[The R.M.C. 803 session was called to order at 1407, 11 October 2016.]

MJ [COL POHL]: Commission is called to order. Trial Counsel, any changes?

CP [BG MARTINS]: No, Your Honor.

MJ [COL POHL]: Does not appear any change in the defense counsel. Mr. Binalshibh has now joined us.

Mr. Connell, you want to talk about 336?

LDC [MR. HARRINGTON]: Excuse me, Judge.

MJ [COL POHL]: Yes.

LDC [MR. HARRINGTON]: Could we just have one more minute before we start?

MJ [COL POHL]: Sure.

[Pause.]

LDC [MR. HARRINGTON]: Thank you, Judge. We're finished.

MJ [COL POHL]: Mr. Connell.

LDC [MR. CONNELL]: Sir, the DIMS records production is a complicated problem for the parties with a simple solution from the military commission.

Our pleading in the 336 series is 336 (AAA Sup), and we filed a reply, 336B. In both of those, like my argument today, we focus not on the redacted versions, which are releasable to the client, which most of the argument on 227

1 was about. Our focus, instead, is on the unredacted or less
2 redacted version, which is available to the defense attorneys
3 that are SECRET level, okay? The frame make sense?
4 MJ [COL POHL]: Back up that for me again.
5 LDC [MR. CONNELL]: Sure. I don't want to talk about what
6 the clients get to see.
7 MJ [COL POHL]: Okay.
8 LDC [MR. CONNELL]: Right. I adopt Mr. al Hawsawi's
9 arguments. They made a lot of sense. I want to talk about
10 the other half of the problem, which is the less redacted or
11 unredacted version which is produced to the defense counsel
12 that are SECRET.
13 MJ [COL POHL]: Okay. Are they unredacted or less
14 redacted?
15 LDC [MR. CONNELL]: That is exactly what I wanted to talk
16 about. Thank you for the segue, Your Honor.
17 I want to be very clear on what we have received and
18 have not received in DIMS records, and I am addressing here
19 only the SECRET side.
20 From the beginning of Mr. al Baluchi's time at
21 Guantanamo in September 2006 through 31 December 2006, we --
22 every page that we have received has one column entirely
23 redacted. I'm not going to refer to the contents in court,

1 but I have for the military commission AE 336D previously
2 marked.
3 MJ [COL POHL]: That's a SECRET document.
4 LDC [MR. CONNELL]: That is a SECRET document.
5 So also during that period of time in 2006, the pages
6 that I have handed to the military commission, which are
7 MEA-10018-00002904 through 2911, have additional redactions
8 other than the large block column found on all of the pages.
9 MJ [COL POHL]: This is an example of the DIMS record that
10 you are given?
11 LDC [MR. CONNELL]: That's right. This is the attorney
12 version of the DIMS records. Now, this one that I have just
13 given you is not representative. Many of them do not have the
14 additional redactions that are found in the -- in the example
15 that I gave you, but up until 2014, which I'm about to go
16 through in detail, they all have that large column blacked
17 out.
18 In 2007 we have received what we think are DIMS
19 records for every day, but the -- every page that we have
20 received has a large redacted column.
21 In 2008 we have received what we think is every day.
22 Every page has a large redacted column. The only sort of
23 anomaly in 2008 is found at page MEA-10018-2057, where there

1 are a limited number of entries, only three, which is
2 unusually small, for 24 December '08. That might be because
3 it's Christmas Eve. It might be because some rows were left
4 out. I don't know. This is essentially a database where
5 columns and rows can be produced.
6 In 2009 we have received what we think is every page.
7 Every day -- every page has a large redacted column. There
8 are three entries that have only -- three days that have only
9 a very small number of entries. Those are found at 2052,
10 2023, and 1881, where there are only two or three entries on
11 each of those days. Again, I don't know if that's all the
12 entries that were made or if rows were left out, because
13 they're not redactions there. There's just less information
14 than normal.
15 In 2010 every page has a large redacted column. We
16 have received information for what we think is every day,
17 except for perhaps 14 April 2010, which is found at page 1825,
18 which has less information than usual. And there is only one
19 entry on 3 March 2011, which is found at page 1630.
20 In 2011 we have received what we think is information
21 for every day. Every page has a large redacted column. On --
22 at page 1630, there's only one entry for 3 March of 2011.
23 Then in 2012 every page has a redacted column, and we

1 have every page except for one, 17 April 2012, which should be
2 MEA-10018-0001416, but that page is missing. We have every
3 day up, I should have said, until September 12 of 2012.
4 Everything is missing between 13 September 2012 and
5 31 December 2012.
6 All of 2013 is missing, and 1 January 2014 to
7 10 February 2014 is missing.
8 Then the format of the records changes. After
9 11 February of 2014, there is no longer a large redacted
10 column, but there is essentially no column there at all. And
11 so my hypothesis -- I can't prove it yet, but the hypothesis
12 is that because this is a database which allows reporting out
13 of various columns and rows, that the -- that simply someone
14 electronically clicked hide the column instead of having to go
15 to the trouble of redacting it afterward.
16 So for 11 February 2014 to 2 April 2014, we have
17 received every day without any visible redaction, but with no
18 column that would correspond with the hidden -- with the
19 redacted column prior to 2014.
20 And we received every day from 3 April 2014 to
21 31 December 2014 -- oh, I'm sorry. We did not receive any
22 records from 3 April 2014 to 31 December 2014 with the
23 exception of, for some reason, 6 October of 2014 which we did

1 receive records.
2 From 1 January 2015 to 11 February 2015, we have not
3 received SECRET records. From 12 February 2015 through
4 9 April 2015, we have received records with no visible
5 redactions, but no column that would match up with the
6 redacted column.
7 We did not receive records for 10 April 2015, but
8 from 11 April 2015 to 31 December 2015, we received everything
9 with no visible redactions, as well as from 1 January 2016 to
10 3 February 2016, and then nothing for 4 and 5 of
11 February 2016. From 6 February 2016 until 5 April 2016, we
12 received complete documents with no redactions. And we don't
13 have anything past April, but I assume that's just because
14 they're not caught up.
15 Now, I know how painful that was, all right? It
16 was -- and I know how painful it was for the analysts who went
17 through page by page to determine what they had given us and
18 what they hadn't. All of these problems can be solved by a
19 simple order from the military commission granting at least
20 the portion of AE 336 which orders the government to produce a
21 complete and unredacted set of DIMS records for the review of
22 the attorneys. Again, I'm not talking about for the review of
23 the clients. I'm talking about for the review of the

1 attorneys.

2 Now, the problems in the litany of discovery that I

3 just recited can fall into three categories. Category one is

4 from September of 2006, pages 2904 to 2011 -- that's 336D that

5 I handed you -- where there are additional redactions.

6 The second problem can be summarized as the column.

7 Now, Mr. -- excuse me. The government told us this morning

8 that it had redacted, or that names -- true names, as they

9 said it -- names were being redacted from these records. My

10 hypothesis is that those -- that's the column where the names

11 go.

12 MJ [COL POHL]: Was that the DIMS record or the incident

13 report record they were talking about at the time?

14 LDC [MR. CONNELL]: I'm sure that they can clarify for us.

15 I took it to be DIMS records. I'm not talking about incident

16 reports or MFRs.

17 MJ [COL POHL]: No, I know what you are talking about.

18 LDC [MR. CONNELL]: But I can tell you that there are no

19 names on these DIMS records.

20 Then separately is the third problem, the problem of

21 the missing dates. Now, missing dates are the kind of, in

22 some ways, ministerial thing that I think the government could

23 solve, and I have every hope that they will.

1 But the problem of whether the government is going to
2 do -- make unilateral redactions to these DIMS records as they
3 have done in 336D and other examples that I've recited to you
4 is one that can be solved simply with an order.
5 There's no controversy over whether the DIMS records
6 are material or not. One of the reasons for that is
7 Skipper v. South Carolina. The Skipper v. South Carolina is
8 so-called good behavior in prison evidence. Every capital
9 sentencing essentially comes -- boils down to the question of,
10 having convicted a person of capital murder, do I as a juror
11 feel that I need to have them executed, or are they safe in a
12 prison?
13 The Skipper evidence goes to that question, which in
14 every capital sentencing is in the mind of the jurors. We
15 know that from -- very well. The ----
16 MJ [COL POHL]: Mr. Connell, let me -- I know you're
17 focusing on what you get.
18 LDC [MR. CONNELL]: Yes.
19 MJ [COL POHL]: You're talking about -- but I believe
20 Ms. Lachelier was talking about, well, if I can't marry up the
21 dates and the guards involved, it does me no good to talk it
22 over with my client.
23 LDC [MR. CONNELL]: Yes. That's a separate question.

1 MJ [COL POHL]: Okay. Your solution does not solve her
2 problem there.
3 LDC [MR. CONNELL]: That does not solve her problem.
4 MJ [COL POHL]: The only way to solve her problem would be
5 to declassify or somehow releasable to the detainee.
6 LDC [MR. CONNELL]: Right. It is clear to me that there
7 will be always be some delta between what the defendants see
8 and what the attorneys see on these kind of records with TTP
9 and everything else.
10 The existence of some delta is not the problem.
11 The -- what Mr. al Hawsawi was addressing was how can we make
12 that delta as small as possible that allows a conversation
13 between attorney and client. And I think that's an important
14 question. I echo all of Mr. al Hawsawi's concerns on that
15 question.
16 But what I'm addressing here is the underlying
17 information from which a redacted version is produced, and the
18 reason why it's so important is that these people, in my
19 hypothesis, the people, the names that are under that column,
20 those are our witnesses. Those are the people who, if we want
21 to present -- at a sentencing, if we wanted to present a
22 claim, for example, that Mr. al Hawsawi -- excuse me,
23 Mr. al Baluchi has been searched 3,000 times without finding

1 any contraband or finding, you know, very minor contraband
2 three of those times, and thus you can -- he is -- he can be
3 in a prison safely and does not have to be executed, those are
4 our witnesses to put on that argument.
5 Or if we -- in virtually every death penalty case
6 there is some prison guard testimony usually from both sides,
7 factors in aggravation from the prosecution, factors in
8 mitigation from the defense. By redacting all witness
9 information out of these DIMS records, the government is
10 denying us access to that type of information in violation of
11 the Eighth Amendment.
12 The point that I wanted to leave you with is, you
13 don't have to get down into the weeds of 6 October 2007 in
14 order to solve this problem. You can simply enter an order
15 saying, Government, produce unredacted versions of the DIMS
16 records.
17 MJ [COL POHL]: What's the government's position, to your
18 knowledge, of what's being redacted? Why is it being
19 redacted? Is it classified? Is it -- well, it's not -- is it
20 classified? Is it something else? Is it irrelevant? Or my
21 favorite, is it cumulative?
22 LDC [MR. CONNELL]: They haven't shared that position with
23 me. I will say this: I acknowledge that the unredacted

1 document is classified. An OCA has said that it's classified.
2 I'm not saying that it's not. It's classified at the
3 SECRET/NOFORN level, and clearly everyone, all of the
4 attorneys have a need to know that information.
5 MJ [COL POHL]: But on the exhibit you gave me, which is
6 currently classified, but since it would be fair to read that
7 the redactions may or may not be classified, but there's
8 something else in here that's classified.
9 LDC [MR. CONNELL]: That could be, yes.
10 MJ [COL POHL]: Now, does it have to be?
11 LDC [MR. CONNELL]: Doesn't have to be. I don't know
12 what's under the redaction.
13 MJ [COL POHL]: No, no. What I'm saying is because what
14 they've given me is the redacted copy, if the only things
15 redacted were classified, would the redacted copy be
16 classified?
17 LDC [MR. CONNELL]: No.
18 MJ [COL POHL]: Okay. That was my question.
19 LDC [MR. CONNELL]: Yeah. You're exactly right about
20 that.
21 MJ [COL POHL]: Okay.
22 LDC [MR. CONNELL]: And this is -- we're going to revisit
23 this in just a moment when we get to 161, which is if there's

1 something that actually has to be hidden, there's a process
2 for that, and that's M.C.R.E. 506, and that process was not
3 followed here. These are unilateral government redactions.
4 MJ [COL POHL]: Okay. But I'm just saying is from -- the
5 cover sheet that I have on this, it tells me that this is a
6 505, this is a classification issue.
7 LDC [MR. CONNELL]: Sure.
8 MJ [COL POHL]: Not the 506 issue.
9 LDC [MR. CONNELL]: Sure. That's right.
10 MJ [COL POHL]: Because otherwise I wouldn't have a red
11 piece of paper saying SECRET on the top of this document.
12 LDC [MR. CONNELL]: Fair enough. 505 is another way to
13 address this problem.
14 MJ [COL POHL]: I'm simply saying -- I got you. I got
15 you. We'll come to 161 in due course.
16 LDC [MR. CONNELL]: Thank you.
17 MJ [COL POHL]: Okay. Any other defense on 336? And I
18 know we're kind of conflating the two, but I think we're done
19 with 22. So I want to throw out 336.
20 LDC [MS. BORMANN]: Judge ----
21 MJ [COL POHL]: Yes, ma'am.
22 LDC [MS. BORMANN]: I'm sorry, if I may.
23 I just wanted to note that consistent with what

1 Mr. Connell says, we are in the same exact boat. We have
2 various DIMS records provided at the SECRET level over a
3 period of time from Mr. Bin'Attash's time in Camp VII. They
4 have changed, but the one thing that seems clear is that
5 information's being redacted.
6 And I want to focus -- I don't have the exhibit in
7 front of me, but I want to focus you on the concept that, over
8 time, the government learned a valuable lesson. If they put a
9 black box, we ask what's underneath the black box. But if
10 they make a column disappear, we don't know the column ever
11 existed.
12 I suspect the DIMS -- along with Mr. Mr. Connell,
13 suspect and hypothesize that the DIMS system has remained the
14 same. It's just we're not seeing the black box over it
15 anymore. It just goes away.
16 So the names of witnesses to the things that are
17 noted in DIMS -- and let's go back to just talk a little bit
18 about that. DIMS is a management system for data that relates
19 to the day-to-day conditions of confinement of these
20 gentlemen. So things that they eat, mundane things, but also
21 things that are unusual, medical conditions, behavioral
22 problems, lack of behavioral problem -- in my client's case, a
23 lot of lack of behavioral problem, no contraband found.

1 If I can't put on evidence about his good conduct, I
2 can't rebut what the government's going to prove in
3 aggravation. I have a duty to do that. I have a duty to
4 investigate it. So at the very least, we need the names of
5 the witnesses who can testify to panel members that my client
6 behaved himself, that he's not a risk and need not be
7 executed.
8 MJ [COL POHL]: Thank you.
9 Ms. Lachelier.
10 ADC [MS. LACHELIER]: Judge, I wanted to get back to a
11 point that Mr. Swann made, and he said that DIMS have always
12 been classified. Well, they are now. They weren't before,
13 and then they were before that. And that's the history of
14 this case.
15 In 2008 and 2009, they were provided classified at
16 the SECRET level. From the beginning of this case, I think,
17 until 2011, whenever the government started providing DIMS,
18 until April of this year, they were unclassified.
19 MJ [COL POHL]: When you say unclassified, were they also
20 unredacted?
21 ADC [MS. LACHELIER]: They were redacted, but the
22 redactions we're getting now appear to be the same, similar --
23 I mean, obviously, I can't see what's under it, so I don't

1 know for a fact what's being redacted now versus what's being
2 redacted.
3 MJ [COL POHL]: You were getting redacted copies that were
4 unclassified?
5 ADC [MS. LACHELIER]: That's correct. And we have
6 attached them to 336, and you have them on the record as
7 Exhibits B, C and D to 336.
8 MJ [COL POHL]: Okay. Go ahead.
9 ADC [MS. LACHELIER]: And actually, if you compare that to
10 what Mr. Connell filed in 336D (AAA), that is classified. But
11 I'll just ask the court to compare the two, and I won't say
12 more. There is little difference is all I'm going to add.
13 So the point is what -- it strongly suggests that
14 what we're getting as a classified document now is the same as
15 we were getting before unclassified. It was simply marked NOT
16 RELEASABLE TO THE DETAINEE before. So they upped it to a
17 classification level in order to avoid our having -- our being
18 able to show it to Mr. al Hawsawi.
19 MJ [COL POHL]: So it's your position that for a period of
20 time in 2010-2011 they would give you the redacted DIMS as
21 unclassified?
22 ADC [MS. LACHELIER]: I'll equivocate a little bit on the
23 years because I don't know when the government started

1 providing DIMS again in this round of the litigation, but
2 sometime after the arraignment, they started providing DIMS
3 post -- let's just say even post MOU, and Mr. Swann is trying
4 to allege it's related to the MOU. It is not.
5 What we were getting until April of this year, which
6 is well after we had signed the MOU, was unclassified and
7 marked NOT RELEASABLE TO THE DETAINEES OR TO THE PUBLIC. And
8 again that's Attachments B, C and D to our original motion in
9 336.
10 So this just belies the whole argument that it was --
11 that this is a classification issue. And I want to go -- I
12 probably should go back to the actual transcripts of the July
13 hearings, but I am willing to give -- to proffer to the court
14 quite confidently that in the last hearing, the government
15 averred that these were force protection issues related to
16 DIMS, not classification issues. So this is highly selective
17 application of what they want in order to preclude our showing
18 things to Mr. al Hawsawi that we need to show, as I mentioned,
19 in order to have discussions with him.
20 And when Mr. Swann mentioned we could piece together
21 things, we could piece together and get information, I know
22 that was in relation to 227, but I want to highlight for the
23 commission why the piecing together concept is complicated for

1 us.
2 We don't take documents into our meetings with
3 Mr. al Hawsawi. We cannot take documents into our meetings.
4 We have to send them ahead of time. They have to go through
5 the privilege team. That doesn't mean we can't get documents
6 to him that we would then discuss in a meeting, but it's not
7 just as easy as taking documents that are already organized in
8 to him and then discussing with him. We have to send them
9 ahead, they have to be reviewed by the privilege team, and
10 then he has to bring them with him, and we have to organize it
11 to show him how to review things.
12 When the government tries to give us this idea we can
13 piece together things and redact some and redact others and
14 piece it together all at once and try to figure it out, it's a
15 lot more complicated in practice than just trying to figure it
16 out which, in and of itself takes several hours for counsel.
17 MJ [COL POHL]: I'm looking at your attachment here which
18 says NOT RELEASABLE TO THE DETAINEE OR PUBLIC.
19 ADC [MS. LACHELIER]: Right.
20 MJ [COL POHL]: You have a whole bunch here. Just so I'm
21 clear, what your position is, you want this RELEASABLE TO THE
22 DETAINEE.
23 ADC [MS. LACHELIER]: Right, or display only. The

1 government is giving us highly classified material that they
2 marked DISPLAY ONLY ----
3 MJ [COL POHL]: Right. I got that.
4 ADC [MS. LACHELIER]: ---- that we can take in.
5 MJ [COL POHL]: But I'm saying what about the redactions
6 here?
7 ADC [MS. LACHELIER]: We would want -- that's just what
8 this is.
9 MJ [COL POHL]: I don't know what the columns stand for so
10 I can't ----
11 ADC [MS. LACHELIER]: Are you looking at B, Your Honor?
12 Doesn't matter, I guess.
13 MJ [COL POHL]: I believe so.
14 ADC [MS. LACHELIER]: This is the copy that we got that
15 the government says we're allowed to use, and it has a date
16 and it has sometimes guard numbers, sometimes not. Depends on
17 which year they were providing the DIMS for.
18 When we get it for Mr. al Hawsawi where he can see
19 it, the dates are gone, and so we have to have -- try to have
20 a discussion with him about incidents that are reported in
21 DIMS or events ----
22 MJ [COL POHL]: Okay. So I'm looking at your B1 has the
23 dates gone, and your next one is one with the dates.

1 ADC [MS. LACHELIER]: Bravo ----
2 MJ [COL POHL]: I'm looking at your pleading of
3 15 January 2015.
4 ADC [MS. LACHELIER]: 15 January, yes, sir.
5 MJ [COL POHL]: Okay. But I'm saying there's the -- okay,
6 look at Appellate Exhibit 336 (MAH).
7 ADC [MS. LACHELIER]: Uh-huh.
8 MJ [COL POHL]: I think it's dated -- let me get the date
9 on it for you. 13 January 2015. Are you tracking now?
10 ADC [MS. LACHELIER]: Yes.
11 MJ [COL POHL]: Then you go down, you've got a couple of
12 attachments.
13 ADC [MS. LACHELIER]: Right. Bravo.
14 MJ [COL POHL]: Bravo is DIMS with black column, nothing
15 to the left, and a bunch of -- also redaction in the middle
16 but that's not releasable to the detainee either.
17 ADC [MS. LACHELIER]: Right. We're conflating a little
18 bit Mr. Connell's issue ----
19 MJ [COL POHL]: Yeah.
20 ADC [MS. LACHELIER]: ---- Mr. al Baluchi's issue. We
21 want unredacted, yes, so I'll just say that.
22 MJ [COL POHL]: But if you go back, down a little further
23 in I think it's Attachment C, again, this gives you more

1 information, but it's still not releasable to the detainee.
2 ADC [MS. LACHELIER]: Right.
3 MJ [COL POHL]: Okay. And your total relief you want is
4 everything to be unredacted ----
5 ADC [MS. LACHELIER]: Right with ----
6 MJ [COL POHL]: ---- and shareable with the detainee.
7 ADC [MS. LACHELIER]: And shareable. And DISPLAY ONLY, if
8 they wanted to leave it in there, supposedly, so they can put
9 together some theory. I have no notion of what the government
10 is actually referring to there.
11 But to be able to have a discussion, if you imagine
12 what you are looking at, these exhibits you're looking at, all
13 of that column with the dates completely redacted, that's what
14 we're getting to show Mr. al Hawsawi. Imagine that column
15 with all of the dates just gone.
16 MJ [COL POHL]: You don't have to imagine it. It's in the
17 exhibit above that one. Okay.
18 ADC [MS. LACHELIER]: In B.
19 MJ [COL POHL]: Page 10. Again, I'm working off pages.
20 You're working off -- 2292.
21 ADC [MS. LACHELIER]: 2292, actually, if you look, it has
22 the dates. It's a different format. That's all. The dates
23 are in there.

1 MJ [COL POHL]: Okay. I see.
2 ADC [MS. LACHELIER]: What we gave you are the samples of
3 the types of redactions we're getting.
4 MJ [COL POHL]: Different spot, I got it. They don't want
5 you to give them anything with dates in it.
6 ADC [MS. LACHELIER]: Right.
7 MJ [COL POHL]: Okay.
8 ADC [MS. LACHELIER]: Or guard pseudonyms.
9 MJ [COL POHL]: Okay. Got it.
10 ADC [MS. LACHELIER]: So anyway, I just wanted to leave
11 you with that, this notion that they're classified and they
12 can't -- it's a classification issue is incorrect. It's
13 not -- it's not consistent with their representations at the
14 previous hearings where they said it's a force protection
15 question, and I think the arbitrariness with which they're
16 applying these redactions and now classifications makes it
17 within your purview to determine what we need and what we
18 should have for discovery in order to properly defend
19 Mr. al Hawsawi.
20 MJ [COL POHL]: Okay. Thank you. Mr. Nevin or
21 Mr. Harrington, do you want to be heard on this?
22 Mr. Harrington?
23 LDC [MR. HARRINGTON]: No, sir.

1 MJ [COL POHL]: Trial Counsel, what are you looking for?
2 TC [MR. SWANN]: I'm looking at something that doesn't
3 have anything to do with this issue.
4 LDC [MR. CONNELL]: So we don't have any control over the
5 display to the ----
6 TC [MR. SWANN]: Fine.
7 LDC [MR. CONNELL]: I'm just asking could the court
8 reporter cut the feed from Table 4, please?
9 MJ [COL POHL]: The feed? Okay.
10 TC [MR. SWANN]: Thanks. All right.
11 Ms. Lachelier brought up 2008-2009. She may have
12 gotten -- back then she got a SECRET version of DIMS records,
13 and the reason they got a SECRET version for 2008-2009 during
14 this first commission is that they had signed an MOU.
15 In 2012, when we started up again, we went all the
16 way through, up to and including, I guess, maybe September of
17 '15, no MOU was signed.
18 So what they did -- what we gave them, what we
19 created for them was a version that was an unclassified
20 version. DIMS are classified. They are marked with a SECRET
21 marking. We get them. They are marked.
22 The column that Mr. Connell is mentioning in that
23 first version, I think back in '06, I am told by my competent

1 staff that, in fact, those are true names. At some point in
2 time, the format to these things changed. We have never given
3 out true names.
4 Mr. Connell has -- he indicates that he's not -- he's
5 got a whole bunch of gaps in places where he hasn't seen them.
6 I'm not sure that's correct, but then again, I can't say that
7 he's incorrect. But we're going to check, we're going to
8 verify one more time, and we're going to give him an
9 unredacted version of DIMS for his use, minus all of the true
10 names that may appear.
11 Now, a lot of times we have to go through page by
12 page, and I think maybe -- just if you think about it, you're
13 talking now in the neighborhood of about 6,000 pages of these
14 things that have been provided to the client.
15 So we create a version for him, we create a version
16 for the accused. We try to make sure the accused gets that
17 information from the DIMS that he can see. We make those
18 documents releasable. On occasion we have given a version, a
19 less redacted version to counsel because of other reasons that
20 indicate, you know, NOT RELEASABLE TO THE ACCUSED.
21 From 2006 to 2014, true names were redacted. From
22 2014 forward, there is no column, that outside column with the
23 names, because what we receive now do not have those names.

1 What they did is they took and merged them into the documents.
2 Early on, you may not see a SOO #, for instance, would see a
3 true name. So now they merge them into the documents. And I
4 think the ones in front of you kind of indicate a series of
5 SOO #s or assistant watch commander numbers and things of that
6 nature. That's what they are getting unredacted. So they
7 have a number. They just don't have the true name.
8 MJ [COL POHL]: Mr. Swann, let me ask you a question here.
9 Retrieve this document, 336D (AAA).
10 TC [MR. SWANN]: This is the 2006 time frame.
11 MJ [COL POHL]: Yes. Okay. Give me my copy back. And
12 just explain something to me because I'm trying to figure this
13 out. I've got that document which you now have, too. And
14 it's labeled SECRET/NOFORN, right? And then I'm looking at
15 attachments to 336 we referred to earlier, and I see virtually
16 the same type of information UNCLASSIFIED/FOUO.
17 TC [MR. SWANN]: UNCLASSIFIED/FOUO?
18 MJ [COL POHL]: I just read the document that's on me.
19 Now, these are 2014.
20 TC [MR. SWANN]: UNCLASSIFIED/FOUO, who is it releasable
21 to on bottom?
22 MJ [COL POHL]: Not to the detainee or the public. But
23 it's not labeled SECRET. It causes me pause that why is ----

1 TC [MR. SWANN]: That document is redacted?
2 MJ [COL POHL]: Yeah, it's redacted. It looks very
3 similar to the SECRET documents.
4 TC [MR. SWANN]: Then it's been redacted and -- okay.
5 It's been redacted because there are certain pieces of
6 information on that form. And maybe if I can tell you
7 exactly, there's probably a little indication at the top which
8 talks about cell numbers and things of that nature. That's
9 redacted out of there, okay?
10 All of these things, they undergo a review.
11 MJ [COL POHL]: No, but -- but I'm -- and, again, I don't
12 want you to discuss a classified document in open session, but
13 if you look at 336D, the way I asked Mr. Connell this, is even
14 with the redactions, it's now SECRET/NOFORN. And I'm looking
15 at a very similar document that's unclassified.
16 TC [MR. SWANN]: Because, sir, I'll take you down to the
17 middle of the page and you'll see the difference.
18 MJ [COL POHL]: Okay.
19 TC [MR. SWANN]: The middle of the page on 2904, and it
20 says there, 14 September 2006.
21 MJ [COL POHL]: Okay. Now, this is classified. I
22 wouldn't ----
23 TC [MR. SWANN]: It says 14 September 2006.

1 MJ [COL POHL]: Okay. All right.
2 TC [MR. SWANN]: You look down further into the next
3 column where it says 13 September, okay? Read across there
4 and think about what I just mentioned. That's classified.
5 That same thing appears throughout this document, and
6 that's why -- that's one reason ----
7 MJ [COL POHL]: So are you telling me ----
8 TC [MR. SWANN]: ---- clearly, it's classified.
9 MJ [COL POHL]: So is there three sets of DIMS records,
10 then?
11 TC [MR. SWANN]: Well ----
12 MJ [COL POHL]: Actually, four. Totally unredacted,
13 SECRET.
14 TC [MR. SWANN]: Totally unredacted, SECRET.
15 MJ [COL POHL]: SECRET redacted.
16 TC [MR. SWANN]: SECRET redacted.
17 MJ [COL POHL]: FOUO redacted and NOT RELEASABLE TO THE
18 DETAINEE and RELEASABLE TO THE DETAINEE.
19 TC [MR. SWANN]: And there might be a fifth version before
20 they signed the MOU that we are trying to catch up with and
21 get everything fixed.
22 MJ [COL POHL]: Okay. So it's the government's position
23 that all of the redacted material on the DIMS record you

1 provided to the defense is redacted because it is classified?
2 TC [MR. SWANN]: It is redacted because it is classified.
3 There's no need to know, for instance, true names and those
4 things. Okay.
5 Again, these documents don't originate with us. We
6 don't do the redactions. These are done by OCAs, at least a
7 couple, and they took a look at every one of these documents
8 before we are authorized to turn it over.
9 MJ [COL POHL]: So Mr. Connell's solution of just giving
10 them unredacted copies, classified, so not releasable to the
11 detainee, is not ----
12 TC [MR. SWANN]: He gets -- he gets a classified version
13 to do with what he wants to do with it. He just won't get the
14 true names that have been redacted from that document.
15 MJ [COL POHL]: All right. Just ----
16 TC [MR. SWANN]: We went from true names to SOO #s.
17 MJ [COL POHL]: So all the redactions are just the true
18 names?
19 TC [MR. SWANN]: No. Sometimes the redactions might be a
20 force protection measure, for instance, location or something
21 like that, which is what you're seeing on these documents
22 themselves.
23 MJ [COL POHL]: Okay. And I'm not sure why I'm asking

1 this question, but I'm going to do it anyway.
2 So we've got the unredacted DIMS records are treated
3 at the SECRET level, and then we've sent them for some type of
4 review to the OCA, or you've sent them?
5 TC [MR. SWANN]: Yes, sir.
6 MJ [COL POHL]: The OCA reviews them?
7 TC [MR. SWANN]: Yes, sir.
8 MJ [COL POHL]: And at that point, they then generate a
9 SECRET redacted version.
10 TC [MR. SWANN]: They generate a SECRET redacted version.
11 MJ [COL POHL]: That's the one you give to the defense.
12 TC [MR. SWANN]: That's the one we give to the defense.
13 MJ [COL POHL]: Then who does the RELEASABLE TO THE
14 DETAINEE version?
15 TC [MR. SWANN]: Last question, sir, who does the
16 redaction?
17 MJ [COL POHL]: I'm saying -- I'm skipping the FOUO
18 version.
19 TC [MR. SWANN]: We take that version, and then we send it
20 through a classification board. The classification board does
21 the redactions. They in turn return them to us. We Bates
22 stamp those items. We try to make them -- a releasable
23 version to the accused, and he gets a releasable version.

1 MJ [COL POHL]: Okay. The documents start with the OCA
2 for their review.
3 TC [MR. SWANN]: The documents -- the documents -- these
4 documents originate with the Department of Defense, okay? We
5 ask for them. We get them on a revolving basis about every
6 three months. That's what we have worked out.
7 MJ [COL POHL]: Okay.
8 TC [MR. SWANN]: They come to us. We take a look at the
9 documents. We send them off to various classification
10 authorities.
11 MJ [COL POHL]: So do you get the unredacted versions?
12 TC [MR. SWANN]: We get the unredacted versions.
13 MJ [COL POHL]: Okay.
14 TC [MR. SWANN]: They send them back to us with their
15 redactions. We take those redactions, and then we say, well,
16 we need another version for the accused. That comes from
17 SECRET down to a releasable version for the accused
18 themselves, and then we hand those over. It's not an easy
19 process. I mean, it's not even an easy process to understand
20 sometimes when you're talking about sheer numbers of
21 documents.
22 But this redacted column that we've been throwing
23 around here that is true names, and they eliminated that

1 column later, and I have a 2014 version in front of me that --
2 but what they've done is they have taken those out and they
3 have used a SOO # since then, and that's the version that the
4 defense gets. Okay.
5 MJ [COL POHL]: Is the version that you give to the
6 defense counsel, would it be fair to characterize it as a
7 summary of the original documents?
8 TC [MR. SWANN]: I'm prepared to characterize all of these
9 documents that they get are summaries. I mean, it tells you
10 how much he ate during the day.
11 MJ [COL POHL]: I know what's in them, Mr. Swann. I got
12 that part. But I'm just saying is does this implicate the
13 505 ----
14 TC [MR. SWANN]: Can I talk to Mr. Trivett for a second?
15 MJ [COL POHL]: Sure.
16 **[Pause.]**
17 TC [MR. SWANN]: Okay. They've asked me to clarify
18 something. These are not like the summaries that you see when
19 we send them for 505s, okay? That's not like these.
20 These are a snapshot in time, as you can see from the
21 document, that his food was taken to him or whatever the case
22 may be. That's what I meant by a summary. I was talking more
23 about a snapshot in time.

1 MJ [COL POHL]: Okay.
2 TC [MR. SWANN]: Okay.
3 MJ [COL POHL]: So you don't think this triggers any 505
4 review.
5 TC [MR. SWANN]: It doesn't trigger 505. These are
6 relevancy reductions -- redactions that we do because they're
7 just not relevant ----
8 MJ [COL POHL]: Well, Mr. Swann, I don't mean to be
9 argumentative here, but I thought you told me earlier that
10 these are classification redactions, classified information
11 redactions.
12 TC [MR. SWANN]: They are for the accused. We give the
13 attorney the information. He has the information.
14 MJ [COL POHL]: So the only thing they're not getting is
15 irrelevant information.
16 TC [MR. SWANN]: Irrelevant information.
17 MJ [COL POHL]: Okay. Got it. Understand. Anything
18 further? Apparently not.
19 Mr. Connell.
20 LDC [MR. CONNELL]: I think that the oral argument has
21 sharpened the -- narrowed the focus even more. The government
22 has told us that the redacted column are the names, whether
23 that's truly redacted with, you know, a black bar or whether

1 it's omitted in post-2014.
2 So the question there really boils down to are the
3 witnesses, the names of the witnesses, are those material to
4 the preparation of the defense, and who gets to make that
5 decision. The first answer -- the question -- the answer to
6 the question of is it material to the preparation of the
7 defense is clearly briefed by the defense in 336B where we
8 talk about the importance of Skipper evidence to a capital
9 trial, and I -- I don't -- the government hasn't offered any
10 reason why it wouldn't be relevant, right? Those are our
11 witnesses. Some of them might be the government's witnesses.
12 And the government has never argued anything to the
13 contrary. They just keep saying "true names" like that
14 answers the question. In fact, a person's name, their
15 identifier, is how they eventually become a witness in a
16 trial.
17 But even more disturbing, if that's possible, in the
18 government's argument was who is making the decision. The
19 government said several times that the OCA is making the
20 decision as to what information the defense gets, which means
21 it's not an attorney review for materiality. No one is
22 looking at it and saying, well, you know, Pat Jones might have
23 something valuable to say to the defense because Pat Jones was

1 administering medication, for example; but Sam Smith doesn't
2 have anything valuable to the defense because Sam Smith was
3 only giving breakfast. No one's making that determination.
4 And second of all, no one is making an adequacy of
5 preparation of the defense determination like happens in 505.
6 Whether these are a summary or not, they are definitely
7 deletions and withholdings within the meaning of 505(f).
8 And I know we have been down this road before, but
9 when the government chooses to withhold things from a
10 document, in a 505 document, it is the military commission who
11 gets to make the determination whether the withholding,
12 deletion or substitution leaves the defense in essentially the
13 same position as they would be otherwise.
14 And so what we are hearing here is that there's not
15 an individual materiality determination on a case-by-case
16 basis, which can only be true, right? There's seven years of
17 redactions, and not a single one of those witnesses turns out
18 to be material to the preparation of the defense.
19 There's no individual determination that's going on
20 by an attorney. There's an OCA review and there's a we don't
21 want the defense to know who their witnesses are so they can
22 more easily prepare a defense strategy. But what there is not
23 is things proceeding consistent with Military Commission Rule

1 of Evidence 505 or 506. If those aren't classification and
2 force protection, those are a 505 issue. In any of those
3 situations, the military commission can say categorically that
4 the witnesses are important and order production of the
5 unredacted documents in a classified format to the defense
6 counsel.
7 MJ [COL POHL]: Thank you. Anything further from any
8 other defense counsel? Apparently not.
9 Mr. Swann, do you wish to be heard again?
10 TC [MR. SWANN]: Your Honor, we make the relevance
11 determinations. We decide what to provide the defense, and if
12 we're wrong, we're wrong. But all relevance determinations
13 made from these documents are made by us. And, quite frankly,
14 we're told by the OCA, no, we don't want to give that out and
15 I say, well, you need to go back and look at it again, because
16 we decided we think it is relevant to certain issues here.
17 Now, if you look at the documents, if after this
18 seven or eight years that Mr. Connell can find that one
19 instance that he wants to reach out to find a witness about an
20 incident that might appear in the documents, he can make a
21 request to us, and we'll consider the request and see what we
22 can do with it.
23 But who gave him his meal that day, who took him to

1 rec, who took him to the library, who took him elsewhere in
2 that camp, that's just not relevant to anything that we are
3 doing in this process.
4 MJ [COL POHL]: Do you think it's relevant if the defense
5 wants to call a guard or guards who have had daily contact
6 with the accused over a period of time to ----
7 TC [MR. SWANN]: Yeah, in the last few years, I would say
8 that they have SOO #s that sort of identify them.
9 MJ [COL POHL]: No, what I'm saying is, you understand
10 the Skipper issue?
11 TC [MR. SWANN]: I do. I understand it.
12 MJ [COL POHL]: But if at some point the defense says our
13 client has been very good in jail and we want to call the guys
14 who have had daily contact with him in a year, a year, and a
15 year here, we're not talking about one meal, we're talking
16 about daily observation of him.
17 TC [MR. SWANN]: Right. And where would that information
18 come from? It would come from the accused because the accused
19 knows who that guard is and who that person was during that
20 period of time. They would be able to identify that person,
21 submit to us, and then we'll see what we can do and try to
22 find out who the person was and ----
23 MJ [COL POHL]: So if the accused has the guard number

1 from '07 -- I mean, but if he doesn't, then he's out of luck,
2 and you can't just give him the names from the DIMS report.
3 TC [MR. SWANN]: Well, he wouldn't have had the true name
4 ever. He wouldn't know who that person was.
5 MJ [COL POHL]: Mr. Swann, we are talking across each
6 other here.
7 TC [MR. SWANN]: Okay.
8 MJ [COL POHL]: I'm just saying it's the defense's
9 position -- and, again, it may be premature in this sense that
10 this issue can be addressed as we get closer to trial. I've
11 got that part of it. But the defense position is we want to
12 present what they're characterizing as Skipper evidence from
13 testimony of guards who have had daily contact with the
14 accused over whatever period of time we're talking about,
15 let's just say from DoD control in '06 up until the date of
16 trial, whenever that is. Now, given the way the guard force
17 churns, you're talking about a number of people for each
18 detainee. And you are saying, well, I've looked at the DIMS
19 reports but I don't know who had all of this contact with him.
20 I got the same name of the guard over and over again, that may
21 be the one I want.
22 TC [MR. SWANN]: You're talking about the true names.
23 MJ [COL POHL]: Well, what -- the government -- if you

1 want to protect the true names, the government says, okay, the
2 defense says, I don't want the true names. I've got this DIMS
3 report, and I want the guards who saw him at this period of
4 time, and they can keep their anonymity from me, if they want
5 to.
6 But, I mean, how do they get -- maybe I'll just turn
7 the question to you. I know you're not the defense counsel
8 here, but let me just ask you this: How can they get guard
9 testimony if they don't have any idea of any way to contact
10 the guards who saw their client?
11 TC [MR. SWANN]: I would think that they would make the
12 request to us, I want to talk to this one guard that saw my
13 client 25 times during this month. They developed a good
14 relationship, and he said some nice things about him.
15 They make us -- they give us the information. We in
16 turn then go back and try to identify it. How do you think I
17 got the guard here this morning? I mean, it took me probably
18 a little bit of time trying to mark up a number with a name
19 and then locate that person in the United States. You asked
20 me to do that. We did it. We would do it in that instance as
21 well.
22 So if they have specific numbers, specific names,
23 specific timelines -- time frames that we would be able to

1 identify who that person might be, we would reach out, try to
2 find the person. And then if the person agrees to talk to
3 them and agrees with what they're saying -- I mean, we
4 wouldn't know what that was, I guess -- we would make them
5 available.
6 MJ [COL POHL]: Okay. Understand. Anything further?
7 TC [MR. SWANN]: No, sir.
8 LDC [MR. NEVIN]: Your Honor, may I speak to this, please?
9 MJ [COL POHL]: Because you didn't speak before, I'll give
10 you a little leeway here, Mr. Nevin. There's a certain order
11 I like to follow.
12 LDC [MR. NEVIN]: Just to say that it's very common
13 practice in capital defense, and really across the board in
14 all types of cases, to interview people who have had contact
15 with your client while he or she was in jail. It is not
16 something that's unusual or anything that's out of the
17 ordinary. We do it all the time. You have to have the true
18 name in order to do that.
19 Counsel wants us to run that through them. I just
20 want the military commission to understand that it confers a
21 strategic advantage on them to know who we would like to talk
22 to and to know why we want to talk to them. Because typically
23 what we get when we ask for a witness is that we're told that

1 that witness is not -- the information is not relevant. Tell
2 us more. Tell us why. Tell us what your thinking is. Tell
3 us what your plans are. When we do that, we're revealing
4 privileged defense information.
5 We've presented this issue, a similar issue to you in
6 another context when we argued that the witness production
7 processes are not constitutional, and I'm not asking you to
8 get back into that again, but there's nowhere that it says
9 that true names can't be provided to cleared defense counsel.
10 That's not written anywhere.
11 And the idea that that's not relevant, that every
12 single true name, in the example of Mr. Connell's materials,
13 every single true name is not relevant, it's obviously clearly
14 relevant, and there's no reason not to be turning that over.
15 I wanted to say that just by way of joining the
16 arguments that have been made previously. Thank you.
17 MJ [COL POHL]: Thank you, Mr. Nevin.
18 That brings us to a similar issue of 161. I believe
19 you've argued 161 already, haven't we, Mr. Connell?
20 TC [MR. RYAN]: Twice.
21 MJ [COL POHL]: Twice.
22 LDC [MR. CONNELL]: Right.
23 MJ [COL POHL]: And you filed a supplement, so you want to

1 argue the supplement?
2 LDC [MR. CONNELL]: That's all I'm going to argue, is the
3 supplement. May I approach?
4 MJ [COL POHL]: Go ahead.
5 LDC [MR. CONNELL]: I'm sorry, sir, I'm waiting for my AE
6 number.
7 Sir, I provided to the military commission and to the
8 parties a set of slides labeled AE 161I. Before I display
9 those, I want to bring something to the military commission's
10 attention, which is, that for a number of years now I have
11 been sending slides for review. And for the first time ever,
12 every single slide out of a set of four e-mails worth of
13 slides that I submitted came back with every slide marked
14 FOUO.
15 The -- we have followed the rule in this commission
16 that FOUO information can be distributed to -- can be shown in
17 the courtroom, but before I make my traditional request to
18 display this, I wanted to be clear that I think the reason
19 that this happened, came back FOUO, was so that I could not
20 distribute the slides to the public and the media as I
21 traditionally do once they're approved by the military
22 commission.
23 So I wanted to be clear that part of my official use

1 is the transparency of these proceedings. And so unless I'm
2 ordered not to by the military commission, I intend to follow
3 my prior practice and distribute these slides to the public,
4 to whoever wants them, once they have been approved by the
5 military commission.
6 MJ [COL POHL]: Hold on a second. When you submitted
7 these slides, to whom did the FOUO -- who put that on there?
8 LDC [MR. CONNELL]: I submit them to the court security
9 officer. The court security officer advised me that they came
10 back FOUO.
11 MJ [COL POHL]: Okay. Trial Counsel, any reason why these
12 are FOUO?
13 TC [MR. RYAN]: We're just seeing them for the first time
14 ourselves, Judge.
15 MJ [COL POHL]: I have a lot of deference to the security
16 agents. I know they have a tough job here. But apparently
17 they don't unilaterally change things that would appear to --
18 I mean, I just don't know.
19 TC [MR. RYAN]: I don't either, Judge. All I can say is
20 if someone reviewed these particular slides, maybe they saw
21 something on these particular slides that caused them to make
22 a change, but I'm speaking completely without knowledge.
23 MJ [COL POHL]: Okay. This is what we're going to do,

1 Mr. Connell. Since I don't know, really, from whence the --
2 well, I -- why these were put on there, you may display them
3 in court, but don't disseminate them.
4 Trial Counsel, you've got one week to give me a good
5 reason why all of a sudden things that have been normally --
6 and there may be a reason. If there is, that's fine. So I'm
7 going to give you an option beforehand. But in the future if
8 things needs to be changed all of a sudden that limits the
9 transparency of this commission, I'd like to know why before
10 we do it.
11 TC [MR. RYAN]: Agreed. Us, too.
12 MJ [COL POHL]: The week starts when we get back. So by
13 COB a week from this week.
14 TC [MR. RYAN]: Yes, sir.
15 MJ [COL POHL]: Mr. Connell, that's the only ----
16 LDC [MR. CONNELL]: I understand.
17 MJ [COL POHL]: If I don't hear from them or they don't
18 give me a good reason, we'll go back to the prior procedure,
19 because ----
20 LDC [MR. CONNELL]: Just so we're clear, I assume that
21 same applies to all of the other slides that we're going to be
22 using over the course of ----
23 MJ [COL POHL]: Are you getting them all FOUO, too?

1 LDC [MR. CONNELL]: I submitted eight sets. Every slide
2 on every set came back FOUO.
3 MJ [COL POHL]: Okay. And that's not been the practice
4 before.
5 LDC [MR. CONNELL]: No.
6 MJ [COL POHL]: Okay.
7 LDC [MR. CONNELL]: I mean, sometimes they come back and
8 say, hey, can you change this word or something like that, and
9 I do it, but ----
10 MJ [COL POHL]: Yeah. Yeah. Okay. All right. Thank
11 you.
12 LDC [MR. CONNELL]: All right. Thank you. So with that
13 said, I would request permission to display the slides to the
14 gallery and to the -- over the feed, and would request the
15 feed from Table 4.
16 MJ [COL POHL]: Sure. Go ahead.
17 LDC [MR. CONNELL]: Thank you. The issue which is
18 presented by this supplement is the application of a new case
19 decided by the D.C. Circuit, American Immigration Lawyers
20 Association, and so that's the only issue that I'm going to
21 argue.
22 The broader issue, of course, is the question in
23 unclassified discovery of whether the government can

1 unilaterally make decisions because they feel that information
2 within an otherwise relevant document is -- or otherwise
3 material document is not relevant or for some other reason
4 without military commission review.
5 The military commission has actually asked us before
6 if that's allowed, and we didn't have -- nobody had case law
7 on it at the time, but in fact it's not 100 percent
8 authoritative, but we have a pretty good indication from the
9 D.C. Circuit at this time.
10 So it very much is going to apply to -- this question
11 applies to AE 330, which we will handle later, about
12 unredacted medical records, and to some extent AE 419, to the
13 extent they're unclassified -- which a lot have been
14 declassified. I think that it intersects to some extent with
15 Mr. al Hawsawi's position in 419. Also to the extent that
16 we're talking about unclassified information, it intersects
17 with the argument that we just made in 336.
18 So the American -- the AILA, American Immigration
19 Lawyers Association -- and that's one of those words for the
20 interpreters that I warned about -- AILA was -- addressed this
21 exact question in the context of Freedom of Information Act
22 claim, not in the context of a criminal discovery claim.
23 But the holding of AILA, which is displayed on the

1 screen, which essentially is if the government identifies a
2 record as responsive to the FOIA request, can the government
3 nonetheless redact particular information within the
4 responsive record on the basis that the information is
5 nonresponsive. We find no authority in the statute for the
6 government to do so.
7 The same situation essentially applies in the
8 military commission. There is no duty or regulation
9 authorizing the government to make unilateral redactions in
10 other otherwise discoverable material.
11 That's really separate from the question of whether
12 each individual redaction is immaterial, which, when we get to
13 the medical records, it will be -- I'm going to show you here
14 that it's completely clear that that's not the situation. But
15 the -- if there really is something that needs protection,
16 then we already have in place Protective Order Number 2. We
17 already have the scheme of special force protection discovery,
18 and special protections, and we already have in place Military
19 Commission Rule of Evidence 506.
20 It's not 100 percent clear who's making these
21 different kinds of redactions. The government told us in the
22 last argument initially we're not in the redaction business.
23 We don't make these redactions. They come to us from the OCA.

1 They later said that in fact these are individually decided by
2 attorneys or something. I don't know who's making these
3 redactions, but we have some examples with us.
4 This is an example of a 302. The first time that we
5 argued 161, we -- the government reproduced a large number of
6 302s to us with less redactions. This is an example of one
7 that they did not reproduce to us with less redactions,
8 although the 183,333 redactions that we identified in the
9 first set of FBI 302s were largely replaced by less redacted
10 versions.
11 But this slide that I'm displaying now, which shows
12 redactions, we did not receive any unredacted version of this,
13 and this did not go through a 506 process or a 505 process.
14 These are just unilateral redactions made by the government.
15 Sometimes those unilateral redactions go to entire
16 pages. These two -- the slide that I'm displaying now goes
17 into the same situation. My favorite is the one on the right,
18 which is entirely redacted, yet still marked FOUO.
19 The -- this is information which the government has
20 chosen to withhold on its own and I think falls under the new
21 AILA decision.
22 So we heard a lot -- interestingly, we heard in the
23 last argument a lot of argument about names, what the

1 difference between a name and a true name is. Sounds almost
2 mystical, but the redactions -- there was a categorical
3 redaction, which was at issue in the AILA case, that was they
4 wanted to withhold the names of the immigration judges who
5 were -- whose records were being requested in the -- under the
6 Freedom of Information Act.
7 And the D.C. Circuit rejected that sort of
8 categorical across-the-board style of redactions of we're
9 going to redact everyone's name -- or the names which are
10 involved. They specifically rejected that because it
11 demonstrates there's not an item-by-item determination;
12 there's, rather, a categorical determination of we're going to
13 get rid of a column or we're going to get rid of the bottom
14 line on every single document.
15 The medical records provide a good example of that.
16 These are some of the medical records from Mr. al Baluchi with
17 the actual medical information obscured. The obscuring which
18 is on the left hand side of the screen is by us to avoid
19 giving away private medical information, but the redactions
20 which are indicated by the red arrows are strictly done by the
21 government.
22 That's an example of what these records -- this is
23 actually a standard form, and the redacted information would

1 provide information about the identity of people who
2 administered medication to Mr. al Baluchi. And it was
3 categorically in these -- in the medical records which the
4 government has produced, categorically excluded. This is the
5 sort of example of a thing which the D.C. Circuit rejected as
6 complained in AILA.
7 The -- I'm not going into the rest of 161, but I do
8 think that the last question, the last remaining question
9 under 161 was whether there was some sort of unilateral
10 authorization somewhere for the government to withhold
11 particular bits of information in an otherwise responsive
12 document on the basis that it thought that that particular
13 information was nonresponsive. That practice has now been
14 disapproved by our reviewing court in the D.C. Circuit.
15 MJ [COL POHL]: Okay. Thank you, Mr. Connell.
16 Trial Counsel? Mr. Ryan.
17 TC [MR. RYAN]: Good afternoon, Your Honor.
18 MJ [COL POHL]: Good afternoon.
19 TC [MR. RYAN]: Judge, it might be that we've already
20 solved one mystery, the slides that were being shown contain
21 pages, or reproductions of pages that themselves are marked
22 FOUO, and in the case of the medical records are marked NOT
23 RELEASABLE TO THE PUBLIC. So it might very well be that

1 someone doing a review looked at those pages within the slides
2 and decided the slides themselves are FOUO ----
3 MJ [COL POHL]: Okay.
4 TC [MR. RYAN]: ---- and not releasable to the public as a
5 group. I can't swear to that, but it seems to make some ----
6 MJ [COL POHL]: I hear what you're saying.
7 TC [MR. RYAN]: All right, sir.
8 MJ [COL POHL]: We'll see if that applies to his 18 other
9 slides.
10 TC [MR. RYAN]: I understand, Judge. I do.
11 MJ [COL POHL]: Go ahead.
12 TC [MR. RYAN]: Yes, sir. Judge, we're here on 161, as
13 Your Honor knows, and Your Honor should know it well because
14 it is the third time that we're in front of you talking about
15 it. And this time we are here pursuant to the case of
16 American Immigration Lawyers Association, since Mr. Connell
17 started with it as "AILA," I'll continue on that record.
18 It is a D.C. Circuit case, and because it is a case
19 from the D.C. Circuit, and because it is concerning a statute
20 not very closely connected to this prosecution, I don't think
21 I can give it terribly short shrift. I think it takes some
22 attention on my part to explain to the commission why I do not
23 believe this case stands for the proposition counsel wants it

1 to. In fact, I would submit it's going to support the
2 government's working efforts for what's being challenged
3 today.
4 A few facts up front -- and by the way, I note,
5 Judge, I have spent an entire career trying to avoid statutes
6 like the Freedom of Information Act, but now it's in my lap
7 and I'm going to have to do the very best I can with it.
8 A few facts of relevance, sir. In American -- in
9 AILA, this organization, the American Immigration Lawyers
10 Association, decided to try and gather information from the
11 United States Government about the large number of immigration
12 judges out there for the purpose of determining how the judges
13 were operating, how they were acting, any issues of concern,
14 any misconduct, et cetera. This makes perfect sense since
15 this particular organization presumably takes in a great deal
16 of lawyers who practice in that world.
17 I should point out that the judges who perform
18 immigration work are not judges under Article III of the
19 Constitution, that is nominated by the President and confirmed
20 by the Senate, but rather, are civil service employees of the
21 Department of Justice. They apply for the job. They are
22 vetted, however that happens, and eventually, presumably given
23 the job.

1 I mention this only because it does bear somewhere in
2 the court's opinion in the sense that these judges ask for
3 this job, and doing so as members of the Department of Justice
4 understand they're fulfilling a public role, and they're also
5 putting themselves out there in terms that they are issuing
6 decisions in regard to the important laws of immigration in
7 the United States. As it is, as I said, a FOIA case.
8 Now, in FOIA, Judge, as I think, you know, a sort of
9 even shallow understanding of the law is concerned, it is
10 Congress looking at the inner workings of the Federal
11 Government and making the determination in the Freedom of
12 Information Act that the public should have access to the
13 information as to the inner workings of its government. Its
14 citizenry deserves to know how the government is acting in
15 certain situations or, really, in a great deal of situations.
16 The public is available, simply by requesting for the
17 most part, to gather information as to what the government is
18 doing in these specific instances. It's a very specific
19 statute. It's strong in its language, and significantly, it's
20 not a sort of subset world. This is open to anybody. There
21 is no showing of need that has to be made. There is no
22 showing of you having a special role vis-a-vis this
23 information that has to be made. You don't have to occupy any

1 particular kind of occupation or rank. All you have to do is
2 ask for it, and under the Freedom of Information Act, you're
3 entitled to it, subject to only, for the most part, nine
4 specific exemptions that are spelled out within the Freedom of
5 Information Act.
6 In the AILA case, the court said things, and
7 Mr. Connell quoted a bit of it, and I want to as well.
8 Significant part states as follows:
9 "Once an agency identifies a record it deems
10 responsive to a FOIA request, the statute compels disclosure
11 of the responsive record, i.e., as a unit, except insofar as
12 the agency may redact information falling within a statutory
13 exemption.
14 "In the context of a record containing exempt
15 information, accordingly, the focus of the FOIA is information
16 and not documents; but outside that context, FOIA calls for
17 disclosure of a responsive record." Responsive record, not
18 disclosure of responsive information within a record.
19 It's very record-centric in that sense. It doesn't
20 concern the underlying information that goes into the record.
21 It's the record itself. This makes some sense, Judge, just
22 because, as I said, this isn't for a specific group. It's not
23 for a specific person requesting it. It's Congress saying the

1 citizenry, for whatever reason or for no reason at all, is
2 entitled to know this information that's contained within the
3 records of its government doing its business.
4 Now, the case, as I just said to you, cites
5 specifically to the statute, which is 5 United States Code
6 Section 552, and I'm going to read from (a)(3)(A) and (B) --
7 and, Judge, I'm going to have to ask you to bear with me just
8 a little bit. I know statutory language is not our favorite
9 thing to hear, but it's really important to my argument.
10 "Each agency, upon any request" -- this is Congress
11 speaking, now. "Each agency, upon any request for records,
12 shall make the records promptly available. In making any
13 record available, an agency shall provide" -- this is the
14 relevant part -- "shall provide the record in any form or
15 format. Each agency shall make reasonable efforts to maintain
16 its records in forms or formats that are reproducible for
17 purposes of this section."
18 So they use the word "record" or "records" about five
19 or six times just in the course of the few phrases I read.
20 It's Congress' way of saying "record" means record, period.
21 They weren't going behind that word. They just wanted to
22 stick with that.
23 But even, sir -- and this is, I think, very

1 significant. Even with this congressional scheme that they're
2 going to make these records available and go to great pains to
3 say so in very specific language, they go to the trouble of
4 also saying that -- and as the AILA case holds as well, they
5 go to the trouble of saying, but without judicial involvement
6 and without judicial approval, the agency doing these --
7 making -- gathering of these documents, these records, has the
8 ability and in fact has the obligation to go into the records
9 themselves, examine them for the nine statutory exemptions
10 that are stated and set forth, and then redact out the
11 information in regard to -- that falls within those nine
12 categories.
13 Now, that's not to say judicial involvement would
14 never happen, and in fact AILA is an example of how it did
15 happen. The agent -- I'm sorry. The organization makes their
16 request. The agency of the United States Government gives the
17 records over. The organization was not satisfied with it and
18 filed suit against the court -- or filed suit in D.C. court
19 asking that the court intervene, and in fact it did.
20 I would submit that's not terribly different from
21 what happens here except instead of having to file a whole
22 separate lawsuit in a whole separate court, here the defense
23 has the ability, as you have lived through many, many times,

1 now to simply go to Your Honor in the form of a motion and say
2 the government is not giving us enough, we want you to become
3 involved as well. So that's FOIA, Judge, and maybe I can get
4 out of that statute now and everybody will thank me for it.
5 But the point being now we aren't in that world. We
6 are in the world of criminal discovery and have our own rule
7 to rely upon, and that is R.M.C. 701, which reads in relevant
8 part, and paraphrasing as necessary, any books, papers,
9 et cetera, or copies of portions thereof which are material to
10 the preparation of the defense, shall be disclosed.
11 So in the world of FOIA, where it's record-centric
12 and it's focused on, quote, record, 701 directs and allows the
13 prosecution to provide for, quote, portion that is material to
14 the defense. This is not something that exists in a vacuum in
15 military commissions law ----
16 MJ [COL POHL]: Mr. Sowards, could you guys keep your
17 conversation a little quieter? You're distracting the court.
18 Thank you.
19 TC [MR. RYAN]: Thank you, sir.
20 This is not something that exists in a vacuum in
21 military commissions law. In fact, the language, the
22 operative language contained in 701 is in many ways identical
23 or extremely similar to that which is contained in Federal

1 Rule of Criminal Procedure 16.
2 There's a slight difference that I want to point out,
3 Judge, and that's this. In Federal Rule of Criminal
4 Procedure 16, it says, "Copies or portions," whereas in
5 Rule 701, it says, "Copies of portions." Personally, I think
6 it was a typographical error. I don't think it changes the
7 analysis at all, but I do make that distinction or at least
8 let you know that it's out there.
9 So 701 says "portions." It was very specific, just
10 like FOIA is very specific of staying on records. And that's
11 why I think the AILA case had to stay where it did. However,
12 even if we were to equate 701 to FOIA, where there was this
13 emphasis on documents, as I said, AILA specifically allows
14 redaction of the nine specific categories.
15 I would submit to you, sir, that that is akin almost
16 exactly to what we do when it comes to redacting out from a
17 particular document that which is not material to the
18 preparation of the defense. It is within our province, it is
19 stated as within 701, and that's, I would submit, basic
20 discovery law.
21 In our context, portions of the documents not
22 material are the same as if they were falling within those
23 nine exceptions in FOIA. And again I must emphasize FOIA is

1 way more expansive than criminal discovery in a criminal case,
2 especially this one.
3 So, Your Honor, to sum it up, I believe AILA, the
4 AILA case supports our position, the government's position of
5 what it's been doing and what we've argued to you on two
6 separate occasions. I believe it supports us in two different
7 ways.
8 First, the strict statutory language of FOIA that I
9 read to you in painful detail shows, by comparison, that 701
10 gives far more discretion to the government to provide the
11 types of information it deems; and two, it supports the
12 government making redactions within a document on its own and
13 without judicial involvement.
14 Now, Mr. -- counsel for Mr. Ali made references to
15 say there is no basis for the government to make piecemeal
16 redactions within it. That's not true, sir, because within
17 the language of AILA itself, it says as follows -- and let me
18 go back to it, Judge, and give you this bit of information.
19 One of the things the agency did in AILA that got the
20 court's attention was this: In disclosing records to the
21 organization as to different judges employed by the Department
22 of Justice for immigration purposes, the agency went to the
23 trouble or the effort of redacting out the names of all of the

1 judges that it was returning information and records about.
2 Now, it did that on the basis that one of the
3 exemptions available to the agency had to do with personal
4 information to such a point that it would become an invasion
5 of privacy.
6 The court looking at that said as follows: "That is
7 not to say necessarily that the agency could not ultimately
8 support redacting identifying information in all cases if its
9 justification for doing so were framed in a more targeted
10 manner. If the agency continues to claim that the exemption
11 warrants withholding the names of all immigration judges, it
12 should make a more particularized showing for defined
13 subgroups of judges or for individual judges. The court, upon
14 conducting the balancing, might determine that the balance
15 does in fact tip toward withholding in some, many or all
16 instances the names of every single judge."
17 Now, talking about this as to all of our discovery is
18 difficult, because it's such a wide range. And I'm not going
19 back into the world of DIMS, because you've heard an awful lot
20 about that, and that seems to be something of an animal of its
21 own and also seems to be something of a work in progress.
22 But in many other instances, we have to make choices
23 about things. And counsel brought up the issue of 302s, and

1 we do have to make decisions in those regards. And as I
2 explained to you in a previous argument, there will be
3 occasions where an FBI 302 will have numerous interviews of
4 numerous persons, some of which are either part of the
5 government's case or material to the preparation of the
6 defense and that we will turn over, but on the other hand, it
7 may have names of people that fall into neither one of those
8 categories. And in those cases, 701 gives us this opportunity
9 and obligation to redact out their names. AILA does not
10 foreclose us from doing that, even in the world of FOIA.
11 So I'd submit, Judge, that our position as to
12 redaction has been proper all along. And with that, Judge,
13 subject to your questions.
14 MJ [COL POHL]: Yeah, Mr. Ryan, let me -- and I'm sure
15 Mr. Connell is going to have an answer to this, too, in a
16 second, but it appears to be -- there seems to be a different
17 focus here from both sides. Mr. Connell's motion talks about
18 these redactions must comply with 506.
19 TC [MR. RYAN]: Yes, sir.
20 MJ [COL POHL]: Okay. Your whole argument is basically
21 this is simply a 701 issue and 506 is not implicated. Is that
22 a fair summary of your argument?
23 TC [MR. RYAN]: It is, Judge. 701 is sort of the first

1 step on the journey. I'm not saying that 506 is not a tool
2 that the government can and will ultimately use.
3 MJ [COL POHL]: But you're not invoking 506 or for that
4 matter, or even 505 for these redactions?
5 TC [MR. RYAN]: Right.
6 MJ [COL POHL]: You're saying they're not material to the
7 preparation of the defense under 701. That's the government's
8 position.
9 TC [MR. RYAN]: That's correct. That's the first step
10 that I'm on right now.
11 Now, 506, the way I read it is similar to 505. And
12 that happens when we get to a point of, say, something I have
13 determined or we have determined is material to the
14 preparation of the defense or is part of the government's
15 case, not classified, so we're in 506 world, but yet it
16 implicates those public interests that are identified in 506.
17 So in this case, we would go to Your Honor and say
18 we've got this that we deem discoverable, but we have got the
19 countervailing interests of not wanting to disclose it for
20 whatever the reason might be, some public interest. So
21 therefore, Judge, give us this relief. Give us this ability
22 to make a substitution or a stipulation or something else in
23 that regard.

1 MJ [COL POHL]: Thank you, Mr. Ryan.
2 TC [MR. RYAN]: Thank you, Judge.
3 MJ [COL POHL]: Mr. Connell.
4 LDC [MR. CONNELL]: All right. First, on the FOUO issue,
5 if we may have the feed from Table 4, please.
6 MJ [COL POHL]: You're going to dash Mr. Ryan's hope of
7 the explanation for it.
8 LDC [MR. CONNELL]: Yes, sir.
9 May we have permission to display to the gallery?
10 MJ [COL POHL]: Sure.
11 LDC [MR. CONNELL]: Okay. There we go. I'm displaying on
12 the screen slide 2 to AE 161I. This slide was also marked
13 FOUO. This slide has the word "Cross-Reference" and then the
14 name of two motions on it. It is difficult to understand how
15 this slide might be FOUO.
16 But even with respect to the slide that Mr. -- that
17 the government identified, if I may have access to the
18 document camera, please? Your Honor, I'm going to show you
19 what is already in the record as AE 161F, page 61 -- page 6,
20 excuse me, of AE 161F.
21 So this is a medical record obscured on the left for
22 medical privacy, showing the arrows and showing the redactions
23 by the government. This was already marked -- this was

1 already unclassified and has already been released. This is
2 the version that we used in July for 161F.
3 So let me just show you something that will look a
4 little familiar. May we have the feed from Table 4 again,
5 please. And, Petty Officer, if we could have slide 8. Slide
6 8, please. It's the same material that we used as an example
7 once before, and previously it was not -- the slide did not
8 come back marked UNCLASSIFIED. We were able to release it and
9 increase to some extent the transparency of the military
10 commission, but at this point, we are unable to do so.
11 So moving on to the substance -- and you can cut the
12 feed from Table 4.
13 MJ [COL POHL]: Just to be clear, if we need a
14 clarification, Mr. Ryan, your suspense was the 21st of
15 October.
16 TC [MR. RYAN]: Yes, sir.
17 LDC [MR. CONNELL]: Understood, sir. Thank you.
18 The government's argument, somewhat remarkable, is
19 that Freedom of Information Act provides more rights of access
20 to information than the Military Commission Rules of Evidence
21 do. I cannot agree, although I do have my criticisms of the
22 M.C.R.E.s.
23 And, in fact, for amusement, one could look up

1 Connell v. Kersey when I sued a prosecutor trying to get some
2 information under the Freedom of Information Act that I could
3 not get through Virginia's discovery process. My attempt was
4 roundly rejected by the Supreme Court of Virginia.
5 But the idea that there are greater discovery rights
6 and greater equities and information in the general public
7 than in a capital defendant cannot withstand much scrutiny.
8 Clearly the rights of access to information by criminal
9 defendants generally, and capital defendants specifically, are
10 substantially greater in their strength than the rights of the
11 public to information about the government generally.
12 But more to the actual core, which is that the core
13 of the argument from the government was that, yes, that under
14 the Freedom of Information Act, an agency can withhold
15 information under redactions for one of the nine FOIA
16 exemptions. Exemption number one, for example, is classified
17 information. But that is then -- and that's just an order,
18 because it's then subjected to judicial review.
19 The Rule 506 and 701 set up a different order of
20 events, which is that books, papers, et cetera, photographs,
21 documents, or portions thereof -- portions of a book, for
22 example, can be produced to the defense, but if there need to
23 be withholdings from that, then those withholding, that

1 decision is made for unclassified information by the military
2 commission.
3 The example ----
4 MJ [COL POHL]: Where does it say that? I mean, what
5 you're saying is -- then is that anything the government
6 feels -- correct me if I'm wrong here -- 701 says they've got
7 to give you stuff that's material to the preparation of the
8 defense.
9 LDC [MR. CONNELL]: Yes.
10 MJ [COL POHL]: Okay. If they determine that it's not
11 material to the preparation of the defense, do I have to
12 review it?
13 LDC [MR. CONNELL]: Is it otherwise discoverable?
14 MJ [COL POHL]: Well, if it's not material to the
15 preparation of the defense, the answer would be no, wouldn't
16 it?
17 LDC [MR. CONNELL]: Well, no, because ----
18 MJ [COL POHL]: What I'm saying is you got a little
19 do-loop here. If they say -- you say -- they say it's not
20 material to the preparation of the defense, therefore would it
21 be discoverable. Is it discoverable if it's not material to
22 the preparation of the defense?
23 LDC [MR. CONNELL]: If it is -- the problem is the

1 framework. If the document is discoverable, then, yes, it's
2 discoverable. Let me give you an example. Can we have the
3 document camera again?
4 So I'm showing you what's page 7 from what's already
5 in the record as AE 161F. This is a -- a psych tech progress
6 note medical record from 12 October of 2006. Clearly a very
7 important time period shortly after the transfer of
8 Mr. al Baluchi.
9 And psychological records often -- use under the
10 DSM-IV use axes for their diagnoses. And the diagnoses are
11 really important, obviously. And you can see there on the
12 document, Axis I, Axis II, Axis III, and then the government
13 having decided that this page of material is otherwise
14 discoverable information makes unilaterally unreviewably -- in
15 their view unreviewably, makes a decision that part of the
16 Axis III diagnosis of Mr. al Baluchi cannot -- is not material
17 to the preparation of the defense. That cannot be the rule.
18 The rule that makes sense is that if the page -- if
19 the information on this page, if this is a discoverable page,
20 then -- and they didn't produce, for example, medical records
21 about some other detainee to me, but this is about
22 Mr. al Baluchi. If they make a determination that this page
23 is discoverable, then if they want to withhold -- delete,

1 withhold or substitute information from it, they need to come
2 to the military commission.
3 Does that answer the question? Because that is the
4 escape from the loop. The escape from the loop is we are --
5 in 161 we are only talking about documents that the government
6 has already decided are discoverable.
7 MJ [COL POHL]: Put up -- I think it's page 8 of your
8 proceeding, the one with the totally blacked out page.
9 LDC [MR. CONNELL]: May we have the feed from Table 4,
10 please?
11 MJ [COL POHL]: Do you know what I'm referring to?
12 LDC [MR. CONNELL]: Yes, sir.
13 MJ [COL POHL]: No. It's the one with the blacked-out
14 page.
15 LDC [MR. CONNELL]: Could we have slide -- slide 6,
16 please, Petty Officer. Slide 6, please. Oh, I'm sorry.
17 I can show it to you on the document camera, if we
18 can have the document camera.
19 MJ [COL POHL]: Either way. Okay.
20 The government provides this to you in discovery,
21 these two pieces of paper -- I'm assuming there are two pieces
22 of paper here, but let's, for the sake of my hypothetical I
23 want them to be two, they are two pieces of paper ----

1 LDC [MR. CONNELL]: Which they are.
2 MJ [COL POHL]: ---- and the paper to the left facing the
3 document has the writing on it responsive.
4 LDC [MR. CONNELL]: Yes.
5 MJ [COL POHL]: The paper to the right is -- for some
6 reason they give you a totally redacted piece of paper, and
7 let's say it has nothing to do with your client or this case.
8 Okay. But now you have a redacted piece of paper. Do I
9 review that, then, now?
10 LDC [MR. CONNELL]: Well, the significance is that piece
11 of paper was attached -- it was part of a larger report.
12 That's why they gave it to us.
13 MJ [COL POHL]: No, what I'm saying is, do I review
14 everything they don't give you?
15 LDC [MR. CONNELL]: If it is part of a report that is
16 material to the preparation of the defense, which is what this
17 page is, all right, probably it's a drawing, let's say, that
18 was attached to a 302. The FBI agent asked something, hey,
19 can you draw something. I don't know what it is, but that's
20 the sort of thing that I would expect. Because otherwise, why
21 would they provide it to me at all.
22 Attached to a report, if they want to give one part
23 of the report and not the other part of the report, yes, you

1 review that.
2 MJ [COL POHL]: So any piece of paper that they give you
3 with a redaction has to go through the judicial review? Isn't
4 that really what you're asking here?
5 LDC [MR. CONNELL]: Yes. Absolutely, that's true, sir.
6 MJ [COL POHL]: Even if the redacted material -- and so
7 the government says this redacted piece of material is not
8 material to the preparation of the defense. Say it's the 302
9 example that Mr. Ryan said earlier. I'm not -- I'm just
10 asking questions here. Understand I'm not taking a
11 position ----
12 LDC [MR. CONNELL]: I hear you, sir.
13 MJ [COL POHL]: ---- yet.
14 That if they have a 302, and half of it deals with
15 something relevant to this case and the other half deals with
16 a totally irrelevant case and they redact that out, and
17 therefore they say this isn't material to the preparation of
18 the defense, I have to look at that anyway?
19 LDC [MR. CONNELL]: This must be like the sixth time that
20 we've used that example.
21 MJ [COL POHL]: I know.
22 LDC [MR. CONNELL]: But it is not realistic ----
23 MJ [COL POHL]: But you keep wanting to argue it, so

1 that's why we ----
2 LDC [MR. CONNELL]: Well, it's because I want the
3 discovery, right.
4 MJ [COL POHL]: Yeah.
5 LDC [MR. CONNELL]: So the -- it is not a realistic
6 example in that there is no 302 that addresses two different
7 cases. It just doesn't happen. There is no medical record
8 that has both Mr. al Baluchi and some other detainee on it.
9 Someone has already looked at this and decided that
10 this is a report about Mr. al Baluchi. Someone has already
11 looked at it and said this is a 302 of materiality to the
12 preparation of the defense.
13 The idea that the government then wants to withhold,
14 for example, their file numbers. Those file numbers are
15 critically important to one element of our defense, and the
16 government redacts every file number off every 302. Why?
17 Because they don't want us to be able to do the analysis of
18 matching up the first three digits of a file number with the
19 type of investigation that it is. I understand why they don't
20 want us to be able to do that.
21 But if they want to be able to withhold that sort of
22 information, they should have to submit it to the military
23 commission so that the military commission can say, Counsel

1 for the Defense, why are the file numbers important? Why is a
2 199 file different from other kinds of files? So then we can
3 explain to you, in a theory of defense or otherwise, what the
4 materiality is.
5 The problem with the government's theory is that it
6 makes -- their redactions are never reviewed judicially
7 because you don't have any more access to what's underneath
8 those redactions than I do. And so that's the problem with
9 the government's theory.
10 I know the problem with my theory, Judge. I know the
11 problem with my theory, that it's a lot of work for the
12 military commission on top of a lot of work that the military
13 commission already has to do. But there's a solution to it,
14 which is, if the document is material, just provide it to the
15 defense.
16 The constant attempt to delay and degrade the quality
17 of the discovery that the defense receives has its cost, and
18 one of those costs is that we have to do line-by-line
19 litigation of redactions when you, sir, don't have any access
20 to what's underneath the redaction.
21 A little while ago, we had a debate over whether the
22 columns covered up names or not, and it was only on, you know,
23 the fourth round of argument that it came out that in fact,

1 well, yes, those are the names. You didn't know. I didn't
2 know. And the reason why none of us knew and the military
3 commission especially didn't know is the government didn't
4 submit those redactions for judicial review.
5 Even in a FOIA case, which was the example that the
6 government was trying to make, even in a FOIA case, the
7 military -- the federal court can order and frequently does
8 order a list of -- the actual documents which are at issue,
9 and if they don't, then the government has to produce what's
10 called a Vaughn index, V-A-U-G-H-N. A Vaughn index is that
11 the government has to go through and say here are the
12 documents that we're withholding from the Freedom of
13 Information Act production.
14 So there's important judicial review that happens
15 even for members of the public, not in prison, not on trial
16 for their lives. That is a step that is entirely skipped here
17 in the military commission.
18 MJ [COL POHL]: Just a second.
19 LDC [MR. CONNELL]: Yes, sir.
20 MJ [COL POHL]: To trigger the 506 procedure, does not the
21 government have to assert a privilege that disclosure would be
22 detrimental to the public interest?
23 LDC [MR. CONNELL]: Yes, sir. Which is essentially what

1 they're doing. Take the names, for example. They're saying
2 that the interest of the public in not having that name
3 released to defense attorneys outweighs the interest of the
4 defense in using that in their preparation.
5 MJ [COL POHL]: I guess it's just how one approaches it,
6 or they just say it's just not material to the preparation of
7 the defense, and therefore it doesn't trigger 506.
8 LDC [MR. CONNELL]: The ----
9 MJ [COL POHL]: I'm not saying I agree. I'm trying to
10 understand both sides. But that's, as I understand from
11 Mr. Ryan's argument, that 701 has to be met first before you
12 get to 506.
13 LDC [MR. CONNELL]: And what we're -- I don't disagree at
14 all that 701 or Brady or ----
15 MJ [COL POHL]: Well, the discovery.
16 LDC [MR. CONNELL]: Right, the discovery, that there's a
17 basis for discovery that has to be met. That's entirely true.
18 What is happening here, however, is that the
19 government takes -- has taken the example of what if there was
20 a document that had two different cases on it and has parlayed
21 that into denying into -- into either passing along from some
22 other OCA redactions or themselves creating redactions that
23 are -- obviously that information is material to the defense,

1 right?

2 So let's take that as an example, instead of the what

3 if there was one document with two different cases on it.

4 Let's take the example of the Axis III diagnosis for

5 Mr. al Baluchi is actually material to the preparation of the

6 defense. We have a psychiatrist who works with us. He would

7 like know what his predecessors who saw Mr. al Baluchi in

8 October of 2006 thought his diagnoses were.

9 In that situation, under the government's view, we

10 can never know because the military commission never reviews

11 that information. We never get under the redaction. And

12 their determination that three lines of Axis III are not

13 material to the preparation of the defense becomes

14 unreviewable. All right.

15 So how do we avoid that problem? The way that we

16 avoid that problem is the government produces -- does not make

17 unilateral redactions unless it has some reason that it needs

18 to. And if it has a reason that it needs to, it submits the

19 information for 506.

20 So it is not a binary, either the government -- the

21 military commission has to review every single piece of paper

22 which is produced in discovery, or the government has free

23 reign to redact whatever information that it wants.

1 The Secretary of Defense came up with a solution to
2 that problem, which was Rule 506, which interestingly doesn't
3 exist in a federal court but in the military commission.
4 Rule 506 allows the military commission to thread the needle
5 between those two negative outcomes.
6 MJ [COL POHL]: If the government's position on a
7 redaction is that it's not material to the preparation of the
8 defense and therefore 506 is not triggered -- I'm doing a
9 onesie here.
10 LDC [MR. CONNELL]: Sure.
11 MJ [COL POHL]: Your position is that even that decision
12 needs to be reviewed, if it's in a redacted document, as
13 opposed to it -- what they just don't give you to begin with,
14 because, of course, nobody sees that.
15 LDC [MR. CONNELL]: That's right. That is our position.
16 If they just don't give it to us to begin with, nobody sees
17 it, nobody knows there's an issue at all.
18 MJ [COL POHL]: Right.
19 LDC [MR. CONNELL]: Although, if they withhold it on
20 cumulative basis ----
21 MJ [COL POHL]: We'll get ----
22 LDC [MR. CONNELL]: ---- I think we need to ----
23 MJ [COL POHL]: We'll get into that. I'm just simply

1 saying the government -- because there can be two reasons to
2 withhold the information; three, but two for my discussion
3 here. One is does it meet the 701 threshold, material to the
4 preparation of the defense; or alternatively, it may, but
5 it's -- 506 protects it from disclosure.
6 LDC [MR. CONNELL]: Sure.
7 MJ [COL POHL]: Okay. But will the 506 procedure -- I
8 suspect that's where you want them to be. But if they say
9 it's not material to the preparation of the defense, then your
10 position is, if they claim that's the reason -- we have one --
11 one finite -- that example you had, that finite example of the
12 Axis III thing, they're saying this isn't material to the
13 preparation of the defense, and that's their position ----
14 LDC [MR. CONNELL]: Right.
15 MJ [COL POHL]: ---- not a 506 position that should be
16 reviewable.
17 LDC [MR. CONNELL]: It has to be reviewable; otherwise,
18 the government's position is -- the government can just redact
19 whatever information it wants, whether it's actually material
20 or not, and there's never judicial review of it.
21 MJ [COL POHL]: But their position -- but I'm saying if
22 their claimed position is it's not material to the preparation
23 of the defense, then that's still challengeable under

1 your ----
2 LDC [MR. CONNELL]: I think does it have to be reviewed by
3 the military commission ----
4 MJ [COL POHL]: Well, what I'm saying is there's a whole
5 bunch of redactions in these documents. I'm kind of
6 taking ----
7 LDC [MR. CONNELL]: Tell me ----
8 MJ [COL POHL]: If I'm misstating Mr. Ryan, I'm sure you
9 will correct me. The government's position is these
10 redactions are not material because they don't meet the
11 material to the preparation of the defense threshold, not
12 because we're claiming a privilege under 506.
13 LDC [MR. CONNELL]: Well, they said that. That's true.
14 MJ [COL POHL]: Okay. So that's the reason for all of the
15 redactions and the 302s or ----
16 LDC [MR. CONNELL]: Sure. Let's ----
17 MJ [COL POHL]: If they claim 506, that would require a
18 different analysis.
19 LDC [MR. CONNELL]: Yes.
20 MJ [COL POHL]: But you're saying despite their claim of
21 that, it still should be reviewable because at least some of
22 these examples are material -- you're disputing whether or not
23 it's material to the preparation of the defense?

1 LDC [MR. CONNELL]: Right. And I don't ask you to take my
2 opinion for whether it's material to the preparation of the
3 defense any more than you can take the prosecution's opinion.
4 There has to be a judicial review mechanism, and that judicial
5 review mechanism is that when they want to withhold
6 information from an otherwise discoverable document, they
7 submit it for 506 substitutions, redactions, deletions or
8 withholdings.
9 MJ [COL POHL]: Okay. But see, you immediately jumped to
10 the 506 analysis. What I'm saying is their position is that
11 it's not material to the preparation of the defense.
12 LDC [MR. CONNELL]: Right.
13 MJ [COL POHL]: You say it is.
14 LDC [MR. CONNELL]: Right.
15 MJ [COL POHL]: So then you give it to me. The threshold
16 inquiry isn't whether it's a 506 material. The threshold
17 inquiry is whether it's material to the preparation of the
18 defense, right?
19 LDC [MR. CONNELL]: Right. But if I give it to you, if I
20 bring you these pages which I -- you don't have anything to
21 compare. You never get a chop on it. You don't know what's
22 underneath that black column any more than I do, if we do it
23 that way.

1 MJ [COL POHL]: No, but you want me to look under the
2 black column to see if it's material to the preparation of the
3 defense?
4 LDC [MR. CONNELL]: Exactly.
5 MJ [COL POHL]: But then you get to the 506 analysis.
6 LDC [MR. CONNELL]: Exactly.
7 MJ [COL POHL]: I thought you kind of skipped that
8 earlier, that I would look at it and go straight to the 506
9 analysis.
10 LDC [MR. CONNELL]: I want you to be the one that makes
11 the determination.
12 MJ [COL POHL]: Of whether they meet 701, and if it does,
13 then we go to the 506.
14 LDC [MR. CONNELL]: Only for documents where the
15 government is trying to withhold some piece of information off
16 the document, yes. Not for every document in the whole
17 possession of the United States Government.
18 Because the government's position provides no way for
19 you to ever know whether that -- those three lines of
20 redaction on that medical record are material to the
21 preparation of the defense. They just say trust me.
22 MJ [COL POHL]: Okay.
23 LDC [MR. CONNELL]: Thank you.

1 MJ [COL POHL]: Thank you.
2 Before you start, Mr. Ryan, does any other defense
3 counsel want to be heard on this, because Mr. Ryan will have
4 the last word. Apparently not.
5 Mr. Ryan.
6 TC [MR. RYAN]: Judge, the last phrase used by counsel was
7 "otherwise discoverable document," which is his attempt to put
8 this in the world of AILA and FOIA. Otherwise discoverable
9 document is a misnomer. It's not the document.
10 This is the point I was trying to make. In FOIA,
11 it's about records. In discovery of a criminal case, it's not
12 about a particular document, it's about the information that
13 counts within it.
14 701 says, among other things, portions, it gives that
15 ability, it gives that obligation, that responsibility where
16 it has always been, to the prosecution, to make the first call
17 on what goes over to the defense in the course of discovery.
18 This is a job that prosecutors have done as long as there have
19 been prosecutors.
20 To suggest that now that's no longer our job, that's
21 no longer something we can be trusted with, and, Judge, you
22 have to get into wading through all of these records from
23 every agency that investigated September 11th puts the whole

1 world on its head when it comes to the practice of criminal
2 law in this case.
3 MJ [COL POHL]: Just so I'm clear, Mr. Ryan ----
4 TC [MR. RYAN]: Yes, sir.
5 MJ [COL POHL]: ---- is that if you had a redaction that
6 was material to the preparation of the defense but you believe
7 was 506 privileged, you would submit that through the 506
8 process.
9 TC [MR. RYAN]: Yes, sir. I go to you.
10 MJ [COL POHL]: Okay. So therefore any 302 redaction,
11 just for want of -- that has not come to me for a 506 issue or
12 whatever, the only -- the only redactions that you believe
13 it's not material to the preparation of the defense.
14 TC [MR. RYAN]: Based on the materiality, Your Honor. I
15 can't think of another reason at this moment. But as far as
16 anything that we determine that's discoverable, that's part of
17 the materiality for preparation of the defense, of course,
18 then we have to go to you one way or another.
19 I've done it in other circumstances, too, and I'll
20 give you a brief example. When we have informants that
21 testify that we have to go into their long and interesting
22 backgrounds as to things they've done, and we make a -- you
23 know, the first ten things clearly have to go over to the

1 defense. The next ten are -- we're not quite so sure.
2 They're pretty darn bad but they're not horribly bad.
3 So in many situations we've gone to judges and said,
4 you know, you make the call as to whether this is Giglio,
5 Judge, because we're just simply not sure. I don't think it's
6 going to happen in this case, but it's an example that I give
7 that prosecutors do that. We don't want to be the last one
8 making a decision on a very, very tight call in a situation
9 where it would amount to Brady or materiality situations.
10 Judge, the last -- I have to make this point. This
11 document that was put on the overhead with the pages, and the
12 first one is less redacted and the second one is completely
13 redacted, if you look at it this concerns an event in
14 Mr. Binalshibh's life where he attended a wedding and spent
15 most of it pleading for jihad. It's -- I have no idea what's
16 behind the blackened part because I haven't seen this document
17 anytime recently. But knowing FBI and knowing the way
18 interviews go, it's entirely possible that the blacked-out
19 page said something like, and one of the people from that
20 wedding who heard this ran to his local police officer and
21 said these people are dangerous.
22 Now, that call that -- this is not discoverable.
23 It's not somebody we're putting on the stand. It's not Brady

1 because it's somebody who's saying their guilty. That call is
2 what prosecutors do. We've done it, as I said, as long as
3 there have been prosecutors. We are entitled to make that
4 decision without coming to Your Honor first with a large pile
5 of other documents as well.
6 That's all I have, sir.
7 MJ [COL POHL]: Just to be clear, Mr. Ryan, these
8 decisions on these redactions are -- you may have consultation
9 with the other stakeholders, but the ultimate decisions on
10 these redactions about not being material to the preparation
11 of the defense is being made by the prosecution.
12 TC [MR. RYAN]: This goes back before, Judge, that the
13 situation of -- you know, it's such a wide variety.
14 MJ [COL POHL]: Right.
15 TC [MR. RYAN]: For example, the DIMS reports in certain
16 situations ----
17 MJ [COL POHL]: Got it.
18 TC [MR. RYAN]: ---- there were calls being made as to
19 force protection and so on. There was consultation with the
20 prosecution and sometimes disagreement with the prosecution or
21 at least discussion back and forth.
22 But in many cases where it's items of, say, the
23 investigation getting closer and closer to the accused

1 themselves, then those are the kinds of things that the
2 prosecutors are always involved in. Yes, sir.
3 MJ [COL POHL]: Okay. But I'm saying is you're saying the
4 redactions are because they don't meet the 701 materiality
5 standard.
6 TC [MR. RYAN]: Right.
7 MJ [COL POHL]: And I'm paraphrasing what it's saying.
8 And my only question is: Is that decision being at
9 least -- is that being made by the -- government attorneys or
10 is that being made by somebody else?
11 TC [MR. RYAN]: The only way I'm couching it, Judge, I'm
12 not trying to avoid it, is in blanket situations -- back to
13 that word. But, for example, now, to the DIMS, where it's --
14 we say all ----
15 MJ [COL POHL]: Right.
16 TC [MR. RYAN]: ---- guard identities can be redacted,
17 it's not that we're reviewing them one by one.
18 MJ [COL POHL]: But whether it's a category or individual
19 ones, the prosecution is making that decision.
20 TC [MR. RYAN]: Yes, sir.
21 MJ [COL POHL]: And now the DIMS categories may not be --
22 the identifying data may be a 505/506 issue ----
23 TC [MR. RYAN]: Yes, sir.

1 MJ [COL POHL]: ---- as opposed to what you're talking
2 about here.
3 But what I'm saying is you're saying that the
4 prosecution is involved with or blesses off or decides that
5 the redactions are not material to the preparation of the
6 defense.
7 TC [MR. RYAN]: Yes, sir.
8 MJ [COL POHL]: Okay. Thank you. Given the time and what
9 I concede will perhaps be a long argument on the other two
10 motions, we'll stop for today.
11 But just kind of the way ahead, tomorrow we will
12 begin with 447 and 449, I believe was the order of march. Is
13 that correct, Mr. Connell?
14 LDC [MR. CONNELL]: Yes, sir.
15 MJ [COL POHL]: I think those are both your motions.
16 Then we want to go into the discovery, the motions to
17 compel discovery. And I got an e-mail today which I'm looking
18 for, which I will -- okay. Exactly. I think it was sent out
19 by Mr. Trivett at 1156 yesterday.
20 And after input from Mr. Connell, if you look at
21 the -- and I think it went to everybody -- the motion to
22 compel paragraph, one, two, three, it would be 284, 328, 404,
23 330, 419, 336, 409, 432, 255, although 255 may require a

505(h) hearing ----

LDC [MR. CONNELL]: Sir, could I help you out?

MJ [COL POHL]: Sure.

LDC [MR. CONNELL]: The -- distilling what needs 505 out of that and what we did today, I think the places that -- there's not really any difference between the government and us on this, the order -- an order of march might be that I could propose 284, then 409 -- no, I'm sorry, 284, then 330 and 419, which are essentially the same issue, and then 409, and then 432. There are two motions that require 505(h) hearings. Those are 255, and 328 and 404 are essentially the same argument, and there's a 404 -- a 505 notice in 404.

The government listed two others, which -- 335 and 434. I don't know if those are appropriate for argument or not. In both of those, the last pleading other than our objection is an ex parte protective order pleading from the government. So what I assumed was there was discovery going through the 505 process with the military commission.

So I think my proposal is 284, 330/419.

MJ [COL POHL]: Just a second. 330/419?

LDC [MR. CONNELL]: Yes, those are essentially the same issue.

MJ [COL POHL]: Got it.

1 LDC [MR. CONNELL]: Then 409 ----
2 MJ [COL POHL]: Okay.
3 LDC [MR. CONNELL]: ---- 432. And then if the government
4 thinks appropriate, 335 and 434, but I think those are in 505
5 process. And then we'll need 505(h) hearings on 255 and
6 328/404.
7 MJ [COL POHL]: Okay. Given how much we've accomplished,
8 which we have, think about how we can gainfully employ the
9 rest of the week. If it makes sense to do some of these
10 505(h) hearings on Friday, that may be the way to go. If
11 there's -- I mean, I'm looking to see what we have now.
12 Today's only Tuesday. I certainly would like to get as much
13 done as possible, but that's if people are prepared to do it.
14 So tomorrow we'll do the 447, 449, 152JJJ we'll come
15 back to.
16 LDC [MR. HARRINGTON]: Is that tomorrow, Judge? When do
17 you want to do it?
18 MJ [COL POHL]: Yeah. I'd like to do it tomorrow. Are
19 you prepared tomorrow, do you think, on it?
20 LDC [MR. HARRINGTON]: Yes.
21 MJ [COL POHL]: That's kind of the way we'll go ahead.
22 Mr. Harrington, I don't want to cause issues here or
23 not. Is there anything else you would like me to do now, or

1 are we good to go?
2 LDC [MR. HARRINGTON]: Judge, obviously we had a situation
3 this morning and during the morning hours. And then during
4 the lunchtime, we've had some conversations, and obviously
5 went through the afternoon session without a problem.
6 But I think probably the best way for me to address
7 it is, rather than going into it again today and you're saying
8 to me we can't address it this way, is I think it all rolls
9 into the argument on 152JJJ tomorrow anyways. It all fits
10 into that argument.
11 MJ [COL POHL]: Just understand on the position of
12 presence tomorrow without an acknowledgement of understanding,
13 then he will have to be here.
14 LDC [MR. HARRINGTON]: He understands that, Judge, and he
15 came this morning and he's ----
16 MJ [COL POHL]: I know, and he has been fine this
17 afternoon. I just didn't know whether he wanted to -- and,
18 again, I'm not going to cause an issue. If we wanted to go
19 over it again ----
20 LDC [MR. HARRINGTON]: He doesn't want to do a waiver,
21 Judge.
22 MJ [COL POHL]: That's the only question I had.
23 LDC [MR. NEVIN]: Judge, could I ask you ----

1 MJ [COL POHL]: Yes, Mr. Nevin.
2 LDC [MR. NEVIN]: May we stay in the courtroom until 1700?
3 MJ [COL POHL]: Yeah, until 1700, and then take the
4 detainees back.
5 Commission is recessed until tomorrow at 0900.
6 **[The R.M.C. 803 session recessed at 1605, 11 October 2016.]**
7 **[END OF PAGE]**
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