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1 [The R.M.C. 803 session was called to order at 1528,  
2 11 December 2015.]

3 MJ [COL POHL]: Commission is called to order. All  
4 parties are again present that were present when the  
5 commission recessed.

6 As much as it pains me to do this ----

7 CP [BG MARTINS]: Your Honor, I'm sorry. I need to  
8 announce that Ms. Tarin is not with the prosecution right now,  
9 and that also Detective Patrick Lantry of the NYPD, and then  
10 Mary Needham, Alicia Dorman and Patrick O'Malley are no longer  
11 with us from the FBI.

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

13 I want to -- I want to revisit the standard of 505  
14 discovery, just so I'm clear here ----

15 LDC [MR. CONNELL]: You mean 703 -- or 701 discovery, sir?

16 MJ [COL POHL]: And, again, I don't want a particularly  
17 long discussion. I just kind of want to make sure, because I  
18 think I see where -- perhaps where the confusion is.

19 Under 701, I believe subparagraphs (c)(1) and (2), it  
20 says materials discoverable upon material preparation of the  
21 defense.

22 LDC [MR. CONNELL]: Yes.

23 MJ [COL POHL]: Okay. 703 production is relevant and

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1 necessary.

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: Okay. Now, discovery of classified  
4 information under 505(f)(1)(B) would appear to apply a  
5 noncumulative, relevant, and helpful to a legally cognizable  
6 defense rebuttal to the prosecution's case or to sentencing  
7 standard.

8 LDC [MR. CONNELL]: Right. So let me walk you -- I think  
9 you skipped one ----

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: ---- relevant part.

12 MJ [COL POHL]: What did I skip?

13 LDC [MR. CONNELL]: And that is 701(f). Okay. The 701  
14 national security privilege implication standard is contained  
15 in 701(f).

16 Sir, when you're ready, I'll walk you through what I  
17 think happens.

18 MJ [COL POHL]: The reason why I skipped ahead in that,  
19 because I thought that was the position of the government,  
20 that there's a different standard for classified discovery as  
21 opposed to regular discovery. Do you read 701(f) somehow as  
22 the same standard?

23 LDC [MR. CONNELL]: So ----

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1 MJ [COL POHL]: Since you said he was wrong, I was ----

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: The standard for production -- for  
5 discovery is found in 701(c), like you said. Now, what the  
6 discussion says is that with -- at least with respect to  
7 701(c)(3), which is statements of the accused, and probably  
8 for the rest of it, the Yunis standard applies.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: And what the Yunis standard adds to an  
11 ordinary materiality analysis is the addition of the word  
12 "helpful," helpful to the defense.

13 And the -- you know, Yunis itself was about  
14 statements. Yunis is really a 701(c)(3) situation, and the  
15 whole reason why Yunis came up was because there were some  
16 statements that really didn't have anything to do with  
17 anything, but the defense wanted them, and so that's why that  
18 Yunis standard got grafted on top of the Federal Rule of  
19 Criminal Procedure 16 standard.

20 So I think the standard for production is found in  
21 701, and then you move from 701(c) ----

22 MJ [COL POHL]: For production or for discovery?

23 LDC [MR. CONNELL]: I'm sorry?

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1 MJ [COL POHL]: You used the words standard for  
2 production.

3 LDC [MR. CONNELL]: I'm sorry. That's because I'm not  
4 used to the distinction between production and discovery that  
5 the military commission rules have, or it's not baked deeply  
6 into my brain. So I should say discovery.

7 MJ [COL POHL]: Discovery.

8 LDC [MR. CONNELL]: What I meant to say was discovery.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: After the military commission finds  
11 that information is -- falls into one of the 701(c)  
12 categories. Then we move over to 701(f), which incorporates  
13 within it 505. So 701(f)(1) says that, "To withhold  
14 disclosure of information otherwise subject to discovery under  
15 this rule," 701, "the military judge must find that the  
16 privilege is properly claimed," which is something that I'm  
17 going on about all the time. We briefed in 013G, et cetera,  
18 the -- under Military Commission Rule of Evidence 505 or 506,  
19 as applicable, which is, in fact, connecting this up to 161,  
20 which is the reason why I said it is possible for the -- for  
21 the prosecution to do redactions if they really felt it was  
22 necessary, but they have to go through the 506 process.

23 The -- so, I mean, I don't think it's as complex as

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1 the government is making it out, but ----

2 MJ [COL POHL]: No, I just was saying is that you're  
3 reading the 701 series as being consistent with the material  
4 to the preparation of the defense standard as explained  
5 amplified by Yunis.

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

7 MJ [COL POHL]: And what I heard the government say was,  
8 on classified information, they talked about this other  
9 standard found in 505(f)(1)(B).

10 LDC [MR. CONNELL]: Just one second.

11 MJ [COL POHL]: And I can decide for myself which one  
12 applies, but I just wanted to make sure I understood. When  
13 you said he was wrong, was that what you meant?

14 LDC [MR. CONNELL]: Well, it's what I meant.

15 MJ [COL POHL]: Because the 505 standard appears to be  
16 different.

17 LDC [MR. CONNELL]: Just one moment, please.

18 MJ [COL POHL]: Sure. The reason I'm bringing this back  
19 up is I think it's important that we all -- well, we don't  
20 need a common understanding. I need to know your position and  
21 their position, and then I'll have an understanding of my  
22 position.

23 LDC [MR. CONNELL]: That's right.

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1 MJ [COL POHL]: But I need to -- so I just wanted to hear  
2 what you had to say, whether there's a different standard for  
3 classified discovery.

4 LDC [MR. CONNELL]: I take your meaning that there is a  
5 different word used here and it may be that this is how the  
6 word "relevant" crept into the prosecution's pleadings about  
7 701 instead of "material to the preparation of the defense."

8 But I don't think this has a different meaning than  
9 701, which would be -- it would be strange to say, well, there  
10 are two rules about the same thing and even in the same  
11 situation, because 701 clearly contemplates classified  
12 information or it wouldn't have 701(f) that this means  
13 something different and that the judge is just supposed to  
14 pick which -- you know, which rule he or she likes better.

15 MJ [COL POHL]: Okay.

16 LDC [MR. CONNELL]: I don't think that's the situation. I  
17 think that, although they do use the word "relevant" here,  
18 it's probably the same standard as material to the preparation  
19 of a defense. Like it doesn't have "material to the  
20 preparation of a defense" at all in this standard, and I don't  
21 think they meant to drop that portion of the standard from  
22 701. I think that this means the same thing.

23 The ----

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1 MJ [COL POHL]: Although they use different words, it  
2 amounts to the same thing in your view.

3 LDC [MR. CONNELL]: That's right. And the insertion of  
4 the word "helpful" into 501 -- excuse me, 505(f)(1)(B) is out  
5 of the -- you know, is the language that I was saying comes  
6 from the discussion, Yunis via the discussion. So I think  
7 they are saying the same thing when it comes down to it.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: It has to be material to the  
10 preparation of the defense; and when it involves classified  
11 information, it has to be helpful to the defense, which is  
12 Yunis.

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

14 General Martins.

15 CP [BG MARTINS]: Your Honor, we welcome the discussion  
16 and think you have it right. I would just note two things.  
17 One is 701(f) doesn't get them anything. I mean, it  
18 incorporates by reference the statutory cite that I was  
19 making, which was 949p-4. It does that in two places in (f).  
20 So again, I was saying that 701 was completely consistent with  
21 the CIPA provisions because it incorporates them by reference.  
22 And then it also references M.C.R.E. 505 and 506. 701(f)  
23 doesn't get them anywhere. That's the first point.

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1           And then when you look at -- I just want to point out  
2 that that standard of noncumulative, relevant, and helpful is  
3 not just a rule that comes out of SECDEF rulemaking authority.  
4 It's statutory.

5           So the noncumulative, relevant, and helpful tracks  
6 identically what you were quoting. Your Honor tracks exactly  
7 the language in the standard for authorization or discovery or  
8 access subparagraph of 949p-4(a)(2).

9           MJ [COL POHL]: Now, in your view -- and again, it's  
10 different words, and normally when a drafter uses different  
11 words, they mean different things. Mr. Connell believes the  
12 word "helpful" in this context amounts to the same standard as  
13 the 701 standard.

14          CP [BG MARTINS]: And we would disagree.

15          MJ [COL POHL]: You believe this is some higher standard.

16          CP [BG MARTINS]: We do. I mean, I think that's what the  
17 statute requires. And then it -- yes, the statute requires a  
18 heightened standard. I mean, Yunis sheds some light on it,  
19 Your Honor, and Rovario and the different cases cited there,  
20 but it's Congress now saying, hey, we've got to have it all.  
21 We've got to have a fair trial, but we've got to protect those  
22 secrets; and the standard that you're applying right there at  
23 the level of whether you -- after you've gotten the

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1 declaration, you know, you have to determine that it's not  
2 noncumulative, relevant, helpful right there at that level  
3 before we get into deletions, substitutions.

4 MJ [COL POHL]: When we talk about noncumulative, does  
5 that mean noncumulative with other classified evidence or any  
6 other evidence that addresses the same point?

7 CP [BG MARTINS]: Any other evidence that puts them in a  
8 position, because eventually you're going to issue another  
9 protective order that says the substitute puts them  
10 substantially in the same position -- but this is important,  
11 because in the Yunis case they're looking at things they could  
12 have gotten from the client, and there's a process then by  
13 which they can take that information and then ask more  
14 specifically for something, and that's part of the protection  
15 that the rules give us.

16 MJ [COL POHL]: Okay.

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

18 MJ [COL POHL]: Okay. I just wanted to flesh that out  
19 because I suspect I'm going to see this.

20 LDC [MR. CONNELL]: Yes.

21 MJ [COL POHL]: But apparently we're going to flesh out  
22 some more?

23 LDC [MR. CONNELL]: Yes. Two comments. I don't think the

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1 position that helpfulness is different from helpfulness is all  
2 that helpful, if you will. But the -- but the place -- the  
3 reason why I jumped up here is the place where the prosecution  
4 is going with this is that where he led at the very end, is  
5 that, gosh, the defendants should know they were, you know,  
6 chained to the floor and naked and freezing and starving, and  
7 they should know everything that happened to them. They  
8 should know what statements they made. They should know who  
9 the men behind the curtains were, and that ----

10 MJ [COL POHL]: Mr. Connell, that's an argument for  
11 another day. I know what you are saying. I think I have  
12 heard it before in different contexts in this case.

13 LDC [MR. CONNELL]: All right.

14 MJ [COL POHL]: I know what you are saying and we'll  
15 address that in the due course of time.

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

17 MJ [COL POHL]: I know you what are saying.

18 That being said, let's -- Trial Counsel, do you have  
19 anything you wish to say on 161?

20 TC [MR. RYAN]: Good afternoon, sir.

21 MJ [COL POHL]: Good afternoon.

22 TC [MR. RYAN]: Your Honor, before 161, I wanted to  
23 address the matter of the two documents submitted by counsel,

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1 that is, 161D and 161E, as in Echo.

2           During the break, I had the opportunity to sort of  
3 drill down as to what these items were, to give you an  
4 explanation of the boxes, and I think it will clarify a great  
5 deal for you, sir. 161D is the most redacted of the two  
6 documents that you have, and if you see at the bottom it  
7 states "releasable to detainee" as well as "unclass." So  
8 because of its going to the detainees, much of the information  
9 on it is redacted for purposes of internal needs of the camp.

10           161E, on the other hand, the less redacted, is not  
11 releasable to the detainee. It has more information in it  
12 and, of course, less redactions as well. Even in that one, in  
13 161E, the items that are still redacted, I'll point out to the  
14 commission, the redactions are because it's still -- it's  
15 classified. And you can see that as well. And those aspects,  
16 those things that are behind those black boxes, the  
17 information therein, counsel will get anyway through the 505  
18 process. So ultimately, they will receive a classified  
19 version, or if not, have already received a classified version  
20 of this document that has absolutely no redactions at all.

21           MJ [COL POHL]: Let me ask you this: Just so -- because  
22 I -- I -- this is being raised as a 506 redaction, and what  
23 you're telling me, it's really ----

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1 TC [MR. RYAN]: It's really not.

2 MJ [COL POHL]: ---- it's really a 505 classified  
3 redaction, only in the sense that it's -- rephrase that.

4 It's not a -- it didn't go through the 505 summary  
5 process. It simply is -- the redactions are because they were  
6 classified, not because they were -- fell under 506's  
7 category.

8 TC [MR. RYAN]: That's correct. So we weren't making a  
9 determination here as to relevance, discoverability.

10 MJ [COL POHL]: Now, is that true of all of the documents  
11 that he references in the motion?

12 TC [MR. RYAN]: No. There's other parts I want to discuss  
13 about 161.

14 MJ [COL POHL]: Okay. But you're saying some of them --  
15 okay.

16 TC [MR. RYAN]: What I did want to just say, though, is in  
17 regard to these, ultimately, I think the way forward on it is  
18 there won't be this middle version, that being 161E, it will  
19 be ----

20 MJ [COL POHL]: Okay.

21 TC [MR. RYAN]: ---- the two versions will be the ----

22 MJ [COL POHL]: So let's kind of come back, Mr. Ryan ----

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

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1 MJ [COL POHL]: ---- to kind of the issue before me is  
2 that the -- are there other redactions, were they because they  
3 fell into some 506 category or something else?

4 TC [MR. RYAN]: It can be both, Judge. But in this case,  
5 and it's going to -- it's going to cover a wide variety of  
6 documents from a wide variety of sources.

7 This is probably, if -- probably not probably -- the  
8 most investigated case in history. Thus far, we have produced  
9 many thousands of pages of reports from many different  
10 agencies and organizations and so on. At least as it pertains  
11 to the FBI investigation through the years, we are -- we have  
12 provided, I think, the vast majority of the documents that we,  
13 in fact, see as discoverable up and to this point.

14 As far as the event itself, and I won't belabor it,  
15 Judge, but it's maybe the most public in history as well.  
16 There were literally thousands of people watching as this  
17 crime occurred, maybe millions. To a great extent, it was  
18 even televised. And literally while fires were still burning,  
19 much of the resources of the United States Government,  
20 certainly law enforcement, certainly the FBI, were already  
21 shifting to this case.

22 I'm raising this, sir, to say to you, and I think  
23 it's fairly intuitive, something like this, this event is

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1 going to generate an enormous amount of investigation. It's  
2 going to require an enormous amount of work and a  
3 consideration of facts.

4           And I also want to point out, Judge, that, you know,  
5 I think everyone can remember that day as being one of the  
6 craziest and worst of our lives, no matter what you were doing  
7 and who you knew. But from a law enforcement standpoint and  
8 even agencies not specifically law enforcement in nature,  
9 things were happening at incredible speeds. And many times  
10 the normal rules of, say, how you write reports, how you  
11 gather information, what you put together and things like that  
12 just weren't followed maybe as well as in the normal  
13 run-of-the-mill case where you have time and things aren't  
14 literally exploding.

15           But to a great extent, the vast majority of the  
16 information that is gathered under these circumstances and in  
17 the weeks and in the months and in the years that follow end  
18 up in reports, in documents, in government databases of some  
19 sort or another. And these databases, these reports, and  
20 these documents naturally are going to contain -- when you've  
21 gotten years down the road, when you've gotten ultimately to  
22 the nuts and bolts of it, it is going to contain things that  
23 are relevant, terribly relevant. It's going to contain an

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1 awful lot of things that may be completely irrelevant.

2           What I'm suggesting to Your Honor, and I think this  
3 is -- this is a mainstay of criminal law, is that the first  
4 call on deciding what is relevant and what is not relevant is  
5 the prosecution's. It simply is the way it is. And I think  
6 Your Honor had a good example. Take two bits of information,  
7 maybe they're on two different pieces of paper and they're not  
8 terribly related to each other; or even if they are, the  
9 government, the prosecution, people who have been doing it  
10 hopefully for a good period of time and are schooled in it,  
11 can look at two different pieces of paper and say this is  
12 discoverable, this is utterly irrelevant, I'm putting it  
13 aside. And there really shouldn't be much questioning going  
14 on and, well, tell me about every piece of paper that you put  
15 aside.

16           And an example that is coming up in this matter,  
17 often sometimes based on the circumstances I was just  
18 describing to you. We could have a piece of paper, a  
19 document, or a report, a 302, that may have many, many  
20 different entries on it, and in some cases an awful lot of it  
21 or all of it will be relevant to the case in chief; in some  
22 cases two lines, four lines, et cetera. In those  
23 circumstances it is my submission, Judge, that it's our job to

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1 make the determination of what's going over to the defense and  
2 that redacting, as we can do in modern life by putting little  
3 black boxes over things, is totally an appropriate way of  
4 doing so.

5           There's the -- there's always this sort of assumption  
6 going back, well, if you have it and you're giving out any  
7 piece of it, just give it all over. But in modern life,  
8 again, Your Honor, the process of redaction has become the  
9 standard operating procedure of conducting discovery. This is  
10 in the world of where, unfortunately, things like identity  
11 theft and viral everything and legitimate fear of people out  
12 there knowing your identity is something that we have to take  
13 into consideration. That's our job, too. As much as we have  
14 the obligation to provide discovery, I think we have a  
15 significant obligation as well to protect people, identities,  
16 names, et cetera, that don't -- should not go any further.  
17 There are no circumstances justifying that.

18           Some of the things that we'll have to be redacting in  
19 the course of discovery will include names of persons that are  
20 irrelevant to the -- that are irrelevant to the case itself,  
21 including hundreds of persons who will not be testifying, who  
22 will not be witnesses, and who can't provide any information  
23 material to the defense.

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1           The easiest example, Judge, is everyone in lower  
2 Manhattan was an eyewitness to a crime on September 11th. Not  
3 every one of them, but a lot of them may have been interviewed  
4 by New York police officers, FBI agents, and a whole lot of  
5 other folks and who might have said something that someone  
6 decided to write down. Ultimately, we can conclude -- I think  
7 it's within our purview and our rights to conclude that that's  
8 not relevant, that it was somebody who saw something -- maybe  
9 it's completely consistent with everything we're going to put  
10 on in the case, but we're not calling that person as a witness  
11 and they have nothing to offer to the defense.

12           Secondly would be things like in documents there will  
13 be -- there will be contained identifying information,  
14 although it may not even necessarily be connected to any one  
15 particular person, it might be phone numbers, it might be  
16 e-mail addresses, it might be Social Security numbers, home  
17 addresses, credit card numbers, et cetera.

18           For example, as you can imagine, we have done an  
19 awful lot of investigation into things like airline  
20 reservations and rental cars and things along those lines. So  
21 we may receive lots of records concerning those items and we  
22 may have reports of agents in which they would conduct an  
23 investigation of, say, a specific day and specific flight

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1 reservations made under a certain name or something close to  
2 it. And maybe there are ten names on a piece of paper like  
3 that and two of them are hijackers and the rest of them have  
4 nothing to do with anything so we could redact items such as  
5 that.

6           Examples, sir, names of official representatives of  
7 the U.S. Government in some capacity in a report other than,  
8 say, the author. And I'm talking specifically now about an  
9 FBI 302 in which he talks about a certain event on a certain  
10 day as part of the investigation. Maybe he has a chain of  
11 command and some of those names are listed on it just for the  
12 case that they were approving approval -- approving officials  
13 of the report itself, or maybe he lists the names of several  
14 agents who were involved in the execution of a search warrant.

15           Now, even though they are law enforcement officers or  
16 maybe they're task force officers from a local police  
17 department, we believe it's appropriate that they don't have  
18 to be -- their names do not have to be turned over in a case  
19 of this size, in a case of this notoriety.

20           So in those situations, the author's name would  
21 appear, say the relevant agent who conducted the search or  
22 obtained the warrant would be named, but we would take steps  
23 within a rule of reason to take out other names in such

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1 situations.

2 Rule 506, Judge, I think can be described as the 505  
3 for nonclassified information after that information had  
4 made -- has made that first cut for relevance, but where there  
5 is a significant government interest in protecting the  
6 information at hand.

7 I don't think -- I submit it shouldn't be every case  
8 like I've just been describing to you. I would suggest, sir,  
9 it's going to be for official situations where there's  
10 something specific owned, government-operated that we need to  
11 protect going forward.

12 So again, using the FBI as an example, maybe they  
13 have -- there's a report in which they talk about the exact  
14 way they monitor or they conduct a wiretap or exact method by  
15 which they conduct surveillance in a certain location. Or  
16 using another agency, a non-law-enforcement agency like the  
17 FAA, things like conducting airport security, how air traffic  
18 controllers work, et cetera. In those situations and assuming  
19 those things that are in the official government's report we  
20 conclude are relevant, we may very well have to come to  
21 Your Honor and ask for the protections -- first invoking the  
22 privilege, but then come to Your Honor and ask for certain  
23 protections in those circumstances.

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1           What we're employing now is both called for in 703,  
2 but also called for as a rule of reason, and, as I said, I  
3 think a time-honored rule within criminal law in the United  
4 States. The prosecution makes the first cut.

5           Now, as you've heard, the government -- the defense,  
6 when they get it, they can see that there's something missing  
7 and there are certain circumstances under which they can say,  
8 we need this because of special circumstances. In federal  
9 court and in probably state court prosecutions, they are often  
10 referred to as specific Brady demands. Prosecutors are left  
11 trying to figure out what Brady means in a case. You know, if  
12 somebody else comes in and says the defendant didn't do it, I  
13 did it, we're smart enough to realize that's Brady.

14           On the other hand, there's lots of circumstances  
15 where it's maybe not readily apparent to us because we don't  
16 know what the defense is.

17           The defense understanding, of course, that they don't  
18 want to turn over all of their internal discussions, but they  
19 can say we want all information concerning somebody else of  
20 this description who was present, or at least clued in to look  
21 for something else. And in those situations, it's our  
22 obligation, by virtue of Brady and its progeny, to look for  
23 that kind of information.

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1 Same sort of situation here. They can look at a  
2 piece of paper, and I think there was one example in their  
3 briefs where the defense talks about the telephone analysis.  
4 Agreed, because much evidence against the accused Ali is going  
5 to talk about his telephone contacts with the hijackers in the  
6 United States.

7 So with a mere request from the defense, and  
8 certainly the first obligation is ours to consider this,  
9 because we know the case ourselves, is to maybe provide more  
10 information when it comes to telephone analysis, but at the  
11 same time conduct a balancing test of not turning over the  
12 subscriber information for every single telephone number from  
13 15 years ago for people who had nothing to do with the case,  
14 although leaving open the possibility we may get to that point  
15 as well.

16 If we can't agree between ourselves, there is still  
17 always the option of going to Your Honor. You know this  
18 because you see it a lot. And it can be brought in the form  
19 of a motion, and Your Honor can rule at that point. But I  
20 would submit, sir, that the earlier steps along the way are  
21 the proper ones. Before it ends up as a long discovery  
22 process under 506 where we'll be handing you things and  
23 handing you justifications for logs and redactions and

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1 substitutions, some -- a good deal of which you will be doing  
2 under 505, I would submit, Judge, that we as the prosecution  
3 can be counted on to do our job and to fulfill our obligations  
4 in that regard without going through this process of 506 that  
5 was not, I submit, not meant for every single report that ever  
6 was written in the course of this case.

7 MJ [COL POHL]: Let me ask you this ----

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

9 MJ [COL POHL]: ---- the information referenced in  
10 Mr. Connell's pleading, okay, you said some of it's  
11 classified. That's a separate category.

12 TC [MR. RYAN]: We're talking about D and E, sir?

13 MJ [COL POHL]: No, I'm just -- what I'm saying is  
14 Mr. Connell's pleading's entitled "Make the Government Comply  
15 with 506."

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

17 MJ [COL POHL]: Or words to that effect. Okay. Now, I  
18 just want to understand, what you're telling me right now ----

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

20 MJ [COL POHL]: ---- is that some of this information is  
21 classified, therefore, really doesn't come under 506 anyway.  
22 Some of this information is -- I'm going to use this term  
23 loosely, but it's just not relevant to discovery.

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

2 MJ [COL POHL]: Okay. And therefore that's out of there.

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

4 MJ [COL POHL]: Is there any other information that is a  
5 505 -- excuse me, a 506 privileged kind of information that  
6 was redacted?

7 TC [MR. RYAN]: It could be redacted under 506 if we  
8 received approval, sir.

9 MJ [COL POHL]: Okay. But you would -- so just so it's  
10 clear, it's your understanding that the 506 redaction  
11 procedure is just like the 505, to a degree. And again, I  
12 knows there's some hoops, but you say here's -- we want to  
13 redact this, here's a substitute or whatever.

14 So you're saying is I can just simply grant  
15 Mr. Connell's motion because you're already complying with  
16 506, correct?

17 TC [MR. RYAN]: Under ----

18 MJ [COL POHL]: The motion's entitled -- I'll look at the  
19 detail, is entitled -- okay. And that anything that is a 506  
20 redaction will follow the 506 procedure. But a lot of this --  
21 but the stuff that he's got so far that didn't go through the  
22 506 procedure is non-506 material. Is that a fair summary of  
23 the government's position?

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1 TC [MR. RYAN]: My answer is yes, I'm pretty darn sure.  
2 But let me just flesh it out by saying this: If we have  
3 gotten to a point where we have a piece of information that we  
4 have determined is discoverable, that is, it's gotten past the  
5 701, 703 hurdles, and we've decided that this is discovery,  
6 this is ----

7 MJ [COL POHL]: I don't want to be -- let's just be  
8 precise here. You said in the 703 hurdles; doesn't 701 cover  
9 discovery and 703 is production?

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

11 MJ [COL POHL]: I mean, Mr. Connell had trouble with  
12 the -- I mean, it's ----

13 TC [MR. RYAN]: Let me put it this way: I come to a piece  
14 of information that I've concluded has to go to the defense or  
15 should go to the defense under applicable discovery rules.

16 MJ [COL POHL]: Okay. Okay.

17 TC [MR. RYAN]: However, within it is something -- and  
18 again I'll go back to the FAA example -- something having to  
19 do with how the -- that agency conducts ----

20 MJ [COL POHL]: Okay.

21 TC [MR. RYAN]: ---- air safety where they have a  
22 significant interest in it not being made public or not even  
23 being released to the other side -- I don't know if there will

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1 be a lot of that, but we'll see -- there's an example of  
2 something that I recognize, the prosecution recognizes we're  
3 going to have to invoke the privilege under 506 ----

4 MJ [COL POHL]: Okay.

5 TC [MR. RYAN]: ---- and then approach the commission for  
6 some extra relief, extraordinary relief.

7 MJ [COL POHL]: But any redacted item that you don't use  
8 the 506 procedure on, this may sound oxymoronic, but let me  
9 say it anyway, is it's the government's position the 506  
10 procedure does not apply to that information; it's either  
11 irrelevant under any discovery standard, or it's in another  
12 category, classified information.

13 TC [MR. RYAN]: That's in existence currently.

14 MJ [COL POHL]: Right.

15 TC [MR. RYAN]: In other words, anything that we have  
16 redacted thus far.

17 MJ [COL POHL]: Okay.

18 TC [MR. RYAN]: That is our position, yes, sir.

19 MJ [COL POHL]: Okay.

20 TC [MR. RYAN]: And as far as the last thing, because you  
21 said the magic words of "should I just grant the defense's  
22 motion," let me suggest, Judge, it's moot, that we understand  
23 using these words what our discovery obligations are including

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1 under 506, we just disagree with the defense as it applies to  
2 every government piece of document out there.

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

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

5 MJ [COL POHL]: Mr. Connell, I don't want to get your  
6 hopes up that I'm going to sit here and grant your motion as  
7 I'm sitting here.

8 LDC [MR. CONNELL]: Okay.

9 MJ [COL POHL]: Okay. I just asked him about that. Go  
10 ahead.

11 LDC [MR. CONNELL]: I didn't take it for anything other  
12 than hypothetical.

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

14 LDC [MR. CONNELL]: What I want to be clear on, first of  
15 all, let me tell you, I'll be delighted to receive unredacted  
16 classified copies of the DIMS reports. You know, it's --  
17 we've started to get DIMS reports a couple of years ago. I  
18 would love for the prosecution to give us some classified  
19 unredacted versions. I think that is an excellent course of  
20 conduct. Maybe by September 30, 2016, you know, whenever.  
21 I'm in my office and waiting -- I'm not trying to be snide,  
22 but the idea that, oh, we were really going to give them to  
23 you all the time rings hollow.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: But the -- I wanted to be clear about  
3 something. We're not really talking here about FAA, you know,  
4 transponder numbers. What we're talking about is things like  
5 in Mr. al Baluchi's unclassified medical records, there are  
6 four pages of classified medical records. All other medical  
7 records are unclassified. In his unclassified medical records  
8 and there is no classified version other than those four  
9 pages, every name of every doctor who treated Mr. al Baluchi  
10 is redacted. In his unclassified medical records, the name of  
11 every person who had contact with him, every person who gave  
12 him a -- he had a CT scan in 2006 for the head injury, and  
13 every person who gave him the CT scan is redacted.

14 The idea that everything falls into either a  
15 classified category or an irrelevant category is just not  
16 supported by the many, many, many thousands of pages of  
17 redacted documents that we have received in discovery.

18 And the alternative here is for us to come through,  
19 you know, for each particular -- I was trying to do it as  
20 general, right, to say, let's -- we have a process. We have a  
21 Protective Order Number 2, we have a 506 process. Let's use  
22 those processes instead of bringing you each individual paper  
23 and saying, hey, look, I want to know what's under this one.

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1 Because the prosecution's view of this has the burden  
2 backwards. They want to put the burden on the person who  
3 doesn't know what's under the redaction as opposed to the  
4 person who does know what's under the redaction.

5 And so I think the 506 process is appropriate. But  
6 in blanket situations, like the names of guards or, in this  
7 situation, the names of doctors, we already have a process in  
8 Protective Order Number 2 which is sensitive discovery. If  
9 something gets designated as sensitive discovery, it can't be  
10 shown to anyone. And in three and a half years we have never  
11 had any kind of difficulty with this.

12 MJ [COL POHL]: Have you received information marked  
13 "Sensitive Discovery, Nondisclosable to the Detainee"?

14 LDC [MR. CONNELL]: Yes, certainly. Yeah. And that's a  
15 perfectly good way to look at it.

16 MJ [COL POHL]: But the gravamen of your motion, as I  
17 said, was for them to comply with the rule that they say  
18 they're complying with. It appears to be the dispute here is  
19 the applicability of the rule to various information.

20 LDC [MR. CONNELL]: Yes, that's fair. Because the  
21 prosecution perspective is that they get to choose and they  
22 don't have to go through any 505 style process.

23 MJ [COL POHL]: Well, if they make a determination, like

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1 all discovery, that it is nondiscoverable per se, they  
2 would -- they would be done.

3 LDC [MR. CONNELL]: Right, if it's nondiscoverable per se.  
4 But we're not talking about nondiscoverable per se.

5 MJ [COL POHL]: Well, it appears to be that's their  
6 position on some of this stuff, it's just not discoverable,  
7 therefore, there's no 506 requirement ----

8 LDC [MR. CONNELL]: Right.

9 MJ [COL POHL]: ---- and you disagree. But now we're  
10 talking about individual pieces of information.

11 LDC [MR. CONNELL]: That's right.

12 MJ [COL POHL]: Okay. I understand your position.

13 LDC [MR. CONNELL]: Usually when you say you understand my  
14 position it means you don't understand my position, so maybe I  
15 should ----

16 MJ [COL POHL]: No, no. I understand it. If I don't  
17 understand it, I'll let you know. I understand -- I  
18 understand both sides' position. It appears to be a -- okay.  
19 Your requested relief is for them to follow the process.

20 LDC [MR. CONNELL]: Yes.

21 MJ [COL POHL]: They say they're going to follow the  
22 process.

23 LDC [MR. CONNELL]: No, they actually say they have

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1 followed the process, which is demonstrably untrue.

2 MJ [COL POHL]: They have followed the process. You say  
3 it's untrue because the starting point is different. Your  
4 starting point is this is 506 information. Their starting  
5 point is it's not 506 because it's not discoverable to begin  
6 with.

7 LDC [MR. CONNELL]: How could the treating doctor's name  
8 not be discoverable?

9 MJ [COL POHL]: Now you're asking me a question better  
10 directed to them. I'm just simply saying is that's where the  
11 dispute appears to be, not to that they have to follow the  
12 procedures. They agree they have to follow the procedures;  
13 the question is whether a piece of evidence triggers the 506  
14 review.

15 LDC [MR. CONNELL]: Right. Here's my next question, then.

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: If it is true they're following the  
18 procedures ----

19 MJ [COL POHL]: I thought we were done, but maybe I made a  
20 mistake.

21 LDC [MR. CONNELL]: ---- how can it be that we have never  
22 had a 506 filing in the past three years? How can it be that  
23 no piece of evidence -- you know, Mr. Ryan just described FAA

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1 flight reservations, you know, things that he thought fell  
2 under -- deserved protection under 506, but we have never had  
3 a single 506 motion brought before this military commission.  
4 I don't think that it is a viable position for the prosecution  
5 to take that they have been complying when, in fact, they have  
6 not been complying. They may comply in the future and I  
7 invite that, but retrospectively, they have not been complying  
8 with 506. They have been making unilateral determinations  
9 about what to redact.

10 MJ [COL POHL]: I understand your position.

11 LDC [MR. CONNELL]: All right. I'll take it this time,  
12 sir.

13 MJ [COL POHL]: I do understand. Thank you very much.

14 See, I'm not going to -- I don't want to start the  
15 other motion. We'll conclude with that one. The commission  
16 will be in recess until the next sessions. As I told General  
17 Martins, the sooner you get that information, the better.

18 That being said, before we -- before we -- go ahead  
19 and sit down. Before we recess for this week, I think it's  
20 always helpful if defense counsel has any ex parte motions  
21 that they want me to make sure I get to, a lot of them --  
22 because sometimes the process ----

23 LDC [MR. RUIZ]: Yes, Judge. It appears that ----

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1 MJ [COL POHL]: Go ahead Mr. Ruiz.

2 LDC [MR. RUIZ]: It appears that the mail is running a  
3 little slow. And one of the ones that was in the mail, 264,  
4 the EE 264 (MAH), has not yet reached us.

5 MJ [COL POHL]: Okay. I'll check on it.

6 LDC [MR. RUIZ]: That motion is one that we'd ask that you  
7 please take a look at.

8 MJ [COL POHL]: Okay. Any other ex parte motions  
9 that ----

10 LDC [MS. BORMANN]: Yes, Judge.

11 LDC [MR. CONNELL]: Just to mix it up a little bit, I'm  
12 going to ask that you get to the government's ex parte motion  
13 365C, which is necessary for the litigation to proceed on 373.

14 MJ [COL POHL]: Yeah. We kind of already made a note on  
15 that, but yeah, okay.

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

17 MJ [COL POHL]: No problem. Ms. Bormann?

18 LDC [MS. BORMANN]: Judge, we're in desperate need of the  
19 resource in AE -- I'm waiting for the number from Major, soon  
20 to be Mister, Schwartz.

21 MJ [COL POHL]: I think I know the one you're talking  
22 about.

23 LDC [MS. BORMANN]: AE 368 and AE 337.

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1 MJ [COL POHL]: And both of those are being worked or have  
2 been worked, but I got them.

3 LDC [MS. BORMANN]: Especially in light of the promise of  
4 a large amount of discovery coming fairly quickly, it's really  
5 important.

6 MJ [COL POHL]: Okay. Thank you. And I think, Trial  
7 Counsel, you indicated 051 and 052, there were some issues  
8 there?

9 MTC [MR. TRIVETT]: I'm sorry, I didn't hear you  
10 completely, sir.

11 MJ [COL POHL]: Okay. There was the issue that came up, I  
12 think on 052, that there may be a little confusion on where  
13 that's at.

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

15 MJ [COL POHL]: Okay. I'll just let you know that I'm  
16 going to look to see -- I'm going to review the pleadings on  
17 what should have gone out on that and what should not have  
18 gone out on that.

19 MTC [MR. TRIVETT]: Thank you, sir.

20 MJ [COL POHL]: Anything else?

21 LDC [MR. NEVIN]: The request for some time here in the  
22 courtroom with our clients.

23 MJ [COL POHL]: Okay. Since it's Friday, say a half hour,

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1 and that will give them time to get back to the camp before  
2 prayer time. So until -- you can stay here until 1635.

3 Commission is in recess.

4 [The R.M.C. 803 session recessed at 1609, 11 December 2015.]

5 [END OF PAGE]

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