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1 [The R.M.C. 803 session was called to order at 1333,
2 23 February 2016.]

3 MJ [COL POHL]: The commission is called to order.

4 I notice that Mr. Mohammad has joined us for the
5 afternoon session. Any other changes? Trial Counsel?

6 CP [BG MARTINS]: No, Your Honor.

7 MJ [COL POHL]: Defense?

8 LDC [MS. BORMANN]: No.

9 MJ [COL POHL]: Apparently not.

10 Ms. Bormann.

11 LDC [MS. BORMANN]: Thank you. Thanks for your patience.
12 The difficulty was in printing off of the mc.mil website, they
13 are so light that the paralegals tried so hard to make it
14 darker so the scanning -- and we failed miserably, but I think
15 with Mr. Chalmers' assistance, we were able to fix the
16 problem.

17 Judge, as I sat here listening today and the other
18 day, I think it was last Thursday in the open session, I was
19 confused, frankly. And then at the end, just recently, when
20 you were going through a colloquy with General Martins, you
21 were trying to figure out what their position and you were
22 asking, "Well, so under this circumstance, what test should I
23 apply? What's your position on this?" And I still never

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1 really got the sense that there was a direct answer there.

2 So I would like to answer you directly. You have a
3 role to play in all motions to compel discovery, and it
4 doesn't matter whether they are classified or unclassified.
5 The tests that you use to determine what is producible under a
6 motion to compel discovery does vary, and that varies on
7 whether or not we're talking about classified discovery or
8 unclassified.

9 Now, I want to point out here that you have not
10 required the government to go through each redaction in AE 112
11 and state with specificity what argument they are relying upon
12 to bar production of that particular -- I think the word under
13 505 is "deletion" instead of "redaction." So when I am
14 talking about a redaction, we can substitute the term
15 "deletion." They are exactly the same term. They mean
16 exactly the same thing. And until you make General Martins
17 answer with some specificity under which argument they intend
18 to go, you can't make a decision, and I think that's probably
19 purposeful.

20 Now, here I want to go through what the procedure was
21 that was followed so that you understand why I say to you that
22 you have a role in every single motion to compel discovery
23 filed before the court. Here what happened was the defense

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1 came upon a series of documents released under FOIA. So there
2 is an entire set of laws that apply to what FOIA
3 considerations should be made when a judge determines or when
4 a FOIA clerk determines what should be released.

5 Here those FOIA documents contain significant
6 redactions. So the defense requested from the government in a
7 discovery request unredacted versions of those FOIA request
8 redacted documents.

9 The government said, "No, we're not going to give
10 them to you. We find they are not relevant."

11 Then the defense, following proper procedure, filed a
12 motion to compel production of those deletions. The
13 government, in its pleadings, has never specified what its
14 basis was for each deletion.

15 Then we have a hearing on it. We have had actually
16 several hearings on it, and as Mr. Connell points out, the
17 government has changed its position on numerous occasions.

18 Today the government tells you you don't get to know
19 what's behind the deletions; and that can't be the way the law
20 works, for several reasons. There has to be judicial review
21 of the discovery process. Yes, the government, in determining
22 what to produce initially, has a cut at everything. If
23 something is unclassified, they have to apply the standard of

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1 materiality and determine whether it's material to the
2 preparation of the defense.

3 If the material is classified, they have to determine
4 if the government wishes to invoke national security privilege
5 or some other privilege, and then make a determination whether
6 or not they believe it satisfies Yunis or, in some cases,
7 Brady material.

8 But the inquiry doesn't stop there. They don't get
9 the final cut. You get the final cut. That's why we have
10 motions to compel. And in AE 112 what happened was after they
11 made their initial cuts, we looked at the material that they
12 gave to us, and maybe in the biggest coincidence in the
13 history of complex litigation, the FOIA-redacted version
14 matched, amazingly, the one redacted for purposes of criminal
15 purposes. But be that as it may, that's what the government
16 said satisfied its obligations.

17 That's not the end of the inquiry. Now you get your
18 cut. And in order for you to get your cut, you, under the
19 rules, have to be provided with the unredacted document. You
20 have to determine if the government is correct. We looked at
21 it and we said their redactions don't make any sense. If you
22 look at AE 112 and you look at 112 -- I think it's K is the
23 one that Mr. Connell was referring to, it makes absolutely no

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1 sense that this particular redaction, which talks about how
2 our clients were treated in confinement, would be redacted as
3 not relevant. That doesn't make any sense.

4 So we go to the judge and we go to the court and we
5 say, "Judge, court, do your job. Look at this and determine
6 if the government is accurate. Tell us whether or not it fits
7 into one of the -- either it's unclassified and the government
8 is right, it's not material to the preparation of the defense,
9 or it is classified and it fits into some other exception."
10 In order for you to do that, you have to have the original
11 document.

12 Now, common sense also applies here, and you have to
13 have the original document not only so you can do your job,
14 but so that appellate courts can do theirs. If you don't
15 order the United States Government, sitting on my right in
16 this room, to provide you the underlying unredacted documents,
17 they will not be preserved for purposes of appellate review.
18 So that when this case -- or if this case reaches appellate
19 review, appellate judges have no way of determining whether or
20 not Brady was violated, whether or not their proposed
21 redactions satisfied Yunis or whether or not those proposed
22 redactions, if they were unclassified, violated the tenets
23 that require them to be helpful, material to the preparation

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1 of the defense.

2 That is why you have to do the right thing here and
3 perform your role. The government performed its, so it says;
4 now you have to perform yours.

5 We know this works in the situation not just because
6 of appellate cases, though. We know that you perform this
7 role because you have already done it in this case. I want to
8 draw your attention to AE 167, decided oh so long ago, and if
9 we can bring up just the camera up here, I have cleared --
10 these are publicly released documents filed on the mc.mil
11 website. The AE 167 was filed by Mr. Hawsawi's counsel back
12 in June of 2013. It was a defense motion to compel discovery.

13 And just to bring you back a little bit to remind you
14 what it was about, in that instance the defense had requested
15 or had received, through FOIA, some redacted documents. They
16 were documents provided, written by the CIA and other law
17 enforcement agencies, that had significant redactions in them.

18 One of the reports, again referring to -- this is
19 part of AE 167, Attachment G, this is also on the website, it
20 has been shown to Mr. Chalmers, one of the documents at issue
21 in AE 167 was titled "11 September: The Plot and the
22 Plotters." That document had been requested in an unredacted
23 form by counsel for Mr. Hawsawi, and that request for

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1 production in unredacted form had been denied by the
2 prosecution. Unsurprisingly, way back then in 2013, the
3 prosecution claimed that material that had been redacted from
4 the FOIA-released document was not relevant to the defense,
5 and therefore they were not going to produce it.

6 So when counsel for Mr. Hawsawi received their denial
7 of requests for unredacted copies of this document and three
8 others, counsel for Mr. Hawsawi filed a motion to compel. He
9 was compelling, in part, things like the following, and this
10 is part of AE 167, Attachment G, the material entitled "11
11 September: The Plot and the Plotters," the very same thing
12 the government claimed wasn't relevant in a case involving
13 September 11: The Plot and the Plotters. And unlike our
14 case, where the redactions are black-boxed, in the FOIA-issued
15 September 11: Plot and Plotters, they were white-boxed. So
16 on the right side of this document, that entire blank spot is
17 a redaction.

18 We were seeking in AE 167, which all defendants
19 joined, unredacted versions of this and three other documents.
20 So what happened in AE 167 was you ordered the government to
21 provide you with unredacted copies of the documents at issue
22 in AE 167, and you reviewed them; and after reviewing them,
23 you determined that the government's proposed redactions were

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1 not proper and you ordered that those documents be produced.

2 So we know that there is a system in place for
3 exactly this issue because we've followed it. The documents
4 at issue were just tendered to the defense last Friday, the
5 documents in AE 167. And I don't find it coincidental that
6 the government has now taken a very different position than
7 they did in AE 167, because, say what you will, the
8 prosecution is bright. They've figured out that if they don't
9 want to lose this argument going forward, the only way they
10 can do that with any certainty is to bar you from seeing the
11 material under the white marks and the black marks. In that
12 way they get to avoid any judicial review either from this
13 court or from any future courts.

14 I cannot tell you how strenuously I implore you to
15 not let them take away and usurp your responsibility. I ask
16 you to follow the same procedure you did in AE 167 and follow
17 the law as it's laid out in the rules and the law.

18 Subject to any questions that you might have, I'm
19 done.

20 MJ [COL POHL]: I don't. Thank you, Ms. Bormann.

21 That brings us to 397, if there is need for any more
22 discussion of 397.

23 Before we do that, I just wanted to amend a statement

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1 I said earlier. This deals with the laptop issue. After
2 thinking about it, I thought it would probably be best if
3 there is a written order so there is no confusion.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: So there will be a short written order
6 that's been drafted and I think it's in the process now of
7 being circulated so there is no confusion about what I said.

8 LDC [MR. CONNELL]: I think that's an excellent idea.

9 Your Honor, I had previously incorporated my 397
10 argument as part of what the military commission yesterday
11 described as 397/112, so I don't have anything else to say
12 about 397.

13 MJ [COL POHL]: I didn't know whether we needed to revisit
14 or not.

15 Does any defense counsel wish to be further heard on
16 397?

17 Trial Counsel, I think we probably explored 397,
18 but ----

19 CP [BG MARTINS]: This is the last word.

20 MJ [COL POHL]: This will be the last time.

21 CP [BG MARTINS]: We seek an order that structures the
22 discovery and consolidates. Thank you, Your Honor.

23 MJ [COL POHL]: Got it.

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1 Okay. What I want to do next is 386. And just so I
2 perhaps can make everybody understand what I see here, I see
3 here as the macro Touhy issue, not necessarily the Touhy
4 applicability to the 350 series. You with me on this,
5 Mr. Connell?

6 LDC [MR. CONNELL]: No, because I only briefed the -- all
7 Touhy regulations are not equal and I only briefed the CIA
8 Touhy regulations.

9 MJ [COL POHL]: I am talking about with the CIA, because I
10 believe you gave a 505(g) notice as you want to do a number of
11 things and I think we probably can keep the 386 discussion out
12 of the classified area. If we've got to get into it, we can,
13 but I am looking for does Touhy apply; if it does apply, what
14 notice is required; and if it applies, the notice required,
15 how is notice delivered, and things like that.

16 LDC [MR. CONNELL]: Okay.

17 MJ [COL POHL]: Go ahead.

18 LDC [MR. CONNELL]: So on that 505 question, the 505(g)
19 notice that we gave in 386C has nothing to do with 350.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: All right? Obviously the facts --
22 this question originally arose in 350, but I haven't briefed
23 it as dependent upon 350. I don't think the government has

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1 either.

2 Our -- the classified portion, there is plenty of --
3 like we are going to have to bifurcate it in my opinion.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: There is 80, 90 percent of the
6 argument I can do unclassified which I am happy to do today,
7 and then we can take up the classified portion of it another
8 time.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: I see it essentially as there are
11 three questions that are presented by the 386 series and I
12 would like to take them in an order that makes sense
13 analytically rather than the order in which I filed them.

14 The first question that I see presented by AE 386B
15 is, does the CIA Touhy regulation exceed the congressional
16 delegation of power under the Housekeeping Statute, 5 United
17 States Code 301; that is, is the regulation valid?

18 The second question is, does the CIA Touhy regulation
19 govern the request for -- I originally was thinking, you know,
20 the example is the former CIA interpreter's testimony, but
21 does it govern these military commissions -- this military
22 commission process? That is 386A with a classified addendum
23 in 386C.

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1 The third issue is, does the CIA Touhy regulation,
2 assuming that it is valid and applies to these -- to this
3 military commission when CIA testimony is sought, does it
4 impose an unconstitutionally nonreciprocal burden on the
5 defense? And that's 386 itself.

6 MJ [COL POHL]: You are going to start with 386B?

7 LDC [MR. CONNELL]: Yes, please.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: 386B is, God help us, an
10 administrative law question. The Housekeeping Statute at
11 5 U.S.C. 301 is the authorizing or enabling statute for Touhy
12 regulations. It provides in its entirety, "The head of an
13 executive department or military department may prescribe
14 regulations for the government of his department, the conduct
15 of its employees, the distribution and performance of its
16 business, and the custody, use and preservation of its
17 records, papers, and this section does not authorize
18 withholding the information from the public or limiting the
19 availability of records to the public."

20 Interestingly, the first of those two sentences is
21 one of the oldest laws in the republic, having been passed in
22 1789 to help General Washington organize his administration.

23 The second sentence, however, was added in 1958 by

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1 Congress after government departments started relying on the
2 Housekeeping Statute to deny information to the public,
3 including under Touhy. The question fundamentally on the
4 Housekeeping challenge is whether the regulation fits squarely
5 under the congressional delegation of authority, and there are
6 numerous examples where courts have found that Housekeeping --
7 that Touhy regulations or other kinds of regulations went too
8 far outside the scope of the executive branch. That includes
9 cases involving the Comptroller of the Currency, cases
10 involving the Federal Reserve Bank, cases involving the
11 Department of Interior, and cases involving the Department of
12 the Navy. I've summarized those cases at note 15, page 5 in
13 the brief.

14 The question here is that the Housekeeping Statute
15 says the conduct of its employees but 32 CFR 1905.2(c) defines
16 employee, gives its ordinary definition, which is clearly
17 within the Housekeeping Statute. But 1905.3(a) says that the
18 Touhy regulations for the CIA apply to former employees to the
19 extent provided by applicable nondisclosure agreements.

20 The question then becomes whether the former
21 employees part falls under the -- outside the definition of
22 employee, which is contained within the Housekeeping Statute.

23 Courts have divided on this question. The primary

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1 case finding that the former employees are not authorized or a
2 Touhy regulation governing former employees is not covered
3 under the Housekeeping Statute is Gulf Oil Corporation v.
4 Schlesinger, 465 F.Supp. 913, an Eastern District Pennsylvania
5 case from 1979. It is an old case from a district court. I
6 don't claim that it's authoritative, but there is very little
7 law here that tells us how to assess these Touhy regulations
8 because the CIA Touhy regulations have not been heavily
9 litigated.

10 I suspect that may be because they aren't summoned to
11 testify that often, but essentially our argument is that the
12 Housekeeping Statute does not authorize a regulation by the
13 CIA to extend backwards out of the pool of its employees to
14 former employees.

15 MJ [COL POHL]: Would it prohibit them from doing their
16 current employees?

17 LDC [MR. CONNELL]: No, certainly not. Current employees
18 are 100 percent covered. In fact, the Housekeeping Statute
19 itself specifically says current employees.

20 MJ [COL POHL]: I am just anticipating an issue that may
21 come along in this case.

22 LDC [MR. CONNELL]: Sure. So this motion, 386B, only
23 challenges the CIA Touhy regulation to the extent it extends

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1 to former employees, not to present employees.

2 MJ [COL POHL]: Got it. Do you make a distinguishment
3 between former employees and former contractors?

4 LDC [MR. CONNELL]: No, sir, I don't, because the
5 definition of employee in 15 -- in 1905.2(c) defines the word
6 "employee" to include contractors, and I think to me that
7 seems to be a fair scope of the ----

8 MJ [COL POHL]: Just a current status of whether they have
9 a current employment relationship, whether as a contractor or
10 a GS, or whatever categories they have with the CIA.

11 LDC [MR. CONNELL]: That's right, and that's an important
12 distinction because of the purpose of Touhy regulations and
13 the purpose of the Housekeeping Statute. The purpose of Touhy
14 regulations at large are twofold: The first is sovereign
15 immunity, that the United States cannot be demanding the
16 federal governments to be doing things. That situation
17 doesn't apply here. About 60 or 70 percent of the Touhy cases
18 are situations where someone in state court went to try to sue
19 to enforce a subpoena in federal court and there was a
20 sovereign immunity problem.

21 The other purpose behind the Touhy regulations is to
22 keep the agencies from being dragged into court for matters to
23 which they have no responsibility, and this primarily comes up

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1 in civil cases, because let us say that I'm suing about a
2 certain medication, and if I am suing about the medication,
3 there is somebody at the FDA who knows that medication
4 backwards and forwards, and as the plaintiff in a medication
5 negligence suit I can't just reach out to the FDA and expect
6 the government to provide my experts for me, so it becomes
7 important for the next motion too, but for this one it's quite
8 important too because that consideration doesn't apply with
9 former employees. Former employees are -- if a former
10 employee has to go testify in court, they are not taking up
11 government time, they are not using government resources, they
12 are not diverting from the mission of the agency because that
13 person simply no longer works for the agency. That's why the
14 Housekeeping Statute was passed and that's what the purpose of
15 Touhy regulations is.

16 So unless there are more questions on that, I am
17 happy to move on to the next piece of the 386 series.

18 MJ [COL POHL]: Sure.

19 LDC [MR. CONNELL]: 386A raises the question of does the
20 CIA Touhy regulations, specifically 32 CFR 1905.1, govern the
21 request for in this case the testimony of the former CIA
22 interpreter, but, for that matter, any CIA employee or former
23 employee.

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1 The first issue here is that with respect
2 specifically to the former CIA interpreter, the regulation
3 does not extend to all former employees. The regulation only
4 extends -- excuse me, just one second with the court's
5 indulgence.

6 Under 1905.3(a), the specific language is, "No
7 employee shall produce any materials or information in
8 response to a demand without prior authorization as set forth
9 in this part. This part" -- and the part is the whole Touhy
10 regulation. "This part applies to former employees to the
11 extent consistent with applicable nondisclosure agreements."

12 So there is an additional burden when the government
13 seeks to extend a Touhy regulation to a former employee, and
14 that is we have to -- someone has to determine, judicially
15 determine, to what extent does the applicable nondisclosure
16 agreement either incorporate them into the Touhy regulation or
17 otherwise restrict their behavior.

18 The government has not even claimed that a -- well,
19 they have claimed that the potential witness has signed
20 multiple nondisclosure agreements. Whether any of those are
21 with the CIA or who they are with or what they say is
22 anybody's guess. So initially, and specifically for this
23 particular witness, the government has not carried its burden

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1 to demonstrate -- to bring this regulation into play by
2 explaining what be the extent consistent with applicable
3 nondisclosure agreements is.

4 But more broadly, the 1905.4(d) contains the
5 limitation on parties; that is, that it only applies, quote,
6 "If written or oral" -- excuse me, "If oral or written
7 testimony is sought by a demand in a case or matter in which
8 the CIA is not a party, a reasonably detailed description of
9 the testimony sought in the form of an affidavit, or if that
10 is not feasible, a written statement by the party seeking the
11 testimony or by the party's attorney must be furnished to the
12 CIA Office of General Counsel."

13 The party limitation, which is implied in all Touhy
14 regulations, is explicit here, and there are a couple of
15 reasons, separate from -- there are a couple of reasons that
16 we know from the structure of this litigation that in this
17 particular case the CIA should be considered a party because
18 the United States is a party.

19 The first of those is the standing of the Office of
20 Chief Prosecution to assert the Touhy regulations at all. In
21 every other case in my career where we have had -- where I
22 have had a Touhy regulation, and I'm not saying that's the
23 standard, but normally the agency from whom I am seeking

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1 information comes and raises their -- they send an attorney,
2 that attorney raises their Touhy objection.

3 The situation here is that the Office of the Chief
4 Prosecutor has claimed authority to speak on behalf of the
5 entire United States, and by speaking on behalf of the entire
6 United States they have presumably the authority to -- the
7 standing to raise a challenge to a potential violation of CIA
8 Touhy regulations.

9 It strikes me that they can't have it both ways.
10 They can't both represent the CIA for the purposes of raising
11 an objection under the Touhy regulations and not represent the
12 CIA for the purpose of the application of 1905.4(d).

13 The second issue, which was revealed in the redacted
14 executive summary of the SSI report, is the operational
15 control of the CIA, that's the phrase, the operational control
16 of the CIA over these defendants at Guantanamo. It is unclear
17 as to when that operational control ended, and the CIA has not
18 commented on the topic, but it is 100 percent clear from the
19 declassified portion of the redacted executive summary that
20 for at least some period of the time that these defendants
21 have been here, the CIA retained operational control of them
22 despite their nominal control by the Department of Defense.

23 The third reason that we know in this particular

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1 litigation that the CIA should be considered a party is the
2 controversy over the activation of the red light. In
3 Protective Order #1, which was 013P, it originally contained
4 language in paragraph 8.a(b) [sic] saying that the government
5 can suspend operation of the military commission -- can take
6 steps to suspend the operation of the military commission.

7 It now says the military commission or the court
8 information security officer can take such action. And after
9 an external party activated the third light -- the light and
10 shut down the military commission, we went to the prosecution
11 and asked -- filed a discovery request, actually, because they
12 had told a news outlet that there was an order from the judge
13 authorizing this third party to set -- to shut down the
14 courtroom, asking what was that authority, and very quickly
15 the government responded and pointed to 8.a(3)(b) in the
16 original version of Protective Order #1.

17 The significance of that is that at the time, when I
18 read during the litigation over Protective Order #1, I thought
19 the government was referring to prosecution. But one of the
20 things that became clear is that in their interpretation of
21 8.a(3)(b), the prosecution took the position that it included
22 other elements of the government, not merely the prosecution,
23 because it wasn't the prosecution who activated the court

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1 security device, it was some other element of the United
2 States Government who, under the protective orders in this
3 case, the prosecution considered to be part of "the
4 government" for purposes of the case.

5 Now, there are no D.C. Circuit cases on this
6 question, and so essentially -- and there are -- there are
7 admittedly some cases from other circuits without a lot of
8 analysis applying Touhy regulations or approving the denial of
9 a witness on the basis of violation of the Touhy regulation.
10 I fully acknowledge that. I don't know what the D.C. Circuit
11 will say about this question, and for that matter I don't know
12 what the Fourth or Fifth Circuits would have said if the
13 case -- if these issues had been brought to them.

14 But there is one case, Alexander v. FBI, found at
15 186 F.R.D. -- which stands for Federal Rules Decisions -- 66,
16 a District of -- a District of D.C. case from 1998 in which
17 both the records of the FBI and the records of the DoD were at
18 issue, and that -- the District Court in that case held that
19 because the United States was a party through its -- the
20 matter of the FBI, then the Department of Defense was
21 considered a party for the Touhy regulations as well.

22 MJ [COL POHL]: Anytime the United States is either a --
23 is a defendant in a civil proceeding or brings a criminal

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1 action, the Touhy regulations will not apply to any agency of
2 the United States Government?

3 LDC [MR. CONNELL]: Well, in the civil context that's
4 100 percent clear, right? Really it's the criminal context
5 where we don't have much guidance from the -- from the
6 D.C. Circuit, at least, because in the civil context, once the
7 United States has joined issue, then the Touhy regulations are
8 no longer -- they just don't have anything to do with the
9 issue anymore, right? Because as I mentioned earlier, Touhy
10 regulations other than protecting sovereign immunity claims or
11 considerations, the core of Touhy regulations is to keep the
12 government out of other people's business, out of other
13 people's cases. Where Mrs. Jones is suing Dow Chemical, they
14 don't want somebody to have to come in and testify from the
15 Department of Agriculture, because the Department of
16 Agriculture doesn't have anything to do with the case.

17 If the case is Mrs. Jones against the Department of
18 Agriculture, then the Department of Agriculture clearly has an
19 interest in the case, the Touhy regulations have -- just don't
20 come into play, because they are no longer protecting any
21 interests. That's why they are written the way they are.

22 MJ [COL POHL]: But then under that scenario, though,
23 assuming the Department of Agriculture, would the Touhy

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1 regulations apply to a DoJ witness, in that case, the civil
2 case?

3 LDC [MR. CONNELL]: Yes, of course, and that's what the
4 Alexander v. FBI held, because FBI was a department clearly,
5 they wanted records from the Department of Defense and the
6 government is in for a penny, in for a pound basically, and
7 once the government has an interest in the case, once the
8 government -- the United States Government is a party, it
9 doesn't matter if we are calling it, you know, this agency or
10 that agency, the United States is a party. It's no longer
11 private litigants to which the United States should not be
12 dragged into.

13 The last thing that I want to notice about this is
14 that the last time that we were here and the first time this
15 Touhy issue came up, the real debate was over the mailbox.
16 The real debate was over -- or a substantial part of the
17 debate was, well, who do we have to send the actual notice to.
18 So I will tell you as soon as we got back, we got on the phone
19 with the Office of General Counsel for the CIA, spent a lot
20 of -- one of my staff spent a lot of time on the phone with
21 them trying to work out, all right, if we have a Touhy notice,
22 who do we actually deliver it to and what do you want the
23 Touhy notice to say? Do you have a form, do you have a

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1 guideline? You know, logistically, how could we make this
2 work?

3 So then it went on for a number of days until we got
4 a letter from this prosecution which said, "We understand that
5 you have contacted the Office of the General Counsel," which
6 is by regulation who we would have to send the Touhy notice
7 to, and -- let's see, I actually have it in the record here.
8 I don't want to mischaracterize it. It is Attachment B to
9 AE 386B. The e-mail says: "Mr. Connell and Lieutenant
10 Colonel Thomas, I have been informed that a person from your
11 defense team reached out to CIA OGC regarding more information
12 about how to go about filing a Touhy request for a witness.
13 Understanding that the Touhy issue, writ large, is currently
14 being litigated based on the military judge's suggestion on
15 the record, OCP," meaning the Office of Chief Prosecutor,
16 "agrees to be the 'mailbox' for such requests and will forward
17 any such request on to OGC to ensure they receive it and work
18 it in a timely manner. As such, please deliver such Touhy
19 requests for CIA witnesses to me in the same manner as you
20 would a discovery request or a motions conference. Thanks."

21 That's fine. You know, that's fine. I don't have
22 any problem with that. But what it does do is it has two
23 effects on this litigation, I think. The first is it shows --

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1 it is an even stronger version of my first argument that I
2 advanced that the Office of the Chief Prosecutor is
3 representing the entire United States Government here. The
4 1905.4(d), the actual regulation at issue, requires us to send
5 it to the Office of General Counsel of the CIA, if we file a
6 Touhy notice, but the prosecution represents the CIA for those
7 purposes is willing to be their mailbox.

8 MJ [COL POHL]: To be fair, it just says in the e-mail,
9 I'm not sure at my suggestion, but they do indicate that that
10 was one of my questions to them is why not -- can't they
11 deliver it easier than sending it directly to general counsel.

12 LDC [MR. CONNELL]: Exactly right. And if I was being
13 unfair, I apologize.

14 MJ [COL POHL]: I am not saying you were being unfair, but
15 I am saying this was not totally sua sponte by them.

16 LDC [MR. CONNELL]: No.

17 MJ [COL POHL]: But I understand your point.

18 LDC [MR. CONNELL]: Yeah. But the second point is how
19 much this kind of idea undermines the policy behind Touhy
20 regulations. You know, there is no chance that the CIA would
21 not know about a subpoena or -- I mean, no subpoena has ever
22 actually issued in this case, but would not know about a
23 request for testimony or documents because it all goes through

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1 the prosecution anyway.

2 The idea that a low-level member of the CIA might
3 accidentally respond without passing up their information
4 through the chain, which is what Touhy is designed for, right,
5 so we have only been talking about the notice part of Touhy,
6 but there is -- you know, the regulation has five different
7 sections with a number of subsections. 90 percent of those
8 sections are internal to the CIA. What does a CIA employee do
9 when they receive a demand? Which makes sense because let's
10 say we are not talking about the CIA, let's say we are talking
11 about the United States Post Office, and an employee at the
12 United States Post Office in Valdosta, Georgia gets a subpoena
13 and they might, if they were not governed by regulations, just
14 say, okay, I am going to respond to this and send this down to
15 the courthouse.

16 There is no possibility of that happening here. The
17 whole thing is routed through the prosecution, and so
18 essentially it is nothing more than -- the only piece of the
19 Touhy policy that is left is to gain additional discovery for
20 the government, which brings me to my third motion, which is
21 AE 386 itself, which is the question of nonreciprocal
22 discovery.

23 The specificity demanded by a Touhy notice is

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1 unclear. We debated the last time how much more information
2 would have to go into a Touhy notice than would have to go
3 into an ordinary discovery request or, in this case, in 350C,
4 the motion for deposition.

5 To the extent there is no real difference between
6 what would have to go in the Touhy notice and all the other
7 notices that the government already receives in the case, then
8 there is no purpose for the Touhy regulation at all; it's
9 really simply a formula.

10 To the extent that it is more detailed, however, then
11 that poses yet another burden on the defense to produce
12 descriptions of its strategies to the prosecution without any
13 responsive or reciprocal discovery burden on the part of the
14 government. They don't have to explain why they want their
15 witnesses and they don't have to provide any information after
16 we have explained why we want these witnesses.

17 So the leading case on that of course is
18 Wardius v. Oregon at 412 U.S. 470, 1973 case, and there is one
19 case specifically applying the Wardius analysis in the context
20 of Touhy regulations, and that is United States v. Bahamonde,
21 B-a-h-a-m-o-n-d-e, at 445 F.3d 1225, a Ninth Circuit case from
22 2006.

23 And unless the commission has any questions, that's

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1 all I have.

2 MJ [COL POHL]: One moment, please. Just a second,
3 Mr. Connell.

4 LDC [MR. CONNELL]: Sure.

5 [Pause.]

6 MJ [COL POHL]: Just to make sure I am clear ----

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

8 MJ [COL POHL]: ---- under 1905.3, and I think you said
9 this, A, the requirement of prior authorization for former
10 employees must be embedded in their NDA?

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

12 MJ [COL POHL]: And since we have not seen the NDA, but if
13 it were embedded in the NDA, would that part of your argument
14 then not apply?

15 LDC [MR. CONNELL]: If the government carried its burden
16 that the extent provided by the NDA included in this
17 regulation and brought it into play, then yes, that part of my
18 argument would go away. As it is, I just don't know because I
19 have never seen the NDA. I don't know with whom it is signed
20 or what its contents are.

21 MJ [COL POHL]: Okay. Thank you. Any other defense
22 counsel want to be heard on this issue? Apparently not.

23 Trial Counsel? Mr. Ryan.

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1 TC [MR. RYAN]: Good afternoon, Your Honor.

2 MJ [COL POHL]: Good afternoon.

3 TC [MR. RYAN]: Judge, I am going to try and go into the
4 same chronology as counsel did to keep it consistent.

5 We started with the argument under the Housekeeping
6 Statute, and I will turn to that first. In Touhy, Your Honor,
7 the Supreme Court spoke quite clearly and said that when one
8 considers the variety of information contained in the files of
9 any government department and the possibilities of harm from
10 unrestricted disclosure in court, the court made clear that
11 usefulness -- indeed, the necessity -- of centralizing
12 determination as to whether subpoenas duces tecum will be
13 willingly obeyed or challenged is obvious. And I submit,
14 Judge, that the Touhy court is talking about the government
15 writ large as to agencies, I don't say unkindly may have what
16 would be considered not incredibly exciting duties and
17 obligations, but it also pertains all the way up the line, and
18 I would submit that the situation before Your Honor right now
19 is a prime example of why we do need Touhy. Maybe the
20 greatest example is the sort of explosive nature of the
21 proceedings in this courtroom when that day came when this
22 whole issue sort of began.

23 Later in the Snepp case, S-n-e-p-p, cited in the

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1 government's briefs, which is a non-Touhy case, the Supreme
2 Court upheld rules requiring former CIA agent to obtain agency
3 approval for information he sought to disclose in a book, and
4 in that situation the court said, and I think it's relevant to
5 Your Honor's analysis because, A, it's CIA, B, he was a
6 former, and the court readily recognized that when a former
7 CIA agent relies on his own judgment about what information is
8 detrimental, he may reveal information that the larger CIA,
9 with its broader understanding of what may expose classified
10 information and confidential sources, could have been
11 identified as harmful.

12 MJ [COL POHL]: But would it be fair to say in that case
13 that that agent had signed a -- whether it's framed as a
14 nondisclosure agreement or a prepublication review agreement
15 ahead of time?

16 TC [MR. RYAN]: Yes.

17 MJ [COL POHL]: I am not sure whether before you start
18 working there or before you leave, but there was specific or
19 for want of a better term requirement for him to do that, and
20 as Mr. Connell pointed out, the Touhy regulation in here talks
21 about a summary kind of provision required for former
22 employees, correct?

23 TC [MR. RYAN]: There is the obligation within the NDA of

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1 the former interpreter to go through the same process, that
2 is, to have the CIA analyze any information he was going to
3 have to provide in the course of testimony.

4 MJ [COL POHL]: But you have not submitted the NDA at this
5 point?

6 TC [MR. RYAN]: We have not, Judge.

7 MJ [COL POHL]: Okay.

8 TC [MR. RYAN]: And I will get to that in one moment, if
9 you will.

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

11 TC [MR. RYAN]: The Accused Ali relies on one case as
12 counsel cited to you, a District Court case out of the Eastern
13 District of Pennsylvania from 1979, where interestingly, and a
14 credit to the courage of the lawyer, he sought -- the private
15 party attorney sought to prevent information from being
16 disseminated by witnesses by claiming the authority of Touhy.

17 Now, from the record and from the case as I read it,
18 it doesn't -- there is no mention, there is no reference to
19 anybody from the agency themselves caring. So you have this
20 private party trying to use Touhy for his own benefit in the
21 course of a civil litigation, not government related.

22 So that's the authority that you are being asked to
23 rely upon.

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1 MJ [COL POHL]: Do you have any cases to the contrary ----

2 TC [MR. RYAN]: Yes, Judge.

3 MJ [COL POHL]: ---- that involve the United States?

4 TC [MR. RYAN]: To the contrary, we have cited various
5 cases in the government's brief and where Touhy is applied to
6 former government employees, and although the Snepp case, as
7 you pointed out, concerned an agreement regarding the writing
8 of a book, it does stand for the proposition that the
9 government has an interest, which the Supreme Court readily
10 recognizes, in governing the behavior of former employees and
11 the information that they may disseminate.

12 Now, getting to the issue of the NDA and the
13 situation with the CIA as a party in the litigation, as to the
14 NDA, the accused want desperately to speak to the former
15 interpreter precisely because he is a former CIA interpreter,
16 but then on the other hand doesn't -- says they don't have to
17 follow Touhy despite the sensitive nature of any testimony he
18 might give because, in their words, the prosecution hasn't
19 proven he is a former -- he is a former CIA with a
20 nondisclosure agreement, and I believe the word that was used
21 just a little -- a few minutes ago was "burden." I don't
22 believe this is a burden that the government carries in this
23 situation. The government is a party in this litigation. We

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1 stand before you as officers of this commission, and when this
2 issue broke, you will remember it well, we scrambled quickly
3 and statements were read to this commission and statements
4 were provided in pleadings numerous times after conducting due
5 diligence throughout the U.S. Government in regard to this
6 whole situation, and certainly with the CIA as well.

7 And following that research, and as officers of the
8 commission, it was clearly stated that in fact he was a former
9 interpreter with the CIA with a nondisclosure agreement that
10 governed the situation before us.

11 I would submit, Your Honor, that as to matters such
12 as this, that should be plenty sufficient for the parties to
13 accept that he does. Not to mention combined with the
14 circumstantial nature in light of all the facts that came out
15 that day, it would be -- it's entirely reasonable for everyone
16 to understand that he would have some restrictions on his
17 testimony. But even putting that aside, as I said, we stated
18 it affirmatively and we stand by that.

19 MJ [COL POHL]: Of course, one of the problems was your
20 initial response seemed to blame the defense for not properly
21 vetting this guy, and I know you've withdrawn that, but that
22 certainly had an impact on the NDA and what he could tell
23 them. I mean, I don't know what was said during the

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1 discussion, but I certainly could envision if he signed an NDA
2 and then he was being interviewed -- rephrase that.

3 If one signs an NDA and is being interviewed for a
4 job that the questions require him to violate the NDA or
5 follow the NDA, I could see that would put the employee in an
6 awkward position.

7 TC [MR. RYAN]: Yes, sir. Absolutely.

8 MJ [COL POHL]: But the government has retreated from that
9 position.

10 TC [MR. RYAN]: I hate to use the word "retreat," Judge,
11 but I will say this, we certainly did withdraw that motion.
12 And I won't go into this in any great detail.

13 But in regard to that, I'll only say this, Judge.
14 The events of the day started with an awful lot of fingers
15 being pointed to the right side of this room and the need for
16 response teams ---- I'm sorry, my right side of the room.

17 MJ [COL POHL]: Okay.

18 TC [MR. RYAN]: ---- and the need for special response
19 teams to come back and all sorts of other things. In light of
20 that the government, the prosecution, I think, felt it was
21 incumbent upon us to try to develop a very wide range of
22 facts.

23 MJ [COL POHL]: Before I get five rebuttals to what you

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1 just said, I understand this is a side collateral issue of the
2 350. I made a remark about it. I'm not litigating 350 now.
3 We are litigating 386.

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

5 MJ [COL POHL]: Go ahead, Mr. Ryan.

6 TC [MR. RYAN]: Just to put the final point on it, we
7 have, as time has gone by -- and I don't know if it is right
8 to say cooler heads prevailed, but no further accusations came
9 or no concerns came, shall we say.

10 MJ [COL POHL]: That's the last word I want to hear on
11 350.

12 TC [MR. RYAN]: It was withdrawn. How is that for the
13 final word, Judge?

14 MJ [COL POHL]: That is the final word. Got it.

15 TC [MR. RYAN]: The plain answer is they are not. As
16 everyone understands the CIA is an intelligence agency with
17 limited domestic powers. It is not law enforcement. It has
18 no prosecutorial arm and I can't think of any case where the
19 CIA was the actual agency advancing a prosecution.

20 On the other hand, the prosecution has cited numerous
21 cases that provide support for our position. Cases involving
22 Touhy for DoJ employees, which I think is especially telling
23 for Your Honor, because the prosecution is typically brought

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1 by the Department of Justice or some component thereof, and if
2 Touhy applies to its own employees, it goes an awful long way
3 to cutting back on the idea that the U.S. -- the prosecutor in
4 the room represents the entire U.S. Government or the entire
5 U.S. Government is in fact a party to the proceedings so Touhy
6 shouldn't apply. So that's DoJ.

7 Other cases involving Touhy as it pertains to
8 employees of the Department of Treasury, the Department of
9 Homeland Security, the Department of State, in courts-marshal
10 and again in the situation of CIA employees, in cases brought
11 by the United States.

12 So I think Your Honor said it at one point. It's
13 absolutely true. If you accept the accused's position
14 regarding this, the agency is already a party to the
15 proceedings even understanding the facts pointed out, many of
16 which were in fact accurate, and I don't deny for a second
17 that they are significant obviously in light of the discovery
18 discussions today, significant equity of the CIA at stake
19 here, but it is simply not the case that every one little
20 agency becomes the party when there is a case before the
21 court, especially in criminal cases.

22 Now, Your Honor, I would like to turn to the ----

23 MJ [COL POHL]: Would any agency be a party in a criminal

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1 case?

2 TC [MR. RYAN]: Say again, sir?

3 MJ [COL POHL]: Would there be any agency of the United
4 States Government that would be a party for Touhy purposes in
5 a criminal proceeding brought by the United States?

6 TC [MR. RYAN]: No, sir. The United States acts as a
7 sovereign.

8 MJ [COL POHL]: Not all the agencies would be separate and
9 apart on that prosecution?

10 TC [MR. RYAN]: Separate and apart at least for the Touhy
11 purposes.

12 MJ [COL POHL]: The Touhy purposes, that's all I am
13 talking about.

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

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

16 TC [MR. RYAN]: For 386, the sort of main body of it,
17 their request -- the request, of course, is that the former
18 CIA interpreter testify at a deposition, and then later there
19 was even a request that he testify in support of the
20 consideration of the motion that he testify at a deposition.

21 As you of course know, 703 requires, in seeking a
22 witness, that the defendant justify the need and relevance,
23 and I understand, of course, that counsel disagrees with that.

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1 In addition to 703, for deposition purposes, 702 requires --
2 in a situation of an extraordinary remedy like a deposition of
3 a witness prior to trial or prior to proceedings, 702 requires
4 "exceptional circumstances," end quote.

5 In contrast, the CIA's Touhy regulations state that
6 what is required is a reasonably detailed description of the
7 testimony sought in the form of an affidavit or, if it is not
8 feasible, a written statement. So in balancing, just going on
9 the plain language, I think that we can draw the conclusion
10 that there is actually less required for the Touhy requirement
11 than there is on 702 and 703 in this circumstance.

12 So quite separate, Your Honor, from Touhy itself, the
13 defendant has -- has to and in fact did divulge a good deal of
14 information already as to why he wanted this extraordinary
15 remedy, and in filing these motions, especially in those days
16 right after it came to light, the defendant did so, provided
17 the information without complaint as to reciprocal discovery
18 or massive imbalances -- and I will have more to say about the
19 sufficiency aspect of it when we get to 350 -- but they did so
20 without complaint because they wanted so much to interview
21 this former CIA interpreter.

22 So in light of that, in light of what they have
23 already done anyway, because they wanted him, and in light of

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1 what's being asked, you know, I have to ask the question, what
2 are we fighting about? But we are.

3 The defendant complains that Touhy contains
4 nonreciprocal discovery, and that can be boiled down to the
5 defense is giving but is not getting anything or is not
6 getting enough in return. As counsel pointed out, that
7 concept comes originally from the Supreme Court case of
8 Wardius v. Oregon in 1973. And although it may be a bit
9 tedious, Judge, I want to go into the facts at least a little
10 bit because, in understanding the facts of that case in
11 Bahamonde, I think you see that it becomes quite self-limiting
12 as to its applicability and its persuasive authority here
13 today.

14 Wardius was a sale of drugs case in which the
15 defendant wanted to present an alibi defense. Oregon had a
16 notice requirement for an alibi defense. The defendant didn't
17 give such notice and, as a result, the trial court precluded
18 the alibi evidence.

19 Now, on the other hand, and this is interesting, and
20 it sure surprised me, Oregon at the time, according to the
21 case, granted no discovery rights whatsoever, not even a bill
22 of particulars to a criminal defendant. Now, we've spent an
23 awful lot of time over the last few weeks and all I will say

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1 is this: I think Your Honor will agree we are a long way from
2 a place where no discovery rights are granted whatsoever. The
3 numbers have been bandied about but we are talking about
4 literally hundreds of thousands of pages that have been, will
5 be or are in the process of being turned over.

6 So the ultimate holding that came out of Wardius was
7 that you can't require the defendant to provide notice or
8 anything while at the same time you are not requiring the
9 government to provide anything, and that would certainly seem
10 to make a great deal of sense, certainly in light of criminal
11 law today.

12 Now, in Bahamonde, and I hope I got the pronunciation
13 right, that is a Touhy case and it is from the Ninth Circuit.
14 It was a divided court. And this is what I could describe as
15 a sort of run-of-the-mill pot hidden in a car case. In it the
16 defendant travels to Mexico, comes back some period of time
17 later. Lo and behold, his car is suddenly full of marijuana
18 and his defense is that he didn't know it and that's why I
19 describe it as run-of-the-mill. And apparently what happened
20 in the case is the case agent took a statement from the
21 defendant in which he said he didn't know.

22 The case agent in that matter sat through trial, he
23 sat next to the prosecutor, he aided in the -- he assisted in

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1 the presentation of the government's proof, and he was on the
2 government's witness list.

3 The reasonable inference, because he wasn't called as
4 a witness by the government, is that they chose not to call
5 him for strategic purposes, probably because he didn't help
6 further the goal of proving guilt when in fact he said that
7 the defendant said something that was consistent with the
8 defendant's defense.

9 So the defense counsel tried to call this case agent,
10 who was sitting there, to introduce that statement. The
11 prosecutor at this point decided to use Touhy as a shield and
12 said it can't be -- he can't be called because the defense
13 hasn't satisfied Touhy obligations.

14 To my surprise, the trial court agreed and precluded
15 the agent being called despite all these matters.

16 Now, the Ninth Circuit, as I said, was divided in
17 this one, but it did reverse and said it was unfair -- it was
18 an unfair use of Touhy because it would require something from
19 the defendant without anything in return from the government
20 on how they would refute the testimony of their own agent.

21 And, Judge, I'll note very briefly, because I don't
22 think it matters a great deal, but that the Touhy requirement
23 in that case, which was a DHS investigated case, was actually

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1 a greater standard than that put forth for the CIA's purposes
2 today.

3 Now, to the extent the defendant -- the accused
4 complains that the Touhy notice now would cause this language
5 being massive imbalance because they have to provide
6 sufficient information in this notice, which I submit they
7 probably have already done in their pleadings as to 702 and
8 703, it supports and plays into part of my argument that I
9 will be making later in that this -- all of this is simply
10 premature. We are a year away from when it happened, but
11 nonetheless, the discovery process, as Your Honor has heard
12 ad infinitum, is in play now, is deeply in play now, and the
13 defense will be -- has been provided with a great deal of
14 discovery so that already goes way past, I think, where
15 Wardius and Bahamonde were, but also much more is to come, and
16 it will in fact provide the accused with a great deal of
17 information about many subjects, including the CIA and its
18 activities.

19 Just based on that alone, I would submit Your Honor
20 would be on proper footing to deny these motions, the 386
21 series, for those reasons.

22 MJ [COL POHL]: Won't we eventually get to them?

23 TC [MR. RYAN]: We don't know that, Judge. We don't know

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1 that at this point. I am not, and ----

2 MJ [COL POHL]: Let me ask you this.

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

4 MJ [COL POHL]: If the defense wants to call a CIA agent
5 on their case-in-chief, do you believe they would have to make
6 a Touhy notice on that?

7 TC [MR. RYAN]: If the defense seeks to call anyone from
8 any agency, Touhy applies.

9 MJ [COL POHL]: Okay. So ----

10 TC [MR. RYAN]: But I would like to provide a caveat on
11 that. Because there was I believe a footnote in one of the
12 defendants' pleadings noting that in prior hearings of this
13 commission we had not gotten into a Touhy requirement as it
14 pertains to agents of the government who are assisting the
15 prosecution in testifying in this matter, and I want to draw
16 that distinction so that the -- I want to explain the
17 distinction so that the commission doesn't think we were
18 acting inconsistently or trying to play something fast and
19 loose when we want to and when it's in our interests, and it
20 goes back to the Bahamonde case.

21 I said to you I was surprised because in a case like
22 that, where an agent of the government investigated the case,
23 brought the case, assists throughout trial and did a

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1 significant part of the investigation -- that is, in taking a
2 statement from the defendant, and ends up on the government's
3 witness list -- in the course of trial, if the prosecutor
4 makes a decision to hold him back and the defense wants him
5 on, I couldn't imagine that -- I've certainly never seen it in
6 my career where someone would say, wait a minute, you have to
7 satisfy Touhy first.

8 I also thought to myself what some of the judges I
9 have had the honor of practicing in front of would have said
10 to me if I had tried such a thing, and I will suffice it to
11 say they would not have been happy with me.

12 So there is a certain rule of reason within this,
13 that is, that where the agency is I think -- and especially as
14 to law enforcement agencies, that's why I drew the distinction
15 before about CIA having no part in typical law enforcement
16 activities. But where agencies investigate a case, seek it to
17 be brought and the Department of Justice is prosecuting it, it
18 is understood that he will testify, he is available to testify
19 as to all matters within this -- within that defined area of
20 the investigation and so on.

21 So for the government -- in past instances where we
22 did have an agent of the FBI or some other agency on the
23 stand, we did not -- we did not consider trying to use any

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1 kind of Touhy argument. It was part of the defined litigation
2 and whether the commission wanted them as government witnesses
3 or the defense wanted them as their witnesses, whatever they
4 were called, we recognized that they were talking about parts
5 of the defined litigation, it was within the scope of the case
6 and the government was -- the prosecution was happy to see
7 them on the stand.

8 Now turning to these facts and to Your Honor's
9 question, where it's a case of, as happened here, a former
10 contractor, this is someone who was unknown to the prosecution
11 completely. He had no law enforcement aspect to the case. As
12 I said, a former prosecutor -- a former contractor, rather,
13 and the defense's areas of inquiry, as stated in the documents
14 in the pleadings, was very broad and very vague. So in that
15 circumstance Touhy has to apply. There has to be some
16 discussion. This agency ----

17 MJ [COL POHL]: You are sliding into a 350 argument. I
18 don't want to get into that.

19 TC [MR. RYAN]: Okay, sir. I'm sorry.

20 MJ [COL POHL]: That wasn't my question. My question
21 was -- kind of picked up on your comment that this may be
22 premature or not ripe and therefore should be denied, and my
23 question to you was -- and again, let's move the 350 issue to

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1 the side.

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

3 MJ [COL POHL]: What I'm saying is, does the government
4 intend to require a Touhy notice for any government witnesses
5 requested by the defense on the merits of this case? In your
6 scenario you talked about with the guy, with the agent and the
7 Mexican, you said the routine, you know, pot in the car case.
8 That was a case on the merits where apparently the defense
9 wanted to call that witness, and I'm saying is I could
10 envision -- perhaps I am wrong, but I certainly could envision
11 that there may be requests for government witnesses, I'm
12 talking about specific CIA witnesses here, but it could be
13 other witnesses, the defense is going to want on the merits.

14 TC [MR. RYAN]: I understand, Judge.

15 MJ [COL POHL]: My only question is, is it the
16 government's position that all those requests -- forget all
17 the other issues, I got it, and forget the issue about whether
18 or not they can be subpoenaed to come to Guantanamo Bay. All
19 that stuff I'm not talking about. I am simply talking about a
20 narrow issue here, will the government -- and I guess you
21 can't speak necessarily for the CIA, but will there be a Touhy
22 requirement in each of those requests?

23 TC [MR. RYAN]: And the answer is it will depend, and I

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1 will explain that and I am not trying to evade by any means.

2 MJ [COL POHL]: I am trying to figure out. You said this
3 is premature and we are -- kind of the way ahead, but it
4 sounds to me this issue is going to come potentially in a
5 number of other situations.

6 TC [MR. RYAN]: The reason I say it was premature -- and I
7 am coming back to the specific question -- but the reason I
8 say it's premature is the accused -- this person fell out of
9 the sky, essentially, and was in this courtroom, and at a
10 rough, at a relatively early posture of the case, at least in
11 terms of the full disclosure discovery of information that the
12 defense is so interested in, he was obviously of interest.

13 What I am submitting to Your Honor now, why I am
14 saying it's premature is over the course of time, as thousands
15 and thousands of documents regarding all sorts of information
16 that have been -- that have been discussed and would apply and
17 could apply to many other aspects of agency actions, the
18 defense could very well decide that this is a person of no
19 interest to them.

20 MJ [COL POHL]: But you are coming back to the 350 issue
21 there. You say this person is of no interest.

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

23 MJ [COL POHL]: Okay. But I am saying the other issue, it

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1 would be whether or not a Touhy notice is going to be
2 required; is that right? A witness by witness ----

3 TC [MR. RYAN]: My answer on that would be it would
4 depend, sir, depending upon the circumstances. I will give
5 you an example of what I think would work out. As you could
6 imagine, numerous, numerous agents of the Federal Bureau of
7 Investigation worked on this matter. To the extent that the
8 government doesn't call one, two or many more of them and the
9 defense wants them at some point to testify to areas that we
10 sort of understand to be within -- within their actions on
11 behalf of the United States Government in investigating
12 September 11, those would be the types of witnesses that I
13 would imagine we would be not seeking or not requiring Touhy
14 notices on.

15 But here is the caveat I have to cling to is this.
16 Within September 11, there are the -- there are the activities
17 of enormous amount, maybe every single U.S. agency out there,
18 I don't know if it's that many, but a whole heck of a lot. As
19 to some of them it might come down to factors and facts in
20 evidence that we, the prosecution, are not well versed in and
21 it might come down to equities that the prosecution is not
22 even aware of, say agencies like the FAA or something else
23 along those lines.

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1 In those cases, simply because we must discharge our
2 duties to protect the United States Government's information,
3 as Touhy made clear and the Snepp case made clear, it will be
4 necessary for the defense to be engaged in a conversation with
5 the general counsel of that particular agency.

6 Now, I am not submitting or suggesting that the
7 prosecution won't be part of it at all. My guess is we will,
8 because we are the only ones in the courtroom who can protect
9 the equities of whoever that might be. And I am not
10 suggesting that there won't be a good deal of practicality at
11 play, I think there will be, and the example was raised to
12 Your Honor where the prosecution said we will be the mailbox
13 as to this interpreter issue.

14 MJ [COL POHL]: Let me ask you this, then, and if you
15 don't want to answer this, I might understand. But basically
16 what you are saying is -- or are you saying, then, that you
17 have the authority to waive a Touhy requirement on behalf of
18 any agency?

19 TC [MR. RYAN]: No, sir.

20 MJ [COL POHL]: So what I am saying is, I have the CIA reg
21 in front of me ----

22 TC [MR. RYAN]: But as a rule of practicality, I can state
23 that in discussing with an agency the appearance of a certain

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1 witness ----

2 MJ [COL POHL]: So what I am saying is the applicability
3 or the requirement of a Touhy notice, the decision will not be
4 necessarily by the prosecution, it will be by the particular
5 agency?

6 TC [MR. RYAN]: No, it almost certainly will not be by the
7 prosecution, certainly not alone. Again, back to the ----

8 MJ [COL POHL]: I'm just saying, I am just looking at the
9 CIA reg and it would seem to me it's pretty, pretty directive
10 on its face. Employees will ----

11 TC [MR. RYAN]: And for that agency and other intelligence
12 agencies, certainly it becomes much more incumbent upon us. I
13 guess this is the best way to say it, Judge: There is less
14 room for a lawyer in that agency who understands, they are in
15 courtrooms every day, to come to a pragmatic decision with the
16 prosecution that Touhy is not going to be required when the
17 prosecution says this is a normal part of the criminal trial.

18 Where it's an intelligence agency and many more
19 equities are involved and they have a sort of first obligation
20 to consider damage, to consider classified, to consider
21 various other equities, they will have to be involved, that is
22 correct.

23 Judge, I have gone through Wardius and I have gone

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1 through Bahamonde. I would like to suggest to you that in
2 terms of persuasive authority that the commission consider the
3 case that we cited in our brief, that being the Rosen case,
4 which was out of the Eastern District of Virginia. It is in
5 fact a national security case so therefore it's more analogous
6 to our case than either Wardius or Bahamonde.

7 In Rosen the judge criticizes and distinguishes
8 Bahamonde in his -- and his language I think is helpful here.
9 In referring to that case, he says, "The Ninth Circuit failed
10 to recognize in Bahamonde that the Touhy regulations, like
11 CIPA, inject into the reciprocal discovery analysis precisely
12 the strong showing of state interests contemplated in
13 Wardius," which again was not a Touhy case, "namely, the
14 centralized agency determination regarding the release of
15 confidential government information and particularly NDI,"
16 national defense information, "as involved here.

17 "It is clear, therefore, that the Bahamonde reasoning
18 is fatally flawed and that the instant prosecution falls
19 squarely within the recognized exception to the reciprocal
20 discovery requirement recognized in Wardius."

21 And what the judge is referring to there at the end
22 is that in Wardius, despite the extreme nature of the facts,
23 that is a jurisdiction where no discovery was required to a

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1 criminal defendant, even there the Supreme Court made
2 reference to that could be justified if there was a
3 significant state interest at stake. And in that case, as I
4 said, that being a sale-of-drugs case on a very street level,
5 the Supreme Court apparently did not find that.

6 However, as the judge in Rosen said, when you are
7 talking about classified information, national defense, there
8 is a much greater state interest and therefore even if -- even
9 if there is this imbalance of discovery, this problem of lack
10 of reciprocal discovery, it can be justified even under the
11 Wardius decision because of the state -- the significant state
12 interest.

13 Your Honor, subject to your questions, that's all I
14 have.

15 MJ [COL POHL]: I have no further questions. Thank you,
16 Mr. Ryan.

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

18 MJ [COL POHL]: Mr. Connell.

19 LDC [MR. CONNELL]: Thank you, Your Honor. I would like
20 to begin with the contract question, the NDA question, because
21 as the military commission observed, Snepp very clearly is
22 about the enforceability of a contract; and that contract
23 requires a holder of classified information to do certain

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1 things.

2 I will notice that the Protective Order #1 in this
3 case requires the signature of a nondisclosure agreement. But
4 the prosecution went a little bit further than that and said
5 in their statement that they've repeated frequently that they
6 had mentioned the nondisclosure agreement, so I went and
7 looked it up to check, and I am reading from AE 350B, a
8 government pleading, at page 2, and this is the exact same
9 language they used in court, word for word. "The prosecution
10 states affirmatively that the presence of a former CIA
11 linguist on one of the defense teams is absolutely not due to
12 any agency -- any action by any agency of the executive branch
13 to gather any information regarding defense activities from
14 any of the defense teams."

15 MJ [COL POHL]: To be fair, wasn't that the motion that
16 was withdrawn?

17 LDC [MR. CONNELL]: Yes, but it's the same thing they
18 argued in court.

19 MJ [COL POHL]: Okay. Let's talk about what they argued
20 in court, then, and not a withdrawn motion.

21 LDC [MR. CONNELL]: I just wanted to give the exact
22 wording because that's the exact wording they argued in court.

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

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1 LDC [MR. CONNELL]: The significance is that the
2 government said that there was some reference to nondisclosure
3 agreement in there, and there is certainly not. And I'm
4 sure -- I am 100 percent sure that every person who has ever
5 had authorized access to classified information has signed a
6 nondisclosure agreement. I am trying to think how many I have
7 signed and I signed at least four, and as far as I know none
8 of them had anything to do with Touhy.

9 What 1905.3(a) says is not simply if a person has
10 signed a nondisclosure agreement they are subject to this
11 provision, but that this part applies to former employees to
12 the extent as provided and consistent with their nondisclosure
13 agreement so it actually matters what the nondisclosure
14 agreement says. If it's a standard Form 312, then the
15 prosecution probably gets no help from that whatsoever. If it
16 is some custom nondisclosure agreement, then we are in a much
17 different situation. So it matters a great deal to the
18 application in this particular case of this regulation.

19 So the government made a number of arguments which
20 exist in tension with the other arguments that they made. One
21 of them is about the relationship between the 702
22 requirements, the 703 requirements and the Touhy requirements,
23 which is what we -- which is where this sort of debate started

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1 in October, and the -- one of the arguments that the
2 prosecution made was that less is required for Touhy than
3 under 702 and 703, but they also said that our 702 and 703
4 statements were broad and vague. So the point of that is not
5 that a person has to maintain consistency. The point of that
6 is that it allows -- the prosecution's position allows them to
7 strategically pick and choose when they want to apply their
8 Touhy regulations, because as I mentioned, either way you look
9 at it, it actually supports our argument.

10 If we have already complied with Touhy by our 702 and
11 703 notices, then Touhy doesn't add anything. None of the
12 purposes of Touhy are served, and they could just hand the
13 CIA, you know, the 350C and the other pleadings in the case,
14 which is what I suggested before.

15 MJ [COL POHL]: So you think the agency should have to --
16 instead of a nice clean piece of paper saying Touhy notice
17 with a summary of what you want, you would rather -- you think
18 it suffices to hand them a motion where they are embedded in
19 there?

20 LDC [MR. CONNELL]: I can write the word Touhy notice on
21 the top of it. I mean ----

22 MJ [COL POHL]: What I am saying is, we are talking cut
23 and paste here, but I am simply saying is that I see a lot of

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1 your -- not your personal -- well, I see a lot of motions from
2 everybody.

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

4 MJ [COL POHL]: And they are not always formatted all the
5 same.

6 LDC [MR. CONNELL]: Sure.

7 MJ [COL POHL]: Sometimes I get a request at the very
8 start of the motion and then at the end of the motion there is
9 nothing and vice versa, so they are not consistent. So I am
10 simply saying if the idea here -- if there is a Touhy notice
11 requirement, it is to put the relevant agency on notice of
12 exactly what you want to talk to this person about. It
13 perhaps is cleaner to put it just simply as a separate piece
14 of paper rather than say here, it's in my motion, figure it
15 out.

16 LDC [MR. CONNELL]: Logistically I tried to figure out how
17 to comply.

18 MJ [COL POHL]: I applaud your efforts, Mr. Connell.

19 LDC [MR. CONNELL]: Who do they send me to, the
20 prosecution, and then the prosecution raised their hand and
21 said, okay, yes, send it to us. The idea that I am somehow
22 burdening the attorneys at the Office of General Counsel by
23 not having a separate piece of paper that says Touhy notice

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1 just doesn't comport with the actual situation.

2 MJ [COL POHL]: When we started this discussion I was
3 referencing that I want to talk about Touhy writ large as
4 opposed to how it relates to Touhy.

5 LDC [MR. CONNELL]: Fair enough.

6 MJ [COL POHL]: Going forward, if there is a Touhy notice
7 requirement, I don't want to get into a situation that we get
8 into way too frequently of something is submitted and then it
9 is returned for a form over substance issue. Well, we don't
10 know what he is talking about, you know, we don't -- you know,
11 this is in here but it's over here, we don't know what the
12 intent of this order is, things like that. So I am trying to
13 avoid that as much as possible. So a simple piece of paper
14 saying Touhy notice, if required, you put down what you say,
15 and then they can say -- say you've got six things, yes to
16 three, no to three and whatever the reason why is, and then
17 you can come to me with the issue properly framed.

18 I am just afraid that if it is embedded in something
19 else you are going to get a piece of paper back saying this
20 doesn't suffice because we are not sure what you are saying,
21 you get all this legal stuff married into what you want. I am
22 just trying to make it a clean issue, because I suspect when
23 you give the Touhy notice, if you have to give one, there is a

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1 substantial chance that they may not grant everything you ask.
2 I just want to make it clear that it's granted on the merits
3 of it or -- I suspect we may hear the nonspecific enough, I
4 got it, but at least that's enough to start the discussion.

5 LDC [MR. CONNELL]: I like a clean record as much as
6 everybody else and I take the point there, but it does lead to
7 the next point of there was a remarkable government argument
8 about how this is not really as earth shattering as you think
9 because sometimes we are not going to ask to enforce the Touhy
10 requirement. And the actual quote from the government was
11 that the Touhy requirement applies to anyone from any agency.

12 Now, that's not 100 percent accurate and I say this
13 in the interest of candor to the court because I know that it
14 cuts my position against -- as much as it supports my
15 position, but the DoJ is not an actually accurate description
16 because the DoJ has two different regulations, one for when
17 the United States is a party and one for when the United
18 States is not a party. So truthfully, the DoJ has solved this
19 problem by creating two different regulations.

20 But, that said, the FBI has its own Touhy regulation,
21 and you know, the point that I was making, the footnote that
22 counsel referenced was that, you know, the FBI, we called the
23 FBI agents -- or Mr. Hawsawi called the FBI agents and there

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1 was no Touhy issue, and Mister -- excuse me, the government
2 says ----

3 MJ [COL POHL]: If the government chooses not to enforce
4 the Touhy issue on one agency representative, does that amount
5 to waiver for -- is that waiver for any further one?

6 LDC [MR. CONNELL]: Absolutely not, but what I am claiming
7 in this line of argument is to demonstrate the huge impact of
8 the government's argument, and counsel stated, gave his
9 personal view of the Bahamonde situation and said it was very
10 unusual, but it's not unique. There was the other case,
11 United States v. Wallace at 32 F.3d 921, Fifth Circuit case,
12 1994, said in fact it was exactly the same situation. There
13 was a government witness. The government chose not to call
14 them and then barred them from testifying because of Touhy,
15 and the Fifth Circuit observed, well, the defense should
16 routinely issue Touhy notices for government witnesses in case
17 they decide not to call them.

18 And without -- I don't support the merits of that
19 position, I think that it is wrong, but we should not have to
20 rely on government forbearance, especially because, you know,
21 that if anything was premature -- I don't think the debate
22 over whether Touhy applies is premature. What's actually
23 premature is the invocation of Touhy, because what Touhy

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1 actually prohibits is finding a person in contempt for failing
2 to produce information because they are relying on a valid
3 regulation.

4 The significance of that is that the Touhy process,
5 if you will, the pipeline is that the military commission
6 decides that it should order a -- I'm just saying
7 hypothetically -- the military commission decided it should
8 order either production of information or a deposition or
9 whatever. Some kind of demand for information. At that point
10 the agency can assert its interests and say we don't want --
11 you haven't complied with our regulation; we're not going to
12 permit our employee, another reason why employees are -- the
13 employee/former employee is a distinction because they can
14 order their employee to do things, but they can't order their
15 former employee to do things except as provided by the
16 nondisclosure agreement.

17 The agency comes and says we are not going to have
18 that person testify and you can't hold us in contempt, because
19 that's what Touhy actually says.

20 The process of saying that we haven't complied with
21 Touhy regulations before the demand is issued is actually
22 putting the cart before the horse, because ----

23 MJ [COL POHL]: Demand from whom?

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1 LDC [MR. CONNELL]: Demand from whomever is seeking the
2 information. If that's a subpoena duces tecum or if that is
3 an order for a deposition, bracketing those other issues that
4 we talked about ----

5 MJ [COL POHL]: Go ahead.

6 LDC [MR. CONNELL]: That's the ordinary process, is that
7 the agency lawyer shows up with his subpoena in hand and says
8 we are not going to comply with this subpoena because you
9 didn't follow our reg and you can't hold us in contempt for
10 it. That's the ordinary process, not a sort of anticipatory
11 use of Touhy not necessarily as a shield for information but
12 as a sword to interfere with the initial request for the
13 witness, which makes sense because, you know, this whole thing
14 might be irrelevant with respect to 350 because you might say,
15 "I find that you haven't provided enough information" or that
16 "I don't find the witness is necessary."

17 And so in which case this whole -- I understand that
18 we need to resolve the issue in general, but the reason for
19 that pipeline is that there is generally an initial either
20 finding by a magistrate or a judge or somebody that something
21 is necessary or there is the issuance of a subpoena.

22 MJ [COL POHL]: And then they issue the subpoena and
23 then -- but they don't ask whether a Touhy notice has been

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1 given, they wait to see what the response to the subpoena is?

2 LDC [MR. CONNELL]: Right, because the agency -- just like
3 the government said here, the agency has discretion. The
4 agency can assert its Touhy regulations as a defense. It can
5 say, you know, "I think actually our agency is closely enough
6 related to this that I am not going to make a claim of Touhy,"
7 which is exactly the discretionary process that counsel for
8 the government described, that sometimes agencies may decide,
9 in the exercise of their discretion, that they have enough
10 information or they have been closely following the litigation
11 and they know what it's about.

12 MJ [COL POHL]: Under a hypothetical scenario then where
13 somebody is asking for a deposition ----

14 LDC [MR. CONNELL]: Yes.

15 MJ [COL POHL]: ---- and I order the deposition ----

16 LDC [MR. CONNELL]: Yes.

17 MJ [COL POHL]: ---- and then we wait to see if the
18 government -- if the agency -- let's just say it's an agency
19 employee, don't worry about previous.

20 LDC [MR. CONNELL]: Sure.

21 MJ [COL POHL]: We wait for the agency employee's general
22 counsel to come in and say "we object to the deposition
23 because there is no Touhy notice" and then you go back to the

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1 requestor and say, "provide a Touhy notice"? Is that the
2 procedure you want me to follow?

3 LDC [MR. CONNELL]: Analytically that is the procedure,
4 right, that is ----

5 MJ [COL POHL]: Then you file the notice and now we
6 litigate the adequacy of the notice?

7 LDC [MR. CONNELL]: Right. In reality -- so that's
8 analytically -- we talked about linearity earlier, linearly
9 that is the process, because otherwise it invests the
10 prosecution withstanding to assert agency interests, and what
11 the prosecution is standing here telling you is they do not
12 have -- the CIA is not a party, they don't represent their
13 interests. It's the way of the double bind of either lack of
14 prosecutorial standing or the agency is a party.

15 MJ [COL POHL]: I understand, it puts them -- so under
16 that scenario I was talking about, if you order production --
17 and again, I don't want to get into whether we can order
18 witnesses to Guantanamo Bay or not. I am not getting into
19 that issue right now, but what I am simply saying is there
20 will be an order for a production of a witness. Okay. At
21 that point then the government would then convey that to the
22 agency required and the agency required would then decide
23 whether they would require a Touhy notice?

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1 LDC [MR. CONNELL]: That's exactly what happens ----

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: ---- in the ordinary Touhy situation.

4 Now, the one thing that doesn't happen is you
5 inserted an extra step where the prosecution conveys it to
6 them, you know, ordinarily it's a deputy or a U.S. Marshal who
7 serves the subpoena or a private investigator, somebody says a
8 subpoena and says, you know, NASA, here is a subpoena for you,
9 drops it off at their subpoena liaison who takes it upstairs
10 to their general counsel's office and says here is a subpoena
11 for this day ----

12 MJ [COL POHL]: If I ordered a deposition, hypothetically,
13 I put that in writing and that's delivered to the general
14 counsel of the CIA or is it delivered to the individual being
15 deposed?

16 LDC [MR. CONNELL]: It's delivered to the individual being
17 deposed and then under the internal -- the 90 percent of this
18 regulation that is internal, and let's just say it's an
19 employee, right. We are trying to bracket it and cut off the
20 subsidiary issues.

21 MJ [COL POHL]: Right.

22 LDC [MR. CONNELL]: An employee, their regulation requires
23 them to take it to the Office of General Counsel, and in

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1 reality what happens then is that the Office of General
2 Counsel calls me up and says, "Hey, I've got this issue here,
3 can we talk about it for a minute," and then we talk about it
4 and they say, "Okay. I am going to require you to file a
5 Touhy notice" or "I am not going to require you to file a
6 Touhy notice" or whatever. That's the way that the ordinary
7 real-life process works.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: But the significance of that to the
10 government's argument is that even if the Office of the Chief
11 Prosecutor decides in its discretion that it doesn't want to
12 assert whatever standing it has to assert Touhy interests, the
13 agency can and in the ordinary course of litigation does.
14 Despite, you know, whether the prosecutor, the special U.S.
15 Attorney in the Eastern District of Virginia decides to assert
16 Touhy requirement or not is different from whether the CIA or
17 whoever wants to assert their own interests. So the idea that
18 the prosecution can just say, "Hey, no problem, if we decide
19 that the -- it's within the scope of what we think is fair,
20 then we are not going to assert Touhy is not a representation
21 that the military commission can rely on nor probably would it
22 want to," because if the last six days have demonstrated
23 anything, it is that the parties do not share a common

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1 understanding of what the scope of discovery and relevant
2 information is.

3 So all these sort of prudential reasons to the side,
4 both -- including the ones offered by the defense, the actual
5 regulation is pretty clear, that it only includes former
6 employees to the extent by a nondisclosure agreement and no
7 one has ever seen this nondisclosure agreement, whether it has
8 any Touhy provisions in it, the Housekeeping Statute only
9 applies to current employees and not former employees; the CIA
10 is a party, has been intimately involved in this case, and I
11 have more arguments to make on that topic. And the -- if we
12 have to provide this extra -- you know, extra burden, it's a
13 substantial burden on the defense and the last thing that
14 I ----

15 MJ [COL POHL]: What extra burden were you talking about?

16 LDC [MR. CONNELL]: The extra Touhy notice burden, that we
17 have to do something else, that we have to express this not
18 simply to the satisfaction of the prosecution and the
19 satisfaction of the judge, but we also have to express
20 specificity to the satisfaction of the CIA general counsel
21 because it is their interests, remember; they are the ones who
22 get to litigate it.

23 MJ [COL POHL]: No, I understand that. I am just -- if a

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1 Touhy notice is required, okay, I perhaps misunderstood

2 Mr. Ryan, but the notice goes to the agency, right?

3 LDC [MR. CONNELL]: Yes.

4 MJ [COL POHL]: And they are the ones who decide whether
5 it's adequate or specific enough and how they want to respond?

6 LDC [MR. CONNELL]: Exactly.

7 MJ [COL POHL]: The government is volunteering to play
8 Western Union but other than that I don't know that Mr. Ryan
9 was taking the position that -- how they are going to review
10 the Touhy notice as sending it back to you as being
11 inadequate.

12 LDC [MR. CONNELL]: Who? The government?

13 MJ [COL POHL]: Yeah.

14 LDC [MR. CONNELL]: That's not my point. My point is
15 under 703 in the production of witnesses situation we already
16 have to convince the government. That was our -- you know,
17 counsel for the government noticed, mentioned that we didn't
18 complain.

19 MJ [COL POHL]: I understand.

20 LDC [MR. CONNELL]: We actually did complain in AE 036 and
21 we lost, so we litigated that and we moved on.

22 MJ [COL POHL]: I understand now. Under 703 you have to
23 convince the government.

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1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: Then you have a different Tuohy
3 requirement ----

4 LDC [MR. CONNELL]: We have a different audience we have
5 to convince.

6 MJ [COL POHL]: Eventually you have to convince, but
7 that's true of everything.

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

9 MJ [COL POHL]: Additional burden here.

10 LDC [MR. CONNELL]: Is convincing someone I have never met
11 or seen in the general counsel's office of the CIA.

12 MJ [COL POHL]: The agency GC ----

13 LDC [MR. CONNELL]: Potentially ten different agencies
14 because it's not just the CIA we're talking about here.

15 MJ [COL POHL]: I understand that.

16 LDC [MR. CONNELL]: The Moussaoui trial went substantially
17 south because of the involvement of the general counsel for
18 the FAA and a number of witnesses were barred from testifying
19 in that situation, so there were a lot of fingers as the
20 military commission likes to say in a lot of pies, and this is
21 just going to make everything a lot more complicated.

22 MJ [COL POHL]: But if that's the only argument ----

23 LDC [MR. CONNELL]: No, it's not the only argument. My

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1 real argument is that the reg doesn't ----

2 MJ [COL POHL]: I am saying if I get to the point where
3 Touhy notice is required, the fact that it has got to go to
4 ten separate agencies ----

5 LDC [MR. CONNELL]: Is a factor in the Wardius analysis,
6 Your Honor.

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: It's not an oh, poor Mr. Connell, he
9 has to do more work. That's not what I am saying. What I am
10 saying is the nonreciprocal nature of the discovery does have
11 as one factor, all right, how much of an additional burden are
12 we talking about, which is the exact argument that the
13 government made. They claimed it was a de minimis burden. I
14 am trying to say that it is not a de minimis burden.

15 MJ [COL POHL]: Okay. I understand your position. Thank
16 you.

17 LDC [MR. CONNELL]: Thank you.

18 MJ [COL POHL]: Any other defense counsel wants to be
19 heard on the Touhy issue? Apparently not.

20 Mr. Ryan?

21 TC [MR. RYAN]: Just real brief, Judge. For the most part
22 I don't feel the need to respond, but just on the issue of
23 whether counsel read our quote in court about whether we had

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1 stated the NDA was applicable, here it is from the
2 government's pleading 386F, here the prosecution has already
3 confirmed the interpreter's prior status with the CIA and that
4 the interpreter has signed a nondisclosure agreement
5 applicable to the information the defense seeks, see AE 350,
6 which was the original, 350DD and so on.

7 So, Judge, at least in three or four pleadings it was
8 stated that the NDA is in effect.

9 MJ [COL POHL]: Mr. Ryan, let me ask you two questions.

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

11 MJ [COL POHL]: One is kind of anticipatory, which I don't
12 want an answer right now and the other one is the process.

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

14 MJ [COL POHL]: Mr. Connell indicated the process works
15 like this. A subpoena, order to compel, something like that
16 is issued. It's conveyed to the agency employee and
17 presumably to the agency general counsel, then they come back
18 and say we are requiring a Touhy notice or we are not and then
19 the requestor submits said notice. The GC then says -- passes
20 on the notice and then -- assuming it's an inadequate
21 response, then it comes to the judge for a decision. Is that
22 how you understand Touhy should work?

23 TC [MR. RYAN]: Yes, sir. Yes, sir. Now, in this -- for

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1 this case going forward, because of the 702, 703 process ----

2 MJ [COL POHL]: Yes.

3 TC [MR. RYAN]: ---- and whatever information is in that
4 maybe, and of course we don't know yet, but may be sufficient
5 for Touhy for whatever the agency is.

6 MJ [COL POHL]: But then it comes back to my other issue
7 is because we got -- we touched on 350 at an earlier hearing
8 and the Touhy issue kind of floated its head up.

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

10 MJ [COL POHL]: And I don't want to talk about 350 except
11 procedurally. So assuming that is the process for the Touhy
12 requirement ----

13 LDC [MR. NEVIN]: Yes, sir.

14 MJ [COL POHL]: ---- it seems to me before we get to Touhy
15 in 350, we get to the deposition order to produce the
16 deposition to begin with.

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

18 MJ [COL POHL]: And if that is done, then that may or may
19 not trigger the Touhy process in that case.

20 TC [MR. RYAN]: Absolutely, Judge, yeah.

21 MJ [COL POHL]: Okay.

22 TC [MR. RYAN]: Just one last thing, Judge. As far as
23 Touhy and practicality with an agency, and I won't use any

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1 specific one, but, you know, I'm going to suggest that I think
2 the practicalities will ultimately not be very difficult where
3 if a military judge has already said this witness should
4 testify, the agency should have some discussion with the
5 accused where they have equities at stake, but at the same
6 time, my guess is there will be an understanding that -- you
7 know, of the road ahead to get where the judge wants to go.
8 Of course, I can't see every possibility out there, but I just
9 raise that.

10 But the only thing I do want to emphasize is that, as
11 much as the prosecution is being suggested, you know, we could
12 be Western Union, the mailbox, and I don't have a problem with
13 that, there is going to have to be some, my guess, discussion
14 between the agency and counsel, because there will probably be
15 some kind of give and take.

16 MJ [COL POHL]: Yeah, sure, I understand.

17 TC [MR. RYAN]: That's all I have, Your Honor. Thank you.

18 MJ [COL POHL]: Mr. Connell, you indicated when we started
19 this discussion there may be a requirement for a 505(h)
20 hearing. After this discussion, do you still believe that?

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

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

23 LDC [MR. CONNELL]: 386C is the notice.

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1 MJ [COL POHL]: Okay. And our roadmap from yesterday
2 would indicate that next we are going to wade into the 018
3 series.

4 LDC [MR. CONNELL]: Your Honor, I know it's a little
5 early. Can I request a comfort break since it is a natural
6 break point?

7 MJ [COL POHL]: Okay. We will have a little longer
8 comfort break. Okay. Just -- there is an issue that if we go
9 after 1700, there is a guard force issue in terms of arranging
10 chow and things like that, so my intent is probably to quit on
11 or about 1700; but given some other factors, we will recess
12 now, from now until 1545 and then go 1545 to 1700.

13 The commission is in recess.

14 [The R.M.C. 803 session recessed at 1518, 23 February 2016.]

15 [END OF PAGE]

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