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1 [The R.M.C. 803 session was called to order at 0920, 30 May  
2 2016.]

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

4 Trial Counsel, who is here representing the  
5 government today?

6 MTC [MR. TRIVETT]: Good morning, Your Honor.

7 MJ [COL POHL]: Good morning.

8 MTC [MR. TRIVETT]: Present for the United States are  
9 myself, Clay Trivett, Mr. Robert Swann, Mr. Edward Ryan and  
10 Major Christopher Dykstra, U.S. Air Force. Kim Walsh and  
11 Patrick O'Malley of the FBI are also present in the courtroom.  
12 Pursuant to your order, these proceedings are being  
13 transmitted by closed-circuit television to places in the  
14 continental United States.

15 MJ [COL POHL]: Mr. Nevin, I'm only concerned with the  
16 attorneys.

17 LDC [MR. NEVIN]: Your Honor, Major Poteet, Mr. Sowards  
18 and Ms. Leboeuf and I as well.

19 MJ [COL POHL]: Thank you. Ms. Bormann?

20 LDC [MS. BORMANN]: Judge, myself, Major Matthew Seeger,  
21 and Michael Schwartz.

22 MJ [COL POHL]: Thank you. Mr. Harrington.

23 LDC [MR. HARRINGTON]: Judge, I'm here along with Major

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1 Alaina Wichner.

2 MJ [COL POHL]: Thank you. Mr. Connell.

3 LDC [MR. CONNELL]: James Connell and Lieutenant Colonel  
4 Sterling Thomas.

5 MJ [COL POHL]: Thank you. Mr. Ruiz.

6 LDC [MR. RUIZ]: Judge, Suzanne Lachelier and Lieutenant  
7 Colonel Williams, Lieutenant Colonel Sean Gleason, and myself  
8 are here on behalf of Mr. Hawsawi.

9 MJ [COL POHL]: Thank you. All of the accused are  
10 present.

11 At this time I'm going to go over, as we do at the  
12 first session each time, with each of the accused their right  
13 to be present and their ability to request to be absent.  
14 Again, this is directed to each of the accused. You have the  
15 right to be present during all sessions of the commission. If  
16 you request to absent yourself from any session, such absence  
17 must be voluntary and of your own free will. Your voluntary  
18 absence from any session of the commission is an unequivocal  
19 waiver of your right to be present during that session. Your  
20 absence from any session may negatively affect the  
21 presentation of the defense in your case. Your failure to  
22 meet with and cooperate with your defense counsel may also  
23 negatively affect the presentation of your case.

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1 Under certain circumstances, your attendance at a  
2 session can be compelled regardless of your personal desire  
3 not to be present. Regardless of your voluntary waiver to  
4 attend a particular session of the commission, you have the  
5 right at any time to decide to attend any subsequent session.  
6 If you decide not to attend the morning session but wish to  
7 attend the afternoon session, you must notify the guard force  
8 of your desires. Assuming there is enough time to arrange  
9 transportation, you will then be allowed to attend the  
10 afternoon session.

11 You will be informed of the time and date of each  
12 commission session prior to the session to afford you the  
13 opportunity to decide whether you wish to attend that session.

14 Mr. Mohammed, do you understand what I just explained  
15 to you?

16 ACC [MR. MOHAMMAD]: (No translation.)

17 MJ [COL POHL]: Mr. Bin'Attash?

18 ACC [MR. BIN'ATTASH]: (No translation.)

19 MJ [COL POHL]: Mr. Binalshibh?

20 ACC [MR. BINALSHIBH]: (No translation.)

21 MJ [COL POHL]: Mr. al Baluchi?

22 ACC [MR. AL BALUCHI]: (No translation.)

23 MJ [COL POHL]: And Mr. Hawsawi?

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1 ACC [MR. AL HAWSAWI]: (No translation.)

2 MJ [COL POHL]: Just so there's some idea of what the  
3 current scheduling plan is, is that prayer is approximately  
4 about 1300. We will go to approximately 1245, and then take a  
5 lunch break to about 1400, and then about 1615, 1630, we'll  
6 decide how much further we go after that.

7 As discussed at the 802, there's going to be need for  
8 a 505(h) hearing, which is a closed session pursuant to  
9 Military Commission Rule of Evidence 505(h). And given the  
10 prayer schedule that we discussed, that is tentatively set for  
11 now at approximately 1400 on Wednesday. If that, after that  
12 hearing there necessitates a need for a closed session  
13 pursuant to the 806, that is tentatively scheduled for 1400 on  
14 Friday. All subject to change, as things develop during the  
15 week.

16 There's some issues I want to touch on that we've  
17 already discussed. And the first one is, Mr. Bin'Attash, I  
18 just want to make sure I understand something you said last  
19 time.

20 Is it your desire that you wish to have Mr. Schwartz  
21 be excused as your defense counsel?

22 ACC [MR. BIN'ATTASH]: (No translation.)

23 MJ [COL POHL]: Okay. Thank you. Ms. Bormann, it ----

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1 TC [MR. RYAN]: Your Honor, there's no translation.

2 MJ [COL POHL]: Well, I know that "na'am" means "yes."

3 TC [MR. RYAN]: Understood, sir. I think we've all  
4 learned that much, but going forward we may need more because  
5 there may be an awful lot of words we don't understand.

6 MJ [COL POHL]: Okay. Thank you. Ms. Bormann, as  
7 discussed, I will give you an opportunity to brief the issue.

8 LDC [MS. BORMANN]: Okay. What issue would you like  
9 briefed, Judge?

10 MJ [COL POHL]: The whether or not -- we discussed earlier  
11 about good cause to excuse statutorily required counsel. The  
12 question is what would be the basis to excuse nonstatutorily  
13 required counsel. What would be the ----

14 LDC [MS. BORMANN]: There's no case law which  
15 distinguishes between the two.

16 MJ [COL POHL]: Okay.

17 LDC [MS. BORMANN]: The government cited in response to a  
18 motion we had filed without any case law. So if we're  
19 briefing it, since it's their idea, I would ask that they lay  
20 out what they believe the law is and that we response to that.

21 MJ [COL POHL]: Let's join the issue, then.

22 Government, in your pleading, you did indicate you  
23 raised that issue. Is it the government's position that

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1 nonstatutorily required counsel can be excused for any reason  
2 or no reason at all?

3 TC [MR. RYAN]: That is correct, sir.

4 MJ [COL POHL]: Okay. Then, okay -- since we're not going  
5 to resolve it at this session anyway, you file a pleading to  
6 that effect. You have an opportunity to respond, Ms. Bormann,  
7 and we will address it at the next session.

8 TC [MR. RYAN]: Excuse me, Your Honor. You're directing  
9 the government to file a brief as to that, the issue is  
10 nonstatutory counsel?

11 MJ [COL POHL]: Yes.

12 TC [MR. RYAN]: Judge, our position is simply that. It's  
13 not provided for in the statute. I don't know that there's an  
14 awful lot else to say.

15 MJ [COL POHL]: Okay. Okay. Let me get it straight here.

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

17 MJ [COL POHL]: It's the government's position that if  
18 it's not statutorily required counsel, then the counsel can be  
19 excused for any reason at all by the client.

20 TC [MR. RYAN]: Our position is he serves at the pleasure  
21 of the accused. It's not provided for in statute. It's not  
22 required under statute. At some point, Mr. Schwartz  
23 transitioned from being statutorily required when he was in

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1 the military, to now being civilian, and I assume he is  
2 detailed to the case now as a result of the chief defense  
3 counsel. But nonetheless, it's our position under the law  
4 that, because it's not statutorily required, he serves at the  
5 pleasure of the accused, and the accused can sever him for no  
6 reason whatsoever, or whatever reasons he may have.

7 MJ [COL POHL]: Okay. That's the sum and substance of the  
8 government's position?

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

10 MJ [COL POHL]: Thank you.

11 Ms. Bormann, you have two weeks to file a response,  
12 if you wish to.

13 LDC [MS. BORMANN]: That's fine, Judge. I'd ask that they  
14 provide any basis in the law or statute ----

15 MJ [COL POHL]: They gave what they gave you. They said  
16 what -- that's it.

17 LDC [MS. BORMANN]: Two weeks from the end of the  
18 hearings, I'm hoping, since I'll be wrapped up in hearings all  
19 this week.

20 MJ [COL POHL]: Yes. The hearings end on ----

21 LDC [MS. BORMANN]: Friday.

22 MJ [COL POHL]: Yeah, I know. But what's the date?

23 LDC [MS. BORMANN]: June 3.

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1 MJ [COL POHL]: Okay. Your pleading will be due by the  
2 17th.

3 LDC [MS. BORMANN]: Thank you.

4 LDC [MR. RUIZ]: Your Honor, just before ----

5 MJ [COL POHL]: Sir.

6 LDC [MR. RUIZ]: ---- just before you get a little bit  
7 further down the road, there are a couple of matters that I  
8 would like the opportunity to address, so when you think it's  
9 appropriate.

10 MJ [COL POHL]: Yeah. There's three kind of  
11 housecleaning, not housecleaning but issues ----

12 LDC [MR. RUIZ]: Sure. The one of the ones I want to  
13 address in particular, which was filed prior to the hearing, I  
14 think it's appropriate to do that before you get started or  
15 further down the road.

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

17 LDC [MR. RUIZ]: Thank you.

18 ACC [MR. BIN'ATTASH]: One minute regarding what the  
19 government has mentioned. I do have a comment about it.

20 In a session in 2013, I had an attorney Bill  
21 Hennessey who was an assistant at JAG, Judge Advocate General.  
22 He was an assistant to the lawyer Cheryl Bormann. And I asked  
23 that he leaves the case. No one objected, not the government

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1 and none of -- from my defense team. Neither did the court.  
2 At the present time, this is the same situation. An attorney  
3 and assistant, not a capital case lawyer. Lawyer Schwartz is  
4 an assistant, and I don't see a difference between both cases.  
5 I just wanted to add that paragraph.

6 MJ [COL POHL]: Thank you, Mr. Bin'Attash.

7 I want to turn to AE 161, which deals with the FBI  
8 302s.

9 Trial counsel, when we talked about this last time,  
10 it was -- it's unclear to me what exactly the redactions were  
11 based on and who was doing them. According to the pleading,  
12 there's numerous redactions in the 302s. And the government  
13 response, as I recall, was they're there for a myriad of  
14 reasons. Is that correct, Mr. Ryan?

15 TC [MR. RYAN]: That's correct, Your Honor.

16 MJ [COL POHL]: And those reasons were?

17 TC [MR. RYAN]: As many as you can probably imagine,  
18 Judge. My argument at the time was in light of the offense,  
19 in light of the event, an enormous amount of reports were  
20 generated by the sole -- I shouldn't say "sole," but the major  
21 investigating agency for the United States, the Federal Bureau  
22 of Investigation, as everyone would expect. Literally, the  
23 entire FBI was working on the case.

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1           In those terrible days, lots of people running in  
2 lots of different directions and generating lots of reports.  
3 That's then. And then, of course, as the investigation  
4 continued, things got much narrower and narrower, and reports  
5 became less voluminous and maybe more pointed as such.

6           My argument to Your Honor was, in any case, but  
7 certainly in this one, the reports that are issued are going  
8 to contain a great deal of information about the subjects that  
9 they pertain to. Maybe it was an interview, maybe it was  
10 discussion with other federal agencies, state agencies and so  
11 on. Within those reports, agents and/or analysts will put  
12 down the information -- take that information that they deem  
13 necessary at the time. It is -- it is necessary, though, for  
14 those people writing those reports, producing those reports,  
15 to probably be overinclusive, I guess is the best way I can  
16 say it, but this isn't every time but in a lot of them and I  
17 think it goes to the gravamen of Your Honor's question.

18           So ultimately when it's time for us to provide the  
19 discovery, the prosecution, which is, I submit, and has been  
20 argued before, the first cut in terms of discovery decisions,  
21 takes the reports and goes through them, and ultimately has to  
22 make certain decisions about whether it's going to hand  
23 reports over, as they are, or whether they are going to redact

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1 them as they see fit based on, for the first -- for the first  
2 cut, at least, just general relevance grounds under 701,  
3 et cetera.

4           Now, some of these decisions are easier, for example,  
5 you know, Social Security numbers, telephone numbers,  
6 addresses of nonrelevant parties under privacy laws and just  
7 sort of good common sense. On the other hand, there will be  
8 other things that may be contained in a report. And I know  
9 this sounds vague, Judge, but it's really hard to talk about  
10 in a giant abstract. But in the course of a report, there  
11 could be many subjects carried, only one or two of which are  
12 relevant. I guess that's the clearest way to say it.

13           In our case, we make the decision to redact that  
14 which is irrelevant to the purpose for which we are providing  
15 the discovery.

16           MJ [COL POHL]: Okay. Let me just ----

17           TC [MR. RYAN]: I'm trying to come up with an example.  
18 But I'm sorry. Go ahead.

19           MJ [COL POHL]: Your first cut is the material preparation  
20 to the defense, the normal 701 analysis, correct?

21           TC [MR. RYAN]: Yes, sir.

22           MJ [COL POHL]: And then you kind of threw in there PII,  
23 too, which arguably could be material to the preparation of

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1 the defense, but there's some PII, bank account numbers that  
2 you may not want to disclose. Okay. I've got that. But  
3 let's just go to the first one. Who is deciding -- I'm  
4 talking about not by name necessarily, but by occupation. Who  
5 is deciding that this is not material to the preparation of  
6 the defense? Is it an attorney, is it a -- or a paralegal?

7 TC [MR. RYAN]: Oh, it's typically an attorney, Your  
8 Honor.

9 MJ [COL POHL]: Typically or always?

10 TC [MR. RYAN]: Oh. I can't say "always" to you, Judge,  
11 but I'll say this: I mean, ultimately, it's the prosecution's  
12 responsibility for an awfully long time, forever in my case,  
13 the way we have done it, before something is redacted out of a  
14 report, I will, or a prosecutor will have a discussion with  
15 maybe a paralegal, but quite often the agent who produced the  
16 report, or the agent who's responsible for working with us in  
17 regard to that report will have a decision about certain items  
18 contained therein.

19 MJ [COL POHL]: So the attorney does a review, maybe not  
20 the initial redaction, but will review the redaction before  
21 it's redacted?

22 TC [MR. RYAN]: Yes, sir. Or even to look at it as a  
23 proposed redaction saying, yes, I'm good with that,

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1 understanding what is under the black box.

2 MJ [COL POHL]: Now we slide into the other category and  
3 we talk about PII.

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

5 MJ [COL POHL]: And there's PII of, for lack of a better  
6 term, irrelevant individuals, and there's PII of what I'm  
7 going to use are material to preparation of the defense, and  
8 I'm going to short -- you use a short word for that, even just  
9 relevant. Even though I know it's slightly different it's not  
10 that type of relevance under 701.

11 TC [MR. RYAN]: Understood.

12 MJ [COL POHL]: And then on the PII on the 701 people, are  
13 the names left in?

14 TC [MR. RYAN]: We -- again, answering in general, my  
15 general practice would be if it is -- and I think I can give  
16 you an example. Lower Manhattan, September 11th, people are  
17 giving statements all over the place. And in some cases,  
18 agents are taking them down. Sometimes it's fourth, fifth  
19 hand, et cetera. Names could be listed. And when I go  
20 through it, I ultimately make a determination that person X  
21 who lives in Brooklyn, who said these things, was irrelevant,  
22 in a general category.

23 I, in that case -- and I'm not talking -- I'm talking

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1 about a statement that would -- that is not anywhere near the  
2 realm of Brady, shall we say.

3 A statement that, you know, an agent took down for  
4 whatever reason, I would make a determination that it's just  
5 not relevant. It's nowhere near; it's not even close. In  
6 that case, I'd be taking out the name. Now, as I -- and I  
7 think I understand where are you going, Judge.

8 If it's a case of somebody gives a statement, some  
9 person is identified in a report, and it's arguably relevant  
10 or is relevant, or maybe even could relate to some theory of a  
11 defense, somebody else did it, then it is my obligation to  
12 provide the information about that person so that the defense  
13 can find them.

14 MJ [COL POHL]: Okay. Now, we got another category, which  
15 is probably everybody's favorite, is the cumulative category.

16 TC [MR. RYAN]: Cumulative.

17 MJ [COL POHL]: Okay. Is that also a basis for some of  
18 the redactions?

19 TC [MR. RYAN]: Outside of the 505 context, cumulative  
20 plays a much less role in a decision to redact or not include.

21 MJ [COL POHL]: Or just easier to give it to them twice  
22 or ----

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

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1 MJ [COL POHL]: Okay.

2 TC [MR. RYAN]: Yes, sir. Or if a hundred people saw  
3 something that I believe is relevant or exculpatory,  
4 et cetera, then I'll at least make it known that there's 100,  
5 so a specific demand can be made, if they so wish. But in  
6 many cases it's simply a case that we turn it over.

7 MJ [COL POHL]: Okay. In 161 on these 302s, are they  
8 primarily from 9/11, people at the -- in New York City or  
9 Washington, or do they cover other interviews?

10 TC [MR. RYAN]: It's going to cover an awful lot of  
11 subjects.

12 MJ [COL POHL]: Okay.

13 TC [MR. RYAN]: I mean, for the most part, it should be  
14 that any report we're talking about relevant to this case has  
15 something to do with this case in one way, shape, or form.  
16 However, as I've been trying to explain, there's going to be  
17 irrelevant stuff within it, and sometimes it won't be a  
18 relationship to the crime.

19 But it could be that it was -- you know, in south  
20 Florida where there was a flight school. Many of those.

21 MJ [COL POHL]: Okay.

22 TC [MR. RYAN]: So on.

23 MJ [COL POHL]: So other than -- just so I got the

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1 categories, you do the material preparation to the defense cut  
2 and then you do a -- and that would throw out the PII of  
3 irrelevant people, and you do the PII redactions to a degree  
4 of relevant people that meet the 701 standard, and then there  
5 may be some that is, you know, a thousand people ran down the  
6 street with a building falling down.

7 TC [MR. RYAN]: Right.

8 MJ [COL POHL]: And that may be the cumulative thing. Is  
9 there any other large category that you can think of?

10 TC [MR. RYAN]: Not that I can think of, sir.

11 MJ [COL POHL]: Okay.

12 TC [MR. RYAN]: By the way, it occurs to me in the case of  
13 PII, that may be a situation where we -- I'm not promising  
14 you, but we may seek to use 506 as sort of getting Your Honor  
15 involved in issuing a protective order or something along  
16 those lines. Maybe not.

17 MJ [COL POHL]: Do you think the current protective order  
18 doesn't cover that?

19 TC [MR. RYAN]: No, I think it does.

20 MJ [COL POHL]: Okay. Thank you. Thank you. I just  
21 wanted to clarify that. Mr. Connell, I know this is kind of  
22 your issue, if you want to be heard on it.

23 LDC [MR. CONNELL]: Your Honor, I previously provided to

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1 the court reporter and to the court security officer and the  
2 prosecution a copy of slides which have been marked for  
3 identification as AE 161FAAA. I would ask that permission to  
4 display them to the gallery, ask for the feed from Table 4.

5 MJ [COL POHL]: Wait a minute. Just so I'm clear here,  
6 Mr. Connell, these appear to all relate to medical records?

7 LDC [MR. CONNELL]: No, sir. They relate to two  
8 categories of information that's covered by 161. One is the  
9 DIMS records.

10 MJ [COL POHL]: DIMS. I'm sorry. And medical records.

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

12 MJ [COL POHL]: And we have spent a lot of time with  
13 Mr. Ryan just talking about the 302s.

14 LDC [MR. CONNELL]: Yes, sir. I'm going to address the  
15 302s. When we discussed this in December, the topic was DIMS  
16 records, not 302s, so I don't have slides on the 302s, but I'm  
17 happy to discuss the 302s.

18 MJ [COL POHL]: Okay. Go ahead. You may publish the  
19 slides for ----

20 LDC [MR. CONNELL]: Thank you, sir. And, sir, let me  
21 observe that I'm somewhat ill. I don't have a lot of voice  
22 left. My -- I will -- if you can't hear me, please let me  
23 know.

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1 MJ [COL POHL]: Very well.

2 LDC [MR. CONNELL]: My voice may be drowned out by the  
3 cheering of the stenographers and the interpreters.

4 Sir, I don't disagree as a matter of principle with  
5 most of the government's arguments, but they do not reflect  
6 the actual process of discovery which has taken place in this  
7 case. I'll begin with the 302s.

8 Initially the government produced approximately  
9 11,000 pages of 302s. I addressed the court on those in 2014  
10 with respect to AE 175, which was the government's position  
11 that it was nearly complete with its production of discovery.  
12 It was at that time that I relied on the information which is  
13 contained in AE 161 itself.

14 And at the time in that first production of  
15 information, the elements that the government just referred to  
16 were present. The government had redacted all personal  
17 identifying information. It had essentially redacted every  
18 numeral from the FBI 302s. It had redacted all bank account  
19 numbers, all telephone numbers, all first names, including of,  
20 say, the hijackers.

21 After that argument in AE 175, the government  
22 reproduced the FBI 302s. A second category of approximately  
23 10,000 -- between 10- and 11,000 FBI 302s, and all of the

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1 information that the government just discussed, PII, for  
2 example, is now all contained within those 302s. We no longer  
3 have a PII issue with the 302s. In fact, after the 802  
4 conference, we went back and checked the FBI information in  
5 the second tranche of information, almost all of which are  
6 duplicates of the first. It wasn't a complete duplicate set  
7 but a largely duplicate set, and I couldn't find a single  
8 place where the government has redacted PII. All Social  
9 Security numbers, all telephone numbers, all that is now in  
10 that second tranche of FBI information.

11           So many of the principles the government just  
12 articulated, while technically valuable, don't really apply to  
13 the 302s in this case. There are probably hundreds of  
14 thousands of 302s they chose not to produce, and no doubt they  
15 applied the principles that they just discussed. But really,  
16 we no longer have an issue with PII in 302s.

17           What the government did redact out of the 302s is all  
18 of the administrative information. The information which  
19 would allow us to match up, for example, a 302 with the 1A. A  
20 1A is the attachment to a 302. So let's say that a 302 says  
21 "a witness gave me this piece of paper," or "a witness gave me  
22 this receipt for mailboxes," et cetera. The description of  
23 what the witness said and did would be found in the 302, as

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1 summarized by an FBI agent, but the -- excuse me -- the piece  
2 of -- the receipt or the letter or the piece of paper would be  
3 attached to a 1A, and the prosecution separately produced all  
4 of the 1As.

5           And what the prosecution redacted was the -- on these  
6 302s was the information which allows you to -- to  
7 administratively track what the FBI has done by matching it up  
8 with the 1As and the other related 302s. So essentially the  
9 PII issue that the government just described is no longer an  
10 issue with respect to the produced 302s. They might produce  
11 some more in the future, I don't know. But rather, the  
12 administration is -- it's an administrative issue.

13           Now, when this -- we addressed this issue on 11  
14 December of 2015, the record was left in some state of  
15 ambiguity on whether the government was producing DIMS  
16 records -- that is, Detainee Inmate Management System  
17 records -- which were solely redacted or whether they were  
18 also producing unredacted versions. I went back afterwards  
19 and checked each production from the government to determine  
20 when that was true and when that was not true.

21           This slide demonstrates -- in AE 161F demonstrates  
22 the production of the DIMS records by the government and which  
23 ones are redacted and they produced to us unredacted versions

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1 as well, which ones are redacted and they did not produce us  
2 unredacted versions. I will point out to you that there are  
3 three tranches of DIMS records that the government produced  
4 only in redacted form and did not produce in unredacted form.  
5 This was the question that came up at the last hearing. I  
6 immediately after December, I gathered this information  
7 together, sent it in an update to the prosecution in the hopes  
8 they might fill in the gaps, but they have not elected to do  
9 so.

10 But to give you an example of one of the records that  
11 falls in the gap. I blurred out the medical, the confidential  
12 information in this, but the redactions in this slide are  
13 accurate and demonstrate the actual redactions from the  
14 government. It's just the blurry stuff is visible in the  
15 original document, but I didn't want to show that to the whole  
16 world.

17 So some dates are -- the dates are -- in this  
18 September 2014 production are visible. Much of the  
19 information which identifies who created the record, the  
20 provenance of the record, and in some cases, such as in the  
21 middle of the page, the content of the record itself are also  
22 redacted by the government and are not produced in a separate  
23 document which contains the underlying unredacted information.

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1           Now, in some cases, the government has produced the  
2 underlying information in a separate, secret production, but  
3 that is not the case for three of the productions.

4           And that brings us to the most serious issue, I  
5 think, dealing with Rule For Military Commission -- excuse me,  
6 Military Commission Rule of Evidence 506, and that is the  
7 medical records. The government has produced six different  
8 kinds of medical records. They are more or less in random  
9 order. To demonstrate their randomness, I checked what was  
10 page one in the discovery, and in the prosecution's discovery,  
11 which is MEA, Mike Echo Alpha, 10018 and seven leading 0s and  
12 number 1, the first page of medical records is dated August 13  
13 of 2007. That's just an example of these records were  
14 produced almost in random order.

15           If we were in a civil case, there would probably be  
16 some consequences for that, but they're not, and we put them  
17 back together as best we can. But there are six types of  
18 orders, and we have carefully detailed for the prosecution  
19 which records are missing. But what I want to discuss today,  
20 since we're talking about AE 161 and Military Commission Rule  
21 of Evidence 506, is not the missing records but rather the  
22 redactions.

23           There are six categories of medical records the

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1 government has produced. One of those are called doctors'  
2 routine orders. One of those are called chronological records  
3 and medical care. One of those are called PRN and variable  
4 dose medication and medication administration records. One of  
5 those are called staff psychiatry progress notes. The fifth  
6 category, a patient lab inquiry and radiological examination  
7 records. And the sixth category is DSMP or Detainee  
8 Socialization Management Program session documents.

9           We have carefully looked at each redaction on each  
10 page of the medical records and created in this slide an  
11 average number of redactions on each page. On each of the  
12 doctors' routine orders, there's an average number of eight  
13 redactions per page; for chronological records of medical  
14 care, an average of 15 redactions per page; for medication  
15 records, an average of eight per page; for psychiatry, much  
16 less, an average of one per page; lab reports, an average of  
17 four redactions per page; and DSMP documents, an average of  
18 four redactions per page.

19           I wanted to give you some example of what these  
20 things look like, just so you know. The confidential medical  
21 information has been blurred, but the redactions are actually  
22 accurate.

23           There are two -- there have been two different sort

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1 of time periods, and the prosecution has produced medical  
2 records in different ways: Prior to mid 2014 and subsequent  
3 to mid 2014. Prior to mid 2014, individual -- every  
4 individual name of a healthcare provider was redacted and  
5 numbered. And so, for example, at the top of the page on the  
6 slide, you will see HM 34, that would be Hospitalman 34, and  
7 right under that, Dr. 36.

8           The -- it may be that the prosecution has a document  
9 which relates Hospitalman 34 to an individual, and Dr. 36 to  
10 an individual, but they have never produced it to the defense.  
11 Instead, all we have is this record as it's shown here,  
12 Hospitalman 34, and Dr. 36. The prosecution did produce four  
13 pages of secret documents after I objected to the  
14 classification handling, but none of them provide any  
15 information about the -- who is actually involved.

16           This is a second -- and this is prior to mid 2014,  
17 there is a second type of redaction, which I'm not sure what  
18 it refers to, but if you see in the upper left-hand side of  
19 the page, you see where they normally use white redactions and  
20 a doctor, they have switched to a black redaction and the  
21 number 3, which looks almost like a Freedom of Information Act  
22 redaction, although, of course, Freedom of Information Act  
23 doesn't have anything to do with the prosecution's

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1 responsibility.

2 MJ [COL POHL]: Mr. Connell, let me make sure I  
3 understand. On the slide that's up there, when you're  
4 counting redactions per page and they put down Doctor 38 five  
5 times, you consider that five redactions.

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

7 MJ [COL POHL]: Okay. I just want to know how you count.  
8 That's all.

9 LDC [MR. CONNELL]: Yes, sir. Transparency is important  
10 with date. So if Dr. 36 is on here, as you say, five times or  
11 Hospitalman 31 is on here four times, those count separately.  
12 There are the separate redactions that I was calling the  
13 court's attention to in black, and I honestly am not sure what  
14 those are redactions of. I haven't been able to figure out  
15 what they are exactly.

16 But identifiers of healthcare providers are not the  
17 only things which are redacted. In this next slide, we  
18 demonstrate where the government has redacted actual patient  
19 historical and diagnosis information. This particular  
20 document is quite important. It's dated 8 September 2006,  
21 shortly after Mr. al Baluchi's arrival at Guantanamo Bay.  
22 And, you know, for example, it redacts the sources of  
23 information. It says that its sources of information are an

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1 interview, and then something else.

2           For his past psychiatric history, which probably  
3 would be significant since it occurred, the only access the  
4 United States would have information to would be from the  
5 black sites, and his diagnoses are blacked out. His history  
6 of medications or therapy are blacked out; information about  
7 possible suicide attempts are blacked out; information about  
8 any history of self-mutilation are blacked out. On this  
9 slide, the black redactions are the ones the government  
10 applied. The blurring is just to dem -- is just to cover up  
11 confidential medical information.

12           There are also some kind of less-obvious redactions.  
13 If you look at the bottom of the page, you will see that a  
14 much -- much of the information in that paragraph has been  
15 covered up by a sticker that says -- well, presumably  
16 originally was covered up by some kind of sticker that said  
17 ISN 010118, but then when it gets to us, it's just a PDF of a  
18 document. There's no sticker to peel back, it's just  
19 information that's been redacted by the government.

20           It changed in mid-2014. The government continued to  
21 redact the individual names or initials in a comprehensive  
22 manner, but it didn't -- it stopped using numbers. We no  
23 longer have Hospitalman 31 or 34 and Dr. 36, we now simply

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1 have redactions. And in this medication administration  
2 record, which appears in the slide, you see that the initials  
3 for all of the people who provided information were -- have  
4 been redacted.

5           And then finally with the medical records, we have  
6 some occasions, at least five, of whole-page redaction where  
7 we don't have any sense of what appears under these  
8 redactions. The government just redacted it with a giant box  
9 that contains the number one with no relationship to what that  
10 number refers to or any reason for the redaction.

11           This is not the way that discovery is supposed to  
12 work. For unclassified discovery, after the government has  
13 made a material-to-the-preparation-of-the-defense cut, or for  
14 Brady purposes a favorable-to-the-defense cut, the only  
15 additional reasons that the government should withhold  
16 information, unclassified information, are on an assertion of  
17 government information privilege governed by M.C.R.E. 506.

18           To my knowledge, the government in this case has  
19 never made an M.C.R.E. 506 pleading. Some of their titles on  
20 their ex parte pleadings are not very enlightening so I don't  
21 always know, but to the best of my knowledge, there's never  
22 been a 506 pleading, I can state with 99 percent confidence,  
23 there's never been a 506 pleading with respect to the

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1 Guantanamo medical records. I know there was a 505(h)  
2 pleading with respect to CIA medical records, but with respect  
3 to Guantanamo records there's never been an authorization by  
4 the judge to withhold information.

5           And so given that medical record information, for  
6 example, is extremely important to the progress of the case in  
7 providing it to experts to assess his current health on the  
8 issues of admissibility of evidence and the effect of torture,  
9 the medical records are actually extremely important. We've  
10 made many, many attempts to negotiate this privately with the  
11 government by pointing out to them exactly what information  
12 was missing. We've provided them a list of every single  
13 doctor number or hospitalman number which is provided within  
14 the records in an attempt to get an index to them. And the  
15 government has neither chosen to produce the information nor  
16 chosen to seek authority for redactions from the military  
17 commission.

18           So the AE 161 does not have any kind of radical  
19 request. AE 161 is just asking the military commission to  
20 order the prosecution to follow the 506 process. If it has  
21 government information privilege it wants to assert, there is  
22 a process that is laid out in the military commission's rules.  
23 But instead, the government has chosen to unilaterally redact

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1 information without seeking approval from the military  
2 commission.

3 I don't have anything further. Thank you.

4 MJ [COL POHL]: Thank you. Okay. Mr. Connell, while  
5 you're up here, let me switch gears here.

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

7 MJ [COL POHL]: I want to just clarify your position on  
8 400.

9 LDC [MR. CONNELL]: May I get my materials, sir?

10 MJ [COL POHL]: Sure. Then Mr. Ruiz, I'll entertain your  
11 issue.

12 LDC [MR. CONNELL]: I'm ready, sir.

13 MJ [COL POHL]: Okay. When we last left 400, there was an  
14 issue about whether or not we could discuss it in an open  
15 session.

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

17 MJ [COL POHL]: Okay. And I just wanted to clarify,  
18 because it was unclear, at least to me, what exactly you  
19 wanted to discuss.

20 LDC [MR. CONNELL]: Yes, sir. You would like me to  
21 address that.

22 MJ [COL POHL]: Well, let me ask you. Do you want to  
23 discuss that the redactions are not consistent with the

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1 declaration?

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

3 MJ [COL POHL]: Okay. And you want to do that in an open  
4 session?

5 LDC [MR. CONNELL]: Yes, sir. Based on unclassified  
6 information contained in AE 400C, Attachment B, which is the  
7 government's proposed second redacted transcript of 30 October  
8 2015.

9 MJ [COL POHL]: But ----

10 LDC [MR. CONNELL]: The information I wish to discuss is  
11 all unclassified.

12 MJ [COL POHL]: Okay. And I want to -- just tell me how  
13 you get there from here.

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

15 MJ [COL POHL]: Let's say you say redaction 18 is not  
16 consistent with the declaration. Okay. That's what you  
17 want -- that's ----

18 LDC [MR. CONNELL]: Sure.

19 MJ [COL POHL]: ---- that's what you want to discuss.

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

21 MJ [COL POHL]: I'll say to you, I'll go -- you say, but  
22 we don't want to discuss what the redaction is because it's an  
23 open session.

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

2 MJ [COL POHL]: Okay. And the government has said it's  
3 classified.

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

5 MJ [COL POHL]: Okay. So redaction 18, you say, doesn't  
6 fit any of the categories in the declaration, and therefore  
7 should not be redacted?

8 LDC [MR. CONNELL]: I can sharpen the example.

9 MJ [COL POHL]: Sure.

10 LDC [MR. CONNELL]: Let us say that the sentence  
11 containing redaction 18 is, "there are approximately redaction  
12 18 guards at Camp VII." The argument that I wish to make is  
13 the same reason that I believe -- is the same reason that we  
14 dealt with on 30 October 2015, which is the blurriness, the  
15 use of the word "approximately," which in most cases has not  
16 been redacted by the government, takes us out of the details  
17 that Admiral Clarke describes in unclassified paragraph 8 of  
18 his declaration.

19 He says that details of TTP could pose a threat to  
20 the safety -- to the security of the United States. And in  
21 most cases, the precatory language, the language which blurs  
22 the number, is unclassified and is contained within AE 400C  
23 attachment B, the government's unclassified submission on this

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1 topic. So that's the argument that I wish to make and that is  
2 based entirely on unclassified information, not what is under  
3 redaction 18.

4 MJ [COL POHL]: Okay. But what we're going to have is a  
5 redacted 18. I'm using this as an example.

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

7 MJ [COL POHL]: You say it's not consistent with the  
8 guidance.

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

10 MJ [COL POHL]: And the guidance is a mixture of  
11 unclassified and classified information.

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

13 MJ [COL POHL]: So the government stands up and says, no,  
14 it is consistent with the guidance and they point to this  
15 paragraph.

16 LDC [MR. CONNELL]: Well, they haven't done -- that hasn't  
17 appeared in their pleadings so far, but I can imagine the  
18 possibility.

19 MJ [COL POHL]: No, but what you're basically saying is  
20 the redaction is -- is not consistent with the guidance and,  
21 therefore, should not be classified; is that your point? I  
22 mean, I'm not quite sure ----

23 LDC [MR. CONNELL]: Yes. Yes, sir. That's right. But

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1 the reason that gets me to that point is all unclassified. It  
2 is the ----

3 MJ [COL POHL]: But wouldn't I have to look, though -- I  
4 mean, we could tap dance around a lot. I understand that.  
5 But in essence, wouldn't I have to have the declaration, the  
6 redacted version and the unredacted version in front of me in  
7 order to intelligently tie all of those three things together  
8 to see whether or not it meets the -- because -- it meets the  
9 guidance? Because if it doesn't meet the guidance, you say,  
10 therefore, it should not have been redacted, therefore,  
11 because it's not classified.

12 LDC [MR. CONNELL]: Correct.

13 MJ [COL POHL]: The OCA did not classify it.

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

15 MJ [COL POHL]: I agree there may be an example that you  
16 can go around on. Do you think that will apply to the bulk of  
17 them or do I need to look at the underlying redaction itself?

18 LDC [MR. CONNELL]: So you, of course, as decision-maker,  
19 may wish to look at the underlying redaction itself. That's  
20 why I prepared a red-line version which is contained at AE 400  
21 F. The argument that I need to make, however, relies entirely  
22 on unclassified information, which is why we're having this  
23 discussion.

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1           The government's position is not that I need to rely  
2 on classified information. I said that I don't, and I'm sure  
3 if I were to get close to a line, appropriate consequences  
4 would ensue. Their argument is that the unclassified  
5 information that I want to rely on is intertwined with media  
6 tweets and classified information to a state that -- to such  
7 an extent that I can't make an unclassified argument about it.  
8 And I simply don't agree with that.

9           It's not -- the question is not is this the most  
10 convenient way to handle these issues. Clearly that it's not.  
11 The question is, under Press Enterprise, whether the  
12 government has demonstrated the substantial probability of  
13 harm to a compelling state interest. And that has not been  
14 satisfied in such a way that the military commission could  
15 constitutionally close the argument on this.

16           MJ [COL POHL]: Okay. Thanks.

17           LDC [MR. CONNELL]: Certainly, sir.

18           MJ [COL POHL]: Trial Counsel, do you want to be heard on  
19 this? Just to be clear, we've discussed part of this in a  
20 closed session already, so I just ----

21           TC [MR. RYAN]: Yes, Judge, it's correct. At that time,  
22 Brigadier General Martins was speaking on behalf of the United  
23 States, and I don't want to replot ground, certainly not which

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1 occurred in closed session.

2 I will simply bring to the commission's attention  
3 that in this particular circumstance, in this particular case,  
4 unfortunately things happened in such a way that information  
5 was released that should not have been. And as a result, Your  
6 Honor's received a declaration from Admiral Clarke spelling  
7 out, I think in good specificity, the damage that can come in  
8 adopting the privilege or asserting the privilege as to  
9 certain areas of classified.

10 I put this in front of Your Honor to say greater care  
11 under this circumstance, and I take counsel completely at his  
12 word, but I -- greater care must be taken in this situation,  
13 this particular case, just because of these unique factors.  
14 And as Admiral Clarke states, things that are seemingly  
15 innocuous or innocent can be pieced together and do damage.

16 For those reasons, Judge, we remain in our position  
17 that these discussions need to take place in a closed session,  
18 and at least give Your Honor the opportunity to see how items  
19 that can be looked at, combined with other things, other  
20 information, can put us back in a realm of items being  
21 released that should not be.

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

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

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1 LDC [MR. CONNELL]: I just want to make one point in  
2 rebuttal, which is: The government describes that things  
3 happened in such a way, but I think it's important to this  
4 analysis what that way was.

5 On 30 October 2015, witnesses on multiple occasions  
6 invoked the classified information privilege. They said, "I'm  
7 not going to answer your question. We don't give that out for  
8 operational security reasons," et cetera. On each of those  
9 occasions, the military commission sustained their invocation  
10 of the classified information privilege. The -- what we are  
11 debating now is not a contemporaneous assertion of classified  
12 information privilege. What we are debating now is, having  
13 gotten the benefit of its bargain, the use of language such as  
14 "approximately" and giving ranges and avoiding details, having  
15 gotten the benefit of that bargain, the government seeks now  
16 to retroactively invoke classified information privilege.

17 And rather than that making us have to be more  
18 careful in avoiding classified information, it undercuts their  
19 argument that the -- my ability to argue unclassified  
20 information in open court damages national security because  
21 that information has already been argued in open court,  
22 without objections from the government, and in many cases with  
23 the government participating in crafting a way to avoid giving

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1 specific numbers such as by giving ranges, uses of approximate  
2 numbers, and percentages.

3 MJ [COL POHL]: Okay. My concern here, Mr. Connell, is --  
4 and I think we can resolve it this week, is I'm not sure how  
5 you get there from your argument without touching on  
6 classified information. So what we will do is we will add 400  
7 to the 505(h) hearing on Wednesday.

8 And government, I want a copy of the declaration, the  
9 copy of the unredacted copy of the transcript and redacted  
10 copy of the transcript, and then we'll discuss it in that  
11 context, and we'll see if we can get there. But I -- I am  
12 struggling with the concept of your premise that this  
13 information doesn't fall within the definitions in the  
14 guidance without discussing the exact information itself. Do  
15 you understand?

16 LDC [MR. CONNELL]: I understand the court's ruling.

17 MJ [COL POHL]: Okay. Okay. Again, I'm not -- I'm just  
18 going to say I'm going to revisit this in a classified session  
19 and then if we can get to it in an unclassified, we will do  
20 that at that point.

21 LDC [MR. NEVIN]: Could I be heard briefly, Your Honor?

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

23 LDC [MR. NEVIN]: On behalf of Mr. Mohammed, I ask that

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1 this argument take place in his presence. And I say it for a  
2 couple of reasons. I have objected generally to Mr. Mohammad  
3 being absent when any matters are discussed in a proceeding  
4 that could potentially lead to his being executed. I think  
5 it's not right and not fair.

6 But more specifically, here we're talking about  
7 evidence that he heard, at least I believe he was present on  
8 those occasions when this testimony was given. And this idea  
9 of the horses having left this corral already, it elevates  
10 form over substance to exclude him at this point from a  
11 discussion about what should be released publicly, he having  
12 already been present for the original statement of the  
13 evidence.

14 So I ask that it not be -- either not be done in a  
15 totally closed hearing or perhaps done at the beginning of  
16 that hearing before you close the rest of it.

17 MJ [COL POHL]: Okay. You're talking about if -- the  
18 argument on the motion itself, not -- are you talking about  
19 the 505(h) hearing?

20 LDC [MR. NEVIN]: I'm talking about a reference to  
21 materials which were ----

22 MJ [COL POHL]: No. I'm not talking about that. You're  
23 saying you want him present. I'm saying do you want him

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1 present at the 505(h) hearing ----

2 LDC [MR. NEVIN]: Yes.

3 MJ [COL POHL]: ---- or present if we do a closed session  
4 under 806 after the 505(h) hearing?

5 LDC [MR. NEVIN]: Oh. I misunderstood your question. At  
6 both.

7 MJ [COL POHL]: Okay. The request for presence at the  
8 505(h) hearing is denied, and I'll reserve ruling on the  
9 second issue when we get to it.

10 Mr. Ruiz.

11 LDC [MR. RUIZ]: Thank you, Judge.

12 I have a couple of just different issues that I just  
13 want to raise to your attention at this time.

14 Number one, it was brought to my attention when you  
15 were giving the scheduling order, the proposed scheduling for  
16 today, that the chow hall is open from 1100 to 1300 but  
17 everything else is closed just because of the Memorial Day  
18 holiday. Do with that whatever you may, Judge. I indicated  
19 that I would let you know that. It's not an issue personally  
20 for me, but it may be for other people, so that's the  
21 availability.

22 Second issue, which is I wanted to bring to your  
23 attention -- first of all, thank you for the extra time this

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1 morning. I needed time with Mr. al Hawsawi. I realize we've  
2 recently had a change in the guard force, and I may be going  
3 through some growing pains with that issue. I want to bring  
4 to your attention that you have given us an amount of time  
5 during the morning which we are allowed to go back and speak  
6 with the persons that we represent. It's a short amount of  
7 time before they are moved. It is important for us to get  
8 back there expeditiously. I was here for 20 minutes,  
9 approximately, before I was able to get back there. By the  
10 time I got back there, I was then told within a minute or two  
11 that I had two minutes left, which is what prompted my request  
12 for additional time today.

13 I will tell you that the response I got from the  
14 officer in charge was less than inspiring when I explained to  
15 him that I needed to get back there. He said, "We're aware of  
16 our time frame." But I bring that to your attention now  
17 simply so that you know that I'm making a record of it.  
18 Hopefully, it won't be an issue from here on out.

19 MJ [COL POHL]: But as you know, new guard forces  
20 sometimes -- I'm not saying it's right, I'm just saying they  
21 have to understand the way we do business.

22 LDC [MR. RUIZ]: Sure. It would be -- I hope you helped  
23 them understand.

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1 MJ [COL POHL]: Understand. We have been doing this a  
2 number of years and there's a certain procedure that we have  
3 been going through and it should hopefully stay the same, but  
4 sometimes it takes a while. Go ahead.

5 LDC [MR. RUIZ]: So that was my second issue, Judge.

6 In regards to the issue that I wanted to raise was in  
7 regards to AE 428. AE 428 was Mr. al Hawsawi's motion for a  
8 continuance of these hearings. And the basis for that was an  
9 April 5 communication that we received from Mr. Trivett -- or  
10 actually, that's not the reason itself, but it's what prompts  
11 this timeline.

12 On April 5, we received a message from Mr. Trivett  
13 that indicated that there was an additional -- additional  
14 compensatory control measure that the defense needed in order  
15 to obtain information that the prosecution at this time has  
16 deemed is material or favorable to the defense, and I'll -- I  
17 think it's important to reference back to the previous ACCM  
18 discussions that we've had before the commission, because in  
19 those discussions, I think at one point, you may have asked  
20 are there other additional compensatory control measures.

21 General Martins' response was, at this time this was  
22 the only one and if they made a determination that the defense  
23 needed to obtain information at a later time, there may be

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1 others.

2           So the inference I drew from that response back then,  
3 and then Mr. Trivett's message on April 5th, is that  
4 somewhere, somehow, the prosecution has made a determination  
5 that now the defense requires this information, and therefore,  
6 requires this additional compensatory control measure. That  
7 was on April 5.

8           On April 6, we contacted the point of contact that  
9 was provided in Mr. Trivett's communication, gave him the  
10 names of the persons on our team, articulated our need for the  
11 read-on and the basis for that read-on. And since that time  
12 we made repeated attempts in different avenues, whether  
13 telephonic conference or e-mail communications, attempting to  
14 get members of Mr. Hawsawi's team read on. Those efforts have  
15 continued all along the lines and also with the assistance of  
16 the chief defense counsel getting involved and attempting to  
17 move forward. Our request as early as last week, we were  
18 still hopeful that we would be obtain that information.

19           The reason why I think it is important that when we  
20 come to this court we're previously cleared, I think is the  
21 same reason that you articulated in one of the meetings where  
22 you denied a request by Mr. Nevin to have a particular  
23 translator. In that order, I think you clearly articulated

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1 that while you may not necessarily be involved in the security  
2 clearance procedures when it comes to personnel such as  
3 translators, you certainly do believe there is a closer link  
4 and nexus when it comes to detailed counsel or their  
5 representatives such as learned counsel, in Mr. Hawsawi's  
6 case.

7 I will tell you, as I stand here, none of  
8 Mr. Hawsawi's in-court detail counsel possess that additional  
9 compensatory control measure.

10 MJ [COL POHL]: Did you ever get a response as to when  
11 that would happen?

12 LDC [MR. RUIZ]: Judge ----

13 MJ [COL POHL]: I read your pleading.

14 LDC [MR. RUIZ]: It's like speaking into a black hole,  
15 Judge. I don't know. We're working on it. The  
16 check's-in-the-mail kind of answer, is the best way I can  
17 articulate that.

18 MJ [COL POHL]: Until you get the ACCM briefing, you don't  
19 really know what the materials are related to.

20 LDC [MR. RUIZ]: Of course, the concern for that is the  
21 interconnectedness of the classification. Clearly the  
22 prosecution and the defense have different views on how  
23 information is interconnected, how possession of some

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1 information affects the litigation of other information. We  
2 do know clearly we have a long list, and I'll ask you about  
3 this shortly, of motions or 505(h) notices on supplements that  
4 were filed because we obtained information in a later time  
5 that we deemed to be relevant to motions that were in  
6 existence. We'd like to avoid that and put all of the issues  
7 forward at one time, so we believe that that information is  
8 necessary.

9           We're also going to be litigating a number of motions  
10 during this hearing that may be impacted by that information.  
11 But I can't make that determination and I can't adequately  
12 represent Mr. Hawsawi's interests if I don't have that  
13 knowledge and that information. Now, they may differ and say  
14 that we don't necessarily require that information for this  
15 litigation, but they have a different agenda. They have  
16 different responsibility than I do and that the counsel on my  
17 team do. And until we get that read-on judge, it is my  
18 representation to this court that we're not in a position to  
19 provide that adequate representation by making those reasoned  
20 legal decisions that we need to make in the context of the  
21 litigation that is moving forward this week.

22           That's why I'm asking the commission either to direct  
23 that we be read on -- this is certainly not the first time

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1 we've been here. We've been through this a number of times  
2 and it's happened. Either we get those read-ons or we abate  
3 these proceedings until we're properly able to get that read  
4 on and we have access to that information and we can make the  
5 determinations that we need to make.

6           Again, Judge, this is -- this is not of our own  
7 creation. On April 6, the day after we received this e-mail,  
8 we began making earnest efforts to obtain these read-ons. And  
9 to this date, they have been unsuccessful. So we're here  
10 before the commission and I'm asking you to weigh in and put  
11 the weight of your authority behind this request.

12           MJ [COL POHL]: Thank you.

13           LDC [MS. BORMANN]: Judge, I would like to add to that, if  
14 I can.

15           MJ [COL POHL]: Sure.

16           LDC [MS. BORMANN]: Mr. Bin'Attash's team is in exactly  
17 the same situation. Major Seeger and myself have attempted to  
18 obtain the ACCM read-on referred to by Mr. Trivett in his  
19 April 5th e-mail. Although I made myself available in  
20 Washington, D.C. for three full days prior to coming here, I  
21 worked out of the D.C. office, I was unable to reach into the  
22 black hole that Mr. Ruiz described so aptly, and I also don't  
23 have that ACCM read-on and I also don't know what I don't

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1 know.

2 I can tell you from the history of this case that had  
3 I known about prior ACCMs and the information that pertained  
4 to those in earlier litigation regarding piercing of the  
5 attorney-client relationship, it would have completely changed  
6 the way I proceeded on those motions.

7 I don't know how this new program will affect what we  
8 do this week or what we do in July. I only know that I don't  
9 know. And so we also have serious concerns -- you know, I run  
10 this team. I have no idea how this will affect  
11 Mr. Bin'Attash's case, and I should. And I've done everything  
12 I possibly can. There have been e-mails and phone calls, and,  
13 you know, I lay out my schedule. I was in Washington, D.C.,  
14 for two full days the week before that attempting to get an  
15 ACCM read-on and still nothing.

16 MJ [COL POHL]: Thank you, Ms. Bormann.

17 Mr. Trivett. I call on you since you were referenced  
18 in the e-mail.

19 MTC [MR. TRIVETT]: Yes, sir. That's fine. I was  
20 prepared to take it.

21 The prosecution's position is that a continuance  
22 isn't warranted in this case. What has been represented to  
23 me, and we're not -- other than giving that letter and letting

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1 the defense coordinate the read-on, we weren't involved  
2 directly with the read-ons until we got the motion filed by  
3 Mr. Ruiz with 428. My understanding, though, and I'm sure  
4 I'll be corrected if I'm incorrect, is that there are members  
5 of four of the five teams who have received the read-on.  
6 Mr. Connell, having signed the MOU, had actually received  
7 these documents a long time ago.

8           Ultimately, my understanding is that the forms that  
9 were filled out by Mr. Ruiz were -- had a self-certification,  
10 and the people doing the read-on required General Baker to do  
11 the certification of his need to know as opposed to his own  
12 determination. Again, we weren't involved with this read-on  
13 process. My understanding is that now has been done, but that  
14 form did not get to the correct people until Friday.

15           Today, being Memorial Day, it's not -- it would be  
16 very difficult to read them on today, because it would require  
17 a secure VTC for the read-on, but my understanding is that the  
18 U.S. Government is willing to do that to get Mr. Ruiz read on.

19           I was not aware of Ms. Bormann not being read on,  
20 because I was told that four of the five defense teams have  
21 been read on. Maybe it's people on her team have been read on  
22 and she hasn't. But if the forms are filled out to their  
23 satisfaction consistent with my understanding of Mr. Ruiz's

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1 form, then they will be read on this week.

2           What I can represent to the court is that with the  
3 exception of two documents, these documents all predate the  
4 accused's capture. None of them are specific to the accused.  
5 They just go generally into al Qaeda and their history of  
6 hostilities with the United States.

7           So that's what the information is. We believe that  
8 it's not a valid ground for continuance. Taking their  
9 position to its logical conclusion, they would require every  
10 piece of discovery we were going to turn over before we could  
11 litigate any motion. That can't be the standard.

12          MJ [COL POHL]: That's true, Mr. Trivett. I don't dispute  
13 that. But the concern I have, and I think I alluded to this  
14 in one of the rulings that Mr. Ruiz referenced to, is that  
15 this seem to be a continual issue with security clearances. I  
16 think Mr. Perry is still awaiting his; is that correct,  
17 Ms. Bormann?

18          LDC [MS. BORMANN]: Judge, we have five people who have  
19 SCI indocs awaiting SAP read-ons that could do their jobs if  
20 we could get the SAP read-ons. Five. Not just Mr. Perry,  
21 five.

22          MJ [COL POHL]: But then -- and then we have this thing  
23 of, you know, two months ago we go through an ACCM. And the

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1 problem is this: I understand that you don't run the -- the  
2 government doesn't run this. We had this discussion last  
3 time.

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

5 MJ [COL POHL]: But my concern is this: Is that the real  
6 remedy is you don't want a continuance and, therefore, there's  
7 no incentive for these people to go any faster. But you know  
8 what that does then? That puts Mr. Ruiz in a position,  
9 Ms. Bormann, everybody else, they file a motion and we  
10 litigate the motion and what happens they get new evidence and  
11 they want a reconsideration. And how do I say no to that  
12 because they don't have it at the time? It's not judicially  
13 economical to have this continual problem.

14 MTC [MR. TRIVETT]: Agreed.

15 MJ [COL POHL]: I know I'm talking to you and talking to  
16 you and you may not be the decision-maker, but all of a  
17 sudden, in April of 2016, we're talking about the need for an  
18 ACCM read-on for a program that you say relates to information  
19 that is decades old, for a case that's not a decade old, it's  
20 four-years-plus old, and then it just -- I just -- I'm at a  
21 loss of the priority this appears to be with the government.  
22 The big G.

23 So what I'm saying is I'm going to deny his request

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1 for a continuance. But you understand, this may then simply  
2 lead is that once we talk about stuff, they get this, Your  
3 Honor, we want reconsideration because after I finally got the  
4 ACCM, I've now been read on.

5 MTC [MR. TRIVETT]: Understood, sir.

6 MJ [COL POHL]: I've now got it. This is not -- let me  
7 ask you this: Are there any other ACCMs out there that they  
8 need to be read in on?

9 MTC [MR. TRIVETT]: I don't believe so. Let me confer.

10 MJ [COL POHL]: Okay. You don't have to confer. I want a  
11 definite answer, because I don't want this to continually to  
12 come up again and again and again. Because, for example, this  
13 one, apparently Mr. Connell was read on a long time ago ----

14 MTC [MR. TRIVETT]: It ----

15 MJ [COL POHL]: ---- but you didn't bother to read the  
16 judge in on it a long time ago.

17 MTC [MR. TRIVETT]: Yes, sir. I mean, you know, to the  
18 extent that -- we believe it's information relating to our  
19 case in chief, ultimately. So I don't -- and there's no  
20 opposition to have the judiciary read on, certainly.

21 MJ [COL POHL]: No, but ----

22 MTC [MR. TRIVETT]: It's not just a ripe issue at this  
23 point, and that's probably why it wasn't brought up to ----

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1 MJ [COL POHL]: Okay. Okay. If you want -- I'm just  
2 saying is, don't get hung up on whether it's ripe or not.

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

4 MJ [COL POHL]: You know where this case is going or  
5 hopefully going.

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

7 MJ [COL POHL]: This should have been resolved a long time  
8 ago; it should not be resolved now. And you -- okay, you got  
9 your marching orders, check on it, and things like that.

10 MTC [MR. TRIVETT]: Yes, sir. I understand.

11 LDC [MR. RUIZ]: Judge, may I have a moment?

12 MJ [COL POHL]: Yeah.

13 LDC [MR. RUIZ]: Judge, a couple of points I want to be  
14 very clear about here. The self-certification issue, I am the  
15 learned counsel on Mr. Hawsawi's case, and if anyone has  
16 articulated that the team has a need to know has been me.  
17 There's never been a requirement. There is no regulation,  
18 there's nothing in the case that it has to be a chief defense  
19 counsel certification accompanying that issue. So I  
20 understand that Ms. Bormann's team has that certification.  
21 She's in the same boat.

22 Mr. Connell never had such certification because it  
23 was just provided to him when he signed the MOU. The addition

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1 of the chief defense counsel certification has been to try to  
2 put the weight of the star, so to speak, behind the  
3 recommendations so that we can try to move things forward, but  
4 it's not a requirement. It's not something that makes it  
5 indispensable. And certainly responding the day after we  
6 received the request for the point of contact, I think it's  
7 more than infinitely reasonable.

8           But I understand you denying the continuance. I did  
9 hear the prosecution saying that there maybe was willingness  
10 to make that happen, and to have a read on.

11           But moving forward without having that read-on puts  
12 me in a position that is in disparate to what the other teams  
13 are. So you have Mr. Connell, you have other counsel who are  
14 read on, who have knowledge of this information, and access to  
15 that information to drive their litigation strategy, and I  
16 don't. And that puts me in a disproportionate disadvantage  
17 when it comes to defending Mr. Hawsawi in a co-defendant  
18 capital litigation case where I shouldn't have to be in that  
19 position.

20           As I said, we've done everything that we needed to do  
21 to try to gain access to this information, and I haven't --  
22 you know, I haven't put in every e-mail and every phone call  
23 into my argument, because that would take quite a bit longer,

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1 but we certainly have. So I would ask you, Judge, to consider  
2 at least asking that we have that read-on given to  
3 Mr. Hawsawi's detailed counsel, not just myself, because I  
4 need to be able to confer with his detailed statutory counsel  
5 as well as other counsel at counsel table, and then proceed  
6 from that moment on with the litigation of these issues that  
7 are before the court and to do this in an orderly and timely  
8 manner, Judge. Thank you.

9 MJ [COL POHL]: Thank you. Okay. As -- interpreting what  
10 Mr. Ruiz just said as a reconsideration of the ruling denying  
11 the continuance, the continuance is still denied.

12 Mr. Ryan, one loose string on 161.

13 TC [MR. RYAN]: Yes.

14 MJ [COL POHL]: Who does the redactions on the medical  
15 records and the DIMS records? Are those attorneys, or are  
16 those others?

17 TC [MR. RYAN]: Excuse me, Your Honor.

18 Your Honor, the -- it's with the government's  
19 approval, but it's DoD who was handling the actual redacting  
20 of documents.

21 MJ [COL POHL]: But what I'm saying, is there a member of  
22 the prosecution team that -- attorney member of the  
23 prosecution team that reviews the redactions? May not do the

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1 redactions, but reviews them?

2 TC [MR. RYAN]: In a general sense, Judge, but I can't say  
3 for every specific record ----

4 MJ [COL POHL]: Okay.

5 TC [MR. RYAN]: ---- that somebody gets eyes on it.  
6 There's a general understanding between us and them as to what  
7 things go and what things don't go, and also ultimately  
8 what's -- also ultimately different versions of them that will  
9 be produced for different purposes. So there would be  
10 more-redacted versions, less-redacted versions, some will be  
11 505s, some will be releasable to the detainee.

12 Thank you, Your Honor.

13 MJ [COL POHL]: Okay. One other issue, given the Memorial  
14 Day schedule, as Mr. Ruiz alluded to, we'll take a longer  
15 lunch today and today only and begin lunch at 1200 hours.  
16 We're going to take the morning break at this point, but first  
17 I want to address an issue with 411.

18 There's an affidavit -- or a statement of waiver from  
19 both Mr. Mohammad and Mr. al Baluchi.

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

21 MJ [COL POHL]: I've got copies of them here. Over the  
22 break, I want you to talk to your client about it. When we  
23 come back, I'm not going to go into detail what it's about,

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1 but just to confirm that it is their signature on it and that  
2 they agree to the waiver. I think that's a way to handle it.

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

4 MJ [COL POHL]: I have copies. These are attached to 411.  
5 These are in English. Were they given an Arabic version also  
6 or was it just explained to them?

7 LDC [MR. CONNELL]: Mr. al Baluchi speaks English.

8 LDC [MR. NEVIN]: I don't know the answer to that, but  
9 I'll find out.

10 MJ [COL POHL]: Okay. It should be a short inquiry after  
11 the break, just to confirm that it's their signatures and they  
12 agree to it. That's all I'm going to go into.

13 With that being said, the commission is in recess.

14 [The R.M.C. 803 session recessed at 1033, 30 May 2016.]

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