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1 [The R.M.C. 803 session was called to order at 1028,
2 18 February 2016.]

3 MJ [COL POHL]: The commission is called to order. It
4 appears that all parties are again present who were present
5 when the court recessed.

6 Mr. Connell.

7 LDC [MR. CONNELL]: Thank you, sir. Your Honor, I've
8 previously provided a copy of slides, which have been
9 tentatively designated AE 397D, to the prosecution, to counsel
10 for the parties, to the court security officer and to the
11 bench. May I please have permission to display these to the
12 gallery?

13 MJ [COL POHL]: Sure.

14 LDC [MR. CONNELL]: Thank you. May I request the feed
15 from Table 004.

16 [Pause.]

17 LDC [MR. CONNELL]: I'm being summoned, Your Honor.

18 MJ [COL POHL]: Okay.

19 [Pause.]

20 MJ [COL POHL]: You can put it on the big TV, the monitor.
21 Okay.

22 LDC [MR. CONNELL]: Thank you, Your Honor.

23 Following the example of the government, I intend to

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1 address the global issues now, and then I expect we will be
2 doing the eaches as we go along through the week.

3 AE 397 started -- or is a request to consolidate, and
4 we are going to have to talk about what that means, but to
5 consolidate certain litigation, but it doesn't write on a
6 blank slate. In January of 2013, in AE 112A, the government's
7 position was that it will, I quote here, "Produce all
8 statements and treatment-related information of the accused,"
9 once motions related to Protective Order #1 are resolved.
10 That happened on 9 February 2013.

11 Subsequent to January 2013, the government's position
12 was that it would produce the RDI-related information and
13 other classified discovery once the parties had signed the
14 MOU. On 19 February of 2013 I signed, for the first time of
15 multiple, the memorandum of understanding. And in June of
16 2013, in AE 175, the government wrote, I quote here,
17 "Anticipated discovery is nearly complete."

18 I raise these points to say that while it is
19 appreciated that the government has a plan to eventually
20 provide us the discovery to which we're entitled, I think that
21 the normal discovery process is the right way to handle it.

22 This particular motion, this consolidation idea, has
23 evolved over time as well. In December of 2015 the

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1 government's position was bottom line up front, granting
2 AE 112 or any other motion dealing with similar or overlapping
3 information in that context would violate the classified
4 procedures of the Military Commissions Act.

5 That was the most aggressive version of this
6 consolidation argument, but the way that it was pled from
7 AE 397 itself was less aggressive, and we will talk about this
8 in a little more detail. But essentially in AE 397 the
9 argument was anything within their ten categories that they
10 are going to produce is moot and only things outside the ten
11 categories should be litigated. Today is even a less
12 aggressive discussion of it, it is, "hey, here is our plan,
13 here is what we are going to produce voluntarily." That very
14 much leaves open the question of what is the military
15 commission going to order them to produce involuntarily,
16 because with respect to classified discovery there are three
17 basic questions that essentially always have to be answered
18 with respect to discovery. The first one is what must the
19 government produce; the second is did the government actually
20 produce it; and the third question is, are any deletions,
21 redactions or substitutions permit the defendant to make
22 substantially the same defense as the original.

23 If the military commission does not address the

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1 individual discovery motions which need to be addressed, then
2 it doesn't solve any of those problems; it simply delays the
3 answering of the first question until some future time. And
4 it's important, I think, for the military commission to
5 answer, as presented in motions to it, the question: What
6 must the government produce?

7 MJ [COL POHL]: Do you think that's not the way we are
8 going to do it? I mean, the government motion -- let me
9 just -- 397. 397 is an approach that the government either
10 reluctantly or for whatever reason has embraced, the
11 ten-category construct, and as I understand it, they will
12 provide information they believe fits within that ten-category
13 construct. That does not prevent the defense from claiming
14 information, A, they need to disclose that's within the
15 defense view is within the ten-category construct that the
16 government says is not or, B, it may not fit any of the ten
17 categories, but still is discoverable by the defense, and then
18 we go down the road of discovery requests.

19 LDC [MR. CONNELL]: Absolutely. That makes perfect sense
20 to me.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: And ----

23 MJ [COL POHL]: You think somehow 397 is designed to

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1 short-circuit that process?

2 LDC [MR. CONNELL]: Well, the descriptions of it in -- you
3 know, people change their position, I don't have any problem
4 with that. A foolish consistency is the hobgoblin of little
5 minds. I have changed my position on things. The way it was
6 presented in December was a much more aggressive version than
7 we saw in the pleadings or have heard today, and I am fine
8 with that, because as we stand here today in what argument we
9 have heard from the government, I think what the military
10 commission just described makes perfect sense. They intend to
11 produce certain information voluntarily, as they have already
12 produced hundreds of thousands of pages of discovery
13 voluntarily. If we think that they have not produced
14 something that they should produce, we make a discovery
15 request, they answer, generally there is a denial, and we file
16 the motion on it.

17 You know, AE 112, AE 114, AE 114F, AE 195, et cetera,
18 are all perfect examples of that. Absolutely, I think that's
19 absolutely what they should do and if they want to produce
20 evidence voluntarily, I thoroughly support it.

21 So let's talk for a moment about what have they
22 produced voluntarily. There have been -- no, I'm sorry, not
23 yet, Colonel. Thank you.

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1 The government has produced 891 pages of discovery
2 related to the rendition, detention and interrogation of the
3 defendants plus one electronic file. And I can't describe the
4 content, I am not going to describe the contents of the
5 electronic file. I believe that the military commission is
6 already familiar and it is always a little difficult to
7 describe given the size of electronic files, but I want to
8 give the government credit for that.

9 The first of the three-paper tranche of RDI discovery
10 was found at MEA-STA, page 1 through page 619, which were 619
11 pages of unclassified government summaries of intelligence
12 summaries of defendants' statements made in the RDI program.

13 The second category which the government has produced
14 found at MEA 10018, page 2948 to 3161, is 213 pages of
15 unclassified summaries of medical records of Mr. al Baluchi
16 from the RDI program. The government just described that as
17 coming from AE 136 substitutions, but I can neither confirm
18 nor deny that. I don't know it.

19 And then the third category is MEA 10018, pages 3823
20 to 3873 and pages 4246 to 4255, which were 59 classified pages
21 of photographs of Mr. al Baluchi and others within the RDI
22 program.

23 That 891 pages is everything to date that the

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1 government has produced -- slowing down -- plus the electronic
2 file.

3 So what does the government actually say? So the
4 government in 397 and in 397B makes a substantial -- it talks
5 a lot about the concession that it has made and the concession
6 that it makes essentially is that the prosecution concedes
7 that the defense could make such a showing of relevance for
8 the same information ordered to be produced in Al Nashiri.
9 Now, the reason why this is significant is that up until this
10 point, up until December of 2015, the government did not
11 maintain precisely that RDI information -- torture, abuse,
12 black sites -- was not relevant. They maintained that the
13 defense had not made a sufficient showing of relevance. I
14 always thought, gosh, what about AE 112, what about AE 114,
15 what do we have to do to show relevance, but the government
16 has come around on that and has acknowledged four bases which
17 are found originally in Nashiri AE 120C, which is found in our
18 record at Appellate Exhibit 308, Attachment B, and Nashiri
19 AE 120AA, which is found in our record at AE 308, Attachment
20 E.

21 Those four bases that the government has now conceded
22 are bases for relevance are the same four that the government
23 just cited in its oral argument: Mitigation in a sentencing

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1 phase, a lack of future dangerousness if sentenced to
2 confinement, outrageous governmental conduct, and the
3 admissibility of statements. Now, whether that admissibility
4 of statements includes both the admissibility of statements by
5 the defendants and possibly others; if, for example, the
6 government calls Majid Khan with whom it has an agreement, a
7 cooperation agreement.

8 But the government also backtracks to some extent
9 from the original Nashiri framework, and especially with
10 respect to Subsection D in dealing with the identities of
11 medical personnel, guard force personnel and of interrogators,
12 they drop a footnote saying, "Such an arrangement will consist
13 of an officer of the CIA with an FBI Special Agent present
14 contacting each individual and informing him or her that he or
15 she has been identified each as someone the defense counsel
16 would like to interview. The arrangement will ensure that
17 each individual is informed of his or her rights and
18 obligations with respect to any defense request and will seek
19 to learn whether each individual is amenable to being
20 interviewed."

21 With all due respect, these two are not equivalent.
22 The original Nashiri framework which the government proposed
23 in 308A and agreed to in 397 is not the same as we are going

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1 to send a CIA agent and an FBI agent out to ask them, "Hey, do
2 you want to speak with the defense?"

3 So I make this because we didn't hear about it in
4 oral argument today as a reservation, but it's clearly one
5 which the government makes a reservation in their brief
6 itself.

7 MJ [COL POHL]: Not to mix motions, but if these are
8 employees of, let's just say the CIA, is this a variation of
9 the Touhy notice requirement? By that, I mean you notice the
10 CIA, "I want to interview this agent," and then ----

11 LDC [MR. CONNELL]: With due respect, it's not.

12 MJ [COL POHL]: No, what I am saying is -- what I am
13 saying is if a CIA agent is going to be interviewed and
14 assuming there is going to be a Touhy notice required, and I
15 am assuming that is still out there, would you expect the
16 agency would contact said employee and basically do the same
17 thing?

18 LDC [MR. CONNELL]: Well, I think that's too far down the
19 road. We are still talking about discovery here.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: We are still talking about finding out
22 the identity, and there are plenty of things that can be done
23 with identity to research a person's background, et cetera,

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1 other than interviewing them.

2 MJ [COL POHL]: Okay. But this footnote seems to discuss
3 interviews.

4 LDC [MR. CONNELL]: Yes, but this footnote describes what
5 the government means by providing the identities of
6 personnel -- medical personnel, guard force personnel,
7 interrogators. Maybe I am wrong. Maybe the government
8 doesn't mean that.

9 MJ [COL POHL]: What you are reading this to say -- see, I
10 am reading this to say that, let's say, Dr. X and the defense
11 says I want to interview Dr. X, assuming you know who Dr. X is
12 because D talks about identities, right?

13 LDC [MR. CONNELL]: Right.

14 MJ [COL POHL]: And this footnote is dropped saying if you
15 want to interview Dr. X, we want to make sure he knows he has
16 to be interviewed or not. Is that how you are reading it?

17 LDC [MR. CONNELL]: That's not how I am reading it, but if
18 that's all it means, that's an issue for another day. I read
19 this to be a restriction that this process is how they intend
20 to provide the identities of medical personnel, guard force
21 personnel and interrogators, but if that's not what it means,
22 great, I'm delighted.

23 MJ [COL POHL]: I will give the government a chance to

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1 respond later on, but it says would like to interview and at
2 the end says amenable to be interviewed. There is nothing --
3 I don't see it as implicating the D disclosure of identity.

4 LDC [MR. CONNELL]: Excellent.

5 MJ [COL POHL]: Trial Counsel, is that how you read that
6 too?

7 CP [BG MARTINS]: Your Honor, that's correct. That's not
8 the only thing we will give in satisfaction of Delta. I think
9 it bears upon it in terms of the totality of the issue.

10 MJ [COL POHL]: Not the initial thing. Okay. Go ahead.

11 LDC [MR. CONNELL]: Wonderful. While we are here, this is
12 a perfect example of, you know, one -- I don't think that the
13 ten categories was ever intended -- and I guess intention is
14 not something we should talk about -- but having read the
15 pleadings in 120, it doesn't look like it was intended to be
16 the end-all be-all of defining the entire universe of
17 discovery. And this is a perfect example, because this is
18 limited to medical personnel, guard force personnel and
19 interrogators. The major category that's left out of this is
20 debriefers. It has been declassified. We dealt with it last
21 time, that Mr. al Baluchi has said something like 150
22 different people came to talk to him about different topics.
23 Those are the substantive debriefers, not covered here at all,

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1 and I suspect that is the reason why there will be -- why
2 there are 87 binders of statements that are out there because
3 there are so many different.

4 MJ [COL POHL]: I thought we just addressed that, though.
5 If there is something that you believe is relevant to
6 discovery and you used the term "debriefers" that you believe
7 is not in the ten categories -- I just want to understand what
8 I think it is.

9 LDC [MR. CONNELL]: All right.

10 MJ [COL POHL]: You know, and if the government wants to
11 say that's not what they want to do, then they can file a
12 motion.

13 LDC [MR. CONNELL]: Sure.

14 MJ [COL POHL]: The ten categories is a construct, as a
15 starting point, that they have agreed to do. Okay? It is not
16 the end of the discussion as far as I am concerned. By that I
17 mean there may be some things, as I said earlier, that you
18 believe should have been in the ten categories or is in the
19 ten categories and the government says isn't or shouldn't be
20 there, or something that's, say, outside of the ten categories
21 that, let's say, you believe is Brady material. Okay?
22 That's -- so this is not a -- I don't view the ten category as
23 a limitation, this is your sole universe, because quite

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1 frankly is the universe -- your universe can be defined by
2 your, what you believe in your professional judgment, and
3 sometimes imagination, of what it ought to be.

4 LDC [MR. CONNELL]: I knew imagination was coming,
5 Your Honor.

6 MJ [COL POHL]: And then we just litigate it as a normal
7 discovery motion. Okay?

8 LDC [MR. CONNELL]: Yes.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: So let's -- that makes perfect sense
11 to me. You can see why I would be concerned. The docket
12 reflects 14 very big substantive motions as subsets of 397
13 that, you know, their names didn't even make it onto the
14 docket. So you could see why I might be a little concerned,
15 but I'm delighted to hear the -- the way that the military
16 commission looks at it.

17 So let's talk about the -- so I'm not going to say
18 anything about that, not wanting to snatch defeat from the
19 jaws of victory.

20 I would like to speak instead about the second
21 element of the prosecution's that they addressed today, which
22 is the standard for discovery. And the -- there are really
23 four major categories of discovery that are governed by the

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1 Military Commissions Act and Brady v. Maryland. The largest
2 of those categories, the largest two categories are those
3 provided by R.M.C. 701(c), which is material -- information
4 which is material to the defense or which is going to be used
5 by the government in its case-in-chief. That's the purple
6 circle and the blue circle, and obviously the largest
7 category. Those categories, by their own terms, apply to all
8 information, but of course there is a special category that we
9 have to talk about a separate standard when we are addressing
10 classified information.

11 So let's just drop out the two big ones and go to the
12 categories which deal with the two major cases on the
13 production of classified information: Brady v. Maryland,
14 which sets the general standard, and United States v. Yunis,
15 which has been reflected in 501(f)(1) and 949p-4, the relevant
16 statute.

17 It sets out the category of relevant, this is
18 relevant, noncumulative and helpful standard. Now, the one
19 thing that we know, we have some guidance here, and the Venn
20 diagrams seem to be especially accurate because the
21 D.C. Circuit spoke in terms of Venn diagrams. In United
22 States v. Mejia, 448 F.3d 436 at page 456, D.C. Circuit case,
23 2006, the D.C. Circuit wrote, I quote, "Brady information is

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1 plainly subsumed within the larger category of information
2 that is at least helpful to the defendant."

3 So one thing that we know is that when we are talking
4 about Brady information, that is information that is, quote,
5 "favorable to the defense," is -- automatically falls within
6 the category of if it's material, it's automatically relevant.
7 If it's favorable or exculpatory, it's automatically helpful.
8 So truthfully for Brady evidence, which is the kind of thing
9 that we are talking about here with the RDI information, we
10 really have very little -- the statute and the Yunis standard
11 have very little to say about the topic because if it is
12 favorable, it's automatically helpful because favorable is a
13 smaller category than helpful is under Yunis. The other
14 circuits have adopted the same approach. The Second Circuit
15 adopted that same approach in United States v. Aref, 533 F.3d
16 72, Second Circuit 2008, and the Sixth Circuit adopted the
17 same smaller larger category an approach in United States
18 v. Amawi, 695 F.3d 457 at page 471, a Sixth Circuit case from
19 2012.

20 Now, that leaves us the little sliver at the bottom,
21 the little moon, analytically, is what about information that
22 is, would ordinarily be material and would ordinarily be
23 exculpatory, it falls within Yunis, it falls within Brady, but

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1 is duplicitous of other information; that is, it is
2 cumulative. I cited some cases in the brief because the
3 cumulative analysis largely comes from the civil context, but
4 there are some criminal cases which we are going to talk about
5 in a moment. But there is a small amount of information which
6 while relevant, helpful, material and exculpatory is also
7 cumulative, and the government has talked a lot about that
8 category. In fact, I think it's fairly small and I fear that
9 the noncumulative tail may be wagging the Brady dog, but I do
10 want to give my perspective on how that information should be
11 handled.

12 The first thing you have to understand about the
13 cumulative restriction contained within Yunis is that it is
14 not a discovery limitation in the sense of a boundary of
15 information that has to be provided; instead, it's founded in
16 the classified information privilege.

17 The reason why we know that is that the first
18 limitation on the production of cumulative classified
19 information that was articulated by a Circuit Court came in
20 1985 in United States v. Smith, which is 780 F.2d 1102, a 1985
21 case from the Fourth Circuit, and that case equated the
22 showing necessary to overcome classified information privilege
23 as equivalent to the showing necessary to overcome informer's

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1 privilege under Roviaro v. United States at 353 U.S. 53, a
2 1957 case from the United States Supreme Court.

3 And so the significance of that is that the
4 analytical framework here is not does the government have to
5 produce the information at all, but it's with a requirement to
6 produce the information, do they have a privilege not to
7 produce the information. That's the Yunis application, and
8 that becomes very important in the procedure of how it gets
9 adjudicated.

10 The reason why it's so important is that the
11 application of privilege is a judicial decision, not a
12 prosecutorial decision. The prosecutor makes the original or
13 gets the first crack at whether information is favorable or
14 not. They do not get the first crack at whether information
15 is privileged or not, whether privilege is overcome.

16 And that principle, that it is the judge who decides
17 if information is cumulative or not and not the prosecution,
18 is explicitly contained in Military Commission Rule of
19 Evidence 505(f)(2), which at Subsection A says, "The Military
20 Judge, in assessing the accused's discovery of or access to
21 classified information under this section, may authorize the
22 United States, (i), to delete or withhold specified items of
23 classified evidence."

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1 So that's the framework for addressing the
2 information that the prosecution feels is cumulative. They
3 provide it to the judge and the judge authorizes them to
4 withhold it. If it falls within Brady, they would ordinarily
5 have to produce it, but the judge can authorize them to
6 withhold certain information.

7 MJ [COL POHL]: What paragraph of 505 do you say says
8 that?

9 LDC [MR. CONNELL]: 505(f)(2)(A)(i). And here are the
10 important elements of that.

11 MJ [COL POHL]: Well, let me ask you this: The government
12 reviews the information and says it's cumulative. Okay?
13 They're saying we are disclosing that information, so -- but
14 they are saying we have already given it to you. So,
15 therefore, they are not deleting or withholding specific
16 items, are they?

17 LDC [MR. CONNELL]: Sure they are. Let's flip forward for
18 a moment, and I am going to come back, but let's flip forward
19 for a moment to the government gives exactly one description
20 of cumulative information, and that is this. For example --
21 because what they think is cumulative is obviously different
22 than what I think is cumulative, but it's not what I think
23 that matters or what they think matters, it's what the

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1 military judge thinks that matters. Here is the example. For
2 example, if the same statement of the potential witness is
3 reported in multiple channels throughout the United States
4 Government, nothing requires the prosecution to get permission
5 from the military judge before it decides that the other
6 information is cumulative with the one statement that the
7 prosecution agreed to provide to the defense.

8 And so that's their example of cumulative. They have
9 information, it was in a cable or whatever, and it was
10 distributed through multiple channels. Well, in fact those
11 multiple channels matter and I have a number of examples that
12 I want to give you of why the government's example here is
13 simply not true, that this -- this claim of what is cumulative
14 is not true.

15 So the first example of that is the question of the
16 1 August 2002 memoranda, torture memoranda. That is the
17 subject of AE 112 (AAA Sup), and that controversy comes
18 involving CIA former General Counsel John Rizzo, and Mr. Rizzo
19 says ----

20 MJ [COL POHL]: Just to be clear, you are reading from a
21 book? I am just saying your source of information for what
22 you are about to say is a published ----

23 LDC [MR. CONNELL]: Is Mr. Rizzo's public book.

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1 MJ [COL POHL]: I just wanted to cite what your source is,
2 to make sure that it is nowhere else. You know that, but for
3 the record all you are doing is reading what he wrote in a
4 book that presumably got a preclearance review.

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

6 MJ [COL POHL]: But it was sold in bookstores everywhere.

7 LDC [MR. CONNELL]: Sold in bookstores and in a bookstore
8 near you, Your Honor.

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

10 LDC [MR. CONNELL]: That book is "Company Man" by John
11 Rizzo, and he writes at page 264 in his book that he never
12 received a copy of the memo which is called "Standards of
13 Conduct for Interrogation." That is more commonly known as
14 the organ failure or death memorandum. And that fact is
15 actually critical to the CIA's defense of its procedure
16 because what Mr. Rizzo's point is they never actually relied
17 on the organ failure or death memorandum or the organ failure
18 or death standard for torture, and what Mr. Rizzo claims is
19 that instead White House counsel Alberto Gonzales received the
20 organ or death memo which is called "Standards of Conduct for
21 Interrogation" but that he, Mr. Rizzo, only received a memo
22 called "Interrogation of al Qaeda Operative." So it really
23 matters, it's critical to his own defense of the CIA who

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1 received the information.

2 The complexity comes in that "Interrogation of
3 al Qaeda Operative," the second memorandum, itself refers to a
4 version of the first organ failure or death memorandum,
5 "Standards of Conduct for Interrogation," which is addressed
6 to Rizzo. And so the point here is that -- the point is not
7 to resolve AE 112A here. The point is instead to say channels
8 of distribution matter, because it's the same piece of paper,
9 except for whose name is written at the top, the two
10 memoranda, standards of conduct for interrogation are the same
11 document, but it matters incredibly whether Mr. Rizzo received
12 it or not. Standard channels of distribution matter a lot.

13 And you know, one of the interesting things here is
14 that even the government got confused on this because in the
15 discovery requests, which is Attachment D to AE 112 (AAA Sup),
16 shows that they got confused about this too because when we
17 asked them for a copy of standards of conduct for
18 interrogation addressed to Mr. Rizzo, they pointed us to
19 Standards of Conduct for Interrogation addressed to
20 Mr. Gonzales. So they made -- you know, they failed to grasp
21 the significance of the distribution channel, the fact that
22 Mr. Rizzo claimed he never received that document is why he
23 says the CIA never provided an organ failure or death.

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1 MJ [COL POHL]: Cumulative -- if a statement is taken from
2 one detainee and sent to five different people, okay, they are
3 saying we are just going to give you the one version rather
4 than the five, the distribution chain, the cumulative issue
5 would be we don't have to give you five versions of the
6 statement, I suspect.

7 LDC [MR. CONNELL]: Right.

8 MJ [COL POHL]: The noncumulative part would be who got
9 it.

10 LDC [MR. CONNELL]: I agree. Noncumulative is who got it.
11 But let's look at the ----

12 MJ [COL POHL]: What I am saying is -- and I am to -- but
13 you believe -- is that a cumulative issue or simply a
14 discovery issue? By that I mean is, do you understand what I
15 am saying? You think it's discoverable as to who got this
16 stuff.

17 LDC [MR. CONNELL]: Sure.

18 MJ [COL POHL]: Okay. And the government will say no,
19 it's not, it is, whatever, okay, that's there, but that's a
20 separate issue. Okay. But if the same identical statement
21 itself goes to five people, giving you five copies of the
22 statement itself would be cumulative, although it would not be
23 cumulative as to who it went to. Are you with me? Do you

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1 follow me on this?

2 LDC [MR. CONNELL]: Yeah, I am.

3 MJ [COL POHL]: They claim the statement is cumulative and
4 your response is but, yeah, I got to know who it went to,
5 that's a separate issue and that's not a cumulative issue,
6 that's simply whether it's a discoverable issue.

7 LDC [MR. CONNELL]: Sure. I agree again.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: We're together today.

10 MJ [COL POHL]: This will end, Mr. Connell, so just -- it
11 always does, but go ahead.

12 LDC [MR. CONNELL]: I won't get used to it. But let me
13 give you a perfect example of what we are talking about here.

14 MJ [COL POHL]: Go ahead.

15 LDC [MR. CONNELL]: That's the STA discovery which I
16 referred to at the beginning of the argument. The STA
17 discovery are summaries of cables, which are themselves
18 summaries of other documents, but all distribution information
19 is stripped off of the cables. And so the content is the
20 same, but in fact who they got distributed to is really,
21 really important. If those cables got distributed to the FBI,
22 for example, then that makes our argument under 10 United
23 States Code 948r -- excuse me -- r(d)(3), that is the

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1 statutory standard for assessing derivative nature of
2 statements makes it a lot stronger if it went to the FBI.

3 If that statement went to the DoD, a CIA statement
4 which went to the DoD which was used by CITF in the
5 interrogation, that makes our claim under Oregon v. Elstad,
6 470 U.S. 298, 1985, the Constitutional standard for assessing
7 derivative statements makes that a lot stronger.

8 MJ [COL POHL]: Just so I am clear, we are talking about
9 unclassified statements here, summaries of cables?

10 LDC [MR. CONNELL]: Yes.

11 MJ [COL POHL]: You believe you need to know the
12 distribution chain of all of those cables?

13 LDC [MR. CONNELL]: I don't necessarily need to know
14 every -- so this is a perfect example of what I see the
15 legitimate use of redaction.

16 MJ [COL POHL]: What I am simply saying is I suspect there
17 is no distribution chain on any of those summaries.

18 LDC [MR. CONNELL]: Right.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: Yeah, that's my point.

21 MJ [COL POHL]: Well, that's my experience, so...

22 LDC [MR. CONNELL]: But let me just give you an example of
23 where I think redactions do make sense to me. So let's say,

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1 just as a hypothetical example, that one of those statements
2 was distributed to NASA. All right? Does it really matter to
3 me if that statement was distributed to NASA? No, it doesn't.

4 MJ [COL POHL]: How do I know that if I am doing the
5 review?

6 LDC [MR. CONNELL]: One thing, I filed a statement of
7 defense, a theory ----

8 MJ [COL POHL]: I understand that, but you understand what
9 I am saying. I am saying I am doing this review and you say I
10 don't need the NASA thing and I am supposed to surmise that.

11 LDC [MR. CONNELL]: Well, that's what the government is
12 asking you to surmise but the thing you really don't have to
13 surmise. Distributions on the cable is to the FBI and the
14 government is trying to introduce FBI interrogations from
15 January of 2007 as the main evidence against Mr. al Baluchi,
16 you know, it's not a far stretch, it doesn't require any, you
17 know, serious gymnastics on your part to say, well, you know,
18 FBI seems pretty important to me or DoD seems pretty important
19 because a joint FBI/DoD interrogation in 2007, whereas if I
20 haven't told you anything why NASA is important, I understand
21 why you would say, "What does he need to know about NASA?"
22 But FBI and DoD are the heart of the case.

23 So the actual core point here is not to move to

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1 compel the distribution channels, but the government only gave
2 us one example of what they consider to be cumulative, and
3 that is distribution channels, reporting through multiple
4 channels, and my point is that is a terrible example of
5 cumulative information because it is not cumulative. Those
6 channels matter.

7 Let me give you just a couple of other examples, and
8 this one is recent. I have no information confirming or
9 denying the truth of this statement, but there exists at least
10 the idea of eyewash and there was a Washington Post article on
11 January 31 that reported about it, but I'm not confirming or
12 denying whether that's true because I don't have any idea
13 whether it's true. But the idea of eyewash is that there are
14 false cables which are designed for a wider internal CIA
15 audience with follow-on true cables for a restricted audience.
16 That's a perfect example of why distribution channels matter.
17 If the government unknowingly produces the eyewashed cable to
18 us, then we have a false version of events, but there is
19 another distribution channel that's producing -- that's
20 producing a different version of events. And so distribution
21 channels matter a lot, even if the same statement of the
22 accused or potential witness is reported in multiple channels
23 throughout the United States.

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1 And I want to give -- another example is with respect
2 to the President. I have a little chart here that shows, you
3 know, how I see the different distribution flow could happen
4 that's relevant to the case, and the information flow between
5 the CIA and the White House is really important. That's
6 actually the subject of AE 112. One of the controversies that
7 surrounds this is called the "Damn Right" controversy. And
8 the "Damn Right" controversy is that former President Bush
9 wrote in his book that he looked at the list of interrogation
10 techniques. There were two that I felt went too far even if
11 they were legal and I directed the CIA not to use them. On
12 March 1, 2003, George Tenet asked if he had permission to use
13 enhanced interrogation techniques including waterboarding on
14 Khalid Shaikh Mohammad. "'Damn Right,' I said." That's what
15 Mr. Bush wrote. Mr. Rizzo completely disagrees with that. He
16 says that the timing is wrong; that that could not have
17 happened; that in fact it was the CIA acting without explicit
18 White House approval on that question or at least presidential
19 approval, and it's an example of the same content, like the
20 cable or the request for enhanced interrogation matters is the
21 same in both situations, but whether the President approved it
22 or whether some more low-level perhaps rogue actor acted on
23 their own is critically important. So distribution channels

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1 matter.

2 So let's go back one slide if we could, Colonel, and
3 talk about this question whereby we went off on what does it
4 matter, what does cumulative mean, which is what we were just
5 discussing.

6 So back to M.C.R.E. (f)(2)(A) [sic] which authorizes
7 the military judge to authorize the deletion or withholding of
8 specific items of classified evidence. There are three parts
9 of that rule that I think are important. The first phrase is
10 "military judge," that it is the military judge who makes this
11 decision that it's authorized to withhold information. And I
12 want to just circle back to something I said earlier. The
13 reason why I drew such an important distinction between the
14 scope of discovery, which Brady governs, and the classified
15 information privilege, which Yunis governs, is that it's
16 really important to who makes the decision. If it is a
17 scope-of-discovery question, then it makes more sense for the
18 prosecution to decide it. If it is a classified information
19 question, which is what Yunis is, then it makes sense for the
20 military judge to make that decision, because judges always
21 rule on claims of privilege. A claim of privilege ----

22 MJ [COL POHL]: But as an initial matter, and we have
23 discussed this before, is the government will have to make a

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1 decision on whether it falls in the discoverable box, true?

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: I mean, quite frankly, there is an element
4 here of the good faith of the government to provide discovery
5 because nobody knows what they don't -- to a large degree what
6 they don't provide and sometimes post-trial it comes out and
7 it doesn't end well. I've got that. Okay.

8 LDC [MR. CONNELL]: That's how Brady works.

9 MJ [COL POHL]: So the government provides classified
10 discovery that they believe meets the Yunis standard
11 initially.

12 LDC [MR. CONNELL]: That's where we part ways. I will let
13 you finish.

14 MJ [COL POHL]: No, go ahead. What I am saying is do they
15 provide classified discovery that meets the material to the
16 preparation of defense standard?

17 LDC [MR. CONNELL]: No, because that's -- 701 that governs
18 classified and unclassified discovery. They instead provide
19 information which meets the Brady standard, if it is material
20 and exculpatory.

21 Now, the Brady standard has become statutory, right,
22 it's provided in 701 ----

23 MJ [COL POHL]: What about material -- see, that's what I

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1 perhaps ----

2 LDC [MR. CONNELL]: Can we go back one slide?

3 MJ [COL POHL]: No, no, I like that slide. I like that
4 slide. Two circles are easier than four to a person of my
5 age. The initial thing is you stated Brady material will
6 necessarily be a subset of Yunis material.

7 LDC [MR. CONNELL]: Right.

8 MJ [COL POHL]: What I am saying is whether it's
9 characterized as Brady material or non-Brady/Yunis material,
10 the government makes an initial determination of classified
11 evidence that it fulfills at least the Yunis standard, if not
12 the Brady standard, and you disagreed when I said that.

13 LDC [MR. CONNELL]: Yes, that's right.

14 MJ [COL POHL]: That's right that you disagreed with me or
15 that's right what I said?

16 LDC [MR. CONNELL]: It's right that I disagree.

17 MJ [COL POHL]: Explain to me where I went wrong.

18 LDC [MR. CONNELL]: The place where the analysis has gone
19 wrong is that -- and I do have to go back to the prior slide
20 because it will be easier.

21 MJ [COL POHL]: Go ahead.

22 LDC [MR. CONNELL]: So there are universes that the
23 government has to produce and so one of those universes is

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1 information material to the preparation of the defense under
2 701(c). One of those is information that the government plans
3 to use in its case-in-chief, producible under 701(c). One of
4 those is Brady information, a much smaller subset, information
5 which is material and exculpatory. Those are the discovery
6 buckets, if you will ----

7 MJ [COL POHL]: What about the Yunis bucket?

8 LDC [MR. CONNELL]: I am getting to the Yunis bucket.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: Those are the discovery buckets. The
11 government has to look at a piece of information and you are
12 right, we rely on their good faith all the time, looks at a
13 piece of information and says this is material to the
14 preparation of the defense, yeah, I think it is, I will put it
15 in that bucket. Am I going to use this in my case-in-chief?
16 Yeah, I will put it in that bucket. The Yunis overlay on
17 those buckets is not a category of discovery, it is not I have
18 to produce this information, I have to produce that
19 information, it's instead a limitation on production, right?
20 949p-4 says the military judge shall order the production only
21 of information that is relevant, noncumulative and helpful.

22 The reason for that is that Yunis, unlike 701(c) and
23 Brady, is an application of privilege. The government has a

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1 classified information privilege just analogous to the Roviario
2 versus Informer's privilege, so it can raise its hand as it
3 has done here and say I invoke my classified information
4 privilege. Because I have invoked the classified information
5 privilege, there is a restraint on what information that I
6 have to produce. I do not have to produce information that is
7 relevant, noncumulative and -- that is irrelevant, cumulative
8 or nonhelpful even if it is otherwise material and
9 exculpatory.

10 Now, we know that material is a subset of relevant
11 and we know that favorable or exculpatory is a subset of
12 helpful. Let's go to the next slide. Sorry, I didn't mean to
13 trick you.

14 MJ [COL POHL]: That's all right. I think we may be
15 looking at the same circles and getting the same conclusion in
16 different ways, so...

17 But what I am saying is if it is Yunis material,
18 okay, the government finds it's relevant, noncumulative and
19 helpful. Okay?

20 LDC [MR. CONNELL]: Right.

21 MJ [COL POHL]: But it's not Brady material. Okay. Okay.
22 They need to disclose that.

23 LDC [MR. CONNELL]: Yes.

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1 MJ [COL POHL]: And if they say we don't believe it's
2 relevant or it is cumulative or it's not helpful, it's really
3 the conjunctive, but let's assume it is that way, do they have
4 to disclose that to anybody for review?

5 LDC [MR. CONNELL]: If they think it's irrelevant, no. If
6 they think it's not favorable, no. Because those map onto the
7 Brady categories. Let's go to the next slide.

8 But there is one category they do have to disclose
9 for review, and that is because the one place that Brady and
10 the Yunis standard do not cleanly map onto each other is the
11 phrase "noncumulative." And actually I am going to tell you
12 about some cases about cumulativeness in this category for a
13 moment. And that is if something falls into Brady, that is
14 that it is material and it is favorable to the defense, but
15 the government thinks that it is cumulative, that's where they
16 get to raise -- invoke their classified information privilege,
17 raise their hand and say I have a defense, essentially, to
18 producing this information. My defense to producing this
19 information, that little half -- that little quarter moon
20 there is that it's cumulative, so I don't want to have to
21 produce it to the defense even though it's exculpatory and
22 even though it's material and it's that category that they do
23 have to bring to the judge because only the military judge can

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1 authorize the deletion or withholding of evidence which would
2 otherwise be discoverable under Brady.

3 MJ [COL POHL]: Okay. I am just reading your motion.
4 When you reference this, you say if the government seeks to
5 withhold otherwise discoverable evidence on the basis that it
6 is cumulative, it must obtain the approval of the military
7 commission and you cite Bismullah for that proposition.

8 LDC [MR. CONNELL]: Yes, and I have some other cases.

9 MJ [COL POHL]: Of course Bismullah was a CSRT case.

10 LDC [MR. CONNELL]: Yes.

11 MJ [COL POHL]: I mean, it was -- anyway ----

12 LDC [MR. CONNELL]: Which goes in my favor I think because
13 this case is much more serious than a CSRT case.

14 MJ [COL POHL]: I got it. But what I just heard you say
15 is this cumulative review by the judge is limited to Brady
16 material, and your little diagram it seems to say that,
17 whereas your motion here seems to say that all cumulative
18 claims of any discoverable material must be reviewed by the
19 military judge.

20 LDC [MR. CONNELL]: So go back one slide, please, Colonel.
21 So there is information that is material to the defense that
22 is cumulative. The 701 standard does not -- is trumped by the
23 Yunis standard to some extent.

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1 MJ [COL POHL]: Okay. No need for judicial ----

2 LDC [MR. CONNELL]: Judicial rule for Brady.

3 MJ [COL POHL]: What I am simply saying is clearly the
4 cumulative rule doesn't require judicial review, under your
5 view, for nonclassified evidence. I don't look at what they
6 don't give you.

7 LDC [MR. CONNELL]: Right.

8 MJ [COL POHL]: Now, my question is -- and I'm trying
9 to -- because your brief seems more expansive than what you
10 just said and I'm making it clear. Does the cumulative review
11 apply to all claims of cumulative evidence that is classified,
12 or just Brady classified evidence?

13 LDC [MR. CONNELL]: Brady. So I see your point that I
14 wrote slightly more expansively. I may have written more
15 expansively than I meant to say.

16 MJ [COL POHL]: Because if that's true ----

17 LDC [MR. CONNELL]: Yes.

18 MJ [COL POHL]: ---- if it is restricted to Brady
19 material -- but the rule you cite for this review of
20 cumulative evidence, does it have a Brady information
21 restriction to it?

22 LDC [MR. CONNELL]: Brady is not a restriction; Brady is a
23 bucket.

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1 MJ [COL POHL]: A Brady bucket. What I am saying is you
2 cited 505(f)(2)(A)(1) for the proposition that the judge has
3 to review cumulative claims for classified evidence, and now
4 you just told me that that only applies to Brady classified
5 evidence and not to non-Brady/Yunis classified evidence.

6 LDC [MR. CONNELL]: That's right. It's because the
7 government has a constitutional obligation to produce all
8 Brady evidence, but they are asking -- if they claim some of
9 it is cumulative, they are asking to withhold some of it. Are
10 you with me?

11 MJ [COL POHL]: I'm with you.

12 LDC [MR. CONNELL]: Okay. Good. So they are asking to
13 withhold some of it and they don't have a constitutional
14 obligation to produce things which are outside -- which are
15 non-Brady; instead, they have a rule-based obligation to
16 produce things which are non-Brady.

17 MJ [COL POHL]: But your cite for me -- and I understand
18 the distinction with the constitutional requirement and for
19 example the Yunis issue. I got the difference. I got it.
20 Okay. But what I am simply saying is your legal authority for
21 the proposition that the military judge must review cumulative
22 claims for nondisclosure of classified evidence is this rule
23 we've just cited.

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1 LDC [MR. CONNELL]: Okay. I have three other authorities
2 if you want to hear them.

3 MJ [COL POHL]: I am just trying to get there, but this
4 rule makes no distinction between types of classified
5 evidence.

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

7 MJ [COL POHL]: So why wouldn't it apply to -- and, again,
8 I am going to call it Yunis, which is non-Brady classified
9 evidence.

10 LDC [MR. CONNELL]: If you want to apply it, great.

11 MJ [COL POHL]: I didn't ask you that. I am just trying
12 to understand the consistency of your argument.

13 LDC [MR. CONNELL]: Right. We have three areas of law
14 that we are trying to map on top of each other: Ordinary
15 unclassified discovery; classified information privilege,
16 which is Yunis 505(f) and 949p-4; and Brady, right? I am
17 trying to map, I am trying to figure out if when you take all
18 four of those, put them on top of each other like this slide,
19 what do you come up with? And so while I completely agree
20 that 505(f)(2)(A) draws no distinction between Brady and other
21 material -- other information material to the defense, that's
22 how I analyze it.

23 It seems to me my conclusion of -- and I know I am

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1 giving something away here, my intellectually honest
2 conclusion in trying to map these three areas on top of each
3 other is that the military commission does have to review
4 claims of cumulativeness for things that the government would
5 otherwise have to produce under Brady, but I don't see that
6 there is any similar constitutional imperative for production
7 under 701(c). Here are my cases. We talked about Bismullah
8 and I understand why it rides in a different context. I think
9 that different context helps us, but there are two cases that
10 I have found in the federal courts which talk about the
11 intersection of cumulative review and Brady. The first one of
12 those is United States v. Sedaghaty -- I can't really
13 pronounce this -- but S-e-d-a-g-h-a-t-y, at 728 F.3d 885, page
14 906, Ninth Circuit case from 2013.

15 What they talk about in that case is they talk about
16 the review for cumulation, for cumulativeness, whatever the
17 noun is, as part of the CIPA process. And the CIPA process
18 maps quite well onto the 505 process. And so it makes sense
19 to me that when they -- that was a case where the government
20 had provided substitutions. Those substitutions were
21 inadequate and the Ninth Circuit held that Brady was violated.
22 They treat the question of was this information cumulative as
23 part of the CIPA analysis, not as part of the, say, favorable

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1 or material to the defense analysis.

2 The second case that I found that sheds some little
3 bit of light on this, maybe not as much as I would like, but
4 is United States v. Abu-Jihaad at 630 F.3d 102, on page 142, a
5 Second Circuit case from 2010, and in that they approved a
6 judicial determination that certain information could be
7 withheld for cumulativeness. Now, it wasn't the core of the
8 case, they didn't analyze it that much, but it did strike me
9 that the thing that they were reviewing was reviewing a
10 judicial determination that certain information was
11 cumulative, not merely an ex parte prosecutorial withholding
12 of the information.

13 So I'm trying to figure out how these things fit
14 together. That's how it looks like they fit together to me.

15 The alternative that you are being offered by the
16 government is that -- is not a distinction between 701 and
17 Brady; it is that they just get to decide that things are
18 cumulative, which is truly unreviewable, because you, the
19 military judge, never even know what they withheld. If they
20 simply say, well, you know, I got three copies of this, one
21 went to the President, one went to the FBI and one went to the
22 DoD and I'm only going to produce the one that went to the
23 President, you don't know that they didn't produce the one

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1 that went to the FBI and the one that went to the DoD.

2 So that's why -- I mean, just from a prudential kind
3 of experience-based reason, that's why the determination
4 for -- at least for constitutionally required production, the
5 question of whether the government has successfully invoked
6 its classified information privilege under Yunis is a judicial
7 determination and not a prosecutorial determination.

8 Moving on from there, let's just talk in overview
9 about the -- about where this leaves us with the remaining
10 motions. So the government's proposal, as they articulate it
11 in 397, is that they have committed to produce certain
12 information, so therefore only defense requests -- motions and
13 discovery requests for information relating to the CIA's
14 former RDI program that fall outside of this ten-category
15 construct need to be litigated. I don't disagree with that
16 sentence and one of the things I think we established this
17 morning is it is the normal process. If we think something
18 needs to be produced, then we file a motion for it.

19 So that brings us to the motions which are currently
20 pending. My analysis of the way that -- the motions that are
21 currently pending is that there are some that are conceded or
22 defaulted, some which are partially conceded, and some which
23 are not conceded at all and need to be fully litigated.

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1 Let us start with the partially conceded motion
2 because that's ----

3 MJ [COL POHL]: It seems to me, Mr. Connell, on this
4 issue, wouldn't it be more useful when we get to each motion?
5 Because the government takes issue with what's conceded or
6 not.

7 LDC [MR. CONNELL]: Sure.

8 MJ [COL POHL]: I understand your position, and I am just
9 trying to -- but it seems to me we are going to have to get
10 into the weeds of each motion, so let's reserve that part of
11 the argument because if they walk up and say we have conceded
12 this motion, then we are good.

13 LDC [MR. CONNELL]: It's easier. That's right.

14 MJ [COL POHL]: Your view of concession and theirs is not
15 exactly the same.

16 LDC [MR. CONNELL]: That's right, they don't map. They
17 are not the same.

18 MJ [COL POHL]: Let's reserve that discussion until we get
19 to the motion itself.

20 LDC [MR. CONNELL]: Sure. One of the reasons is
21 defaulted. The military commission made certain orders. In
22 112, 114, 1 -- F, the government didn't comply and I think
23 they have defaulted, but we will get that on the eaches.

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1 MJ [COL POHL]: Yes.

2 LDC [MR. CONNELL]: So the point I wanted to make here is
3 simply that there is substantially more litigation about this
4 coming. There are one, two, three, four, five, six, seven,
5 eight, nine, ten -- ten discovery requests relating to RDI
6 that are mature and that the motions are either horizon
7 motions or are actually being written right now, and there are
8 11 discovery requests that have actually been started. They
9 are in process. These discovery requests, because there's so
10 much detail in the SSCI report and elsewhere, take a long time
11 to write, have a lot of detail to them. But the military
12 commission has quieted my concerns that we were just going to
13 put all motions to compel RDI discovery on hold, but I just
14 did want you to know that there is more coming.

15 So the last factor that we need to discuss, which is
16 one that the government did not discuss this morning, is the
17 effect of the government's stipulation that the facts
18 contained within the SSCI executive summary occurred, which
19 took place at AE 397B. It only came in the reply, not at
20 page 9.

21 So that is significant. I'm not trying to say that
22 that's not significant. It's quite significant. I mean, it's
23 a concession that the government subjected Mr. al Baluchi to

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1 EITs which had never been conceded before, subjected
2 Mr. al Hawsawi to rectal rehydration, which had never been
3 conceded before, that the government participated in an
4 extensive campaign to deceive the media and the CIA -- excuse
5 me -- and Congress about CIA activities that had never been
6 conceded before, but this stings like ----

7 CP [BG MARTINS]: Your Honor, I am going to object to some
8 of those characterizations. That is not what's in the brief
9 and it's excessive to what was stated. Whatever the slide
10 says, we will stipulate.

11 LDC [MR. CONNELL]: If the government wants to backtrack
12 from the stipulation, that's one thing but ----

13 MJ [COL POHL]: Your last comment, was that a fact or a
14 conclusion by the SSCI?

15 LDC [MR. CONNELL]: Well, obviously there is going to
16 be -- there is room for debate about what a fact and a
17 conclusion is, but ----

18 MJ [COL POHL]: As I gather their concession, I am just
19 saying we don't need to litigate it now, they are conceding
20 the underlying facts, but not necessarily the analysis or the
21 conclusions of the Senate themselves.

22 LDC [MR. CONNELL]: I take it the same way, but a
23 substantial part ----

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1 CP [BG MARTINS]: Since we are saying what we said, it
2 might be valuable for me to say it. The word "concession"
3 isn't in the paragraph.

4 LDC [MR. CONNELL]: Okay.

5 CP [BG MARTINS]: It's rooted to the opportunity for
6 substitutions and other relief and the government may admit to
7 relevant statements of fact and seek that to be a substitute
8 for some other information, and we freely stipulate to factual
9 matters within the report, not to opinions or conclusions.

10 MJ [COL POHL]: Okay. And that's I think what it says,
11 but just to put this aside for now, this will relate to
12 specific responses to other requests. Would that be a fair
13 statement?

14 CP [BG MARTINS]: Yes.

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

16 LDC [MR. CONNELL]: But I do want to defend the last
17 statement, and I don't understand what the objection is. I
18 let my opposing counsel make their arguments without
19 interrupting them.

20 But the fact -- so whether there was ----

21 MJ [COL POHL]: You are allowed to object, Mr. Connell, if
22 you think the argument is inappropriate. You know that.

23 LDC [MR. CONNELL]: But I don't get to object just because

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1 I don't like their argument.

2 MJ [COL POHL]: I understand. There has to be a legal
3 basis for it, I got it, but go ahead. But I think the
4 stipulation stands for what it says and I think it appears to
5 be a starting point for other -- other motions and things like
6 that. But go ahead.

7 LDC [MR. CONNELL]: All right. Let's talk about where --
8 the starting point, if we could have the next slide. So one
9 of those -- and this has to do with, well, how valuable is
10 this stipulation. So what the SSCI report says is that after
11 Ammar al Baluchi was transferred to CIA custody, the CIA
12 subjected Ammar al Baluchi to enhanced interrogation
13 techniques from May 17, 2003 to May 20, 2003. As a starting
14 point that's valuable. That had never been in the public
15 realm before. I don't know whether the government is
16 retreating from its stipulations or would stipulate, but
17 that's valuable, but that is as far as the SSCI report goes.
18 There is no detail which EITs, what were the conditions, what
19 information was produced out of it. You know, so it's really
20 just a starting place, not an ending place.

21 But there are other places that sort of -- you know,
22 there are other things that disagree. For example, the CIA,
23 in its response to the SSCI redacted executive summary,

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1 contested the facts. It said, "Just as important for those
2 portions we were able to view in detail, we found that the
3 accuracy was encumbered as much by the author's
4 interpretation, selection and contextualization of the facts
5 as it was by errors in their recitation of the facts, making
6 it difficult to address its flaws with specific technical
7 corrections." And there are places, important places where
8 the SSCI redacted executive summary conflicts with the
9 minority report and with the -- and with the CIA's versions of
10 events. One of them specifically relates to Mr. al Baluchi.
11 So when the CIA produced its fact sheet, its unclassified fact
12 sheet on December 9 of 2014, only one detainee's name appeared
13 on that fact sheet and that was Mr. al Baluchi.

14 Now, I am not saying that this is in fact true that
15 Mr. al Baluchi was the first detainee to reveal that Abu Ahmad
16 al Kuwaiti served as a courier. I don't know whether that's
17 true or not, but it is a substantial factual conflict between
18 the CIA's claim around the SSCI report claim. So my point is
19 that simply saying, well, the SSCI is accurate or stipulating
20 to the facts contained within the SSCI report is not a viable
21 substitute for the actual information.

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: Thank you very much. You can take

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1 down the slide, you can take down Table 4.

2 MJ [COL POHL]: Again, we are going to get into the eaches
3 subsequently, but does any other defense counsel want to be
4 heard on the 397 global approach?

5 Mr. Nevin?

6 LDC [MR. NEVIN]: Thanks, Your Honor. And understanding
7 your comment about the eaches, I just want to say that we join
8 and adopt Mr. Connell's remarks, with a couple of exceptions.
9 And it's possible that these aren't exceptions, but I want to
10 be clear about it.

11 As I looked at the Venn diagrams and the overlay
12 producing a sliver-moon-shaped, crescent-moon-shaped space
13 there that was cumulative information that was within the
14 Brady circle, and if it is necessary for us to understand it
15 or for the military commission to understand what I am
16 arguing, I'm sure Colonel Thomas would bring it back up.

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

18 LDC [MR. NEVIN]: You know what I am talking about.

19 MJ [COL POHL]: Sure.

20 LDC [MR. NEVIN]: Our position is that Brady material is
21 all -- all has to be provided. There is no exception within
22 Brady for cumulative material. And so to the extent that
23 that -- that that sliver moon of cumulative material is

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1 treated as something that does not have to be disclosed, I
2 take it that it's outside the larger circle of Yunis material,
3 of classified information with the requirements for provision
4 that apply to classified information. But the implication of
5 the argument was that that -- that that cumulative section
6 would not have to be provided, would not have to be
7 discovered. But if it's Brady material, it has to be
8 discovered because Brady doesn't have an exception for
9 noncumulative material. And that may be what Mr. Connell was
10 saying or that may be what the commission understands, but I
11 wanted that to be clear.

12 Second, there was a discussion of providing the
13 statements of the defendants to each of them and to the
14 representatives of the other defendants, and I want to be
15 clear that our position is that we are entitled to be provided
16 with the statements of all of the defendants which are made
17 within the case. It may well be that counsel said that, but
18 that the way it was said was not clear to me, but I want it to
19 be clear ----

20 MJ [COL POHL]: I understand what you are saying,
21 Mr. Nevin. On that issue, I wasn't addressing what can be
22 given to the client at this time. Okay? But as I understood
23 the government's position, it is that -- and correct me if I

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1 am wrong -- it is that the information will be provided to --
2 as a general rule, to everybody who has the appropriate
3 clearance and then maybe down the road to your clients, and --
4 but some bits of information, like PII medical information,
5 will be provided to just that particular team who are free to
6 share if they so desire.

7 Would that be a fair summary right there, General
8 Martins?

9 CP [BG MARTINS]: Yes, Your Honor.

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: And, Your Honor, my remarks were just
12 focused on statements, and I did not mean to get into the
13 question of who on the team having what -- including the
14 client, having what clearances would be allowed to see what
15 material. I'm talking about producing it to the team and I
16 believe it should all be produced to each team. Okay?

17 MJ [COL POHL]: Okay.

18 LDC [MR. NEVIN]: The third thing I wanted to say and add
19 to that is the remark about -- one minute -- the remarks about
20 material generated by -- generated during the defendants' --
21 during Mr. Mohammad's and others' confinement in the RDI
22 program. And I have read again page 5 of the government's
23 pleading in 397B, Bravo, and that is the page that refers to

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1 the 30 January 2015 CIA additional classification guidance
2 with respect to the former RDI program, and it says clearly
3 that the following materials are no longer classified. So I'm
4 not talking about now -- I'm not talking about classified at a
5 particular level or exceptions for that or anything else, I am
6 talking about unclassified. And it says that EITs as applied
7 to the 119 individuals, all of the people who were in the RDI
8 program, EITs are unclassified. The conditions of
9 confinement, as applied to the 119 individuals, are
10 unclassified. And their treatment -- information regarding
11 the treatment of the 119 individuals is unclassified, and
12 information regarding the conditions of confinement or
13 treatment during transfer are unclassified.

14 So I want to emphasize that when the military judge
15 is reviewing materials that have been submitted, and when the
16 government is selecting materials for submission, materials
17 that are unclassified, information that is unclassified should
18 not be redacted. It should not be ----

19 MJ [COL POHL]: Why would I review unclassified materials?

20 LDC [MR. NEVIN]: Well, you shouldn't be. It should
21 simply be provided.

22 MJ [COL POHL]: If it is material to the preparation of
23 the defense standard.

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1 LDC [MR. NEVIN]: Yes.

2 MJ [COL POHL]: Now, if they provide you redactions in
3 their end, then that's -- then if you believe you need that,
4 but I am just simply saying this is normal, unclassified
5 discovery.

6 LDC [MR. NEVIN]: Yes, exactly.

7 MJ [COL POHL]: So I wouldn't review it ab initio. Now,
8 that being said, you could get unclassified discovery with the
9 redactions the government has done so -- I didn't redact them,
10 they did, and if you want to say we want those redactions
11 changed, that's a different issue.

12 LDC [MR. NEVIN]: We would litigate that.

13 MJ [COL POHL]: I don't generally look at unclassified
14 discovery of what they give you or more importantly what they
15 don't give you.

16 LDC [MR. NEVIN]: Right. But I guess my point is we heard
17 a recitation from counsel regarding the ten categories of
18 materials related to the RDI program, and the 397 is a motion
19 about the RDI program and what of it will be disclosed, and
20 there is an elaborate process contemplated, I gather, under
21 Rule 505 for seeking the military judge's redaction,
22 permission -- consent to redactions or substitutions or
23 whatever the -- whatever it may be.

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1 I simply want to emphasize that these materials are
2 no longer -- that the bulk of these are no longer classified
3 so that if we are talking about, for example, a report that
4 describes events taking place in a room where -- where people
5 are being, let's say, waterboarded, the contents of that
6 report are not -- are no longer classified. There may
7 certainly be information on them, the person's name ----

8 MJ [COL POHL]: The issue of course comes up, and we
9 discussed this I believe at a prior session, that with the
10 release of the SSCI report, I directed the government to go
11 back to make sure that previously classified material would
12 still remain classified, which is kind of what you are saying
13 here. It is that as of January 15, if it falls within this
14 category, it should be arguably declassified ----

15 LDC [MR. NEVIN]: No, it's not arguably. It is.

16 MJ [COL POHL]: No, what I am saying is any bit of
17 information ----

18 LDC [MR. NEVIN]: Yes.

19 MJ [COL POHL]: ---- there is going to be an argument of
20 why it doesn't fall within this. I am simply saying if it
21 falls within here, clearly the OCA says that should be
22 declassified. I've got it. I am just saying I have done this
23 too long to say it's going to be all that clear that something

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1 falls within it, well, that does or this doesn't. Do you
2 understand what I am saying? But they should -- and I think
3 that's what we talked about, I believe a year ago December,
4 when the SSCI report came out, that I directed the government
5 to review it to make sure that they complied with the new
6 classification guidelines.

7 LDC [MR. NEVIN]: And these 619 pages I think that were
8 referred to, which are summaries of summaries ----

9 MJ [COL POHL]: Yeah. Yeah. Yeah.

10 LDC [MR. NEVIN]: ---- that's an anachronism. In other
11 words, that is an artifact of an earlier understanding of
12 classification.

13 MJ [COL POHL]: But didn't I address that when I told them
14 to go back to relook?

15 LDC [MR. NEVIN]: Yes, sir. I'm not quarreling with that.
16 I mention it only because I think the subtext of the
17 conversation has been -- so far today has been somewhat
18 misleading and I simply want to bring that to the military
19 commission's attention. Thank you.

20 MJ [COL POHL]: I understand.

21 LDC [MS. BORMANN]: Before I begin, I have a point of
22 clarification with the military judge, and that is that the
23 medical records we received as part of a discovery dump that

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1 contained redactions and appear to be -- they are
2 unclassified, but they appeared to be summaries, those were
3 the result of a substitution process under AE 136, I am
4 assuming?

5 TC [MR. GROHARING]: I believe you are referring to 156.

6 LDC [MS. BORMANN]: Maybe it's AE 156. I'm sorry, maybe I
7 misspoke. The reason I bring it up is because when we receive
8 the discovery, it is not marked having gone through a
9 substitution process.

10 MJ [COL POHL]: I understand that. I am just saying --
11 and I may be wrong in my memory. Mr. Groharing, the medical
12 record redactions, did they go through me or did you just ----

13 TC [MR. GROHARING]: Some did and some did not. We
14 provided medical record discovery both through the military
15 judge and directly to the defense.

16 MJ [COL POHL]: Just what I am saying -- just -- just
17 because we are talking about unclassified evidence here, so we
18 are talking about PII redactions as a general rule. Okay? I
19 don't know what they gave you on some of these. Some maybe I
20 do. If you have an issue about the redactions, just assume
21 that I didn't see them and you want me to look at them again
22 to fix it.

23 LDC [MS. BORMANN]: I have actually a more pointed

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1 question than that.

2 MJ [COL POHL]: Okay.

3 LDC [MS. BORMANN]: And that is, is there going to be a
4 way going forward that we will be able to determine when we
5 receive discovery that it's gone through the substitution
6 process with the military judge?

7 MJ [COL POHL]: Well, I think with the classified stuff
8 it's almost -- well ----

9 LDC [MS. BORMANN]: Well, what happens if the substitution
10 that comes out of the court happens to be unclassified?

11 MJ [COL POHL]: Okay. Then I will tell you this, that
12 there is no reason in the world that you shouldn't be able to
13 know that from that -- what I am saying is I can't recall
14 specifically on any individual item, but if you are asking me
15 that going forward anything that I see that I do a redaction,
16 I have no problem with you knowing that it went through me.

17 LDC [MS. BORMANN]: Good, because we are put in a position
18 then -- you are looking at the government.

19 MJ [COL POHL]: He was standing up.

20 TC [MR. GROHARING]: I was just going to say, we have no
21 objection to that, Your Honor.

22 MJ [COL POHL]: Good, then it works out. If it is just to
23 clear it up and for transparency, I have no problem with that.

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1 I have no problem, quite frankly, of if you get a summary, did
2 I see it. On an unclassified thing you can almost assume I
3 had. Just understand, I am not making excuses here, but I see
4 a lot of stuff.

5 LDC [MS. BORMANN]: Exactly.

6 MJ [COL POHL]: I mean, it think it came up more recently
7 in a currently -- just recently released piece of evidence and
8 one of the questions I asked is how does the defense know that
9 I have done this, and I think we added an order to it. I've
10 got no problem with that, Ms. Bormann.

11 LDC [MS. BORMANN]: So then going backward, then, if we
12 have been tendered material that has actually gone through the
13 process without a notation indicating that it in fact went
14 through the process, I would ask the government to give us a
15 heads up on that.

16 MJ [COL POHL]: Okay.

17 TC [MR. GROHARING]: We are happy to do so.

18 LDC [MS. BORMANN]: Thank you.

19 MJ [COL POHL]: Okay. Understand this, though. Even if
20 it has gone, we are talking about -- okay. We are talking
21 about unclassified material here with redactions, right?

22 LDC [MS. BORMANN]: Sometimes.

23 MJ [COL POHL]: Of course, the classified material with

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1 redactions there is usually about the reconsideration of
2 whether you can request it or not. I don't want to get into
3 that currently now, but I'm saying, if it is unclassified
4 material with redactions, whether I saw it or not, you get the
5 information, you say I want to revisit these redactions, you
6 are free to do that.

7 LDC [MS. BORMANN]: I understand.

8 MJ [COL POHL]: Because you know the case better than I
9 do.

10 LDC [MS. BORMANN]: I understand that, but here is the
11 issue that we have. So the question is when I receive an
12 unclassified document with redactions, I don't know if the
13 redactions are PII taken by the government without any review
14 by the commission itself without some sort of marking or
15 whether it's gone through -- it started out something that was
16 a much larger group of materials that's been condensed into
17 something much smaller and then put into an unclassified
18 format for provision to the defense.

19 MJ [COL POHL]: I understand that, and there is going to
20 be some tension here because you don't know what was redacted.
21 For example, if you have a piece of paper -- and I'm talking
22 about unclassified. The top of the piece of paper is related
23 to Mr. Bin'Attash and the bottom of the piece of paper is

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1 completely redacted out. Okay? You know, the question is do
2 I review that redaction. The government says that deals with
3 something completely irrelevant, okay, that was why that was
4 redacted out. If something like that were to come up, I don't
5 generally review what unclassified discovery they don't give
6 you, and I think discovery is about information, not paper.
7 By that I mean that same example, instead of the two things on
8 one piece of paper, there was two separate pieces of paper, I
9 wouldn't review the other -- what they didn't give you on the
10 other piece of paper. Nobody would even know about it.

11 So what I am saying is there are redactions that come
12 through. And if the redactions are you don't know why they
13 were redacted and the government won't tell you and you think
14 it is something you need to know, then we will get through it.
15 But as a general rule I will ask them why was that redacted,
16 they will say it's PII, noncumulative -- it would be nice if
17 they told you that going in, then you could say that's PII, it
18 doesn't have anything to do with your client or whatever. I
19 mean, I think this is -- a variation of this theme may come up
20 on some of the FBI issues. Okay?

21 LDC [MS. BORMANN]: It did. It has. That's why I asked
22 the question.

23 MJ [COL POHL]: So what I am simply saying is that on the

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1 unclassified stuff, whether you think I saw it or not is
2 irrelevant. If you think the redactions are too extensive and
3 you ask -- I would encourage you to ask the government first
4 why was this redacted because it may be a reason that you will
5 accept. Maybe not. But you are free to bring it back to me
6 and then we will sit in court and I will look at it and I will
7 say, "Trial Counsel, why was this redacted," and they will
8 say, "That's because the home address of somebody."

9 LDC [MS. BORMANN]: Fine.

10 MJ [COL POHL]: Are you with me on that? What I'm saying
11 is, don't just assume that I have seen it and therefore the
12 issue is closed. Don't assume I have seen it, and don't
13 assume the issue was closed.

14 LDC [MS. BORMANN]: But from now going forward and
15 whatever we received going back, I will have an indication
16 from the government that it went through the process with the
17 commission. I wanted to clarify that with the commission.
18 Thank you.

19 MJ [COL POHL]: No problem.

20 LDC [MS. BORMANN]: With respect to the ten categories of
21 material, a couple of things that I wanted to note, and that
22 is that the Al Nashiri litigation is different from our own
23 because, of course, there are no charged co-conspirators in

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1 that case and in this case there are multiple charged
2 co-conspirators. So the way the commission and the way the
3 defense has to approach it is that we need all of the
4 information on all of the alleged co-conspirators and we need
5 every bit of it, because we need to determine to what extent
6 and whether we will be moving to sever at any point or whether
7 we will be moving to bar certain information which ----

8 MJ [COL POHL]: You are talking about charged
9 co-conspirators?

10 LDC [MS. BORMANN]: Well, I am talking about charged
11 co-conspirators first.

12 MJ [COL POHL]: What I am saying is, and I don't want to
13 get into what happened in Nashiri because as I keep saying
14 these are two different cases.

15 LDC [MS. BORMANN]: We are getting into what happened in
16 Al Nashiri, which is why we have the ten categories.

17 MJ [COL POHL]: I know, because the government decided to
18 use that as the model. That's their choice. I am back to the
19 thing that there are co-conspirators in Al Nashiri, but just
20 not, for want of a better term, charged co-conspirators.

21 LDC [MS. BORMANN]: My client happens to be one. I am
22 fully aware of that.

23 MJ [COL POHL]: Okay. Are you talking about these five

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1 gentlemen only or all the other people in the conspiracy
2 specifications?

3 LDC [MS. BORMANN]: My first comment was just these five
4 men in here.

5 MJ [COL POHL]: Okay.

6 LDC [MS. BORMANN]: Which I guess we can call them
7 co-accused or co-defendants, which is the term we would use in
8 a federal courtroom.

9 MJ [COL POHL]: Okay.

10 LDC [MS. BORMANN]: So the five co-defendants here,
11 obviously we need to have all of the material with respect to
12 them because we need to be informed about where we need to
13 look for possible compromises of a fair trial before a jury.
14 So that is point number one. And that does not seem to be
15 addressed in the ten categories.

16 The term "co-conspirators," as it is contained in
17 subparagraph -- I'm going to get there -- (h), of the ten
18 categories is undefined, and I suspect that in this case
19 "co-conspirators" is going to take on a much broader term as
20 used by the government ----

21 MJ [COL POHL]: You think "all co-conspirators identified
22 in the charge sheet" is undefined?

23 LDC [MS. BORMANN]: Right. That was the problem. But

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1 what I am saying to you now is that the term "co-conspirators"
2 as this case proceeds will take on a much broader
3 interpretation as used by the government. And if you look to
4 (i), they use the term "co-conspirators" as separate from the
5 accused. If you look at (i), (i) says copies of requests with
6 any accompanying justifications and legal reviews of the same
7 to employ EITs on the accused and all co-conspirators.

8 By the use of the conjunctive in that format, I
9 assume the intent is to have all persons who the government
10 will argue at some point, whether trial, pretrial motions or
11 sentencing, conspired with Mr. Bin'Attash in some way to
12 commit whatever it is the government has alleged he has
13 committed.

14 MJ [COL POHL]: Just so -- maybe we can handle this very
15 quickly. When it talks about (h), it says "co-conspirators
16 identified in the charge sheet," and (i) it says "accused all
17 co-conspirators" and it does not include the term "identified
18 in the charge sheet."

19 Was that a -- Trial Counsel, does that mean there is
20 a bigger universe for (i), or you simply didn't repeat
21 yourself?

22 TC [MR. GROHARING]: We didn't repeat ourself, but I think
23 we took it straight from your order in Nashiri.

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1 MJ [COL POHL]: So it's my fault.

2 TC [MR. GROHARING]: The intent, though, is to have the
3 same language, the same effect of the language.

4 MJ [COL POHL]: Okay. So it's limited to co-conspirators
5 named in the charge sheet.

6 LDC [MS. BORMANN]: Well, and then here is where -- that's
7 what I needed to ascertain. So let me proceed with my
8 argument.

9 The fact of the matter is that the government, I
10 believe, will argue that these five men, Mr. Bin'Attash in
11 particular, conspired with a variety of different individuals
12 not charged here in the commission of a variety of offenses,
13 both at the case-in-chief and at sentencing, because of course
14 uncharged conduct is admissible in a sentencing hearing under
15 certain circumstances.

16 What occurred with respect to uncharged
17 co-conspirators may be just as important as what occurred with
18 charged conspirators, and I point this out not to argue about
19 whether or not this is an all-inclusive list, but to argue
20 that using the ten categories here as some sort of approved
21 format may be a mistake and may limit us and may cause the
22 commission, the government and the defense to -- to conclude
23 or miss material that would otherwise be helpful to the

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1 defense and relevant and noncumulative under Yunis.

2 MJ [COL POHL]: Ms. Bormann, didn't I make it clear --
3 perhaps I didn't, and if I didn't, I apologize -- that the ten
4 categories are a starting point for the government? The
5 defense is free to request discovery that does not fit within
6 the ten categories. It is not a limitation; it is simply a
7 starting point.

8 So if you have -- for example, on your issue about
9 unnamed co-conspirators, that is the government ----

10 LDC [MS. BORMANN]: Uncharged. Uncharged co-conspirators.

11 MJ [COL POHL]: I'm saying not on the charge sheet, is
12 that what we are talking about?

13 LDC [MS. BORMANN]: Right.

14 MJ [COL POHL]: That universe, if we need to litigate
15 discovery on that and it doesn't fit within the categories,
16 feel free to do it. I don't know how much clear I can make
17 it. The ten categories are not a limitation.

18 LDC [MS. BORMANN]: Okay.

19 MJ [COL POHL]: That's all I am saying. I've said it a
20 number of times.

21 LDC [MS. BORMANN]: I will remind you of that somewhere
22 down the line.

23 MJ [COL POHL]: On that, you can quote myself back to me.

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1 LDC [MS. BORMANN]: Perfect.

2 MJ [COL POHL]: And I am good with that. Go ahead.

3 LDC [MS. BORMANN]: I want to address some of the comments
4 about the term "cumulative" as it applies in the little Venn
5 diagram, the circles, the difference between Brady analysis
6 versus Yunis analysis, and I want to make the argument to you
7 that the government should not be making the determination of
8 what's cumulative before it goes to the court on even a Yunis
9 determination, and let me explain to you why.

10 We submitted a theories of difference which was quite
11 extensive back when the court required a deadline for that,
12 and you have an ex parte filing that gives you a glimpse into
13 what is important with respect to Mr. Bin'Attash's defense
14 that the government has not seen and will not see.

15 One of -- we talk about several areas of defense
16 where this issue of cumulative comes into play, and without
17 going into privileged information, let me just give you an
18 example. If, and I think it's probably when, Mr. Bin'Attash
19 wants to make an argument of outrageous governmental conduct,
20 my question to the court would be, is it out- -- if there
21 is -- and I am just making this up, this is nothing having to
22 do with anything I have read and no classified discovery, not
23 a conversation with Mr. Bin'Attash.

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1 MJ [COL POHL]: This is a hypothetical discussion.

2 LDC [MS. BORMANN]: Hypothetical. If Mr. Bin'Attash was
3 subjected to torture treatments that went on that were beyond
4 anything approved as an EIT, beyond any list of EITs, and that
5 torture technique was one that caused him serious physical
6 harm that lasted beyond this, would it matter whether or not
7 that report of that torture -- and let's say that torture went
8 on for a series of days; would it matter whether or not a
9 cable went -- the identical cable went to maybe the station
10 chief in a CIA headquarters somewhere or whether that same
11 cable went to 50,000 people throughout the United States
12 Government? Exactly the same content, but the fact that that
13 cable went to a variety -- or may have gone to a variety of
14 different people establishes the very argument of outrageous
15 governmental conduct.

16 And it doesn't just go to, as Mr. Connell noted,
17 the -- you know, the to/from list, who did it go to. The
18 actual numbers matter, because outrageous governmental conduct
19 requires or may require an argument that the program was so
20 massive and so readily known that everybody in the government
21 must have known something about it, everybody involved in the
22 decision-making about charging this, about later
23 interrogations when these gentlemen land in Guantanamo Bay;

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1 and the wider the dissemination is, the more likely that fact
2 is true. It becomes relevant.

3 So if the government strips out 49,999 of those
4 memoranda, those cables, and you get one, how can you ever
5 make the decision that that's irrelevant to Mr. Bin'Attash's
6 defense? I don't know the answer to that. The answer is you
7 can't, and the government can't know what's relevant to
8 Mr. Bin'Attash's defense because they have not been provided.

9 MJ [COL POHL]: Because your example is Brady material?

10 LDC [MS. BORMANN]: Well, only if the government looks an
11 at it in the light of what I might want to argue. After the
12 fact when I get up to argue and I say, well, I would like to
13 be able to argue that this was widely disseminated, but I only
14 got one cable so I guess I have to forgo that argument, how do
15 I know what I don't know? That's why we filed theories of
16 defense.

17 MJ [COL POHL]: No, I understand that, but one of the
18 government's three categories is outrageous government
19 conduct.

20 LDC [MS. BORMANN]: But their definition of outrageous
21 government conduct may be one cable.

22 MJ [COL POHL]: I got it. I understand what you are
23 saying.

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1 LDC [MS. BORMANN]: But the court can determine by
2 reading ----

3 MJ [COL POHL]: If they improperly restrict or keep or
4 whatever Brady material, that's I think what prosecutors have
5 found out in other cases, I'm not saying it happened in this
6 case or anything else, but other federal cases and military
7 cases, that is fraught with peril.

8 LDC [MS. BORMANN]: I understand that.

9 MJ [COL POHL]: Okay. I understand your point.

10 LDC [MS. BORMANN]: One more example on that of a
11 different color.

12 MJ [COL POHL]: Ms. Bormann, I am going to ask you -- I am
13 not going to limit how long you can talk. We are about at the
14 lunch break.

15 LDC [MS. BORMANN]: Okay.

16 MJ [COL POHL]: Would you like to pick up your
17 thought ----

18 LDC [MS. BORMANN]: Yes, because I have a good five, ten
19 minutes.

20 MJ [COL POHL]: I would like to give Mr. Ruiz and
21 Mr. Nevin an opportunity. Let's break for lunch now and
22 convene at 1330. The commission is in recess.

23 [The R.M.C. 803 session recessed at 1201, 18 February 2016.]

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