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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 THE NEW YORK TIMES COMPANY,

4 Plaintiff,

5 v. 20 CV 833 (PAE)
Remote Conference

6 FEDERAL BUREAU OF PRISONS,

7 Defendant.

8 -----x

New York, N.Y.
April 9, 2021
4:00 p.m.

9
10 Before:

11 HON. PAUL A. ENGELMAYER,
12 District Judge

13 APPEARANCES

14 THE NEW YORK TIMES COMPANY
15 BY: DAVID EDWARD McCRAW
ALEXANDRA SETTELMAYER

16 AUDREY STRAUSS,
17 United States Attorney for the
Southern District of New York
18 STEVEN J. KOCHEVAR
Assistant United States Attorney

19 ALSO PRESENT:

20 KARA CHRISTENSON, BOP
21
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1 (The Court and all parties appearing telephonically)

2 THE COURT: Good afternoon. This is Judge Engelmayer.

3 Let me begin by asking my law clerk to confirm that
4 all counsel are on the line.

5 THE LAW CLERK: Hi, Judge. That's correct. And the
6 court reporter, Mr. Walker.

7 THE COURT: Very good. Then let me take the roll.

8 Who do I have for the New York Times?

9 MS. SETTELMAYER: Your Honor, you have Alexandra
10 Settelmayer on behalf of Plaintiff New York Times Company. I'm
11 here with my colleague, David McCraw.

12 THE COURT: Very good. Good afternoon to both of you.

13 Who do I have for the government on behalf of the
14 Federal Bureau of Prisons?

15 MR. KOICHEVAR: Steven Kochevar, your Honor. Good
16 afternoon.

17 THE COURT: Good afternoon, Mr. Kochevar.

18 And, Mr. Walker, our court reporter, are you on the
19 line?

20 (Pause)

21 THE COURT: Good afternoon, and, as always, thank you
22 for your service.

23 This the case of New York Times versus Federal Bureau
24 of Prisons, 20 CV 833. We here are for oral argument on the
25 reciprocal motions for summary judgment by both sides. At the

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1 outset, let me thank counsel for careful and thoughtful pairs
2 of briefs, really, on both sides.

3 I've given thought to the right sequence here. I
4 think it makes the most sense for the defendant, for counsel
5 for Bureau of Prisons, to go first, really because, for the
6 most part, they are in the process of explaining the
7 withholdings and redactions, and so I think the discussion
8 works best with them going first and with The New York Times
9 going second.

10 With that, Mr. Kochevar, I'll hear you first.

11 MR. KOCHEVAR: Absolutely. Thank you, your Honor.

12 There are several exemptions in play here, but I'll
13 start with Exemption 7(A) and note at the outset that if the
14 Court upholds the Exemption 7(A) withholding, then some of the
15 other issues that are in play here need not be reached. But
16 with that in mind, I'll start with Exemption 7(A).

17 With respect to the documents withheld under 7(A), the
18 government has met its burden by showing a rational link
19 between disclosure of the documents and ongoing law enforcement
20 proceedings. Specifically, the government has demonstrated a
21 rational link between disclosure of the documents and
22 interference with the pending criminal proceedings of Tova Noel
23 and Michael Thomas as well as the criminal prosecution of
24 Nicholas Tartaglione. These are weighty pending criminal
25 proceedings, and the government has clearly explained how

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1 release of the documents could reasonably be expected to
2 interfere with them.

3 I think that there are really two points in dispute
4 right now with respect to the government's application of
5 Exemption 7(A), and, respectfully, neither of them are
6 particularly close calls.

7 First is the question of whether the documents were
8 compiled for law enforcement purposes. And, as noted, in I
9 believe both briefs, the Tenth Circuit has adopted a per-se
10 rule.

11 THE COURT: Let me just pause you on the doctrine for
12 just a moment.

13 Assume for argument's sake that my perspective is not
14 the per-se rule but something more akin to what Judge Oetken
15 used. So I'd urge you, without in any way conceding the
16 broader legal point that I know you have made, it would be more
17 fruitful for me for you to argue it other than on a per-se
18 basis.

19 MR. KOCHVAR: Absolutely.

20 So, applying the more practical standard that Judge
21 Oetken applied in this district, the showing there is just a
22 rational nexus between the compilation of the records and law
23 enforcement. And, here, I would say there are multiple
24 independently sufficient reasons that there's a rational
25 relationship between these documents and law enforcement.

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1 The first one is that they relate to the pretrial
2 detention of an individual or multiple individuals, and that is
3 in itself a law enforcement purpose.

4 The second one is that these documents, like many BOP
5 documents, pertain to the safety and security of BOP
6 facilities. So, there's sort of, even separate from the
7 criminal proceedings that are necessarily going to be in play
8 if someone is in BOP custody, there's also a separate law
9 enforcement interest and purpose that BOP has to enforce the
10 law within its own facilities. So the documents also pertain
11 to that.

12 But the third reason that these are also compiled for
13 law enforcement purposes is that the law is that a document
14 does not have to meet this standard in the first instance in
15 and that it doesn't actually have to be created for a law
16 enforcement purpose provided that it's later compiled for one.
17 The documents here were created for law enforcement purposes,
18 but even setting that aside, the fact that they were later
19 compiled in connection with investigations, including some of
20 them in connection with the pending criminal prosecutions that
21 we're going to talk about in a second, that would also show
22 that they were compiled for law enforcement purposes.

23 So, overall, I think the point is that even if the
24 Court does not adopt the Tenth Circuit's per-se rule, much of
25 the insights or thinking of the Tenth Circuit is still going to

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1 come in here because BOP is a law enforcement agency and much
2 of what it does is suited to law enforcement, is directed at
3 law enforcement purposes.

4 THE COURT: Given the way you're conceiving of things,
5 what BOP-held documents would not qualify as compiled for law
6 enforcement purposes?

7 MR. KOCHEVAR: I think, under the rational nexus
8 approach, I think there's an example — I'm not going to
9 remember exactly what it is — from Judge Oetken's opinion but I
10 think it was, you know, a BOP document that lists all BOP
11 facilities or something like that, things that are mundane and
12 are not going to really implicate security interests at BOP are
13 not related to specific inmates or any criminal proceedings
14 with them. And then beyond that, like I said before, even if
15 you have some mundane documents like that, they may be later
16 compiled for some law enforcement purpose --

17 THE COURT: But, for example, a document that just
18 describes conditions of confinement — let us say, COVID-related
19 conditions of confinement or general, you know, cleanliness
20 versus filth, something like that — would that be a law
21 enforcement purpose?

22 MR. KOCHEVAR: I think many of those documents
23 actually would be, your Honor; specifically, I think in terms
24 of COVID, because they would implicate some of the security
25 issues that BOP deals with as a law enforcement agency within

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1 its own facilities.

2 I want to use maybe the example of like a contract for
3 outside maintenance work at a BOP facility may be -- if there's
4 like a contract for someone to come, and, I don't know, fix the
5 bushes outside. I don't mean to be flippant here but I'm just
6 trying to think of things that are not related to the core
7 purposes of BOP's work with inmates and all the various issues
8 that are implicated in the penological context but that are BOP
9 documents, those are the ones, I think, that are going to fall
10 outside the rational nexus test but would fall, of course,
11 within the per-se rule.

12 But my point overall here is that the documents we're
13 talking about in this case are pretty far away from that
14 category, for the multiple reasons that I just listed — they
15 are about inmates' pretrial detention, they do implicate the
16 security concerns and internal law enforcement concerns that
17 BOP has, and then also many of them were later compiled for
18 other investigatory purposes.

19 THE COURT: Let me move you to the second prong of
20 7(A) because I think that is, more than the first, where the
21 action is here.

22 MR. KOCHVAR: Sure, absolutely, your Honor.

23 So, disclosure of the documents could reasonably be
24 expected to interfere with multiple criminal prosecutions in
25 this district.

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1 First, I'll start with the Tartaglione documents. But
2 I want to sort of be clear that the Court does not actually
3 need to reach that issue of the Tartaglione documents if it
4 upholds the documents -- actually, I should flip this, I should
5 start with the Noel documents.

6 THE COURT: Actually, I'm going to start with
7 Tartaglione because that's where I intended to start you. So
8 why don't you stick with the original game plan.

9 MR. KOCHEVAR: Sure.

10 THE COURT: In fact, let me start us off on
11 Tartaglione because I may be able to zero in on what is of
12 particular concern.

13 I could not follow, although I've read both Capone
14 declarations, including the first one — which, starting around
15 paragraph 28, engages with Tartaglione — I couldn't think up,
16 except with some degree of speculation, which of the entries on
17 the index of withholdings in full — and there are 60 of them
18 and 57 are withheld in full under 7(A) — lost to me was how
19 much of those are being withheld in full on 7(A) on account of
20 Tartaglione or, for that matter, in part, because of
21 Tartaglione under 7(A).

22 Can you tell me, of the 57 categories here, how much
23 of them have some degree of withholding on account of
24 Tartaglione?

25 MR. KOCHEVAR: I apologize, I can't give you a

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1 specific number. And this is actually a wider procedural point
2 about what, frankly, would need to happen depending on how the
3 Court ruled. Because many of these are withheld in full under
4 7(A), more broadly under Noel, I think, if the Court were not
5 to uphold certain withholdings, there interest would need to be
6 a period where BOP would go back in and sort of very precisely
7 determine which documents or portions of documents --

8 THE COURT: Pause on that. There are a couple of
9 premises in there.

10 I trust that an AUSA has looked at every single
11 document that has been withheld or redacted in this case. Is
12 that correct?

13 MR. KOCHEVAR: Yes, absolutely, your Honor. And to be
14 clear, I can tell you in general -- I just -- I don't have it
15 at my fingertips, a number for the specific --

16 THE COURT: Well, but I think it's important. And let
17 me just go through a couple of aspects of methodology.

18 The first thing I wanted to make sure that the lawyer,
19 not the client here, meaning the U.S. Attorney's Office and not
20 a lawyer at BOP or somebody else at BOP, made the calls here.
21 Are you representing to me that for every single document that
22 has either been withheld or redacted, an AUSA signed off, with
23 eyes on the document, on that decision?

24 MR. KOCHEVAR: Yes, that is correct, your Honor.

25 THE COURT: Okay.

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1 So, as to Tartaglione, is there somewhere, even if not
2 yet presented to the Court, a grid or something that would
3 reflect essentially which entries, and within the entries which
4 documents, are being withheld, at least in part, on the basis
5 of Tartaglione?

6 MR. KOICHEVAR: No, other than -- well, other than the
7 descriptions of the documents given in the declarations
8 supporting the withholding, no, we don't have a chart
9 specifically on that. And there is somewhat of a reason for
10 that separate from just how things were presented, which is
11 that I think there's some concern that providing too detailed a
12 description of some of these documents and their contents could
13 start to tread into some of the underlying concerns here.

14 THE COURT: With respect, I think "too detailed" is
15 not the problem here; I think the problem is that there's too
16 much of a "trust us" quality about the description here. As my
17 staff and I went through paragraph 28 and what followed, we
18 were able to come up with, broadly, what looked to be to us 20
19 to 25 separate entries where there appear to be withholdings of
20 documents withheld on account of Tartaglione — I could rattle
21 them off for you, I don't think it would be productive — but
22 based on the short clauses in the Capone declaration.

23 But, in truth, the problem is, as the Court, I'm left
24 with a degree of guessing as to whether it's correct that entry
25 19, medical and psychological records of Epstein, or 31,

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1 investigative documents from suicide, or 41, psychological
2 reconstruction responses -- you know, there's plenty in here
3 that suggests that materials for Tartaglione have been withheld
4 that relate not just to July 23rd but to August 10, and I'm
5 just left with way too much guessing here in terms of ticking
6 and tying the categories to Tartaglione.

7 MR. KOCHEVAR: I'm not -- if this is -- I don't know
8 if this addresses the Court's concerns, but I believe
9 everything withheld in full under 7(A) is independently
10 withheld in full under Noel.

11 THE COURT: We'll get to Noel, we're going to get to
12 Noel, but since the government has put Tartaglione front and
13 center here, I'm entitled to probe.

14 Let me try this: Has a single document here been
15 withheld under Tartaglione that relates to the events of
16 August 10th?

17 MR. KOCHEVAR: So, in some sense, yes, in that I
18 believe -- and I want to be careful here because I don't have
19 the documents in front of me but my understanding is that there
20 are certain documents that relate to the events of August 10th
21 that also include some history of Epstein's incarceration such
22 that it includes descriptions of his prior apparent suicide
23 attempt on July 23rd.

24 THE COURT: And if that were the case, though, to the
25 extent we're talking about Tartaglione, though, only a limited

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1 subset, that that really gets at the July date -- sorry, I
2 think somebody needs to mute the phone. If there is a
3 synthetic document that covers a lot of Epstein history, I
4 understand the point that a subset that relates to July 23rd
5 might be withholdable under Tartaglione, but that would not
6 implicate the entire document, right?

7 MR. KOCHEVAR: With the exception that I think some of
8 these documents — and I believe this is noted in the Capone
9 declaration — there are concerns about even releasing them in
10 part because I think the idea, first, in the Tartaglione case
11 that there would be documents, heavily redacted documents
12 related to Jeffrey Epstein that came out and there was just a
13 little piece of them without context, I think that some of the
14 7(A) concerns would apply there as well.

15 THE COURT: Wait, because you're saying that, in
16 effect, if the government redacts too much, that raises its own
17 concern about the limited amount it allows to be seen? I'm
18 puzzled. That's a somewhat backwards argument, which is, if
19 we're very aggressive about what we withhold, that justifies us
20 in withholding yet more because it creates a mystery as to what
21 must be underneath the blacked-out part.

22 Is that what you're saying?

23 MR. KOCHEVAR: I think what I'm saying is that the
24 particular concerns here, particularly about jurors and the
25 understanding of potential jurors in a death penalty case like

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1 Tartaglione's, the idea that there would be documents released
2 that might not give a complete picture and given how some of
3 these events have been reported on and perceived broadly, that
4 there would be concern that partial -- it's maybe different
5 from the typical case where it's a little easier to go in and
6 just take out precise portions where we say, oh, this is about
7 the 23rd and this is not and therefore this piece goes and this
8 piece doesn't. I think there is a concern beyond that here,
9 that if there are documents that do not have full context that
10 come out that give certain impressions, because of the wider
11 landscape here, there is sort of a broader set of concerns
12 than --

13 THE COURT: I'm not sure I'm following. Let me see if
14 I understand the theory under Tartaglione. As I understand it,
15 there's no argument that his bunking with Epstein has anything
16 to do with the liability phase. Tartaglione is, as I
17 understand it, claiming that if he is convicted at trial, he
18 wants to somehow use it as a mitigating fact that he, I gather,
19 alerted the authorities to a suicide attempt by Epstein.

20 Is there more to it than that?

21 MR. KOICHEVAR: I am -- I can answer directly on the
22 liability part. I do not think any part of Mr. Tartaglione's
23 liability is at issue here. I think the concerns arise, yes,
24 from the penalty phase or the possible penalty phase of his
25 proceeding.

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1 THE COURT: Right.

2 MR. KOCHEVAR: And I think the defense has said there
3 that his actions with Epstein reflect positively on
4 Mr. Tartaglione.

5 THE COURT: Is there anything else, besides the fact
6 that he assertedly intervened to report a suicide attempt —
7 that appears to be the theory here — is there anything else
8 about his cohabitation with Epstein that is any part, as it's
9 been described by the defense in the case, as any part of the
10 mitigation case? I don't understand him to be arguing that
11 it's a mitigating fact that conditions in the MCC were
12 assertedly substandard. That's sympathetic at sentencing
13 perhaps but I've never heard any law that says that's a
14 mitigating factor in a capital case, nor have I understood you
15 to be even articulating that. I understand it solely to be
16 that he apparently did a good deed by reporting Epstein's
17 suicide attempt.

18 MR. KOCHEVAR: So, respectfully -- and I'm not trying
19 to be evasive here, your Honor, but I can't make a full
20 representation as to what the defense's theories are or will be
21 in Tartaglione.

22 THE COURT: But you need, if you're going to be
23 withholding under FOIA, to be able to articulate what at least
24 you have in mind beyond that, because it can't be that
25 Tartaglione says "Epstein," and then, you know, this Iron

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1 Curtain descends over the Bureau of Prisons' production; you
2 need to articulate what it is, what the factual component is,
3 of the interaction between Tartaglione and Epstein and then we
4 can use that as a measuring gauge for species of documents.

5 So, let me try it this way: Understanding that the
6 defense may have been opaque in Tartaglione as to what it has
7 in mind, what theories is the government articulating, or does
8 it have in mind, as to potential mitigation use of the bunking
9 with Epstein by Tartaglione? What premises is it using to
10 define what is exempt under FOIA?

11 MR. KOCHEVAR: So, respectfully, I think the
12 government disagrees with a little bit of the framing of the
13 law that you just put out there. The standard here is to
14 articulate a rational link between disclosure of the documents
15 and interference --

16 THE COURT: So, articulate a rational link for me,
17 other than the thesis that at a particular moment in time he
18 reported Epstein's suicide attempt. Is there some other
19 rational link here? If you wanted to use that language, I'm
20 happy to use it. I'm just trying to pin you down so we can
21 move on. I've got a lot of ground to cover with Noel but I'm
22 not going to get there until we get through Tartaglione, and I
23 want to define the Tartaglione problem.

24 MR. KOCHEVAR: Sure. I think there are two letters on
25 the docket in the Tartaglione case that are cited in the

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1 government's brief here, and I believe in the Capone
2 declaration as well; and they have, I think, various ideas in
3 them from the defense in that case. I believe the conditions
4 of his confinement are at issue there as well. I believe the
5 events of Mr. --

6 THE COURT: Meaning that it would be a mitigating fact
7 that the heating system is off, or there are vermin, or
8 something like that?

9 MR. KOCHEVAR: I believe that's implicated in the
10 letters, yes.

11 But I think -- and also the events of Mr. Epstein's
12 apparent suicide attempt are also raised in those letters. But
13 I want to be clear that, respectfully, I don't think the
14 government needs to go into very precise specifics here because
15 the concern is that the government does not know exactly what
16 the defense is going to bring in at the penalty phase of that
17 proceeding, and in the broader context here, there are big
18 concerns that getting anywhere near this stuff is going to
19 hurt, or could reasonably be expected to harm, the integrity of
20 that proceeding.

21 And FOIA, I think, really does carve out criminal
22 proceedings like this, especially a death penalty proceeding,
23 which is sort of the weightiest law enforcement proceeding
24 there is. So I think there's going to be a zone around any of
25 the issues that the defense has raised or might raise or has

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1 indicated in any way that they will raise, and that --

2 THE COURT: But, sorry, sorry, at that concept level,
3 it's hard to disagree about a zone and about the importance of
4 the proceeding, but one still needs to -- the conversation
5 can't simply stop with invoking Jeffrey Epstein and capital
6 case. I think, for example, it is a reasonable question for a
7 court to say -- let me ask you: When does the guy stop rooming
8 with Epstein, Tartaglione?

9 MR. KOCHEVAR: I don't have the immediate date. I
10 believe it's shortly after his apparent suicide attempt.

11 THE COURT: I believe that to be correct, from what
12 I've read in some of the papers here.

13 Is there a coherent theory under which what happens to
14 Epstein after the two of them stop being bunkmates is
15 implicated here? Or is it like tag, where Epstein got tagged
16 by this guy once and now everything's off limits? I really am
17 not being sarcastic, but it is highly likely at the end of this
18 process that I'm going to direct immediate production of all
19 this material with a tag as to what exemption, as between Noel
20 and Tartaglione, which is being withheld for what basis, and
21 I'm trying to understand what your boundaries are on
22 Tartaglione because the papers do not give me anything tangible
23 to go on.

24 MR. KOCHEVAR: Sure. I understand the Court's concern
25 here.

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1 So, yes, there's a large number of documents, I think,
2 afterwards where he's no longer rooming with Epstein, like
3 certain -- the count documents or something, where Tartaglione
4 is not implicated at all. I just can't be global in that
5 because I do recall that there are later reports that are
6 fairly thorough, that he pops up sometimes and specifically
7 discussions of the July 23rd events pop up.

8 THE COURT: Fair enough. But that would be a
9 situation in which one would think redaction more than withhold
10 in full; in other words, if there's a synthetic historical
11 narrative, there's going to be a portion -- Tartaglione is the
12 word "cameo role" almost naturally presents itself in the
13 Epstein period of time at the MCC, there's a brief Tartaglione
14 window here. And to the extent there are documents that are
15 systematic with respect to Epstein, redaction appears to be a
16 rational response here. But once they separate, except insofar
17 as there's a theory that the general conditions of confinement
18 as a whole at the MCC are somehow a mitigation theory that
19 requires anything about what the conditions are at the MCC to
20 be withheld -- otherwise, I think you're talking redaction, are
21 you not?

22 MR. KOCHEVAR: Oh, I understand a little bit more what
23 you're -- yes, broadly, like every document related to
24 conditions of confinement at the MCC, I don't think that that
25 would fall under the Tartaglione withholding theory here.

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1 THE COURT: Nor would Tartaglione justify -- the last
2 17, 18 days of Epstein's life, Tartaglione is not part of his
3 life, right?

4 MR. KOCHEVAR: So, there are, I think, possibly some
5 documents -- and this is -- I think I need to be careful, I
6 apologize but I have to be careful about -- there are certain,
7 I believe, what you might call more administrative documents,
8 where because they are not cellmates but they are still in the
9 same facility, and in some of these, frankly, they appear next
10 to each other by coincidence, but because their interactions, I
11 think even for some of those documents there are concerns about
12 release. So --

13 THE COURT: Let me pin you down here. Paragraph 32 of
14 Capone describes categories of records withheld by BOP. And
15 I'm just zeroing in reports and evidence of Epstein's death on
16 August 10, 2019, period. That's between a semicolon right
17 there. I don't get it. Maybe there's something there that
18 looks historically back at the Tartaglione scene, but I'm
19 having difficulty understanding how something could be
20 withheld. A category as important to the FOIA request as that
21 on the basis of Tartaglione. That's very, very inexact.

22 MR. KOCHEVAR: Yeah, I think that is primarily the
23 theory that we've already discussed, that there are -- I
24 believe -- again, I don't have this in front of me but I
25 believe that is the theory there. Although, again, I need to

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1 note that there is a broader concern here that because of all
2 the coverage of these cases, that I need to be clear that I
3 think there is a theory that extends beyond specific mentions
4 of Tartaglione, such that these documents could be withheld
5 more broadly than that just because the discussions about
6 Epstein's incarceration, they may have some bearing on
7 Tartaglione's --

8 THE COURT: I don't follow. Let's suppose that the
9 New York Times gets the August 10th materials. Pretend Noel
10 isn't part of this, and so understand it's just on Tartaglione.
11 And suppose The New York Times does a soup-to-nuts description
12 of the last 24 hours of Epstein's life and the investigation
13 thereafter, and all that we have carved out is the events that
14 Tartaglione was percipient to and the condition of the joint
15 area that he and Epstein shared. So, maybe the Bureau of
16 Prisons comes across horribly for letting somebody die on their
17 watch and for any number of other misdeeds, but I don't
18 understand how that implicates the government's trial interests
19 in Tartaglione, where they are defending at the mitigation
20 stage against the theory that Tartaglione acted nobly in
21 reporting the suicide and endured crummy conditions when
22 bunking with Epstein.

23 MR. KOICHEVAR: I think the issue here is that
24 Mr. Tartaglione has claimed that his contacts with Epstein,
25 whatever they are, are going to reflect positively on him. And

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1 so that means that the defense has put Epstein at issue,
2 Epstein's life, the details of his incarceration, at issue in
3 the penalty phase of a death penalty proceeding.

4 THE COURT: Sorry. That's a sound bite that you can
5 expect to read in an opinion of mine because the idea that
6 Epstein's life is triggered by the brief brush across the stage
7 of Mr. Tartaglione in the same scene as Epstein is just exactly
8 the problem here, which is, I'm unable to judge whether there's
9 been any rigorous attempt to tailor or whether the invocation
10 of Epstein has broadly been used to justify excessive
11 withholding. I'm not doubting there's something here that's
12 properly withheld; it's the linkage and it's a scale issue, and
13 I'm having difficulty with the idea that because Tartaglione
14 breathed the word "Epstein," quote, as you just put it,
15 Epstein's life now is off-limits.

16 MR. KOCHEVAR: Respectfully, the issue here is the
17 integrity of the criminal proceeding against Tartaglione. And
18 I think — and this will probably be an issue later on as well —
19 the government doesn't know exactly how a criminal trial will
20 go there. They don't know the theories that the defense is
21 going to put on. And I don't think that FOIA -- FOIA, I think,
22 gives a zone, some breathing room there basically; and
23 specifically in this case, where we're way past the rational
24 link, this stuff has directly been put on the docket in a
25 criminal case that's been put at issue.

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1 So, with facts like that, I think there is a zone
2 beyond that where the government can reasonably say, listen, we
3 want to be careful and not affect a death penalty trial, and,
4 look, it's defense counsel has represented -- and we don't
5 really know exactly what they're talking about, I can't
6 represent exactly what they're talking about, but we know there
7 are going to be issues there. I think under the FOIA standard
8 of a rational link, I think that's exactly what Congress had in
9 mind in terms of carving out 7(A). FOIA is not supposed to
10 interfere with proceedings like that.

11 THE COURT: No, no, no, but you're assuming the
12 conclusion of interference.

13 Let me ask you this question: Can you assure me that
14 any document that has been withheld on the basis of
15 Tartaglione, either mentions Tartaglione, mentions July 23rd,
16 or mentions their common cell?

17 MR. KOCHEVAR: No, because I know of other
18 documents -- again, some of them are -- there is an issue here
19 because explaining some of this stuff -- there are also a
20 category of documents that I understand their appearance next
21 to each other to be essentially coincidental, but, given the
22 context here and given the issues that I just walked through,
23 there is a concern about releasing even documents that have
24 like a coincidental connection between -- oh, I'm sorry,
25 perhaps those documents would include the name, so perhaps that

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1 doesn't fall outside of the Court's question.

2 THE COURT: Look, in the end, I appreciate that you're
3 hamstrung to some degree in the explanation you can give, but I
4 think you can see the frustrating situation a court is put in,
5 being told rational relationship, zone, nexus, law enforcement,
6 but given the small role that Tartaglione plays even in the
7 Bureau of Prisons part of the Epstein life, you can understand
8 the concern. And it's magnified by at least the
9 nonpreservation presentation to the Court of anything that
10 would allow me to gauge how many of the 57 out of 60 categories
11 which have been withheld in full are being withheld in full on
12 the basis of Tartaglione.

13 Let's move on to Noel because I think you understand
14 the concern I'm raising here.

15 Noel — help me with this — I've read the indictment in
16 the case and I've tried to familiarize myself with the filings,
17 and I appreciate the gravity of the prosecution. The charges
18 relate uniquely to events that begin on August 9th. There is
19 background about this Epstein guy, and that he's at the MCC,
20 but the case is about the events of August 9th and 10th,
21 correct?

22 MR. KOCHEVAR: In terms of the immediate events that I
23 think are the subject of the charges, yes, but I want to -- and
24 I will unfortunately have to return to a theme here, that I
25 think the understanding is that it's possible that the trial

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1 could implicate times before then, for sure.

2 THE COURT: May I ask you a question. I mean, I
3 understand the reason why anyone paid any attention to the
4 alleged false statements and lapse by these defendants is
5 because of Epstein — that's what drew everyone's attention to
6 it — but at the end of the day, the offense here is not itself
7 immediately about Epstein, it's about the failure to do the
8 rounds, and the lie, and the coverup about it, right?

9 MR. KOCHEVAR: Again, I'm -- I think the answer to
10 your question is yes, but I have to caveat here, that I'm in a
11 little bit of a tricky position as an AUSA. I don't want to
12 say things that bind prosecutors in a criminal case --

13 THE COURT: And you're not. I'm asking for your
14 understanding, and I'll make a record here that nothing you are
15 saying is binding; you're merely trying to capture what your
16 thought process, as a careful person of integrity, was in
17 participating in the FOIA decision-making process and in
18 justifying it to the Court. But, having been on the criminal
19 side of things as a prosecutor decades ago, I wouldn't have
20 wanted a FOIA statement to bind me, and nor does it.

21 So we've got a clear record on that.

22 MR. KOCHEVAR: Okay.

23 THE COURT: In other words, Epstein is what prompts
24 everyone to catch the violation here, but, at the end of the
25 day, Epstein's just another inmate who wasn't seen during the

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1 rounds and who is within the scope of the false statement
2 that's allegedly told by the defendants, right?

3 MR. KOCHEVAR: Yes — thank you for that, your Honor —
4 and, and, yes, I think, to some extent, you've actually put
5 your finger on why the withholdings extend back further,
6 because the case is, I think, in many ways about what happened
7 at -- like what BOP employees did at MCC. And that could
8 implicate sort of what typically happens at BOP or, for some of
9 the earlier documents, I think what specific people did at BOP
10 on certain dates. So --

11 THE COURT: Wait a minute, wait a minute. Is what
12 you're saying that because there's going to be perhaps general
13 testimony of background at BOP, about the general procedures
14 and about the fact that on some prior days these defendants did
15 or didn't comply with their round-walking duties, essentially,
16 the Noel prosecution knocks out of bounds all Epstein-related
17 events, beginning with his admission to the MCC? The case is
18 fundamentally about a narrow 24-hour window, isn't it?

19 MR. KOCHEVAR: No. To be clear, I think BOP has
20 released a number of Epstein-related documents at this point,
21 so it's not like it covers everything of his time there. The
22 withheld ones, they do pertain in part to what you were just
23 talking about in terms of if there's going to be, I think --
24 there's some expectation there's going to be evidence about
25 practices at MCC related specifically to Epstein or not. I

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1 think beyond that, there's also a concern that, in addition to
2 just sort of what happens at BOP evidence, given the
3 circumstances, specific things about the events of June 23rd
4 and thereabout are also going to be brought up at that trial.

5 Again, though, I have to be -- I know this is somewhat
6 unsatisfying, but there is also the point that I don't know --
7 the government doesn't know exactly what is going to happen
8 really at any criminal trial, of course, before it starts, but
9 particularly here, when the defense is entitled to put on what
10 case it will put on, and, given the circumstances and context
11 of this case, I think, again, as we just talked about with
12 Mr. Tartaglione, although possibly, to be clear, to an even
13 greater extent here because the Epstein things are directly
14 related to the liability pieces of the Noel criminal
15 proceedings, there's going to be a substantial zone of things
16 where it's an expectation of reasonable or reasonable
17 expectation of interference.

18 THE COURT: Let me push back a bit.

19 You have withheld an incident report of Jeffrey
20 Epstein's July 23rd, 2019, apparent suicide attempt. Putting
21 aside Tartaglione, it appears, from what the government has
22 submitted, that that has been withheld on the basis of Noel as
23 well. Is that true? And, if so, what's the justification? In
24 other words, what could a report about the July 23rd incident
25 have to do with the Noel and Thomas' failure to complete inmate

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1 counts three weeks later?

2 MR. KOCHEVAR: So, I have to be careful about how
3 precise I get here, but there are people who work at BOP who
4 could be involved in multiple incidents that happened there,
5 and such that --

6 THE COURT: In other words, hypothetically, it could
7 be a similar act, the same people could have failed -- if your
8 evidence was, the same people failed to do the rounds that day,
9 the government might want to offer that in evidence?

10 MR. KOCHEVAR: Again, I can't speak to -- and this is
11 actually going beyond me not wanting to bind anyone, I actually
12 don't know the specific --

13 (Pause)

14 THE COURT: Hello?

15 MR. KOCHEVAR: -- cast of characters here that are
16 going to appear in multiple documents. And so, yes, there is a
17 concern that one side, a side, at a Noel trial would want to
18 rely on these. And I also think the particular context of this
19 case, and I guess the status of the defendants as employees, I
20 think there are concerns about witnesses and witness testimony,
21 and, again, all of that leads to a zone where release of many
22 of these documents, there is a risk that it would interfere,
23 there would be concerns about witnesses conforming their
24 testimony, you know, to documents, or being made aware of
25 things that they aren't aware of now.

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1 THE COURT: What about medical and psychological
2 records about Epstein? That's entry 19. How is that relevant
3 to the false count certifications in the Noel case?

4 MR. KOICHEVAR: So, I believe that many of the medical
5 records are already released, at least in part. I believe --

6 THE COURT: In category 19, which is what I'm quoting
7 here, it says withheld in full under 7(A). It says medical and
8 psychological records of Epstein, 48 pages, and it says
9 withheld in full.

10 MR. KOICHEVAR: I'm sorry, I apologize, that is maybe
11 ambiguous. That is not -- that does not mean all the medical
12 records in full have been withheld, I believe, but some medical
13 records have been withheld, such as those pertaining to the
14 night of Epstein's suicide or, I believe, some pertaining to
15 the night of his apparent suicide attempt. I believe all of
16 the psychological records have been withheld in full under
17 7(A), and I believe the theory of that is the idea that many of
18 them relate to his -- I guess the theory is that they relate to
19 his -- the idea of his prior suicide attempt implicates his
20 later suicide and such that it is at issue; pretty much all the
21 psychological records are going to also be at issue in
22 connection with that.

23 But, to be clear --

24 THE COURT: Wait. Maybe that has something to do with
25 Tartaglione, or at least the July 23rd part does, but, sorry,

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1 help me with that. In other words, why is it Epstein's
2 psychological records, what do they have to do with the 1001
3 violation in Noel?

4 MR. KOCHEVAR: I guess I want to be careful here, with
5 the qualifications we talked about earlier. My understanding
6 is that there's a sort of like notice theory or something, that
7 the fact that he -- his placement on suicide watch, his removal
8 from suicide watch, things like that, implicate those concerns
9 that we talked about before, in terms of the details of his
10 incarceration being relevant to the immediate events at issue
11 in the Noel case. So, decisions -- and all of that implicates
12 his prior suicide attempt, the circumstances of that attempt,
13 BOP's response to that attempt; that whole set of things is
14 going to be at issue because they sort of shape the setup to
15 what happened on the night August 9th.

16 THE COURT: Is it your representation, though, that
17 there are materials withheld in full that are in this
18 category — which is to say, psychological and medical records
19 of Jeffrey Epstein that are withheld in full — on account of
20 Noel?

21 MR. KOCHEVAR: Yes.

22 THE COURT: What about entries 212 and 41,
23 psychological reconstruction of inmate deaths? This report —
24 I'm reading aloud — typically includes education, marital
25 status, religion, race, occupation, medical history, release

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1 plans, institutional infractions. It may be bits and pieces,
2 but I'm having difficulty with the idea of that being withheld
3 in full on the basis of "a false statement prosecution
4 involving orderly rounds."

5 MR. KOICHEVAR: I'm not sure what -- the concern with
6 all of these, just to sort of recenter things, is that they may
7 be trial exhibits, the subject of witness testimony, and/or
8 were prepared by witnesses who will testify at trial. That
9 draws a rational link between the stuff that we're talking
10 about here and interference of the criminal proceeding.

11 THE COURT: Wait. So you're saying if somebody is
12 going to be a trial witness, any document involving them, even
13 if utterly extraneous, is off limits because it could serve to
14 impeach them? In other words, let's suppose you got a trial
15 witness in the Noel case, and in a FOIA request there's
16 information that in a completely separate part of their life
17 they told a fib but it's obviously potentially useful ammo for
18 the defense at trial. Is it your view that FOIA allows you not
19 to present that because it could be harmful to the government's
20 case? Is that what you're saying?

21 MR. KOICHEVAR: I don't think so, your Honor. I'm not
22 sure -- if I understand the question correctly, then I don't
23 think so because these are not sort of completely unrelated
24 documents; these are, again, BOP documents that are related to
25 his incarceration. So I think if they --

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1 THE COURT: But Noel is a false statement case about
2 rounds. And you appear to be saying either anything that
3 touches -- almost anything that touches Epstein is a rational
4 relationship or anything that touches a trial witness is a
5 rational relationship, and I am kind of skeptical. Help with
6 me that. Are you really saying that documents that bear on a
7 potential trial witness for that reason get excluded?

8 MR. KOICHEVAR: So, the question -- I apologize. The
9 theory here is that, is there an expectation on the part of
10 prosecutors that these might come in at trial or be used at
11 trial, and there is an expectation for documents like that. As
12 I've already said, it's not clear exactly what's going to
13 happen at the trial, but for these documents, including things
14 like psychological records, there is some expectation that they
15 may come in, and so it would interfere with the trial to have
16 them publicly released.

17 But that doesn't extend -- I don't think that
18 withholdings have been claimed over documents that are totally
19 unrelated here.

20 THE COURT: All right. Let me see if I can try it
21 this way: The standard, under Rule 16 of the Federal Rules of
22 criminal discovery, is itself quite broad. I assume you're
23 representing to me that anything that you are withholding here
24 in connection with the Noel prosecution has been produced in
25 discovery to the Noel defendant. Is that what you're

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1 representing?

2 MR. KOCHEVAR: I cannot represent 100 percent on that,
3 but many of the documents, yes, were produced --

4 THE COURT: Sure, many have, but "many" doesn't cut it
5 here. I'm trying to figure out: Since you have a broad theory
6 of potential relevance or utility to the defense of various
7 documents, including along the theories you've articulated, has
8 somebody gone through the exercise to make sure that all the
9 documents concerned at the civil division in the U.S.

10 Attorney's Office, that could move the needle at a Noel trial,
11 were in fact produced to Noel's defense lawyers? Has somebody
12 gone through that exercise?

13 MR. KOCHEVAR: Yes, I mean, as noted in the briefs --
14 and, again, I don't want to make representations in a criminal
15 case, but my understanding is, yes, the prosecutors in Noel
16 have looked at everything that's withheld and they have made
17 appropriate discovery disclosures.

18 THE COURT: No, no, no, I'm not asking you whether
19 they've attempted to do their job. I'm trying to figure out
20 whether the left hand and the right hand of the government are
21 in sync.

22 Your thesis here is that the documents you've withheld
23 on account of Noel have, in the vernacular, some capacity to
24 move the needle in the Noel case. And treating that as an
25 honestly-held determination you've made, the natural question

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1 is: That articulation comes awful close to the standard that a
2 prosecutor would be flying under Federal Rule of Criminal
3 Procedure 16 in terms of primary source Rule 16 discovery. I'm
4 asking you how the materials withheld, in effect with the
5 blessing of the civil division, in this case align with the
6 materials produced under Rule 16 by the criminal division?

7 MR. KOCHVAR: So, I understand what the Court is
8 getting at, and I believe that exercise has been done. I have
9 discussed that.

10 THE COURT: What is the comparison of the two?

11 MR. KOCHVAR: I guess I have not -- I can't make a
12 representation that all of them have been made because I don't
13 know if we've actually gone through and like compared every
14 document, but my understanding is that, certainly -- I mean,
15 the basis for the 7(A) withholding here is interference with
16 the case.

17 I also, I apologize, I don't know sort of the details
18 of the Rule 16 obligations in the case, so, I'm not trying to
19 be evasive but I guess there could be some category of
20 documents that falls outside of Rule 16 that would nonetheless
21 fall in the FOIA -- have significance in the FOIA context. I
22 don't think that's a large category of documents, but I don't
23 want to represent that it doesn't exist.

24 THE COURT: Let me ask you about a few discrete items.
25 I want to bring this to a close because I want to give our

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1 court reporter a brief break and hear from the other side. Let
2 me go through a couple items to help me make sense of this.

3 Entry 39 is called "Copout Note." I have no idea what
4 that is. What is that?

5 MR. KOICHEVAR: I believe it's a note about -- I
6 believe that means when someone leaves a cell.

7 THE COURT: And I guess there's nothing about entry 39
8 more than that that would enable me to make any judgment
9 whether that's properly or improperly withheld; it's not, for
10 example, dated or something?

11 MR. KOICHEVAR: So, under Exemption 7(A), the
12 government can make categorical exemptions of documents. So,
13 there are categories set out in the Capone declaration which,
14 under the FOIA standard, it draws a rational link between the
15 withholding of those categories of documents.

16 THE COURT: Does that mean any copout note, as you've
17 just defined it, that's the category? Or is the category, you
18 know, Epstein copout note July 23rd or August 9 or 10? Yes, I
19 understand your proposition, but it doesn't mean that you have
20 an unrestricted hand in how you define the category.
21 Obviously, that, taken to its logical extreme, would take
22 anything produced in the building and keep it exempt.

23 So, I mean, the devil is in the details here. What's
24 the parameter being used to exclude copout notes?

25 MR. KOICHEVAR: So, I believe -- hang on one second.

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1 I believe it would be paragraph 21 of the Capone
2 declaration, is what would cover that, and that it is a
3 document relating to accounts of inmates. I believe that that
4 is -- so, the basic idea is that the categories are set out in
5 the Capone declaration. And I believe that's actually all the
6 government -- that that carries the government's burden here,
7 in that -- I'm sorry, maybe -- I may not have the paragraph
8 right, but the categories are set out in the Capone
9 declaration.

10 The index is sort of above and beyond that here in
11 that it's intended to provide some sense of what these
12 documents are. But the Court does not need, under 7(A), a sort
13 of specific description of document by document; I think it's
14 well settled law that for 7(A) there can be categorical
15 descriptions of withholdings, provided that there is a rational
16 link between those categories and interference with the law
17 enforcement proceeding, as here.

18 THE COURT: Let me push on. Entry 50 is called "Scan
19 Of Sign." Any idea what that is?

20 MR. KOCHVAR: So, respectfully, the description of
21 that would, I think, be -- I cannot -- I don't want to provide
22 a further description of that because I believe it would
23 implicate some of the withholding issues here. It is, I
24 believe, a sign that was posted -- my understanding is it was a
25 sign that was posted in the SHU, or in the special housing

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1 unit, at MCC or thereabouts.

2 THE COURT: Okay. Entry 52 is 969, approximately,
3 pages of emails relating to the July 23rd apparent suicide
4 attempt Epstein's mental health and his presuicide
5 incarceration. Those have been withheld in full.

6 Is it your view -- are any of those being withheld on
7 the basis of Noel?

8 MR. KOCHEVAR: Yes.

9 THE COURT: How much of those 969 are withheld on the
10 basis of Noel? This is July 23rd.

11 MR. KOCHEVAR: All.

12 THE COURT: All? So every document relating to
13 Epstein on July 23rd has been withheld on the basis of Noel?

14 MR. KOCHEVAR: That --

15 THE COURT: I think you just said -- say again?

16 MR. KOCHEVAR: Yes, that's on this list, yes.

17 THE COURT: Explain to me -- again, we're talking about
18 July 23rd, and essentially it's universal Epstein emails,
19 mental health incarceration -- what's the justification, under
20 Noel, for withholding all 969 pages of the emails that are
21 synced to July 23rd?

22 MR. KOCHEVAR: So that's given at paragraph 24 of the
23 Capone declaration, and the government anticipates that they
24 will be the subject of witness testimony at the Noel trial such
25 that their disclosure could influence witness testimony,

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1 including by allowing witnesses to alter their testimony to
2 conform to other evidence or influence potential jurors'
3 perceptions of witness testimony or evidence.

4 Also, there is the concern about poisoning the jury
5 pool -- or, I'm sorry, "poisoning" is too strong a word but,
6 well, affecting, making it more difficult to select and seat
7 jurors in the case. If a bunch of BOP emails -- and I should
8 have added this before, which I believe is noted in the Capone
9 declaration as well: Obviously, the events of Mr. Epstein's
10 incarceration and death have been extremely widely publicized,
11 so there is a concern that disclosure of some of the stuff is
12 going to affect public perceptions and lead to difficulty with
13 seating jurors, including things that relate to the
14 July 23rd --

15 THE COURT: Sorry, but given the vast disclosures and
16 publicity about Epstein, is it really credible that whatever
17 increment is brought to bear by internal documents dealing with
18 a day two and a half weeks before the *actus reus* of the Noel
19 offense is really going to influence the jurors in that? At
20 the end, the issue in the Noel case is, did they or didn't
21 they, did they make false statements about their activities and
22 whereabouts and observations on that night? And I would be
23 startled if, you know, this turned into a full renewed autopsy
24 of Jeffrey Epstein.

25 I'm quite sure that, under Rule 404(b), a responsible

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1 district judge would have to think about the extent to which,
2 at a false statements case, a full narrative history about the
3 journey of an inmate through the MCC really is going to play
4 much of a role. But I'm having difficulty with the sense of
5 proportion here, as you can tell.

6 MR. KOICHEVAR: Yes. So, a couple points:

7 First is that the standard here is a rational link.

8 And the declaration submitted by the government clearly clears
9 that standard; there are definitely rational links drawn here.

10 And, also, I would reiterate some points that I've
11 made before: That FOIA really was not designed to interfere
12 with criminal proceedings like this. And on top of that, there
13 are special concerns here, given the widely publicized nature
14 of this.

15 But a new point beyond that, actually, which I think
16 the Court just sort of brought up on its own there, in terms of
17 exclusion from evidence, as I noted before, I don't think we
18 know what the defense is going to bring in at a trial here; and
19 if some of the stuff is excluded, as you just said, by a
20 district judge who's controlling the proceeding, if it has been
21 widely publicized prior to then, that's going to raise a whole
22 new set of issues at that trial. And the government's position
23 here is that protecting trials like this, FOIA definitely wants
24 courts to do that. The purpose of FOIA is not to create new
25 burdens for the government in criminal --

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1 THE COURT: But, sorry, the problem, Mr. Kochevar,
2 here is not with any of the broad propositions you're stating —
3 I mean, all of them have their place — it's how much they serve
4 to shelter in the particular case. And the challenge for me is
5 the request to simply trust without verification, because the
6 problem here is that the individual prosecutions here appear,
7 on their own terms, as Epstein is relevant to them, to be
8 islands in a sea, and the disclosure here appears to be more
9 like the sea.

10 All right. Well, let me pause there. We've been at
11 this for about an hour. It's been very helpful, and I think I
12 understand the outlines of what the government is arguing, and
13 I think the heart of the case here is primarily the 7(A). I
14 think I can resolve on the papers the other exemptions, which
15 appear to apply to a much narrower set.

16 Let me ask our court reporter whether you need a
17 comfort break?

18 (Pause)

19 THE COURT: Very good. I'm going to log off for five
20 minutes. I will dial back in five minutes, and at that point
21 I'm going to turn back to counsel for the New York Times.

22 Thank you, Mr. Kochevar. We'll take a short break.

23 MR. KOCHEVAR: Thank you, your Honor.

24 (Recess)

25 THE COURT: All right. This is Judge Engelmayer

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1 rejoining the call. Let me just confirm that the principals
2 from each side are still on the line.

3 Ms. Settelmayer, are you on the call?

4 MS. SETTELMAYER: Yes, your Honor.

5 THE COURT: And, Mr. Kochevar, are you on the call?

6 MR. KOCHEVAR: Yes, I am, your Honor. Thank you.

7 THE COURT: And, perhaps most important, Mr. Walker,
8 our court reporter, are you on the call?

9 (Pause)

10 THE COURT: I'll hear now from the New York Times.
11 Ms. Settelmayer.

12 MS. SETTELMAYER: Thank you, your Honor. My
13 colleague, David McCraw, is actually going to be addressing the
14 7(A) issue, so I will leave it to him.

15 THE COURT: That's the heart of the matter here.

16 MR. McCRAW: Thank you, your Honor. This is David
17 McCraw. And I think Ms. Settelmayer would like to speak just
18 briefly after I'm done to 5, if your Honor would entertain
19 that.

20 THE COURT: Of course.

21 MR. McCRAW: Much of what the first hour has covered
22 goes to the heart, so I'm not going to repeat that, that we
23 find a lack of specificity, a lack of detail, necessary in
24 these records to find that nexus that I think we all agree has
25 to be there. But I want to speak about Tartaglione because I

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1 think the government's own documents from that case belie the
2 theory that the government is using here.

3 THE COURT: Sure. Can I ask you, though, as you turn
4 to Tartaglione: I welcome your characterization, neutrally, of
5 the materials that you have received for each of these cases as
6 you turn to each of them, because one thing that is elusive to
7 me is what the content is of what in fact you have already
8 received via this FOIA request.

9 MR. McCRAW: Yes, we can do that, your Honor, and
10 Ms. Settlemayer probably has a closer look at some of the
11 documents.

12 In the main, the heavily redacted -- so, for instance,
13 the caller lists are 60 pages of green redaction tape, with
14 entries, two or three on a page, which shows that somebody, who
15 knows, came to visit. And we know how much money was
16 transferred into an account for Mr. Epstein, but not from whom.
17 We see some of his medical records, none pertaining to his
18 death. I think that's a fair characterization.

19 But let me speak, if I might, to Tartaglione because I
20 think the thing that the government fails to address is the
21 letter that the criminal AUSAs in that very case wrote in
22 response to the defendants' raising of the issue of what
23 happened on the night of the attempted suicide. As your Honor
24 knows, because you've seen the letter, the defense says, we
25 want to be able to show that our guy did the right thing on the

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1 night of the attempted suicide, that he should get some credit
2 for that during the penalty phase, and he is upset because the
3 video has gone missing. That's what starts the whole
4 correspondence.

5 The government comes back in a letter, which is number
6 189 on the docket there, and says, in the first paragraph: The
7 government does not intend to dispute the defense assertion
8 that the defendant called MCC staff to the cell. It then goes
9 on and says on page 2 of that same letter: To the extent the
10 defense chooses to present evidence during a potential penalty
11 phase regarding his conduct in prison, the government may seek
12 to rebut such evidence with instances of the defendant's
13 misconduct while detained pending trial — and here's the
14 important part — but those incidences would not include any of
15 the events of July 22nd and 23rd, 2019, involving Jeffrey
16 Epstein. In effect, they are taking the dates of the attempted
17 suicide off the table.

18 So, I don't understand how these documents then become
19 relevant at all, because there would be no interference if
20 they're not even in play, they've been concealed --

21 THE COURT: But it's not that they're in play, right?
22 In other words, in fairness to the government, no, at a top
23 line they're not disputing the conclusion that Mr. Tartaglione
24 made a phone call when Epstein was in distress, and they're not
25 otherwise putting stuff at issue there; on the other hand, as

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1 you know, the way one tries a case is not merely trying to get
2 that sterile factoid out but the defense would have significant
3 interest in the look and feel of that event in trying to
4 develop it, right?

5 So, there's obviously an issue as to how far that
6 reaches, but the mere fact that the government doesn't dispute
7 that Tartaglione, in effect, in the moment did the right thing
8 doesn't mean that the defense isn't going to try to milk that
9 one for a whole lot more than that one-sentence sound bite?

10 MR. McCRAW: Correct, I take your Honor's point.
11 However, what becomes crucial with 7(A) is what is the
12 interference, not does the disclosure connect to something that
13 may come up in the trial but what is the interference? And the
14 reason the government has given here seems to be the effect on
15 witnesses. That connection is not made in Mr. Capone's
16 declaration, either of his declarations — what is the
17 interference that would take place if this was released?

18 The other letter which is referenced, and your Honor
19 referred to it, talks not about Epstein — this is the
20 January 21st letter in Tartaglione — it is about the dirty
21 decrepit, vermin-infested, hyperisolating conditions of the
22 MCC. I can't tell from the Vaughn Index, as it is, whether
23 there's anything at all about that, whether there's any
24 document here, and certainly it doesn't go to the Epstein
25 document. Again, I think there has to be --

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1 THE COURT: So, help me. I take it you acknowledge
2 that there is some category of Tartaglione document that is
3 properly withheld; you're just drawing the concentric circle
4 over the lines of more tightly than the government. What's
5 your line? Help me with how you would formulate what is
6 properly withheld on account of Tartaglione.

7 MR. McCRAW: Your Honor, in the current state of the
8 record, I don't see it. I just don't see where the
9 interference would come. This is not --

10 THE COURT: Well, suppose there's a document that
11 literally recounts Mr. Tartaglione's outcry on July 23rd, it
12 really is giving the narrative about that event. Granted, the
13 government may not in the Tartaglione penalty phase, if it
14 getting that far, make a big deal about the point, they might
15 even stipulate to it or part of it, but nonetheless, insofar as
16 Tartaglione's defense will be apparently trying to get some
17 mileage out of that, why isn't, at a minimum, a document that
18 actually recounts those events something that the government
19 has the right to maintain public control over so that there
20 isn't a narrative in the newspaper the day before the
21 Tartaglione penalty phase, you know, recounting what the
22 exhibits say happened there, just to be really extreme?
23 There's some irreducible core here that you have to concede is
24 properly withheld.

25 MR. McCRAW: Your Honor, I'm going to come across as a

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1 newspaper lawyer; and I would think that kind of story doesn't
2 have any impact on the trial, the jury is impaneled, that they
3 have been properly voir dired, that --

4 THE COURT: Sorry, but if that were the answer, that
5 would be an answer to a whole lot of step two under 7(A),
6 right? In other words, we all hope that juries follow
7 instructions, both at the selection stage and during the trial,
8 and we hope that they follow the limiting instructions during
9 the trial; but, that being said, if that were an ironclad
10 bulwark, 7(A) would be less of an issue and then you'd only be
11 worried about influencing the witnesses. But the case law says
12 that I'm allowed to assume the possibility that something slips
13 through the sieve before jury selection or during the trial.

14 MR. McCRAW: Yes, I couldn't agree with you more, your
15 Honor. I would, of course, point to, in the Southern District,
16 that we have had, over of the course of my career, much higher
17 profile cases than Mr. Tartaglione's and found a jury and had
18 those upheld as fair and impartial juries, whether you're
19 talking about celebrities or terrorists or mob figures. So
20 could there be a document that is such that its public
21 release — that is, its public release now — would so affect
22 some witness about what happened or didn't happen? I suppose I
23 can hypothetically entertain that notion. I just think that
24 the government's going to have a very hard time, after they
25 have lost the videotape and conceded that they're not going to

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1 contest that he made the call, I am just not quite sure what
2 the facts would be that would get me there, but I will concede
3 the point that it could be.

4 THE COURT: What about the other dimension of
5 Tartaglione? I have to say to you, as I think I indicated to
6 Mr. Kochevar, it's not obvious to me that, as a matter of law,
7 decrepit prison conditions qualify as mitigating. I just have
8 never had occasion to think about that. It's not at the core
9 of what one ordinarily thinks about in the capital phase as
10 mitigating, even if it is very much germane, and certainly has
11 been over the last year, in judicially imposed sentences under
12 Section 3553(a) or compassionate release applications.

13 But what is your view as to that? In other words,
14 assuming that there is some relevance to prison conditions in
15 the jury's determination of the proper sentence — just let's go
16 with the premise that there is a proper place for that — what's
17 the parameter? Is it simply, you know, the government gets to
18 withhold the condition of the joint cell of the two men but as
19 to broader prison conditions at the MCC or Epstein's prison
20 conditions, other than when he's bunking with Tartaglione,
21 those are properly produced? What do you do with that factor?

22 MR. McCRAW: I think it would have to be specific to
23 their particular cell on that particular very short period when
24 they were together. As you know, the defense theory in
25 Tartaglione is that it will prove that he should be eligible

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1 for life in prison rather than being executed. I don't have --
2 I don't know enough about criminal law to know whether that's
3 mitigating or not, but that's the theory.

4 It seems highly speculative to me, but I would still
5 want a declarant to say what the interference would be from
6 early release, and it is, as your Honor knows, early release
7 here could be substantial, between COVID and the delays that
8 have already taken place in this prosecution. This is a --

9 THE COURT: Early release? Just help me with what
10 you're referring to, Mr. McCraw.

11 MR. McCRAW: Oh, I'm sorry. Early release of the
12 documents, early -- disclosure of the document at this point.

13 THE COURT: Because any trial may be apt to be delayed
14 a long time under COVID?

15 MR. McCRAW: Correct, COVID, and the natural --

16 THE COURT: And capital cases are, by their nature,
17 long-tailed before they hit trial.

18 MR. McCRAW: Right.

19 THE COURT: Let's turn to Noel because I think what
20 Mr. Kochevar has helpfully said is, as a practical matter, even
21 if you, The New York Times, prevail to a large degree with
22 respect to Tartaglione, if you don't prevail on Noel, Noel
23 either literally or comes awfully close to replicating the same
24 universe of withheld documents.

25 So, look, as to Noel, help me with what your line is.

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1 I mean, there is clearly — and I will just say it because it
2 seems obvious to me — there is clearly some category of
3 documents under Noel that is within the ambit of the Noel
4 prosecution; the challenge is, as you can see me struggling
5 with, where do we draw the line, what is too far afield?

6 MR. McCRAW: Right. And, your Honor, I would come
7 back to the point I was making earlier, about what is the
8 nature of the interference. I do not believe that these
9 documents will -- I don't think there's a credible case that
10 this will impair a fair trial in the Southern District of New
11 York. We make that point in our brief. I don't need to dwell
12 on it, so it really becomes about interference with witnesses.

13 I point to three things from the prosecution of that
14 case. One is the representation, again made today, that much
15 of this material has been released. Now, if there is some that
16 falls -- when released to the defendants. Now, if there's some
17 that falls outside of that, we should have heard about that,
18 they should have made a record of it; I don't know whether
19 that's so or not, but --

20 THE COURT: All right. Let's assume that either most
21 of the material has been produced to the defense, meaning the
22 government is necessarily consistent, or, to the limited degree
23 there's material that's outside, it's because of the technical
24 requirements of Rule 16 of the Federal Rules, which may not be
25 a perfect map for 7(A), but let's assume for argument's sake

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1 that the government is broadly consistent in its treatment
2 under Rule 16 and its application of 7(A). So take that off
3 the table and give them credit for that, and assume that. Now
4 move on.

5 MR. McCRAW: Right.

6 THE COURT: I think your point is possible, they
7 haven't been, but I'm going to assume for purposes of this
8 discussion that I'll find out. But let's call that one in the
9 government's favor for the purposes of this discussion.

10 MR. McCRAW: Will do, your Honor.

11 So then you move to paragraph 3 of the protective
12 order in the case. What that says, in the protective order in
13 Noel, is that the defense is allowed to show the document to
14 fact witnesses. So, this idea that this will prevent
15 coordination, if that's really a concern — I don't assume that
16 people are going to lie — the defense is now -- already has the
17 right to take these documents and show them to fact witnesses.

18 The third factor I pointed to is the indictment
19 itself. This is not, as your Honor knows, a barebones
20 indictment. This tells a story as to what these two people
21 were shopping for online, which rounds they missed, a
22 supervisor who did nothing when he showed up. If a witness in
23 this case were keen on trying to understand either how to
24 contradict the government's case or get in line with the
25 government's case, that indictment is deeply factual and would

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1 be a playbook, if you want to look at it that way.

2 So, I struggle to see what the interference is, and I
3 think the government should have to speak to that, not just --

4 THE COURT: Isn't the premise here that although I
5 expect the district judge will impose limits on the evidence
6 that's received, the fact that it was the Epstein suicide that
7 catalyzed the investigation which revealed the malfeasance
8 here, I assume that Epstein is going to be a -- that fact will
9 be, let's assume for argument's sake, before the jury, and then
10 I suppose it becomes the question of does the defense get a
11 fair trial if, for example, facts about the Epstein suicide
12 come to light that would lead somebody to conclude that this
13 was really avoidable, by people who had walked the halls, that
14 had done their sentry duty? Or, in effect, is it possible some
15 of the evidence that could come to light could make the jury,
16 in effect, treat these defendants as if they're accountable for
17 the death of a human life and the manner of discomfort,
18 suffering or whatever else, whereas the absence of reporting on
19 that would make it more of a 1001 false statement case, as
20 charged? There's a little bit of a risk, if you're the judge
21 on that case, that it's going to be mistaken as a case about
22 responsibility for a death as opposed to false statements.

23 MR. McCRAW: Yes, your Honor, I see that point. I'm
24 going to default to what I said earlier, which is that the fact
25 that there could be a jury that disregards its duties, that

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1 there's a judge who doesn't oversee a proper voir dire, that
2 defense counsel or the prosecution misbehaves and talks about
3 murder in a closing argument, all those things are possible,
4 and you can imagine -- I do a lot of FOIA cases, I get charged
5 with speculating a lot, but this strikes me as this is one case
6 where the government is speculating very far out as to the
7 things that could happen.

8 THE COURT: From your perspective, as to Noel, what
9 about the government's thesis that, for example, you've got two
10 individually named defendants here who presumably had done a
11 bunch of rounds on previous days during Epstein's tenure at the
12 MCC, and the government argues, I think, that one of the closer
13 concentric circles is, for example, the prior conduct of those
14 defendants in doing their rounds — in effect, the government
15 may want to say, you know, either they've had a long history of
16 dropping the ball, now that we've gone back and looked, there
17 were many days on which they didn't do their rounds — or their
18 awareness of their responsibilities is reflected on the fact
19 that every day but this one for the three weeks beforehand they
20 dutifully did their rounds? There's an inference, one way or
21 the other, that can be drawn whichever way the facts point,
22 but, either way, it's exactly the sort of raw material that
23 could easily be brought to bear at the criminal trial of these
24 defendants, right?

25 So, to the extent we're talking about the prior

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1 history of check-ins about these defendants, of the monitoring,
2 sentry procedures by these defendants, isn't that something
3 that is at the core of what ought to be protected here, stuff
4 that deals with the work activities by these two criminal
5 defendants?

6 MR. McCRAW: Let me approach that a couple ways
7 because I'm going to concede something here.

8 One is, I think, as to them, if in fact Rule 16 has
9 been complied with, they already know that.

10 THE COURT: They already know that. But the fact the
11 defendants know that makes it more clearly Rule 16 -- it's Rule
12 16 material, and I'm assuming that evidence like that would
13 have been produced in the case, their prior records for the
14 weeks and days leading up to August 9th and 10th. That
15 enhances the argument for its exemption, no?

16 MR. McCRAW: I may be missing the point, but its
17 public release, hypothetical public release, doesn't change
18 anything about the defendants because the defendants already
19 know.

20 When we look at other witnesses --

21 THE COURT: No, no, no, but it changes, it enhances,
22 the risk of a jury hearing about it, it enhances potentially
23 the risk of a witness, who wasn't supposed to hear about it,
24 hearing about it. In other words, if, for example, the
25 narrative of all the days -- what did the defendants do

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1 vis-a-vis their BOP responsibilities in the days, weeks and
2 months leading up to August 9th and 10th? If that's a chapter
3 at the trial, which it may well be, the government is on very
4 strong footing, are they not, saying that's exactly the sort of
5 thing that we have a right to keep out of the public domain
6 under Exemption 7(A) prior to the trial, maybe the analysis
7 changes after trial?

8 MR. McCRAW: I would push back a bit on that, your
9 Honor, and I would go back to that whole line of cases that
10 grow out of the prior restraint cases from the Supreme Court
11 starting with the Nebraska Press Association. They talk very
12 clearly — and, again, different context, I understand — about
13 why prior restraints aren't needed to preserve fairness in a
14 criminal trial, it talks about all the things that I've raised
15 earlier about the success in voir dire, gag orders on the
16 participants as opposed to on the press, and so forth.

17 THE COURT: Right, but you're arguing against the
18 second element of Section 7(A). I mean, there's an
19 interference -- the case law on that acknowledges the prospect
20 of witnesses or jurors being affected. I can't read that out
21 of the case law even though I appreciate that, from your point
22 of view, these other protections in the system ought to
23 minimize the reach of 7(A), but the case law goes the other
24 way.

25 MR. McCRAW: I would make that point, about prior

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1 restraints too and gag orders, that there are, as your Honor
2 knows, times when even though what I just said about the
3 Supreme Court's view of gag orders and prior restraints and so
4 forth, that in the Don King case, in the Second Circuit, the
5 circuit upheld restrictions there on who could speak, the trial
6 participants. And, again, I would say it's not so much a
7 categorical either/or, it's is this the kind of extreme case
8 where this is something to be concerned about? I think this
9 prosecution, the Noel prosecution, the Noel/Thomas prosecution,
10 is not the kind of thing where you're going to find that those
11 kind of extraordinary steps are needed.

12 I am much more sympathetic to the idea of, would
13 disclosure, at this point in time, affect witnesses? What I
14 haven't seen — and, again, I've characterized this as a failure
15 of proof — what I haven't seen from the government is making
16 this link. What is it that witnesses who are not Thomas and
17 not Noel — they might not be witnesses, but that aren't the
18 defendants — may gather from these and they would affect their
19 testimony? I'm open to the possibility that something could be
20 changed by that; I just don't see it in Mr. Capone's
21 declarations.

22 THE COURT: All right.

23 Let me ask you a final question on 7(A), which is:

24 Assuming that the Court were inclined to get my hands dirty
25 reviewing these materials, to make my own judgment, obviously

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1 that's not a process in which the New York Times gets to
2 participate, but are there questions you would think would be
3 fruitful for the Court to put to the government, in connection
4 with its provision of those materials to the Court, to guide my
5 review?

6 MR. McCRAW: I think it would go back to some of the
7 points that were raised earlier, your Honor, which is, many of
8 the things that deal with Jeffrey Epstein's psychological
9 state, medical records, and so forth, seem to be far removed
10 from a false reports case.

11 I think, second, documents that appear to be
12 assignment rosters and so forth, which you see on the first
13 page of the Vaughn Index, again, it's not clear how those
14 connect. Maybe they can — I think we've heard a couple of
15 theories of possibly getting there — but we'd like to know
16 that.

17 The last point I would make, again, on 7(A), is they
18 have in 52 and 53, they have taken 2000 emails off the table.
19 I do not have any idea of --

20 THE COURT: Have you received any of those? In other
21 words, I couldn't tell whether that meant literally all emails
22 were off the table or only all of the withheld emails equal
23 that amount, the number there in those categories.

24 MR. McCRAW: I'm going to have to ask my colleague.
25 I've seen emails from third parties — that is, good citizens —

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1 talking about what they thought that BOP should do.

2 But, Ali, are there emails in the production that
3 you've seen?

4 THE COURT: Just to be very clear, because I want to
5 make sure that our court reporter -- if you're done with your
6 presentation, I'll turn to Ms. Settelmayer, and I'm happy to
7 start off, but it's a little hard on these phone calls to have
8 counsel toggling to one another.

9 MR. McCRAW: Fair enough.

10 THE COURT: Is there anything further you want to say,
11 Mr. McCraw, as to 7(A), including, if I were to undertake a
12 review of my own, whether there are questions that you would
13 think that I ought to be putting to the government in
14 connection with what it produces to me that would be
15 particularly fruitful? One natural one is: What's been
16 produced in Rule 16?

17 MR. McCRAW: Correct, I was going to go there, that
18 today counsel has raised the idea that the compiled-for
19 standard applies. And I've seen that before — it comes out of
20 *John Doe v. John Doe Corporation* of the Supreme Court — I get
21 that, that compiled-for is measured for at the time of the
22 request. I just don't know whether in fact these documents
23 were all swept up and turned over to the investigators and
24 prosecutors.

25 THE COURT: Okay, very helpful. Thank you very much.

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1 MR. McCRAW: Thank you.

2 THE COURT: Ms. Settelmayer, let me start with you
3 with just the item or two that Mr. McCraw, I think, tried to
4 lateral to you. It sounds like you may be closer to the
5 produced documents, and I welcome getting your take on that.

6 What do the produced documents look like, including
7 the emails?

8 MS. SETTELMAYER: Yes, your Honor.

9 So, we do have a number of documents that are internal
10 to BOP that have been produced to us, as well as some external
11 documents related to press reports related to Jeffrey Epstein.
12 We have documents related to Jeffrey Epstein's records as far
13 as the money he was wired regarding -- to be used in
14 commissary, as well as records such as the final press release
15 that the Department of Justice issued. So we do see emails in
16 the productions that -- long story short, we have received
17 emails from the government in this matter.

18 THE COURT: And are those in the categories you just
19 described, or other ones?

20 MS. SETTELMAYER: Those are in the categories that I
21 described.

22 THE COURT: Okay. But not others?

23 MS. SETTELMAYER: No.

24 THE COURT: All right.

25 I understand your argument is not the 7(A) argument,

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1 you're arguing under exemption 5?

2 MS. SETTELMAYER: Yes, your Honor, and I will keep my
3 remarks fairly brief.

4 At the outset, I just want to point out, The Times
5 agrees with your Honor's description of the government's
6 submissions as having a "trust us" quality, and that quality
7 directly bears on the government's failure to satisfy the
8 foreseeable harm requirement of the 2016 FOIA amendment.

9 As your Honor --

10 THE COURT: I'm sorry, let me just cut you off right
11 on that.

12 I noted in your brief that you are relying on the 2016
13 amendments. Why is it that that argument is made in connection
14 with Exemption 5 but not others? That seems to be consistent
15 with the limited case law on that exemption, but does that
16 amendment limit itself to that exemption?

17 MS. SETTELMAYER: No, your Honor, it's not limited to
18 that exemption. And you're quite right, that obviously the
19 case law directly speaks to Exemption 5. We raised it because
20 it's something that the government has put at issue by virtue
21 of its affidavits. So, the 2016 amendment requires at that
22 boilerplate and generalized claims of disclosure that would
23 impair or chill deliberations simply don't suffice. Here, the
24 government really offers rote and generalized speculation as to
25 what harm might come of releasing these documents.

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1 I'd like to respectfully direct this Court to the
2 Christenson declaration submitted by the government, and that's
3 Document No. 24, specifically, paragraphs 49(a) through 49(s).
4 In these paragraphs, the government offers essentially the same
5 formulaic explanation — release of X records would hamper frank
6 and open discussions on Y topics. And now we believe that the
7 government has had ample opportunity to supplement its
8 declaration and has failed to do so. And having failed to meet
9 its burden under the foreseeable harm standards, we believe the
10 records must be released.

11 That's really all I wanted to take a moment to
12 address, your Honor.

13 THE COURT: But may I ask you this: If the 2016
14 amendment requires, in the context of Exemption 5, some more
15 specificity, some greater rigor as to why the FOIA concern, in
16 this case about chilling deliberations, applies, does it have
17 any comparable reach as to the second step of Section 7(A)? In
18 other words, Section 7(A) also has the step two, not law
19 enforcement purpose but the interference one. That's largely
20 where the whole discussion I had with government counsel zeroed
21 in. Is there a case law that says that the government has to
22 with comparable rigor make a representation to satisfy step two
23 of 7(A) with what it needs to do now after the 2016 amendments
24 under Exemption 5?

25 MS. SETTELMAYER: Your Honor, I would imagine that

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1 baked into Exemption 7(A), because we are talking about a
2 circumvention of law enforcement activity -- there's not as
3 much of a need to really spell out that foreseeable harm. I
4 mean, that foreseeable harm is pretty much implicit in the sort
5 of law-breaking that would happen as a consequence of release
6 of those records.

7 THE COURT: No, no, but, in other words -- and this
8 gets to sort of the issue of how categorical the government can
9 be or how broad the government can be in defining the category,
10 even if categorical approaches are warranted, which appear to
11 be the case, then the question is sort of do we draw the
12 category at 30,000 feet, 15,000, 5,000, that sort of thing? I
13 guess the question is, you know, to what degree the 2016
14 amendments bear on the rigor of the showing that the government
15 has to make about interference? I don't know if you've seen
16 anything like that.

17 MS. SETTELMAYER: Your Honor, I'm not aware of any --
18 of the case off the top of my head, although I have not steeped
19 myself in it, so, to be fair, I might be -- it's quite possible
20 that I am missing something.

21 THE COURT: Let me ask you, while I have you, then:
22 Understandably, The New York Times made a broad-ranging request
23 for a host of categories that look like all things Epstein.
24 May I ask you, without abandoning your interests in anything
25 here, what is the heart of the request? What do you most care

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1 about in this request? What types of records are really at the
2 heart of The Times' interest?

3 MS. SETTELMAYER: Well, your Honor, a suicide when a
4 government is a custodian of an individual necessarily
5 implicates a government failure, and I think that we are deeply
6 committed to providing the public with the sort of oversight
7 over its institutions as a result of -- that would emanate from
8 these records. We would like to provide the public with a
9 clear picture of what happened and how Mr. Epstein's suicide
10 occurred, and what --

11 THE COURT: Okay, that's extremely helpful. Am I
12 right to understand, as I look at the requests here, that —
13 although there might be interest in the human saga that was
14 Jeffrey Epstein and who his friends and family and financial
15 backers were and whatnot, visitors — at the heart of the issue
16 here is the failure of a public institution, and your autopsy
17 into how it happened, and that's essentially the topic sentence
18 of the news story?

19 MS. SETTELMAYER: Yes, your Honor.

20 THE COURT: Okay.

21 I guess the issue is, in effect, to boil it down, to
22 what degree FOIA can help you tell that story without getting
23 in the way of two prosecutions that in some way bump into
24 Jeffrey Epstein? Because there are fine points about other
25 details, other exemptions, but the heart of this is 7(A), and

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1 the question is, in effect, how much is the fact that these
2 other two prosecutions overlap here properly hold you back from
3 that story.

4 To what degree do the materials that you've received
5 help The Times gain insight into that issue?

6 MS. SETTELMAYER: Your Honor, I would say that the
7 materials that we've received have provided us with a very
8 limited scope of information as far as what -- the autopsy of
9 what happened here and what government failings necessitated
10 this situation. To be frank, there have been productions that
11 are almost entirely redacted, that don't provide a whole sense
12 of what happened here.

13 So, we are still -- while we recognize and appreciate
14 the Court's assistance in receiving the documents, because, no
15 doubt, without this action we would not have received these
16 documents, we still have quite an incomplete picture.

17 THE COURT: No, look, I, too, am struck by the
18 audacity of the initial denial by the Bureau of Prisons to have
19 anything that was producible. That was attention-getting, and
20 it certainly does raise a concern from a court that there is an
21 attempt, where there's a high-profile epic failure like this,
22 that the wagons are being circled, that's obviously the
23 concern. In the end, the issue is how the exemptions apply to
24 the particular documents, but it certainly inspires a desire to
25 be more rigorous and hands-on as a court, given the initial

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1 denial there was anything responsive; get it.

2 May I ask you if there are criminal cases that The
3 Times is familiar with that look at all like this, where, in
4 effect, you have -- or, I should say, FOIA cases that are
5 brought in the context of a pending criminal matter where the
6 FOIA requester is trying to gauge an institution's response and
7 a court is, in effect, trying to figure out which documents
8 that bear on the institutional responses can and can't be
9 produced consistent with the FOIA exemptions that are designed
10 to protect the integrity of the criminal process? Are there
11 cases that really get at that tension? Because that's the
12 heart of the issue here.

13 MS. SETTELMAYER: Yes, your Honor. While not to this
14 scale, I think one of the things that's absolutely striking
15 with this particular proceeding is obviously the scope of
16 documents, but kind of the lack of granularity and how the
17 government has broken down these categories of documents. And
18 I don't think that there is quite an analogous case where we
19 are dealing with these broad tranches of documents and the
20 government is reticent to provide those documents.

21 THE COURT: All right, okay. Thank you. Thank you
22 very much, very helpful.

23 Anything further from you, Ms. Settelmayer?

24 MS. SETTELMAYER: No, your Honor. Thank you. We'd
25 like to stand on our briefs unless your Honor has any further

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1 questions.

2 THE COURT: I don't have further questions for you,
3 but thank you very much.

4 MS. SETTELMAYER: Yes.

5 THE COURT: Mr. Kochevar, let me ask you just a
6 question or two, and then I'll close. Are you there,
7 Mr. Kochevar?

8 MR. KOCHEVAR: I am, your Honor.

9 THE COURT: How did it come to pass that the BOP
10 originally took the position that there was literally nothing
11 responsive here? What was the level of involvement of the U.S.
12 Attorney's Office at that stage?

13 MR. KOCHEVAR: Just to be clear, I believe the
14 response was not that there was nothing that was responsive, it
15 was that it could be categorically withheld in full.

16 THE COURT: Fair enough. But, in other words -- and
17 I've seen this drama play out before, that when a court gets
18 involved, suddenly there's a more rigorous attention to the
19 application of FOIA to the project at hand, and the initial
20 response is a more stout categorical denial, I've seen that
21 before and this fits that pattern. And, if you can say, I'm
22 eager to understand: What led the government to take the
23 position it did originally, and how come it changed?

24 MR. KOCHEVAR: So, I'm not sure that I am privy to a
25 certain -- at some point, I was not involved, at the start, the

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1 very start, of when the FOIA request came in, but to some
2 extent, to answer the Court's question, I think there is a view
3 that Exemption 7(A) is one of the broader -- well, the rational
4 link standard is one that can be met here. And there is, I
5 think, a position that the government could take, that more
6 things were covered here by 7(A) and that, in fact, some of the
7 things that were released that relate to Mr. Epstein's
8 incarceration, they are connected to live criminal proceedings
9 and investigations.

10 I don't think it was -- so, I believe that was the
11 thinking, basically, that given the various investigatory
12 processes involved in connection with his incarceration and
13 death, that, as phrased, some of the Times' requests could just
14 be categorically denied. I believe that was the thinking. I
15 think that changed -- in part, the agency and the government
16 reassessed and made things more specific, in response, and is
17 now taking the position that it's taking. I don't think it's
18 completely out of left field, though, that when there are
19 numerous investigative processes in play, that Exemption 7(A)
20 can be invoked broadly.

21 THE COURT: Okay. In the spirit of reconsideration,
22 let me ask you: The government's submissions in this case were
23 last made on January 15th, 2021, albeit in the context of other
24 matters. I am mindful, in cases on my docket and those of
25 colleagues, of the government's taking a fresh look at some

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1 issues of public importance before it upon the change of
2 administration. May I ask you whether this question, the
3 nature of and extent of the government's FOIA response in this
4 case, has been reassessed north of the U.S. Attorney's Office
5 since January 20th?

6 MR. KOICHEVAR: Not that I am aware of, your Honor.
7 Yes, not that I'm aware of.

8 THE COURT: All right. Look, very helpful.

9 Mr. Kochevar, I am all but certain that the next step
10 in this case, in order to enable me to get my hands dirty on
11 this, is going to be to direct the government to produce for
12 the Court's review the withheld and produced material here, and
13 in a way that enables me to see not only what's been produced
14 and what's been withheld but as to what's been withheld in a
15 way that associates the exemption or exemptions of withholding
16 with the particular document. I am sufficiently concerned —
17 not that there isn't a basis for withholding of some here, but
18 that too much has been withheld — that I think it is likely
19 necessary for me to get my hands dirty doing that.

20 How quickly would the government be able to produce to
21 my chambers, for my in camera review, binders that contain the
22 documents here, with the necessary flagging as to which
23 exemption? Given it doesn't look like, as FOIAs go, this is
24 that voluminous — I think we're talking 3500 pages or something
25 like that, which is child's play compared to many other cases —

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1 how quickly do you think you'd be able to get that to me, with
2 the necessary association of exemptions to particularly either
3 documents or portions?

4 MR. KOCHEVAR: So, I think I would ask, at the outset,
5 for one month, with the understanding -- it's hard for me,
6 given the current situation in the broader world of COVID and
7 everything else. I think that it may take some time just
8 because of the various entities that are involved here --

9 THE COURT: Wait, sorry. At this point, the entities
10 involved, I'm not asking -- I'm not asking for the Bureau of
11 Prisons to do anything here. This is a U.S. Attorney function
12 at this point; it's a legal assistant and an AUSA, right?
13 That's all we're talking about. I'm not inviting the Bureau of
14 Prisons to meddle with this. The decisions have already been
15 made. If they haven't been made, then you've got a bigger
16 problem on your hands because I'm asking to you show me what
17 you've already concluded. And I'm assuming that there is a way
18 in which, if you take any document, it's simply a matter of
19 blocking and tackling to take your notes as to the document and
20 show which is 7(A) Noel, which is Section 7(A) Tartaglione,
21 which is 5, that sort of thing, but I'm not inviting a fresh
22 look here. I just want you to show me your work.

23 MR. KOCHEVAR: Maybe I didn't fully understand, then.
24 So, yes, I think there is an issue of the things that have been
25 withheld under 7(A) in full. If there are -- some of the other

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1 exemptions that are noted for them, they are not on like a
2 line-by-line basis within the document. So, for instance, if
3 there's a document withheld in full under 7(A), well, we can
4 identify, this document also has, say, Exemption 5 exemptions,
5 I'm not sure -- it's not like they would be ready for
6 production tomorrow with redactions specifically for the
7 exemptions. So we --

8 THE COURT: No, right, but if the document was
9 withheld in whole on 7(A) but the log at Docket 39-1 lists a
10 different exemption -- so, for example, I'll look at entry
11 number 2 is a good example, it says withheld in full under 7(A)
12 and then it says Exemptions 5, 6, 7(C), 7(E) and 7(F)
13 applicable in part. I would like to think that the "part" is a
14 known thing, meaning that somebody actually critically analyzed
15 the underlying material and figured out what part those
16 exemptions applied to.

17 MR. KOCHEVAR: Sure.

18 THE COURT: Is that an accurate premise, I guess is
19 the question?

20 MR. KOCHEVAR: Yes, so to make this more concrete --

21 THE COURT: Yes.

22 MR. KOCHEVAR: -- some of the Exemption 7(C)
23 exemptions in part, which I don't think are even disputed
24 anymore, are like names of BOP employees, I think. I can't
25 give the Court tomorrow a document that has like a box on it

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1 that is like, "This is a BOP name," right? Certainly, the
2 documents here could just be produced, but what the Court would
3 get would be essentially what it says here — this page was
4 withheld under 7(A) and also, Exemption 6 and 7(C) are
5 applicable, under the theories that are laid out in the
6 government's brief — but there wouldn't be a specific marking
7 on it — does that make sense — for those other --

8 THE COURT: It makes sense that right now you don't
9 have that, but it would not make sense in terms of what I'm
10 looking for, because I would like to do a one-stop shop, where
11 when I look at the document, I'm making a judgment both about
12 any categorically expressed basis for withholding as well as
13 any subset basis. So I think I would need, if your current
14 notes don't permit a clear reconstruction of what the reviewer
15 had in mind, I think I would need that done.

16 MR. KOCHEVAR: And so that is the timing that -- we
17 would need to time to put that together for the Court, because,
18 again, the things that were withheld in full under 7(A), those
19 particular other exemptions are not mapped out in part, and I
20 think that will take some period of time.

21 THE COURT: Let me ask you: There's a rolling way of
22 doing this, right? In other words — I'm looking at the log
23 here — you've got 60 entries. I am eager, given the importance
24 of FOIA and the journalistic mission of the requester here, to
25 move this sooner rather than later. One way to do it would be

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1 to say, let's be done in a month but let's do it on a rolling
2 basis so that beginning in two weeks I get a binder that
3 answers the question for some of the items, some of the
4 withheld categories on the list.

5 Is there a reason to wait for a month to get
6 everything as opposed to getting it on a rolling basis?

7 MR. KOCHEVAR: No, I think a rolling basis would
8 probably work, yes. I mean, I think -- honestly, I would think
9 that the main issue here, probably the longest thing, which may
10 take more than a month, honestly, is the email documents. And,
11 respectfully, based off of some of the responses The Times just
12 gave, I'm not sure — maybe this is something to discuss with
13 The Times separately — I think many of those emails, while they
14 may technically fall within the Times' request, I'm not sure
15 that they're core -- anyway, we may -- yes, I think the emails
16 are going to be the time-consuming piece here.

17 THE COURT: All right. Then let me suggest this,
18 because I'm eager to structure this in a rational, productive
19 way, and I regret that the nature of what I'm going to be
20 asking you to do is going to create a fair amount of work, but
21 I think, given the importance of the request and the
22 controversy and the concern I do have about not invoking FOIA
23 but the extent to which it's invoked on the basis of those two
24 prosecutions, I do think my own independent review is going to
25 be needed, and I would value front-loading the categories that

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1 can be more easily presented to the Court and that are most
2 likely central here.

3 So, may I suggest that I will issue an order, in all
4 likelihood, on Monday that confirms my current inclination to
5 direct this sort of production, and probably very much along
6 the lines of what I've imagined for you in the last few
7 minutes, but I would welcome your beginning to give focused
8 thought to what a sequencing might look like. And please speak
9 to your colleagues at the Times because, again, I would rather
10 focus my initial review on both what you can accomplish readily
11 but also what is, frankly, more centrally of interest to them.
12 There's no reason why that aspect of collaboration can't occur.

13 I would ask you, as well, pursuant to what I said a
14 few moments ago, may I ask you, just within the U.S. Attorney's
15 Office, while I can't direct you to do this, I would happy to
16 know that the question of how to address the FOIA request here
17 and the scope of the objections claimed, I would be happy to
18 know that at least there was consideration given at the top of
19 the U.S. Attorney's Office whether to raise this more centrally
20 within Main Justice. There may or may not be an interest in
21 taking a fresh look — I don't know, and I don't presume to know
22 the politics at all — but mindful that there has been that
23 fresh look on other things, it's not inconceivable to me that a
24 different set of eyes might take a more receptive view of the
25 FOIA request here.

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1 MR. KOCHEVAR: Understood, your Honor. I will
2 certainly carry this back.

3 THE COURT: Very good.

4 Look, all I need to know is that you are committing to
5 me that you will do that with some dispatch. I don't need to
6 nose around more into the answer. I just want your commitment
7 that you will raise it so that I know now that the U.S.
8 Attorney's Office at the top level will consider the question
9 of whether to elevate this within DOJ, but it's not my business
10 who felt what or whether it was elevated; I just want to make
11 sure that the U.S. Attorney is taking a close look and asking
12 that question.

13 MR. KOCHEVAR: And so, just because I know the Court
14 is interested, I want to be careful about what precisely the
15 Court is asking, just so I can make sure --

16 THE COURT: Look, I'm asking that the U.S. Attorney,
17 Audrey Strauss, take a close look at the case and ask the
18 question: Is this the sort of problem, the sort of
19 controversy, that ought to be elevated north of the U.S.
20 Attorney's Office now that there is a different group in
21 charge? I have no idea how much, or little, different
22 sensibilities within the current Justice Department might
23 affect how the government views FOIA requests these days, how
24 they view FOIA requests that are aimed at examining significant
25 institutional failures, how broadly or narrowly they may be

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1 viewing some of the questions about the intersection between
2 criminal prosecutions and a more systems-oriented FOIA request,
3 but it is endowed of the question that that there's a different
4 philosophy about this. And it may also be that people who
5 don't have the same sense of responsibility — it's a different
6 crew overseeing the Bureau of Prisons — people may take a fresh
7 look at this and not feel perhaps as defensive as people on
8 whose watch a very highly publicized suicide was allowed to
9 happen, would take it.

10 It stands to reason that fresh eyes may look at it
11 differently, and I will be satisfied to get your representation
12 that Audrey Strauss, for whom I have great esteem, is taking a
13 close, independent look at whether to elevate this within DOJ.
14 That's all.

15 MR. KOCHEVAR: Understood.

16 THE COURT: Very good.

17 So, I'll have an order out, in all likelihood, Monday
18 as to next steps, but you can pretty safely assume that it will
19 entail a review by me broadly along the lines of what I've
20 envisioned. Start giving thought, and start discussing amongst
21 yourselves, the rational sequencing.

22 With that, look, I want to thank you all. And,
23 Mr. Kochevar, I ought to specifically say, you were under
24 considerable fire during much of the argument, and I very much
25 appreciated the caliber of your answers and the grace of your

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1 answers. These are hard problems, and I appreciated the
2 high-level briefing and high-level presentation from both
3 sides.

4 MR. KOCHEVAR: Thank you, your Honor.

5 THE COURT: All right. With that, we stand adjourned.

6 Thank you.

7 MR. McCRAW: Thank you, your Honor.

8 MS. SETTELMAYER: Thank you, your Honor.

9 * * *