officer, I got to  
11 find out who were the other police officers who were present  
12 witnessing that. They may not have touched my client. They  
13 may not have said a word to my client. They may not have  
14 filled out a police report regarding my client. But I got to  
15 find out who was in that room.

16           And under this restrictive definition of "direct and  
17 substantial contact," I know no one else who was in that room  
18 when Mr. Bin'Attash was being beaten and eventually some form  
19 of answer was extracted from him.

20           This is the only court I've ever been associated with  
21 where that is a struggle that we are facing on a routine  
22 basis.

23           MJ [Col PARRELLA]: Thank you.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

1           Okay. Would anyone else on the defense?

2 Ms. Pradhan?

3           ADC [MS. PRADHAN]: I promise to keep this short,  
4 Your Honor, but -- excuse me, I'm sorry, because I think  
5 Mr. Nevin and Mr. Montross have covered some of the issues  
6 that I wanted to talk about with what Mr. Groharing says.

7           But I wanted to show you -- if I may have access to  
8 the document camera, [REDACTED]

9 [REDACTED]

10          MJ [Co] PARRELLA]: You may.

11          ADC [MS. PRADHAN]: Thank you. This is in the record at  
12 [REDACTED] This is the first page.

13          Now, I understand that the government believes there  
14 is a way this is supposed to work; there is a process to this;

15 [REDACTED]  
16 [REDACTED]

17          I understand how it's supposed to work, right? We  
18 understand; this is a fairly straightforward Excel  
19 spreadsheet. That is not, in fact, how it does work.

20          And again, I refer you back to our pleadings. This  
21 is the first page that is supposed to cover from before, you  
22 know, [REDACTED]

23 [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1 This is for Mr. al Baluchi.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

22044

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 MJ [Col PARRELLA]: Okay. Just for the record, what you

2 [REDACTED]  
3 ADC [MS. PRADHAN]: Yes, Your Honor.  
4 [REDACTED]

5 MJ [Col PARRELLA]: All right. Thank you.

6 ADC [MS. PRADHAN]: This is page 2 of that attachment.

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 But, I mean, there are so many of these incidences,  
22 right? In open argument we talk about how the government  
23 referred to 100 occasions on which Mr. al Baluchi cooperated

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 with investigators, right?

2  
3  
4  
5  
6  
7  
8  
9  
10  
11

12           So it is entirely possible that on those significant  
13 occasions when Mr. al Baluchi is cooperating with  
14 investigators, right, that there are people who were present  
15 who had that contact, who had that -- who witnessed those  
16 events, who are not listed here. And we just don't know  
17 whether they're in the original documents, and the government  
18 is just not putting them in there.

19           Well, we know they are in some of the summaries.  
20 There's just so much internal inconsistency here that it's  
21 impossible to use this as a guide.

22           And the one last point I wanted to make is there has  
23 been a lot of discussion ----

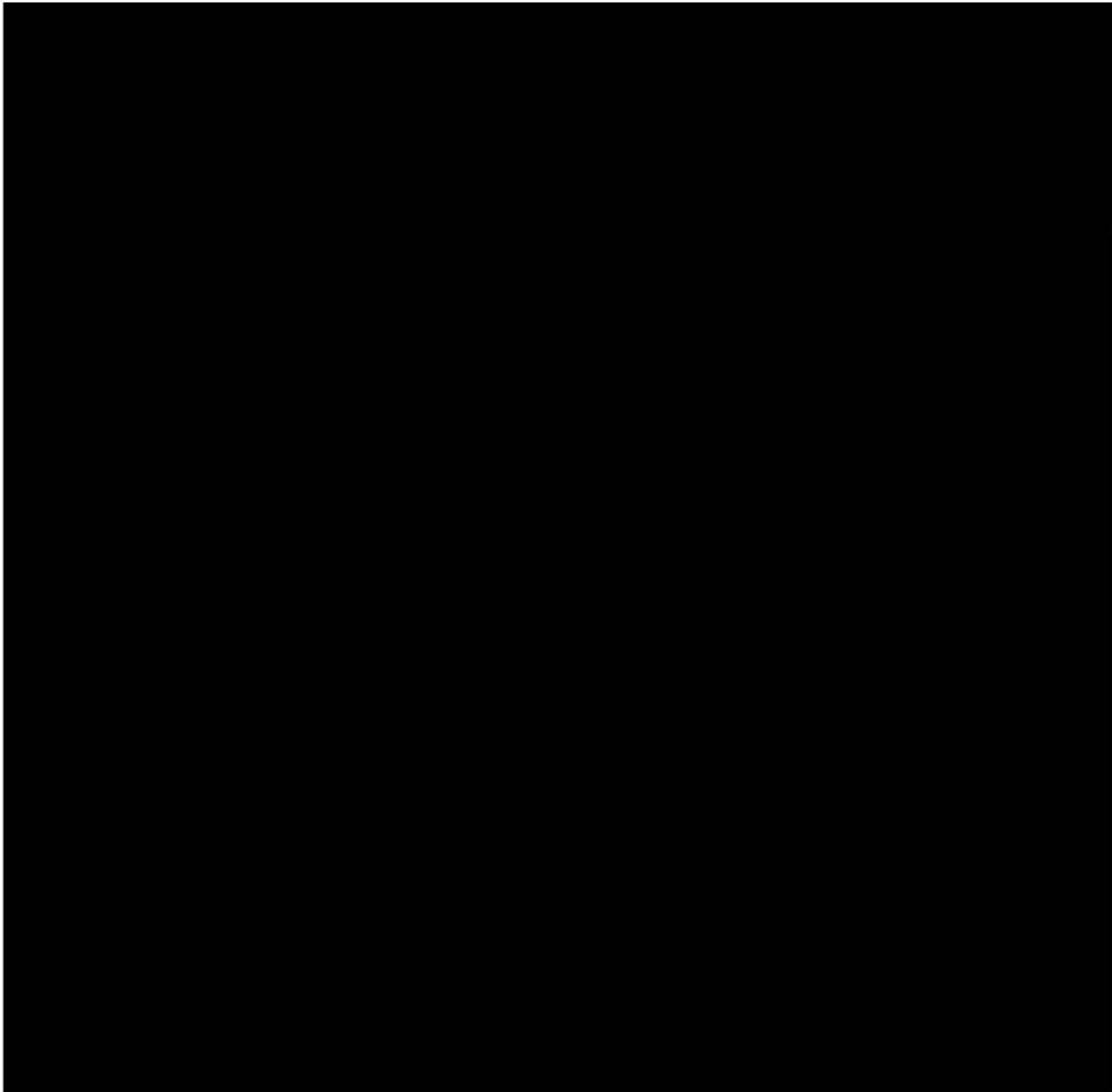
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 Thank you. I'm done with the document camera.  
2 There's been a lot of discussion about direct and



3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

22 MJ [Co1 PARRELLA]: Thank you.

23 ADC [MS. PRADHAN]: Thank you.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

1 TC [MR. GROHARING]: Judge, if I could just make one point  
2 very briefly.

3 MJ [Col PARRELLA]: No, thank you. What I don't want to  
4 do is get engaged in a back-and-forth. The defense is the  
5 proponent. I'm going to give them the last word. I think  
6 I've heard everything I need to render a decision.

7 So with that we're going to take a 10-minute recess,  
8 we're going to come back. We have two more AEs to take up.  
9 The commission is in recess.

10 [The R.M.C. 806 session recessed at 1442, 16 November 2018.]

11 [The R.M.C. 806 session was called to order at 1503,  
12 16 November 2018.]

13 MJ [Col PARRELLA]: The commission is called back to  
14 order. All parties who were present when the commission last  
15 recessed are again present.

16 I will also note that General Baker is not present or  
17 no longer present, nor was he during our last session.

18 Ms. Bormann?

19 LDC [MS. BORMANN]: Captain Brady has been excused to do  
20 other work as well.

21 MJ [Col PARRELLA]: Okay. Thank you.

22 Mr. Connell.

23 LDC [MR. CONNELL]: Accounting for parties, Lieutenant

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 Colonel Thomas and Mr. Farley have not been present since the  
2 lunch break.

3 MJ [Col PARRELLA]: Thank you. Okay.

4

5 TC [MR. GROHARING]: Subject to your questions,  
6 Your Honor.

7 MJ [Col PARRELLA]: No questions.

8 LDC [MR. CONNELL]: Your Honor, I put in unclassified  
9 session a list of motions as one of my slides demonstrating  
10 how many different threads of this case have come together in  
11 Judge Pohl's decision in 524LL. The -- so I have a lot of  
12 disparate pieces that I have to address over the course of  
13 this. So I will not lie to you, this is not brief. I will be  
14 as efficient as I can, but I cannot promise brevity.

15 The first point ----

16 MJ [Col PARRELLA]: Well, you understand I get veto power.


17 LDC [MR. CONNELL]: You have all the power in the world,  
18 sir. I do whatever you say. But, you know, and if you say  
19 wait until next time, that's what we will do.

20 But the first issue that I have to bring to your  
21 attention is the -- we talked about in unclassified session  
22 the strategic decision that the government had to make. There  
23 were a lot of pieces of investigative prohibitions that did

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 not make it into 524LL.

2           There's a serious conflict of issue -- a conflict of  
3 interest issue because of the conflict between the  
4 investigative prohibitions and the duty of counsel to  
5 investigate. 

6 

7

8

9

10

11

12

13

14           The importance of this to this motion to reconsider,  
15 524LL, is the strategic decision of the prosecution whether or  
16 not to seek a protective order. We talked in unclassified  
17 session about the strategic decision to choose the protective  
18 order route under 949p-6 as opposed to the UI route. This was  
19 a place where they made a different strategic decision.

20 

21

22

23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 that protective order in either separate from or in addition  
2 to or combined with the other protective order. And there was  
3 some back and forth between the government there.

4 I would cite the military commission to the

5  
6  
7  
8

9 At that point, [REDACTED] Judge Pohl directed the  
10 government to redraft the order if they wanted one.

11 Now, ultimately the government did not redraft that  
12 order, and they did not seek any further relief [REDACTED]  
13 [REDACTED] strangely in fact, did not get wrapped up when  
14 Judge Pohl issued a number of sort of -- AE 524LL wrapped up  
15 the protective order issue, but then he issued other orders  
16 denying, for example, the UI issue because it was consumed in  
17 AE 524. [REDACTED]

18 The significance there is that as we talked about in  
19 unclassified session, the government made very clear strategic  
20 decisions as to which mechanism it wanted to proceed under.  
21 It chose the protective order regarding in the 524 series to  
22 proceed under, not the UI framework, which it would have done  
23 otherwise, [REDACTED]

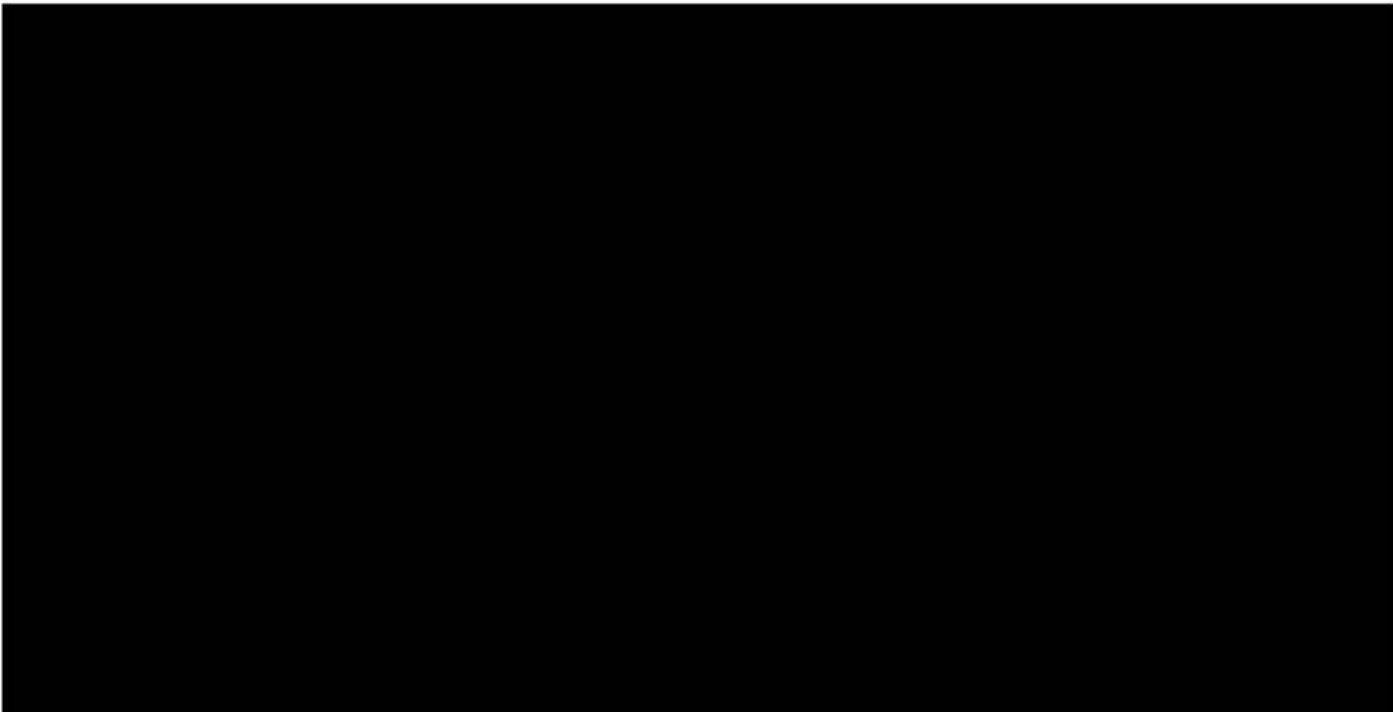
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1           The second point that I wish to make is a response to  
2 the government's claim that the -- Judge Pohl's footnote  
3 citing all the different classified evidence that he had  
4 reviewed is in some way inconsistent with his decision that  
5 making a -- making decisions about whether one document was  
6 adequate to substitute for another document, it was conflicted  
7 in some way -- the government relied very heavily on this  
8 point -- with the idea that at that time when he was making  
9 all those decisions, he assumed there would also be defense  
10 investigation.


11  
12  
13  
14  
15  
16  
17  
18  
19  
20



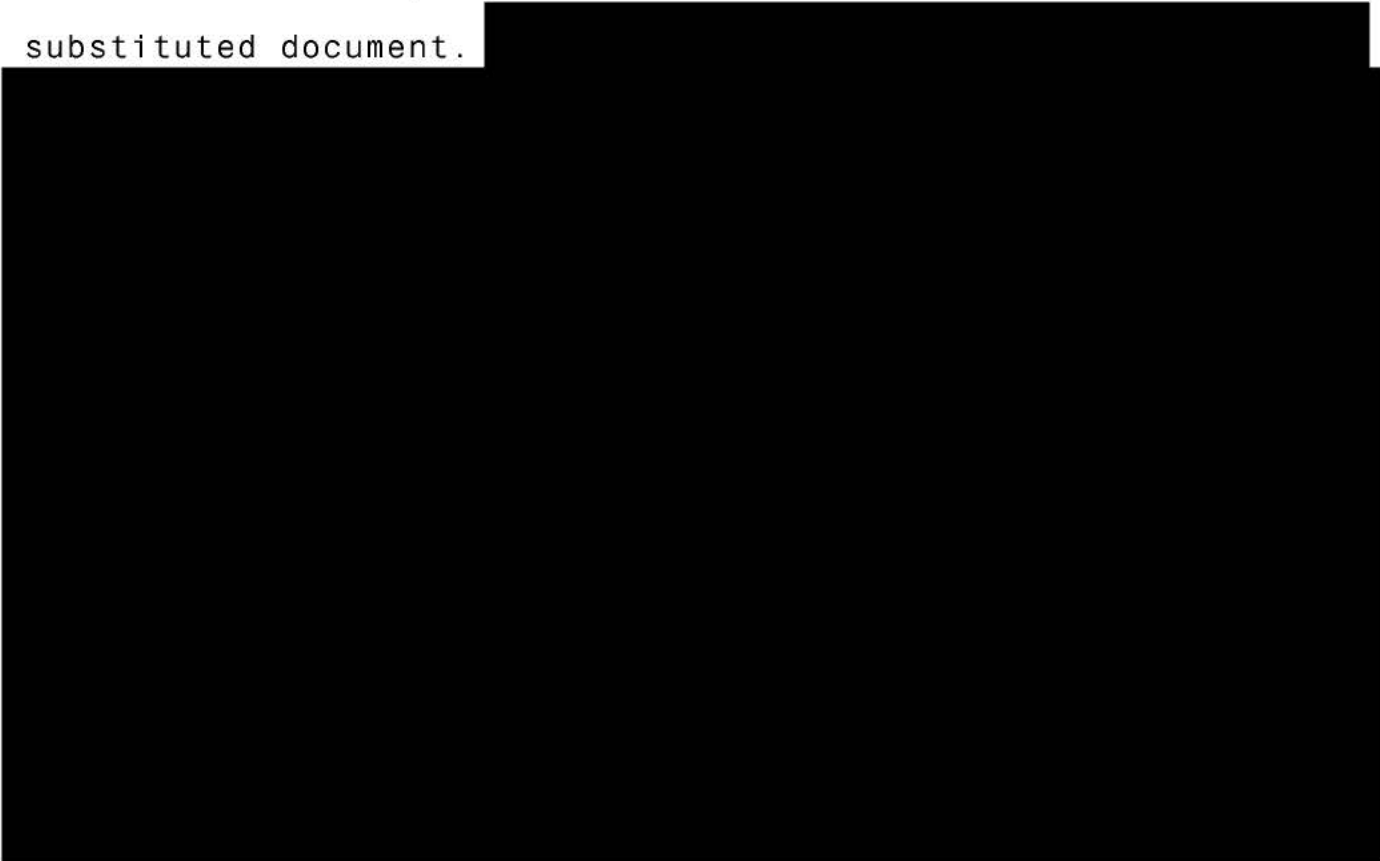
21           The -- but the significant point that I want to tell  
22 you is that when Judge Pohl was taking a look at all these  
23 items, and he would say, all right, so we have an original

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 document which we just heard a lot about, and then we have a  
2 substituted document. 

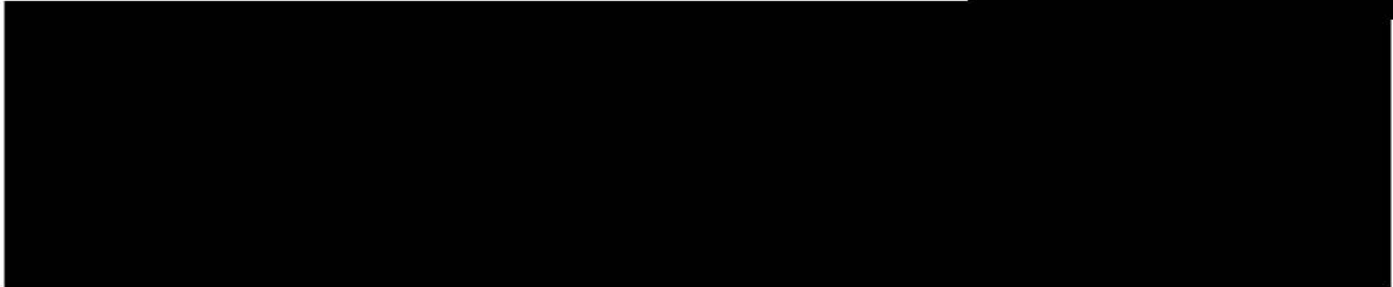
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13



14           It is instead to say that Judge Pohl had that delta  
15 in mind when he was saying whether it would be appropriate to  
16 utterly prohibit defense investigation into black sites that  
17 is independent outside of its very narrow protocol.

18           And just to give you just a couple of quick examples.  
19 So just to tell you what you are looking at, 

20  
21  
22  
23

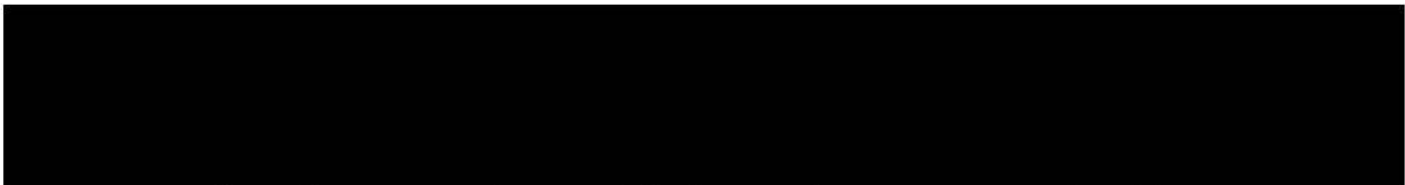


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



So, for example -- if I may have access to the document camera.

MJ [Co1 PARRELLA]: You may.

LDC [MR. CONNELL]:



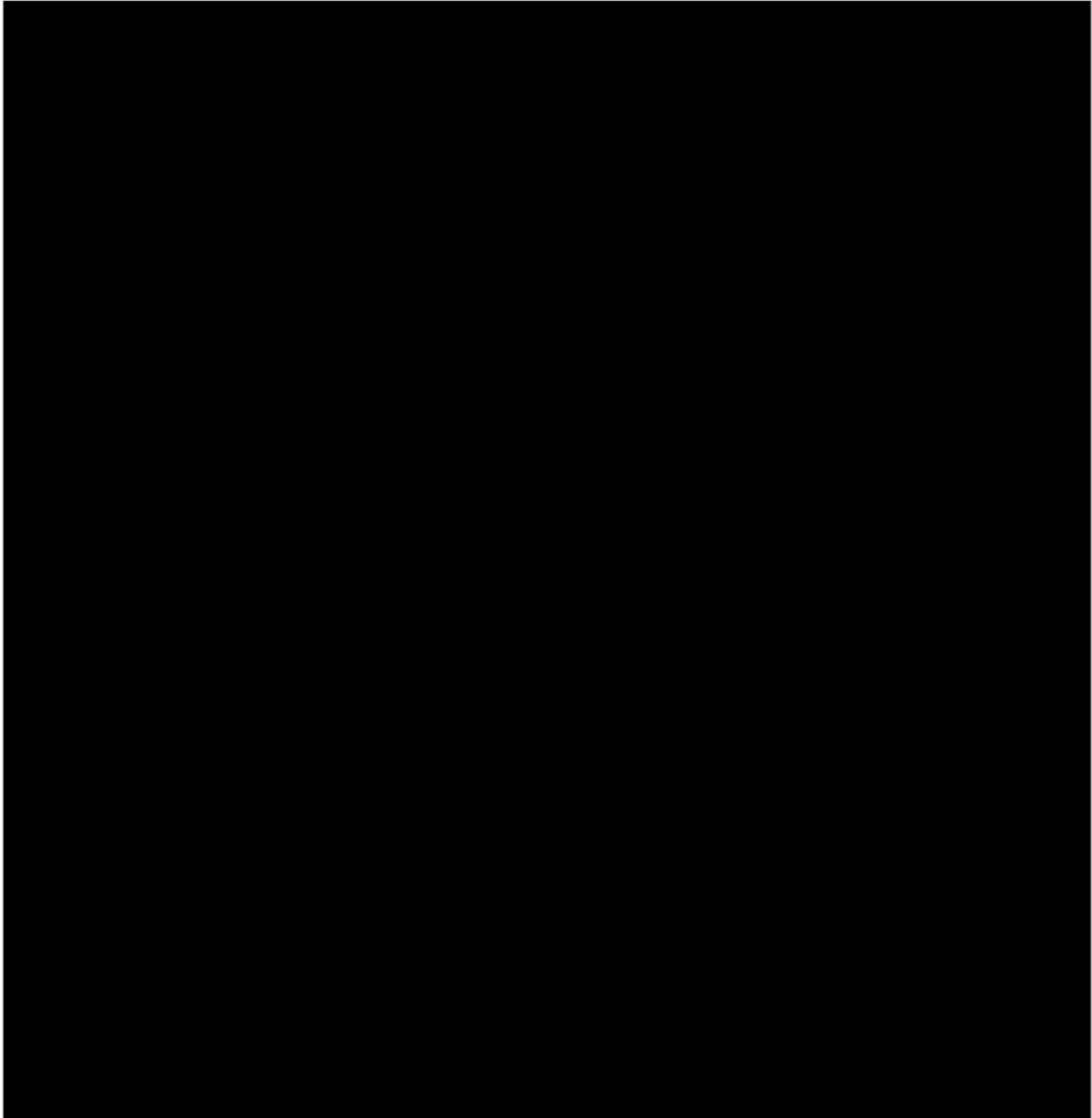
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 to preserve the individual idiosyncrasies and character. Like  
2 we don't know what -- we don't have a close-up that gives us,  
3 for example, who wrote this.

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 [REDACTED] No document that the government has produced  
2 has anything explaining what this is about. But Judge Pohl  
3 thought that us having pictures of it was enough to give us  
4 substantially the same ability to present a defense.

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 MJ [Co1 PARRELLA]: Mr. Connell, just a reminder, when you  
10 lean over the document, just keep the mike in front of you.

11 LDC [MR. CONNELL]: Thank you for that, sir.

12 MJ [Co1 PARRELLA]: Yes.

13 LDC [MR. CONNELL]: [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

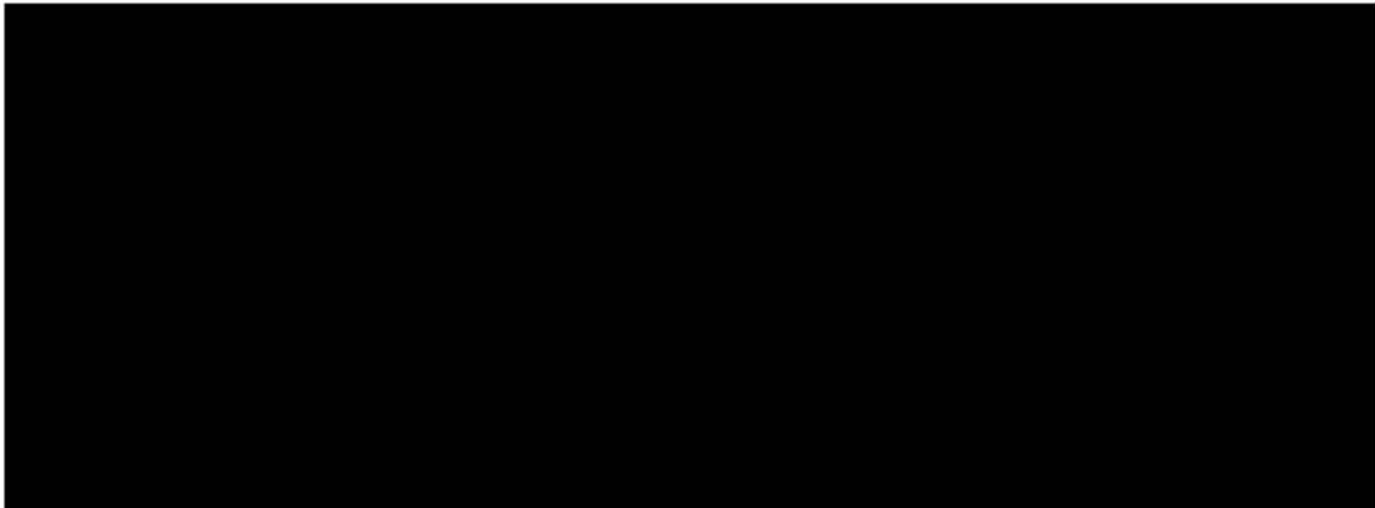
23 And then finally, the same sort of error is

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7



8           The point of that is not to relitigate that question.  
9 I understand that I lost. It is instead -- it is, in my view,  
10 critically important to understand -- and I'm done with the  
11 document camera, thank you -- that when Judge Pohl evaluated  
12 holistically all the information which he recited in his order  
13 in 524LL, that the discovery that the government had given us,  
14 among other things, the voluminous, extraordinarily voluminous  
15 discovery the government had given us was not the same as  
16 allowing defense investigation. He had in mind the gaps and  
17 delta between what the original information would provide and  
18 what the substituted information would provide, I would  
19 suggest.

20           The third point that I want to make is, is closely  
21 related to one that the government just argued relating to the  
22 impact of Protective Order #4 that Judge Pohl knew when he was  
23 making his decision and how -- what the difference between

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 mere discovery is -- thank you, sir -- between mere discovery  
2 and discovery plus investigation, which is normally considered  
3 to be the full function.

4 The government claimed on, I noticed last Wednesday,

5

6

7

8

9

10

11

12

13

14

15

16

17 And I think that the RDI program,  
18 as Ms. Pradhan said earlier, is not the appropriate standard;  
19 it's the treatment of the defendants is the appropriate  
20 standard. That's the universe of discovery. Not what is  
21 arbitrarily or perhaps bureaucratically defined as the RDI  
22 program.

22 But so I do want to point out the government just  
23 referred to this. If I could have access to the document

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 camera again, [REDACTED]

2 MJ [Col PARRELLA]: You may.

3 LDC [MR. CONNELL]: So this is the report documenting the  
4 interviews of Mr. Ali, according to the government, what it  
5 had produced prior to May of this year. And, you know, one  
6 could debate whether this is a report at all; it looks more  
7 like a letter to me.

8 But there is only a sentence and a half about it that  
9 refers to interviews at all, and that's [REDACTED]

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 the time of the closed argument in May 2018 is exactly the  
2 time that Judge Pohl [REDACTED]

3  
4

5 But in May 2018, Judge Pohl and the defense both  
6 thought that Special Agent Fitzsimmons, who we talked about at  
7 the time, would fall into the non-CIA category, that he would  
8 be category 1 in the protective order instead of category 4 in  
9 the protective order.

10 We knew at the time only that -- only just at that

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

23 Judge Pohl dealt with this in Protective Order #4. I

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 mean, he adopted -- essentially he adopted my scope argument  
2 in Protective Order #4 when he was crafting the categories in

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 But it's a perfect example, separate from -- and so  
23 Judge Pohl later came to know that information. Surely he

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 took that into account in the crafting of Protective Order #4  
2 in AE 524LL, but it's a perfect example of the impact of  
3 Protective Order #4 on us and the defense, in that prior to  
4 Protective Order #4, the defense could and did interview  
5 Special Agent Fitzsimmons.

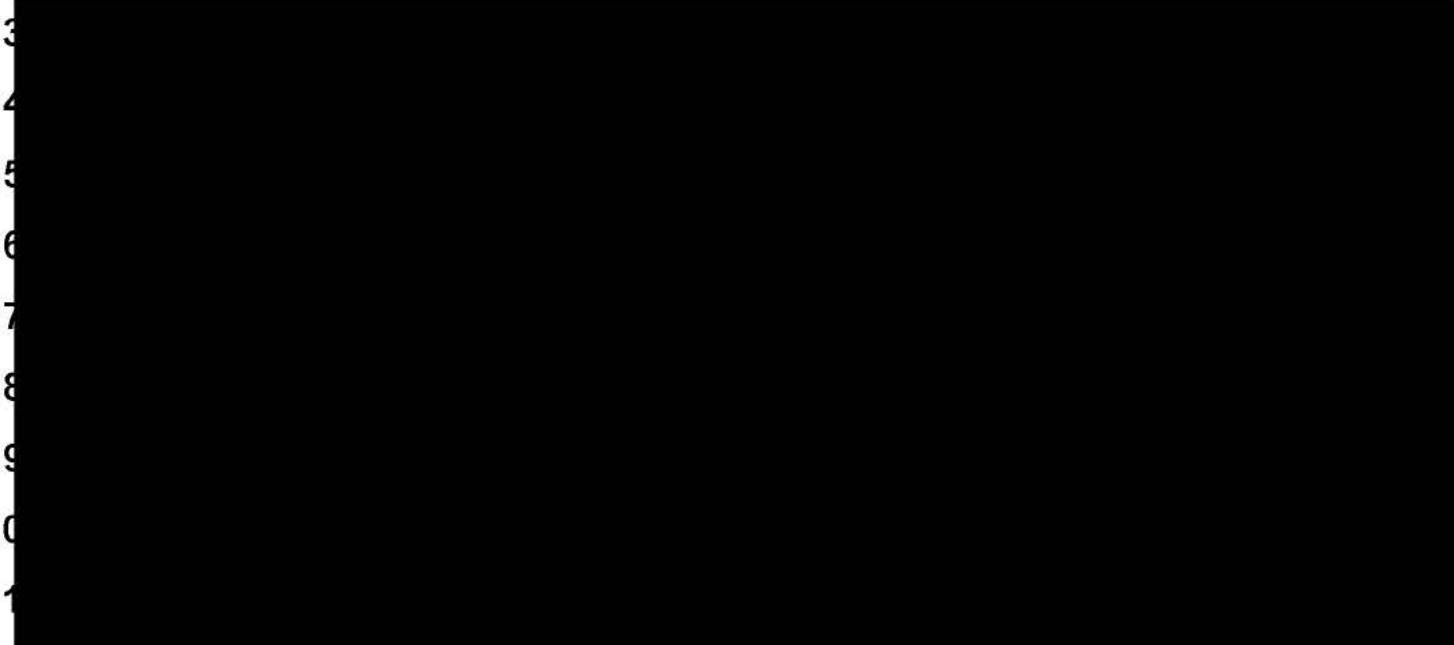
6           And, you know, it's -- I was taken -- the other day  
7 the government argued that why would any of these people want  
8 to talk to the defense? Well, the actual reality is, and what  
9 the military commission reflected in one of its questions, the  
10 actual reality is that most people are willing to talk to  
11 professionals, and that you present your -- if you're honest  
12 about your credentials and you explain what you're actually  
13 doing, what your role in the process is, and behave in a  
14 professional manner, most people will talk with you.



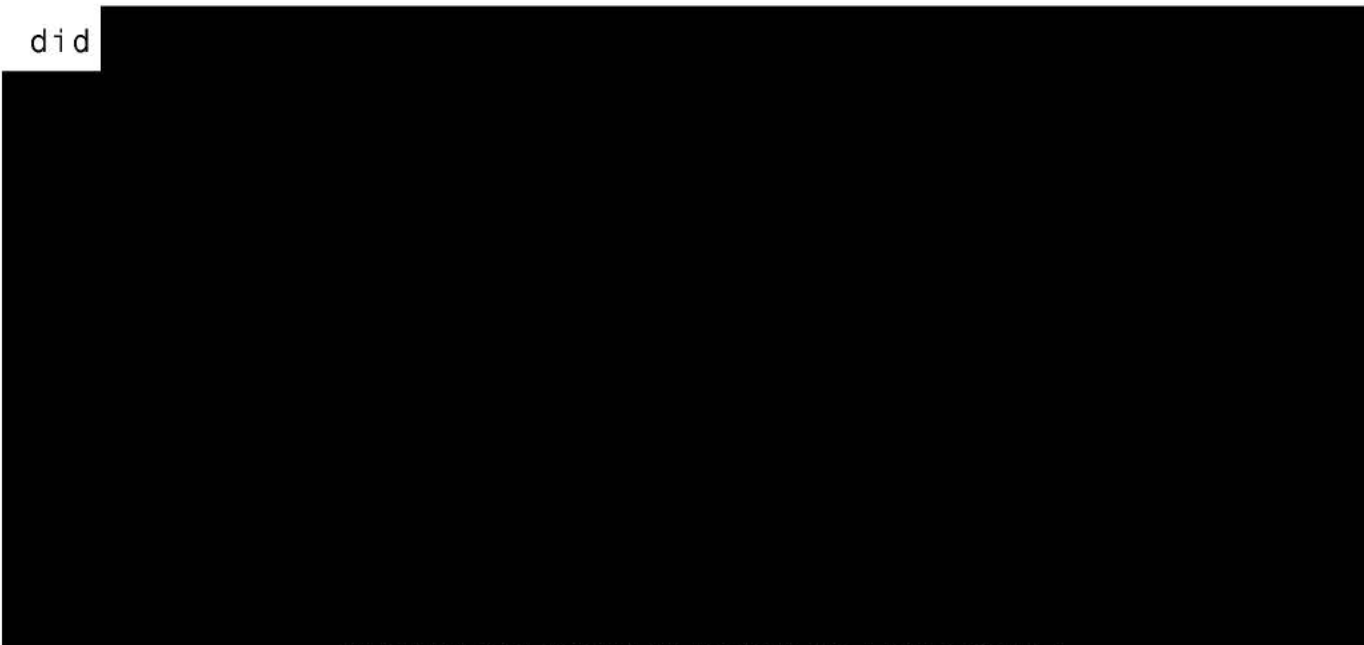
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 subject to the restrictive protocol that the government has  
2 imposed.



12 And what we did with that information is twofold.  
13 First, it led us to push the government for more discovery;  
14 and second of all, it led us to other people, because he  
15 did



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1 sorts of useful information for the case in general.

2

3

4

5

6

7

8

I would like to give you examples of different ways

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 [REDACTED] They do fall into the category -- at least

2 [REDACTED]

3 [REDACTED]

4 We are not allowed to, under Protective Order #4,

5 speak to them about that as we frequently did before. In

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 So Glenn Carle,

12 write a book.

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 Gina Haspel, [REDACTED] She has

19 talked extensively about her various administrative roles in

20 the RDI program. She testified about it in front of Congress.

21 James Mitchell, [REDACTED] He wrote a

22 book and has been out on book tour. We have been out to his

23 book signings. He didn't promise to meet with us at any book

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 signings, but we've certainly been there.

2 MJ [Col PARRELLA]: I think I get your point, Mr. Connell,  
3 that, you know, if approached properly there are people who  
4 would be willing to speak to the defense. I understand that.

5 LDC [MR. CONNELL]: Great. I'll move on then.

6 MJ [Col PARRELLA]: Yes.

7 LDC [MR. CONNELL]: I mention that only because you  
8 incorporated that idea into one of your questions yesterday,  
9 so I just wanted to make the point that a lot of people market  
10 their CIA experience on their websites, on their LinkedIn and  
11 if they had anything do with RDI, [REDACTED]

12 [REDACTED]

13 Now, that brings us to this alternative procedure,  
14 because you asked a question of the government yesterday about

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

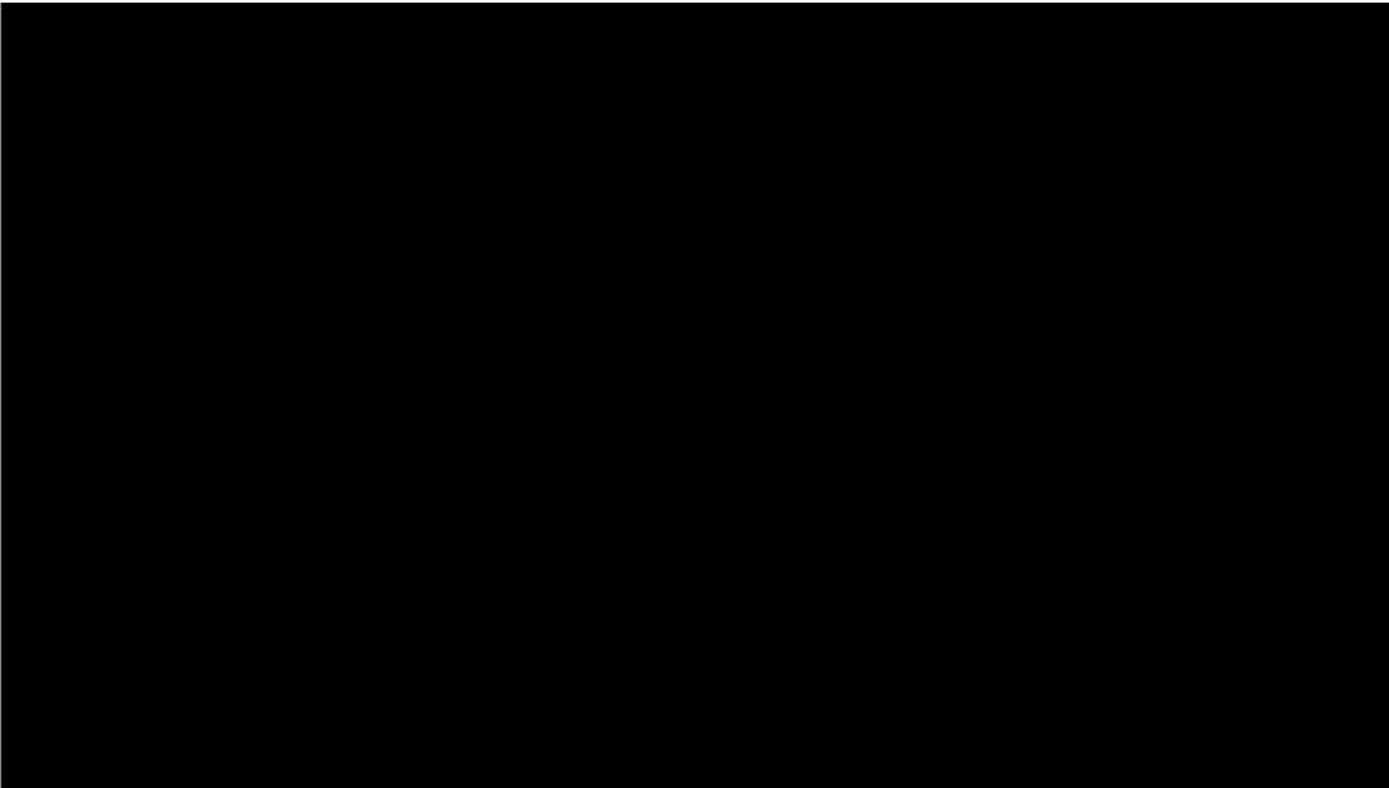
21 But there was a question that arose about couldn't  
22 you -- or I thought you could order interviews, and I briefed  
23 that question extensively. [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

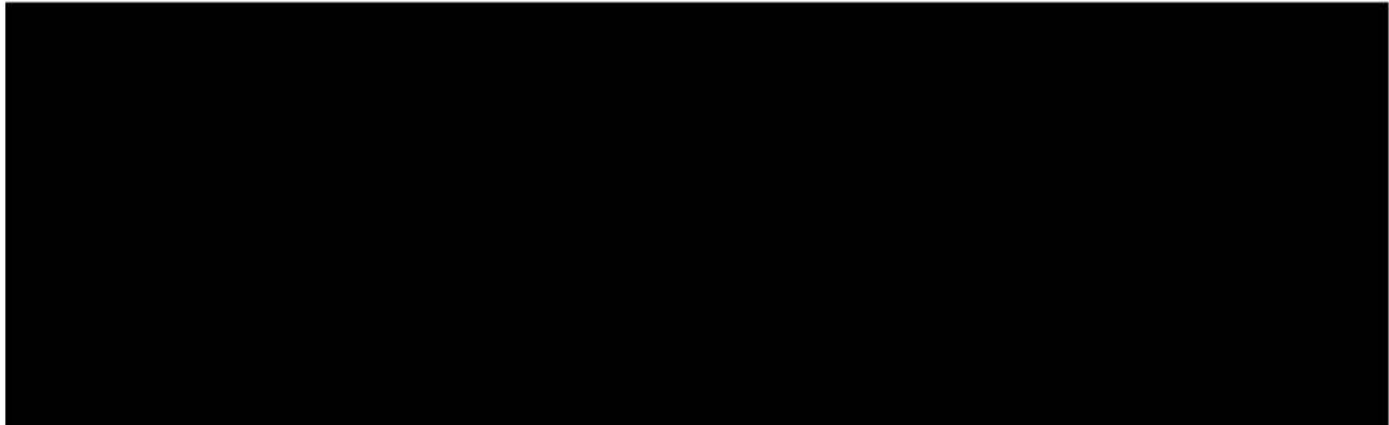
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11



12           What the government -- even in this idea of we can't  
13 investigate anybody; we can only rely on the discovery which  
14 was given to us. That creates this mock-trial-like universe  
15 where we're working from a set of documents which were never  
16 intended to be complete and are not guaranteed to be accurate  
17 as the universe of witnesses that we have to work from.

18  
19  
20  
21  
22  
23

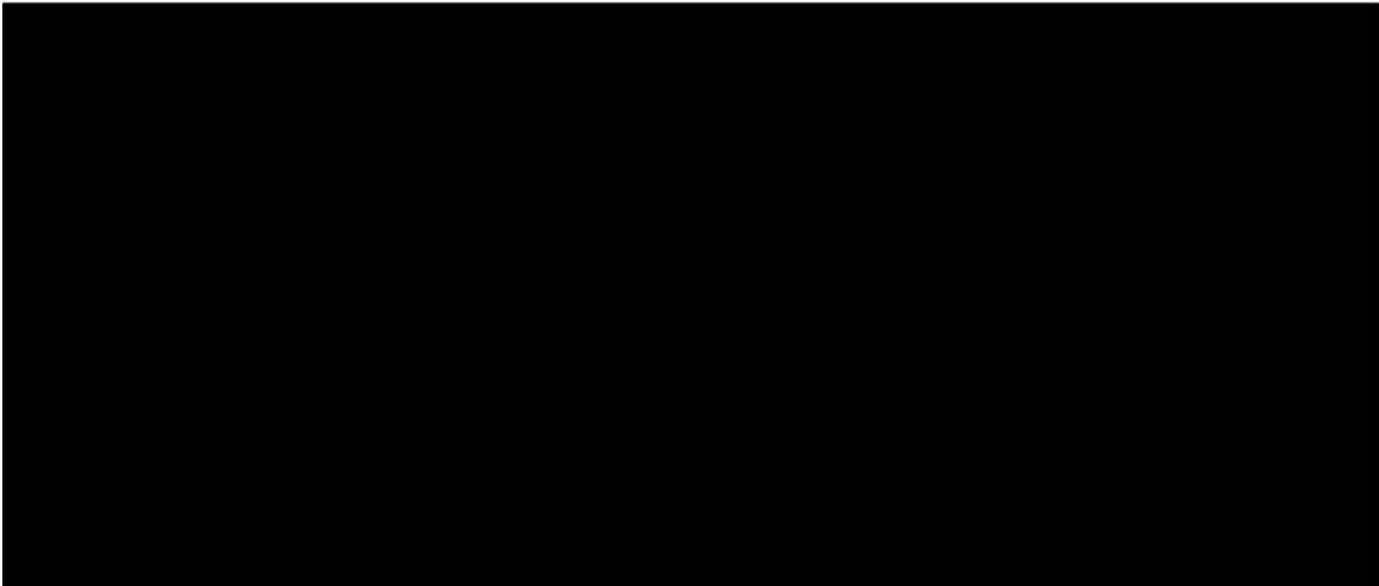


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

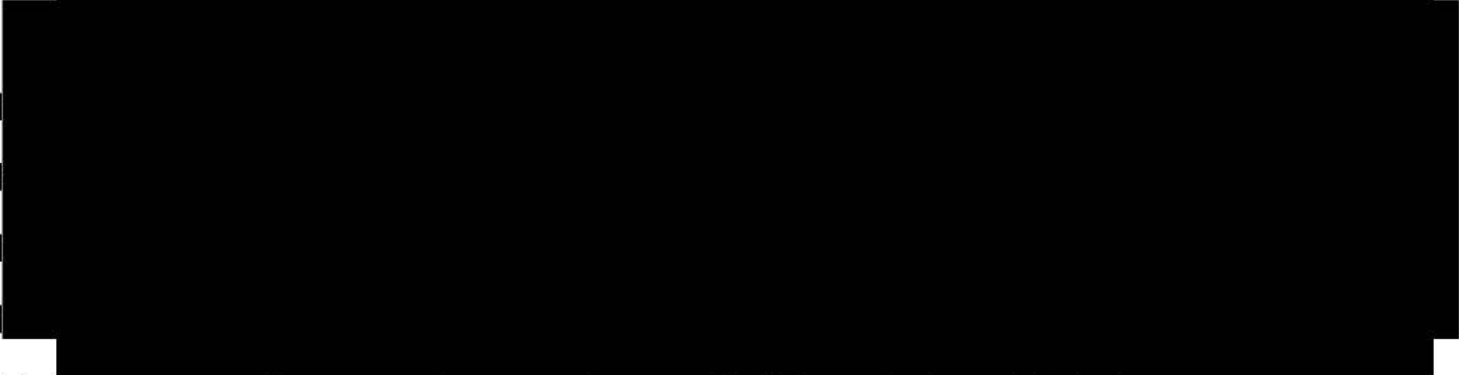
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8



1  
1  
1  
1



14 Now, moving on to my fifth point, which is  
15 Judge Pohl's knowledge of the impact that his -- not just the  
16 impact of Protective Order #4, but his knowledge of the  
17 impact.

18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16



17 MJ [Co1 PARRELLA]: While we are talking about Mr.  
18 Fitzsimmons ----

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

20 MJ [Co1 PARRELLA]: ---- what's your understanding of the



22  
23 LDC [MR. CONNELL]: So we actually have a specific answer

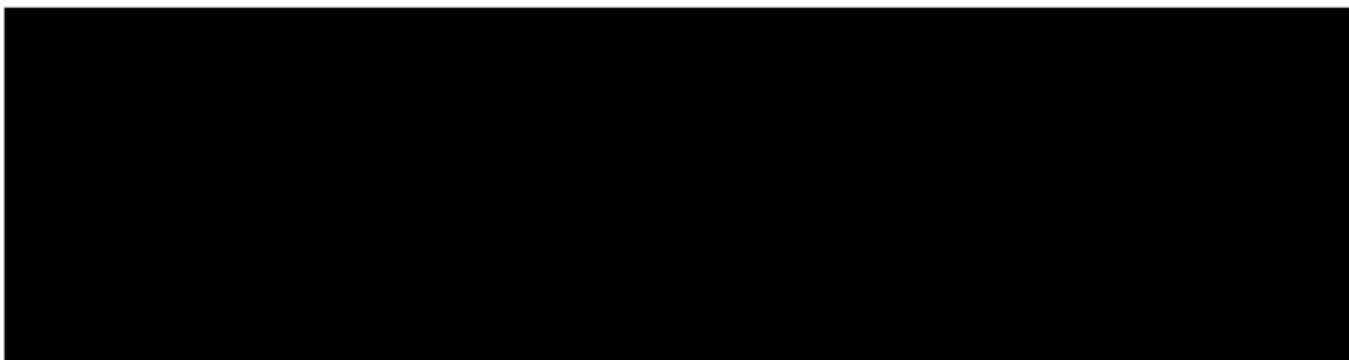
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~


~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

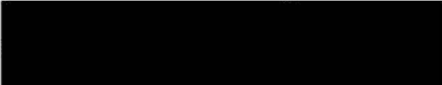
1  
2  
3  
4  
5



6 MJ [Col PARRELLA]: Okay. Thank you.

7 LDC [MR. CONNELL]: Yes. But the point here is that it's  
8 an example of how Judge Pohl carefully modified the protective  
9 order to protect the government interests in RDI  
10 information -- in fact, more effectively I think in Protective  
11 Order #4 than the government did itself 

12 But at the same time Judge Pohl had detailed  
13 knowledge of how those restrictions would interfere with  
14 defense investigation, and because we were talking in such  
15 detail about this critical point.

16 Now, the sixth point of seven that I want to make is  
17 the substantive restrictions. Because we talked a little bit  
18 about logistical problems earlier with these -- under this  
19 program, this protocol, but what we did not talk about is the  
20 substantive restrictions, because Judge Pohl's protocol for  
21 witnesses who fall under  in addition to  
22 giving essentially the government control over the means of  
23 the interview, also sets out restrictions on what we can ask

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 them, critical restrictions, restrictions that are very

2

3

4 In fact, it's already come up, and the interviews and  
5 the declarations regarding those interviews demonstrate the  
6 impact that those substantive restrictions have on defense  
7 investigation.

8 For example, the government told us earlier that

9

10

11


12

13 But in investigation we were trying to figure that  
14 out, because before, obviously, the government had started  
15 saying no, we were based on bad information, and the -- the

16

17

18

19 But the witness had never seen it, but he denied the  
20 substance of it. And we were just trying to get -- according  
21  trying to get to the bottom of this. Like  
22 does this mean that we need to seek further Brady material  
23 because the CIA is providing false material to the government?

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

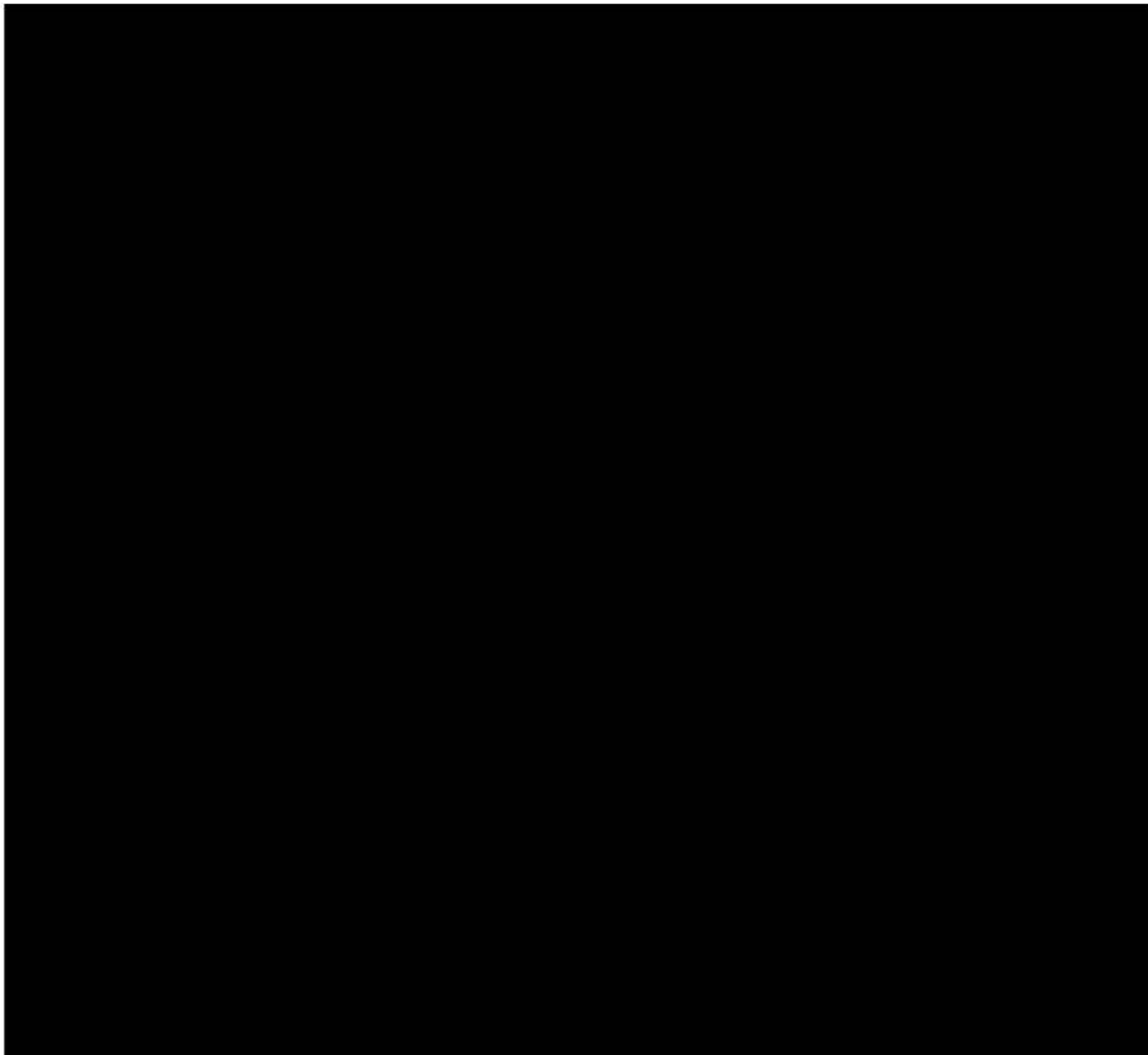
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 Is this a government mistake? Is this the witness lying to  
2 us?

3 But we couldn't even show him the document to figure  
4 that out, and eventually -- and the declaration is very clear  
5 on this -- eventually we just gave up on the area.

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 [REDACTED]  
2           And most importantly, he couldn't use this for  
3 networking, he couldn't ask this for additional witnesses,  
4 because the question in an interview is always well, who else  
5 should I talk to about this? And people pass us on to the  
6 next people that they think we should talk to. People wonder  
7 why this is such an iterative process and it's because you  
8 talk to the person, you build a relationship with them, they  
9 put you in contact with their friends, colleagues, et cetera.

10           In fact, [REDACTED] we had to

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20           Now, the seventh of -- the seventh point that I want  
21 to make is that in October of 2017, when we first raised this  
22 issue, and throughout the winter and throughout the spring, we  
23 talked about -- because remember the al Baluchi team adopted

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 these -- adopted limitations in January after the invocation  
2 of national limitation -- national security privilege.

3           The -- we are no longer investigating the CIA. We  
4 are acting strictly under Protective Order #4. That's an  
5 order of the court; we follow it.

6           But what that means is that two things are happening.  
7 Number one, our prejudice is getting much worse. Our leads  
8 are getting cold. Our ability to work with people is falling  
9 off. People are finding other investigative priorities. And  
10 we're just not making any progress.

11

12

13

14

15

16

17           But the people that we would have contacted between  
18 January and now -- and I defer to no one in our diligence and  
19 investigation, no longer -- do not exist, because we didn't  
20 contact anybody who falls under a series of evolving and  
21 sometimes contradictory prohibitions. But our ability to  
22 prove prejudice is declining at the same time as our prejudice  
23 is increasing.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1           So there was a question of, you know, what court  
2 should this be in, and now is the time to resolve this issue.  
3 And if the government thinks that it has appellate remedies,  
4 now is the time to pursue them, because our appellate remedies  
5 X number of years from now are not going to sufficiently  
6 capture our problem, because we will no longer be able to  
7 prove prejudice after January of 2018, because we are no  
8 longer investigating the CIA.

9           The situation is getting worse, but our record is  
10 getting worse at the same time, and there is nothing that we  
11 can do about it. That's just another impact of Protective  
12 Order #4. Thank you.

13           MJ [Col PARRELLA]: And no attempts under the protocol  
14 established in Protective Order #4 to investigate the CIA?

15           LDC [MR. CONNELL]: No attempts, sir?

16           MJ [Col PARRELLA]: Am I correctly summarizing what you're  
17 saying, is that -- I mean, Protective Order #4 doesn't say you  
18 can't investigate, right? It just simply says you have to go  
19 through the protocols established in Protective Order #4.

20           LDC [MR. CONNELL]: And we have on six occasions, sir.

21           MJ [Col PARRELLA]: Okay. That's what I just wanted to  
22 clarify.

23           LDC [MR. CONNELL]: Yes, sir. But what I'm saying is that

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 we are following it, right? There are two main pieces to  
2 Protective Order #1 [sic], and I'm drawing a distinction  
3 between the word "investigate" and the word "interview."  
4 There is an interview protocol, highly restricted both in  
5 substance and in logistics.

6 MJ [Col PARRELLA]: I got it.

7 LDC [MR. CONNELL]: And we have followed that on six  
8 separate occasions. That is different from investigation.  
9 The investigation includes interviewing, but it's a much  
10 broader framework than simply talking to a small number of  
11 people.

12 MJ [Col PARRELLA]: All right. I understand that. I just  
13 wanted to clarify.

14 LDC [MR. CONNELL]: Thank you, sir. I just don't want to  
15 leave any -- if the question is have we somehow been  
16 nondiligent in not pursuing the few options that were  
17 available to us, we have pursued them with great gusto and  
18 have spoken to the prosecution on many occasions, have worked

19

20

21 You know, we have been extraordinarily diligent in  
22 pursuing the few remaining investigative options which remain  
23 to us.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

1 MJ [Co1 PARRELLA]: I understand.

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

3 MJ [Co1 PARRELLA]: Thank you. Mr. Nevin?

4 LDC [MR. NEVIN]: No additional argument, Your Honor.

5 MJ [Co1 PARRELLA]: Ms. Bormann?

6 LDC [MS. BORMANN]: Nothing from us, Judge.

7 MJ [Co1 PARRELLA]: Mr. Harrington?

8 LDC [MR. HARRINGTON]: Nothing further, Judge.

9 MJ [Co1 PARRELLA]: Mr. Ruiz?

10 LDC [MR. RUIZ]: No additional argument.

11 MJ [Co1 PARRELLA]: Trial counsel?

12 TC [MR. GROHARING]: Just a couple points, Your Honor.

13 The first point is the defense complained about the  
14 logistics of the interviews in question. I made that point  
15 yesterday, but I will make it again. Whatever logistics  
16 limitations there were placed upon them by the interviewees,  
17 and they certainly could have brought photographs, they could  
18 have brought whatever material they -- asked us to provide,  
19 whatever material they wanted to to have in front of a person  
20 to talk through on the telephone.

21 That may not be ideal, but there was nothing that  
22 prevented that. The record is full of the e-mail  
23 communications back and forth between counsel where we offered

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SGI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 to do this and, in fact, did do it at counsel's request.

2 LDC [MR. CONNELL]: Your Honor, objection to proffer in  
3 that all my arguments were based on evidence that we put  
4 before the military commission and not simply descriptions. I  
5 say that in part because characterizations like this are  
6 especially difficult proffers, because one person  
7 characterizes something in one way; the other attorney  
8 characterizes it in a different way.

9 It's a little bit different from a factual  
10 representation I did X -- you know, I put the envelope in the  
11 mailbox.

12 TC [MR. GROHARING]: Judge, the e-mails ----

13 MJ [Col PARRELLA]: Okay, the objection is overruled.  
14 This is argument. Go ahead and proceed, Mr. Groharing.

15 TC [MR. GROHARING]: The e-mails are on the record, Judge.  
16 I will just rely on those. They speak for themselves.

17 Briefly on the individuals the defense mentioned.  
18 Again, the folks that we are talking about are not those that  
19 are writing books or posting their affiliation with the CIA  
20 RDI program on social media. The people we are trying to  
21 protect are the individuals whose association with the program  
22 are still classified, remain classified.

23 Glenn Carle is -- you know, to the extent he's

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS//SCI //~~

1 willing to talk to the defense, to the extent the defense  
2 wants to talk about RDI matters, they could still follow the  
3 protocol and facilitate that conversation. There is nothing  
4 that would prevent that. And if he's willing, we could  
5 facilitate that as quickly as he's available.

6 I would note that the other two examples that  
7 Mr. Connell mentioned, Gina Haspel and James Mitchell, both of  
8 those individuals declined defense requests to be interviewed.

9 So today as we stand here, I still don't see --  
10 there's still no one in the record that the defense has, that  
11 had contact with Mr. Ali, whose association in the CIA RDI  
12 program is classified that they've established is willing to  
13 talk to the defense. And they have been prevented from doing  
14 so by operation of the protocol. There is simply nothing in  
15 the record other than claims of their investigator.

16 And I respectfully suggest that those are not  
17 individuals that actually had contact with Mr. Ali. If they  
18 were, again, let us know who they are, we are happy to  
19 facilitate that interview consistent with Protocol #4. We  
20 don't want to get in the way of that.

21 All we are trying to do is protect the identity of  
22 CIA officers in a way that still allows the defense to seek  
23 information, but doesn't disclose that information.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS//SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1           So those are the only points I wanted to make. I  
2 think everything has been adequately covered extensively on  
3 unclassified argument, but subject to your questions,  
4 Your Honor, that's all I have.

5           MJ [Co] PARRELLA]: I have no questions. Thank you.

6

7           ADC [MS. RADOSTITZ]: Good afternoon, Your Honor.

8           MJ [Co] PARRELLA]: Good afternoon.

9           ADC [MS. RADOSTITZ]: It feels so unfair that I have to go  
10 last. It's, you know, past 3:30 and we all have a flight that  
11 we have to get ready for. But this is an important motion, so  
12 I'm not going to rush too much through it, but I will try to  
13 be economical.

14           You had asked that we identify the classification  
15 level, and pretty much everything that I'm going to talk about

16

17

18

19

20

21           So I used to be a journalist. And one of the things  
22 that our professors in the journalism program told us is that  
23 you should show, not tell. And so I heard Mr. Groharing say

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

1 today something I have heard him say a number of times before  
2 of, "if you don't have it, just ask us." So I want to talk  
3 about the "just ask us" that happened in this case.

4

5

6 [REDACTED] so I am not going to go into all the permutations of  
7 it. But what I will say is that one aspect of it was that  
8 there was a carveout for certain people that were publicly  
9 acknowledged as participating in it, such as Dr. Mitchell.

10 And so in February we had a hearing, and  
11 Mr. Groharing said to the court -- you know, if there are  
12 other people -- these are the eight people we have identified.  
13 We've put them in a footnote in our proposed protective order;  
14 and if there's other people, the defense should just ask about  
15 them. So that was in February or early March.

16 Later in that month President Trump nominated Gina  
17 Haspel as Director of the CIA, and in a meeting with someone  
18 on our team, our client says, [REDACTED]

19

20

21 So we took that information, we obviously did some  
22 media searches, and we saw that there is quite a bit of media  
23 information saying that she was involved in black sites. [REDACTED]

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

1 [REDACTED]  
2 [REDACTED]  
3 So we looked at the information that had been  
4 provided and we saw that it was important to be really careful  
5 about how we asked this. We crafted an e-mail with the help  
6 of our DSO that did not in any way disclose any classified  
7 information. But what we asked was, essentially: Does Gina  
8 Haspel go into footnote number 1?

9 And we sent that e-mail on the 2nd of April -- I'm  
10 sorry, on the 16th of April. Lieutenant Colonel Poteet sent  
11 the e-mail to trial counsel. We didn't get any response.

12 In May the government [REDACTED]  
13 [REDACTED] Gina Haspel is not on that  
14 list, but there is still no affirmative response that she  
15 would be added to the list.

16 And this is important because we are moving towards a  
17 hearing before the Senate Select Committee on Intelligence,  
18 and our client would like to get this information before the  
19 Senate committee. But we know that we cannot share classified  
20 information with the Senate staff unless it's unclassified or  
21 we are given permission to do it.

22 Because we haven't been able to get information as to  
23 whether it's classified or not, we moved forward filing a

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 [REDACTED] and we request permission to  
2 provide information to the Senate Select Committee that Gina  
3 Haspel was in Site Blue or #4, [REDACTED]

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 Ms. Haspel testifies at the Senate Select Committee  
14 on Intelligence on the 9th of May. We still don't have a  
15 ruling as to whether we can provide that information; we don't  
16 get that ruling until long after the hearing is over. So  
17 that's sort of like a normal way.

18 And like Mr. Montross was describing it, I practiced  
19 in Texas, and we never could get discovery from -- I thought  
20 we could never get discovery in Texas, but I have to say that  
21 this is even worse than Texas, which is rare for me to say  
22 that about anything.

23 So now I want to get to sort of the substance of the

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

1 argument. For more than a year now, we have been talking  
2 about the change in classification guidance. So we heard  
3 testimony -- or argument yesterday about the fact that  
4 starting in 2013 we were told we can go talk to anybody about  
5 anything at any location and that we were free reign. And a  
6 lot of people did. Our team did. Mr. Connell's team did a  
7 lot of that.

8           So then we talked -- we learned through a process, an  
9 iterative process, that there was a change in the  
10 classification guidance. And Judge Pohl lays out very well in  
11 524LL all of those changes.

12           We learned what the parameters of those changes were,  
13 and again, they were iterative. They changed from this to  
14 that. But again that's all laid out in 524LL.

15           We also have had a lot of litigation about how that  
16 impacts the defense, how it impacts Mr. Mohammad's team's  
17 ability to investigate, his Sixth Amendment right to counsel,  
18 the right of counsel to do -- or the implication to the  
19 obligation of counsel to do the investigation.

20           But what has not been discussed very much in any of  
21 this litigation is why. We talked about that there was a  
22 change in classification guidance, but we have never learned  
23 why there was a change.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

1           So my dad was a physicist. And one of the things  
2 that he told me all the time was -- we would talk about  
3 science with a capital S. And what he would say was  
4 correlation is not causation.

5           And so I cannot say as we stand here today that the  
6 fact that Gina Haspel became the Associate Director of the CIA  
7 and had more authority within the CIA, that that caused  
8 changes to the classification guidance. But what I can say is  
9 that we now have evidence that's been provided by the  
10 government that backs up everything that our client told us,  
11 except one small piece.

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

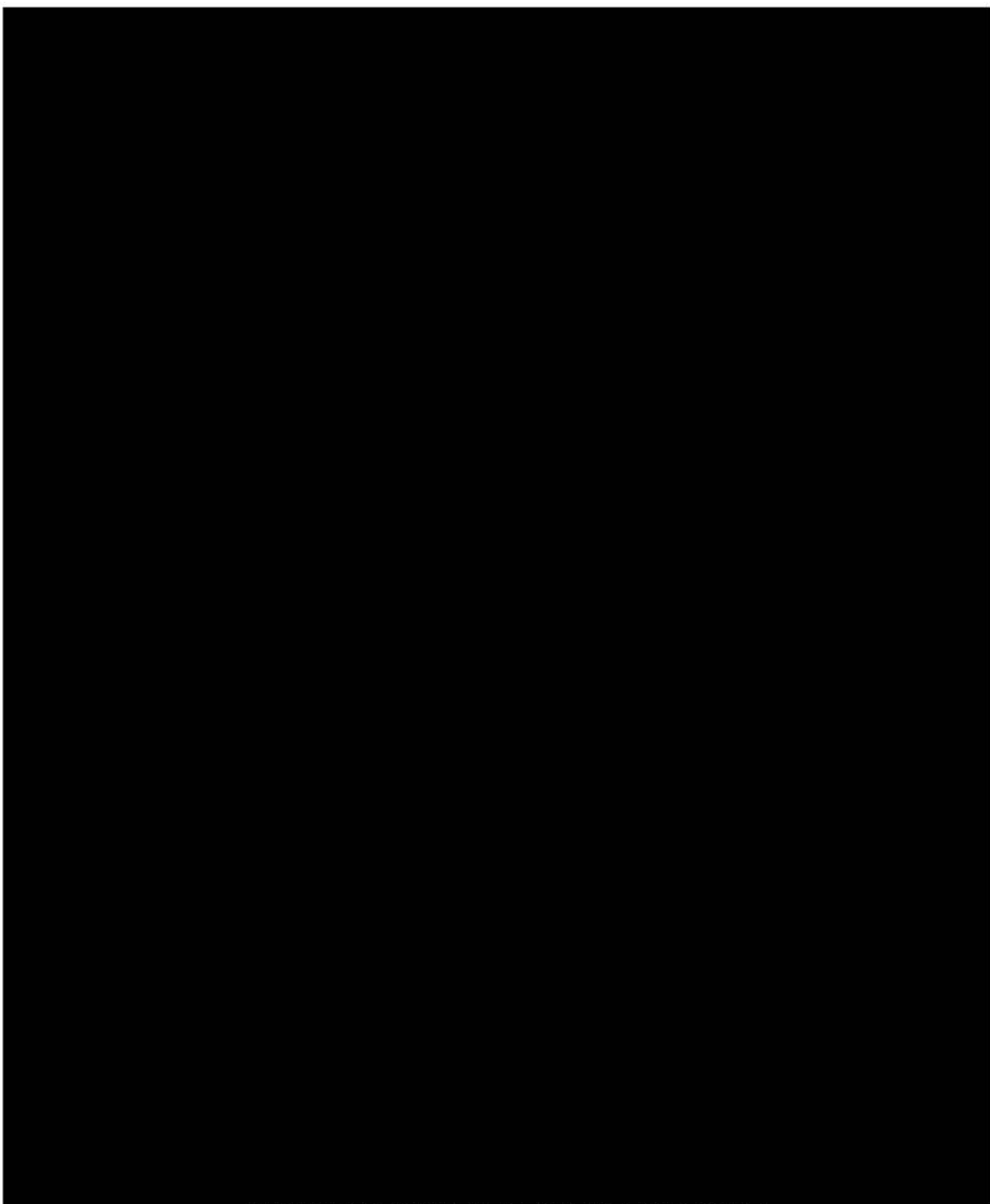
~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

~~// TS//SI //~~

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~

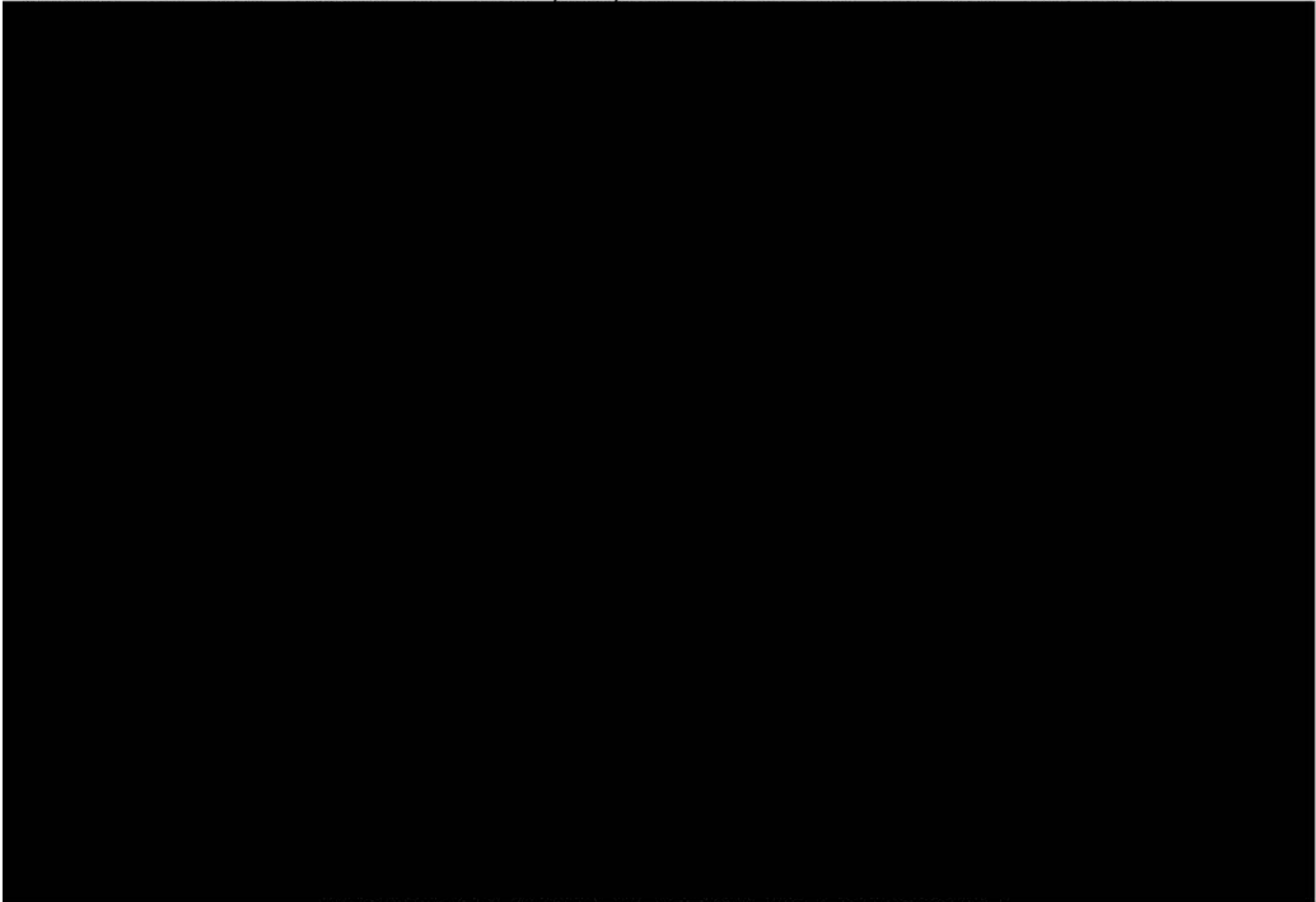
~~// TS//SI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



Yesterday we heard a number of different times the government assert that they're not trying to cover up the torture, that they're happy to talk about the torture, and that we have everything that we need to know about the torture. But the one thing that they're not willing to talk about is the names of the people involved in the torture.



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS//SCI //~~

1           So what incentive would she have to change the  
2 classification guidance? By doing so, it makes it impossible  
3 for us to find out more about her involvement. It makes it  
4 impossible to find out other people who saw her there. It  
5 makes it impossible for people at Guantanamo, who may have  
6 seen her when she was here as chief of base, to identify her  
7 and talk about it. Because the classification guidance means  
8 that we can't go talk to those people.

9

10

11

12

13

14

15           And so again, our evidence here is that there is a  
16 change, a significant change, a sea change in the  
17 classification guidance once Gina Haspel becomes in a position  
18 of power within the CIA. And we don't know for sure, and we  
19 cannot tell you for sure that she is who requested that change  
20 in the classification guidance.

21           And that brings us to our motion for witnesses. The  
22 government's position is kind of odd in their response to our  
23 supplement, which is where we lay out all the connections

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS//SCI //~~



~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

1 between Director Haspel and the torture program. And they  
2 basically say you can't prove UI because you have no evidence,  
3 and you can't have witnesses because you haven't proved some  
4 evidence of UI. And that can't be right.

5           If we were in any other court and I wanted to be able  
6 to prove something that I had to show some evidence of, I  
7 would go talk to the person I wanted to get the information  
8 from and I would interview them. And then I would ask the  
9 clerk of court for a subpoena and then bring them to court. I  
10 can't do any of those things. I can't even approach her.

11           If I want to ask for an interview, which the defense  
12 has already done and she has declined, I can't do anything  
13 about that; she's declined. I can't bring her to court  
14 because I don't have the power to and we have to ask the  
15 government for permission to bring her to court, and she  
16 doesn't come here.

17           The other point I want to make is that we don't know  
18 if she is the person who made that decision, and we don't know  
19 if that person is protecting her or protecting others. We  
20 don't know who that person is. There is no evidence in the  
21 record as to whether she is the original classification  
22 authority or not.

23           Mr. Swann has said in argument that she is not, but

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

1 there is no evidence. There's no declaration. There's no  
2 witness saying that she is not. All we have is her testimony  
3 under oath before the Senate Select Committee on Intelligence  
4 in which she says that she is ultimately responsible for all  
5 classification decisions of the CIA as Director, because at  
6 that time she was Interim Director.

7 And so the evidence -- and we've attached her  
8 testimony as an exhibit to our pleadings. The evidence before  
9 the court is that she is the classification authority. As I  
10 argued, and I'm not going to go into it again -- we argued in  
11 open session -- it kind of doesn't matter, because she is  
12 ultimately responsible.

13 If I may just have a moment, Your Honor.

14 MJ [Col PARRELLA]: You may.

15 ADC [MS. RADOSTITZ]: So our argument is we need  
16 witnesses. We need Director Haspel. If it isn't her that is  
17 the original classification authority and the person who made  
18 the decision to circumscribe defense investigation and change  
19 our ability to do this case, we need those witness. Because  
20 we need to know why. We need to know the answer to the  
21 question of not just that the classification guidance changed,  
22 but why.

23 Subject to your questions, Your Honor.

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~~~// TS/SCI //~~

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~

1 MJ [Co1 PARRELLA]: No questions. Thank you.

2 Ms. Bormann?

3 LDC [MS. BORMANN]: Judge, we adopt Ms. Radostitz's very  
4 able argument.

5 MJ [Co1 PARRELLA]: Mr. Harrington?

6 LDC [MR. HARRINGTON]: No further argument, Judge.

7 MJ [Co1 PARRELLA]: Mr. Connell?

8 LDC [MR. CONNELL]: Nothing further, sir.

9 MJ [Co1 PARRELLA]: Mr. Ruiz?

10 LDC [MR. RUIZ]: Nothing further.

11 MJ [Co1 PARRELLA]: Trial Counsel.

12 TC [MR. SWANN]: Subject to your questions, Your Honor.

13 MJ [Co1 PARRELLA]: I have none.

14 TC [MR. SWANN]: You have none. Thank you.

15 MJ [Co1 PARRELLA]: Thank you. Okay. Anything from the  
16 parties? Any other issues or concerns before we complete this  
17 closed session?

18 There being none, this commission is in recess.

19 [The R.M.C. 806 session recessed at 1607, 16 November 2018.]

20

21

22

23

~~UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT~~  
~~// TS/SCI //~~