

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0901,
2 23 February 2016.]

3 MJ [COL POHL]: The commission is called to order.
4 Mr. Binalshibh and Mr. Ali are with us. The others are not.
5 General Martins, any changes in the government team
6 since our last recess?

7 CP [BG MARTINS]: Good morning, Your Honor. No.

8 MJ [COL POHL]: Mr. Nevin?

9 LDC [MR. NEVIN]: No, Your Honor. No changes.

10 MJ [COL POHL]: Major Seeger?

11 DC [MAJ SEEGER]: No change, Your Honor.

12 MJ [COL POHL]: Mr. Harrington?

13 LDC [MR. HARRINGTON]: No change, Judge.

14 MJ [COL POHL]: Mr. Connell?

15 LDC [MR. CONNELL]: Good morning, Your Honor, no change.

16 MJ [COL POHL]: Good morning. Mr. Ruiz?

17 LDC [MR. RUIZ]: No changes.

18 MJ [COL POHL]: Thank you. Mr. Swann.

19 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
20 was sworn, and testified as follows:

21 **DIRECT EXAMINATION**

22 Questions by the Trial Counsel [MR. SWANN]:

23 Q. Major, are you the same major who testified

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 yesterday?

2 A. I am.

3 Q. Once again, I remind you you are still under oath.

4 A. I am.

5 Q. I have before me what is marked as Appellate Exhibit
6 408D, E, and F. Let's take up the waiver by Mr. Mohammad
7 first.

8 A. Okay.

9 Q. Did you advise Mr. Mohammad of his rights to attend
10 today's session?

11 A. I did. I notified him that he had a commissions
12 hearing this morning at 0-9, and then I read both pages of the
13 English version of the waiver.

14 Q. All right. And did he execute that waiver at page 2
15 of what's been marked as 408D?

16 A. He did. He did sign and date and then he indicated
17 that he would be here this afternoon.

18 Q. He indicated he wanted to come this afternoon?

19 A. He said he wanted to come this afternoon.

20 Q. All right. Do you have any question about him
21 understanding his right to attend today?

22 A. I do not.

23 Q. And did he waive that?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. He did.

2 Q. With respect to Mr. Hawsawi, again, did you advise
3 him of his rights?

4 A. I did. I read the entire document to him in English
5 as he followed along with the Arabic version, and then the
6 translator read the Arabic version to Mr. Hawsawi and he
7 filled out a majority of the form in terms of his name, date,
8 and then signed and dated it as well.

9 Q. All right. That's marked as Appellate Exhibit 408E,
10 a one-page document, an Arabic document. Did he sign the
11 document?

12 A. He did sign the document.

13 Q. And it indicates he signed it at 0611 this morning?

14 A. I signed it at 0611 just after he handed it back to
15 me.

16 Q. Did he understand his right to attend today's
17 proceeding?

18 A. He did.

19 Q. With respect to Mr. Bin'Attash, the same thing. It's
20 an Arabic form. Did he sign that document?

21 A. He did. With Mr. Bin'Attash, I read to him the
22 English version and then the translator read the Arabic
23 version to him. He filled out his name, and then he signed

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and dated it and indicated he had no questions.

2 Q. All right. Did you deviate in any way from the many
3 times that you have done this?

4 A. I have not.

5 Q. And do you believe he understood his right to attend?

6 A. I do.

7 TC [MR. SWANN]: I have nothing further, Your Honor.

8 MJ [COL POHL]: Mr. Nevin?

9 LDC [MR. NEVIN]: No, thank you, Your Honor.

10 MJ [COL POHL]: Ms. Bormann?

11 LDC [MS. BORMANN]: No questions, Judge.

12 MJ [COL POHL]: Mr. Ruiz?

13 LDC [MR. RUIZ]: No questions.

14 MJ [COL POHL]: Thank you, Major. You are excused.

15 WIT: Thanks, Judge.

16 [The witness withdrew from the courtroom.]

17 MJ [COL POHL]: There are a number of issues that were
18 raised yesterday, and I just want to issue some of these
19 rulings. Considering the 254YY motion for reconsideration, I
20 grant the motion for reconsideration with respect to the
21 Eighth Amendment claim in this regard: I will permit the
22 defense to argue the applicability of the Eighth Amendment
23 through the due process clause of the Fifth Amendment if they

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 wish to in Bell v. Wolfish to the instant motion. However, I
2 find Dr. Stewart's testimony is not necessary for a fair
3 determination of the issue before me in 254Y. Accordingly, I
4 deny the motion to reconsider the ruling in AE 254XXX denying
5 production of Dr. Stewart.

6 Considering 254RRR, I deny production of and/or
7 identity of individual documents involving the amendment to
8 SOP #39. The discovery request is not material to the
9 preparation of the defense.

10 Concerning 254SSS, this one may or may not have
11 already gotten to you, I deny the motion to compel production
12 of individual documents related to the E0 complaint. The
13 commission does not know who filed the E0 complaint or what is
14 in the E0 complaint. As such, the request for discovery is
15 not relevant to the issues of actual or apparent unlawful
16 influence that are before me in 254WW and 254ZZZ. There will
17 be written orders on all of these issued in due course,
18 although I think 254SSS has already been sent out or it was
19 sent out today -- will be sent out today.

20 Considering AE 182G, apparently the government did
21 not understand the intent of the order. To be clear, the
22 laptops are to be returned to the detainees with the same
23 functionality they had when seized in 2010. If the government

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 cannot restore the particular laptops with the same
2 functionality as 2010, they will notify the commission and the
3 defense immediately with a date certain when adequate laptops
4 with the 2010 functionality will be given the accused.

5 The commission fails to see how the security
6 conditions have changed since 2010 to justify disabling some
7 of the functionalities that apparently did not represent a
8 security risk in 2010.

9 Concerning the enforcement of this order, and this
10 has come up in other contexts also, the commission understands
11 the JDG does not work for the prosecution. However, providing
12 the laptops to the accused directly impacts on these
13 proceedings. Accordingly, if the JDG fails to comply with
14 this order, the commission will consider abating all further
15 proceedings until the order is complied with. If, after
16 providing the laptops to an accused, an accused misuses them,
17 the JDG may take appropriate remedial action against the
18 offending accused and will notify the defense and the
19 government to that effect.

20 The suspense to return the laptops to them under
21 these conditions is 8 March and, trial counsel, if there is an
22 issue with it, I am to be told not later than 8 March why that
23 cannot be accomplished.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 No written order will follow on that one.

2 Mr. Harrington, an issue that I want to address with
3 you deals with your client tomorrow, and hopefully this is an
4 easily solvable issue or if there is not an issue here, it has
5 been my experience, not just in this case, but in other cases,
6 that sometimes individuals have particular religious reasons
7 why they want to take a particular kind of oath or
8 affirmation. Okay? And if there is an issue, since this is
9 the first time a detainee has testified, at least in this
10 proceedings, he has to take an oath or an affirmation; but on
11 the other hand, it has to be appropriate for his religious
12 beliefs too. I mean, we have modified it for children and for
13 other reasons too. So -- and the government will, as their
14 practice is, will swear him in, but work with the government
15 and your client as to what would be the appropriate language
16 to take.

17 LDC [MR. HARRINGTON]: Okay.

18 MJ [COL POHL]: Again, hopefully it is a nonissue, but I
19 just thought it was easier to address it today so tomorrow we
20 don't stop immediately.

21 LDC [MR. HARRINGTON]: Okay. Thank you.

22 MJ [COL POHL]: That brings us to 112.

23 LDC [MR. RUIZ]: Your Honor, may I have a follow-up

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 question on your ruling?

2 MJ [COL POHL]: Sure.

3 LDC [MR. RUIZ]: Judge, with regards to your order
4 directing return of the laptops, I have Mr. al Hawsawi's
5 laptop in my possession. I can return it to him today through
6 a special request through the Staff Judge Advocate's office.
7 So it's not as though Mr. Trivett or the prosecution has
8 possession of that laptop or they need to do anything to the
9 laptop to restore it to functionality. It works now as it did
10 in 2010.

11 So my question to the commission is: Can I just
12 simply return it to Mr. al Hawsawi today ----

13 MJ [COL POHL]: I want the JDG to know the order, okay,
14 because they have to comply with it.

15 LDC [MR. RUIZ]: Sure.

16 MJ [COL POHL]: You know, if there is an issue -- and as I
17 pointed out here, I don't know what condition these laptops
18 are in and I don't want to get into, quite frankly, having to
19 revisit an issue again about whether it works or not, but the
20 JDG needs to know what the rules of the road are, because if
21 you give them directly without them knowing what the order is
22 through the government, then they are going to say, well, he
23 doesn't have -- we are just going to disable the CD-ROM

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 capability or whatever functionalities were there at the time.
2 Okay?

3 LDC [MR. RUIZ]: Yes.

4 MJ [COL POHL]: Let the order -- take the order back to
5 the JDG and then see what their response is.

6 LDC [MR. RUIZ]: Can we ask that that order be delivered
7 today?

8 MJ [COL POHL]: Okay.

9 LDC [MR. RUIZ]: And I will follow up with the laptop
10 later in the week.

11 MJ [COL POHL]: The government will do that expeditiously.
12 I am not going to ask them to stop what they are doing today,
13 but hopefully they will get to it this week to tell the JDG.
14 I don't know the condition of the laptop. That's why I am
15 giving them two weeks.

16 LDC [MR. RUIZ]: The laptop was exactly as it was when
17 returned to us.

18 MJ [COL POHL]: I don't know whether they disabled
19 functions. I don't want to get into the individual laptops.

20 LDC [MR. RUIZ]: Our laptop hasn't been disabled because
21 we didn't turn it over to be disabled.

22 MJ [COL POHL]: Once the JDG gets notice of the order,
23 then -- right now they say you cannot give it to them without

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the protocols being followed. I'm simply saying -- and I
2 don't know whether this impacts on all the protocols or some
3 of the protocols. I am simply saying whatever they had in
4 2010, they are going to -- they'll get now. Okay?

5 LDC [MR. RUIZ]: The main thing I wanted to understand is
6 we wouldn't have to wait until March 8 to take the laptop and
7 return it when it's ----

8 MJ [COL POHL]: That's a not-later-than date. That's just
9 designed to make sure it can be done mechanically.

10 LDC [MR. RUIZ]: I understand. Thank you.

11 MJ [COL POHL]: And see what the JDG does. If they say,
12 "We are not going to do that," as I said, there are remedies.

13 LDC [MR. RUIZ]: Thank you.

14 MJ [COL POHL]: Got it.

15 CDC [MR. SOWARDS]: May I clarify one other point for the
16 record on 182?

17 MJ [COL POHL]: Sure. And then it will be based on who
18 stood up first, Mr. Connell and then Ms. Bormann.

19 CDC [MR. SOWARDS]: It was just a brief mea culpa,
20 Your Honor. Yesterday I compared to -- in comparing
21 resources, referred to the fact that we had three paralegals,
22 as I counted it, dedicated primarily to processing discovery,
23 at least that was my estimation, and I didn't want to leave

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the commission with the impression that we had only three
2 paralegals. And so this is just to advise you and make it
3 clear on the record we have sort of a revolving cast of
4 approximately six paralegals, one who is leaving in March, one
5 who just arrived in December, and of that total we share four
6 with some other teams, noncapital, but I had hoped that we
7 would get the benefit of maybe three, as opposed to what's on
8 the other side.

9 MJ [COL POHL]: Got it.

10 Mr. Connell.

11 LDC [MR. CONNELL]: Your Honor, the observation that I
12 wanted to make about 182 is that although JDG is the core
13 actor, the people who actually disabled the functionality or
14 will reenable the functionality are the IT staff for the
15 Convening Authority and for the defense. So I just wanted you
16 to know that, because it may impact on, you know, the
17 logistics of actually getting the thing done.

18 MJ [COL POHL]: I understand. That's why I gave the
19 two-week timeline. I am not -- I don't want a wiring diagram
20 of everybody who is going to touch this. It is simply my
21 understanding is the objections are from the JDG and not from
22 the IT folks, but that's why I did it. Understand, you know,
23 I would like things to happen immediately, but I understand

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the logistics of things, particularly in the technology world,
2 so got it.

3 LDC [MR. CONNELL]: Thank you.

4 MJ [COL POHL]: Ms. Bormann.

5 LDC [MS. BORMANN]: I would simply note that
6 Mr. Bin'Attash accepted the laptop in a compromised, basically
7 broken condition. They've disabled all of the functionality
8 that allows him to access and sort through discovery that we
9 talked about yesterday. So in addition to your order to
10 return the laptops, I just want to make it clear that we are
11 asking that ----

12 MJ [COL POHL]: For those that have been returned with the
13 disabled functionality, they should be all the same.

14 LDC [MS. BORMANN]: Right.

15 MJ [COL POHL]: And I think that should be clear, but
16 maybe it shouldn't.

17 LDC [MS. BORMANN]: I just want to be clear that we
18 shouldn't have to come back and argue that.

19 MJ [COL POHL]: Got it.

20 LDC [MS. BORMANN]: Thank you.

21 MJ [COL POHL]: Just to be clear, each detainee should
22 have a laptop with the same capabilities and functionalities
23 that it had when it was taken from them in 2010. It can be

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this laptop, they can be a new laptop, I don't care; but if
2 the thing has been disabled, then they will be enabled for
3 that.

4 Okay. That being said, that brings us to -- well,
5 first of all, let's start -- I said 112.

6 LDC [MR. CONNELL]: Yes, sir, you said 397 and 112.

7 MJ [COL POHL]: Let's start with just 397. Do you have
8 anything more to say at 397?

9 LDC [MR. CONNELL]: Yes, I have -- there has been a
10 running debate on these issues, many of which were brought up
11 on Friday during closed session. I didn't respond at the time
12 because I was objecting to that portion of the closed session,
13 so I do have things to say. I'll get to that later, I
14 suppose.

15 But I also owe the commission, I took a pass last
16 night on a question about the operation of Rule 505.

17 MJ [COL POHL]: Yes.

18 LDC [MR. CONNELL]: The military commission asked me if it
19 is possible to go straight from an agreement of the parties to
20 the 806. I think as long as the press and the public have
21 notice under your order in AE 081A, that it is possible to do
22 that with consent of the parties. I think that you asked it
23 in the context, I believe, of 400F, and if I could -- so

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 today, in what we are going to be going through is the 386
2 series, and 386A, Attachment B, is our classified addendum to
3 an unclassified pleading. I think that that would be a good
4 candidate for skipping the 505(h) hearing. I think that every
5 word in it is classified, and I suspect the government will
6 say the same thing.

7 400F, however, the transcript of 30 October I don't
8 think is a good candidate for skipping the 505(h) process
9 because that's a situation where it's a government motion for
10 505(h) because they think some of the things I want to argue
11 are classified. I think the things that I want to argue are
12 not classified, so we need to have that discussion.

13 MJ [COL POHL]: Let me go back on 400.

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

15 MJ [COL POHL]: The concern I have is there are
16 third-party interests here that, as I am sure you are aware
17 of, even there are cases where even both sides, for example,
18 agree to close the courtroom, that the third party still has a
19 role to play.

20 LDC [MR. CONNELL]: Press-Enterprise itself was such a
21 case.

22 MJ [COL POHL]: Yeah. So I'm not necessarily concluding
23 that we can skip the 505(h) process because I think one of its

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 goals is to protect that third party with a separate type of
2 hearing.

3 So that being said, back to 400, you provided your --
4 your pleadings, and then your position was you were going to
5 just discuss the unredacted parts of the transcript.

6 LDC [MR. CONNELL]: Right.

7 MJ [COL POHL]: Okay. And, Trial Counsel, you believe
8 that in order to intelligently discuss that, you have to
9 discuss other aspects of the transcript that are classified?

10 CP [BG MARTINS]: Your Honor, these are -- it was our
11 motion, but this was argument that counsel, defense counsel,
12 wished to make. And in hearing him describe how he was going
13 to use the material, I didn't have a sense of confidence that
14 it was going to stay fully where it could be in public
15 session.

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

17 CP [BG MARTINS]: I don't have an objection to discussing
18 it in a 505(h) so we get the ground rules of use, relevance,
19 admissibility out there.

20 MJ [COL POHL]: If Mr. Connell says, "I am not going to
21 use any of the classified material," then ----

22 CP [BG MARTINS]: I recommend we look at that, Your Honor,
23 because he has about -- he has a bunch of references to the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 transcript that are right around the parts that continue to
2 remain redacted and I think it's worth the discussion.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: I don't disagree with that,
5 Your Honor. When General Martins said he wanted to handle it
6 that way, that made sense to me.

7 MJ [COL POHL]: Okay. Okay. Let's return.

8 LDC [MR. CONNELL]: Thank you. Before we get started, can
9 I have the assistance of one of the courtroom staff in opening
10 the document viewer? It seems to be stuck and I'm afraid of
11 putting myself on the hook for breaking it if I jerk it open.
12 I'd rather someone else be on the hook.

13 MJ [COL POHL]: Well, that person will be your agent,
14 so...

15 [Pause.]

16 LDC [MR. CONNELL]: I wish all my tech problems were
17 solved so easily.

18 So yesterday's description of what we are going to
19 discuss this morning is 397 and 112, which makes sense. I
20 have tried to argue 112 separately. The government has tried
21 to argue 112 as an example of 397. Ultimately, I don't think
22 that matters, but there is -- there are substantial things to
23 say. What I'd like to do is review the bidding and then I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 would like to focus on what seemed to me to be the areas of
2 controversy between the parties.

3 As I count it, this is the government's fourth
4 position on AE 112. The first position was that they will
5 produce "All statements and treatment-related information"
6 after Protective Order #1 was signed, and their second
7 position was they would produce the information after the MOU
8 was signed. On 11 December 2015 their position was that
9 addressing AE 112 would violate the Military Commissions Act.
10 And at that time the military commission told them, in what
11 seemed to me no uncertain terms, that they either need to file
12 a substantive response to AE 112 or have it considered to be a
13 concession.

14 Now, I know I can't hold the military commission to
15 that and I'm not even going to try. But I do know that
16 yesterday the military commission prohibited most of my
17 argument on AE 254YYY, which I had briefed three times,
18 because in the military commission's ruling, and I accept the
19 ruling, that it wasn't in the proper procedural posture, that
20 I didn't have the right pleading in the 254 series as opposed
21 to the 321 series.

22 The difference between that situation and the
23 situation that we have here is that the prosecution has never

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 briefed substantive reasons why the military commission should
2 not grant AE 112.

3 The position that the military -- the government
4 presented in AE 397 is that it was going to produce ten
5 categories of information, information which was within that
6 ten categories is moot, and that we need to litigate the
7 others. That makes sense in a certain way to me, so I would
8 like to move on to what I see as the core areas of
9 controversy.

10 The first area of controversy is whether the
11 prosecution can unilaterally, and without judicial review,
12 withhold classified evidence which is favorable to the defense
13 based on an internal claim, a claim that it makes to itself,
14 about cumulation. There are multiple reasons why this
15 position is not supported by the law.

16 The first one is that withholding classified
17 information under the Yunis standard is not a determination
18 that information is not discoverable. It is instead the
19 assertion of a privilege, the classified information
20 privilege, under United States v. Yunis as implemented in
21 10 U.S.C. 949p-3 and 949p-4, and Military Commission Rules of
22 Evidence 505(f).

23 Those authorities describe in some detail the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 process, and there was one slide that I'm not -- that we found
2 useful yesterday. So, Your Honor, I would request permission
3 to show what is already in the record at AE 397D, slide 6.

4 It's the two-circle slide. May I have the feed from Table 4?

5 May I have permission to display it to the gallery,
6 Your Honor?

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

8 LDC [MR. CONNELL]: Thank you. This slide describes, you
9 know, in a basic sense what I see as the interaction between
10 the Brady v. Maryland and United States v. Yunis, which is
11 implemented, among other places, most immediately and
12 concretely in M.C.R.E. 505(f), and there are a couple of
13 things that are important about M.C.R.E. 505(f) to this
14 particular area of controversy.

15 The first one is its reference to the military judge.
16 It is the military judge who assesses the accused's discovery
17 of or access to classified information under this section. It
18 is the military judge who may authorize the United States to
19 delete or withhold specified items of classified evidence.
20 Now, that's important. The word "authorize" is important
21 because it implies judicial action, and the words "specified
22 items of classified evidence" is important as well because it
23 means that those items in fact must be specified through a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 process whereby, in 505, if the government seeks to withhold
2 information as cumulative, it must submit to judicial review.

3 Now, 505(f)(2)(C) adds another important element of
4 this analysis. It provides, inter alia, that if the military
5 judge finds that the summary, statement or other relief would
6 provide the accused with substantially the same ability to
7 make a defense as would discovery or access to the
8 classified -- to the specific classified information, then it
9 may order relief.

10 The significance of that is that the -- if the
11 prosecution gets to make a unilaterally unreviewed decision
12 that information is cumulative, it strips the military judge
13 of the understanding or the ability to make the decision as to
14 whether the redaction or the withholding or the cumulative
15 substitute, which is essentially the substitute for
16 information, which is what they are arguing, we are going to
17 provide it in one form and not another, is -- allows the
18 defense to essentially make the same defense.

19 Now, one of the cases that I cited last week on this
20 was United States v. Sedaghaty, S-E-D-A-G-H-A-T-Y, at 50 --
21 excuse me -- at 728 F.3d 885, a Ninth Circuit case. The
22 government's response to that case was that they didn't
23 understand what it was being cited for, and at page 906 of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that case, the Ninth Circuit said it would be illogical to
2 conclude that a substitution that excludes noncumulative
3 exculpatory information could "provide the defendant with
4 substantially the same ability to make his defense as would
5 disclosure of the specific classified information as required
6 by CIPA."

7 The significance of that case, as I see it, is that
8 the accumulation analysis is part of the CIPA analysis, which
9 is the same thing that CIPA itself says, Section 4; it's the
10 same thing that 505(f) says.

11 Thank you. You can take down that slide, or we can
12 cut the feed from Table 4 if you wish.

13 The third reason why the prosecution's response --
14 position that it can, unilaterally and without judicial
15 review, withhold information that it claims is cumulative are
16 the basics of Brady law, and there are some important factors
17 that require revision -- discussion. The first one is there
18 was an interesting sort of debate that went on, sort of a
19 one-sided debate, about whether "Government information" is a
20 shorthand or "documents" is a shorthand, and in fact neither
21 is what the Supreme Court says. I understand they were only
22 being used as shorthands, but what the Supreme Court actually
23 says is that Brady governs evidence. The actual holding of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Brady v. Maryland at 373 U.S. 38, page 87, 1963 case, is that,
2 I quote, "The suppression by the prosecution of evidence
3 favorable to an accused upon request violates due process
4 where the evidence is material either to guilt or to
5 punishment, irrespective of the good faith or bad faith of the
6 prosecution."

7 We ordinarily focus on the word "favorable" or the
8 word "material," because those are generally considered to be
9 the elements of a Brady claim, but the word "evidence" is
10 important as well. I am going as slow as I can, Your Honor.
11 I'm trying.

12 And it's not simply the casual use of the word
13 "evidence" in Brady v. Maryland, because the principal case on
14 what the prosecution actually has to produce under Brady is
15 even more specific. That case is Kyles v. Whitley at
16 514 U.S. 419; it is a 1995 case. And in Kyles v. Whitley,
17 which is a very granular opinion, they go to a great level of
18 detail in describing what should have been produced in that
19 Brady violation. They describe each "item of favorable
20 evidence." They separately describe "each piece of" -- excuse
21 me, "each," and here is where the quote begins, "piece of
22 evidence."

23 So sometimes "evidence" might mean information.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Sometimes "evidence" might mean a recording. Sometimes
2 "evidence" might mean a document, but in fact, in reality, it
3 often means all of those things.

4 I would like to read to you the description of the
5 seven items in Kyles v. Whitley that the Supreme Court found
6 were unlawfully withheld, so this is at the granular level,
7 what is it that the prosecution actually has to produce.

8 1. The six contemporaneous eyewitness statements
9 taken by police following the murder, statements.

10 2. Records of Beanie, the cooperating witness, the
11 initial call to the police, that is records.

12 3. The tape recording of the Saturday conversation
13 between Beanie and Officers Eaton and Miller, that is, a tape
14 recording.

15 4. The typed and signed statement given by Beanie on
16 Sunday morning, a document statement.

17 5. The computer printout of license numbers of cars
18 parked at Schwegmann's on the night of the murder which did
19 not list the number of Kyles' car, computer printout.

20 6. The internal police memorandum calling for the
21 seizure of the rubbish after Beanie had suggested the purse
22 might be found there, a memorandum.

23 And 7. Evidence linking Beanie to other crimes at

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Schwegmann's and to the unrelated murder of one Patricia
2 Leidenheimer committed in January before the Dye murder; that
3 is more general evidence category.

4 The significance of reading that is that it is not
5 simply information that the cooperating witness was
6 unreliable, substituted in however the government chooses. It
7 is instead specific information that is called for under
8 Brady; that is, statements, tape recordings, items of
9 evidence. And there is an importance of that that is
10 described in Kyles because it is not just the information that
11 is exculpatory in Kyles that is favorable to the defense, but
12 the fact of its having been said, which is something that is
13 extremely important to the evaluation of AE 119, which
14 governs, which is about memoranda and who said what to whom
15 and were they telling the truth.

16 The Supreme Court in Kyles gives three examples at
17 page ----

18 MJ [COL POHL]: You said 119?

19 LDC [MR. CONNELL]: I may have said that, but I meant 112.

20 MJ [COL POHL]: Okay. Good.

21 LDC [MR. CONNELL]: At page 444 in Kyles v. Whitley, the
22 Supreme Court suggests three reasons that these documents
23 that -- or tape recordings that it talked about should have --

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 could have been used by the defense, and they have some
2 substantial application to the documents at issue in 112.

3 The first of those is the thoroughness and even the
4 good faith of the government's investigation; second is
5 inconsistencies among the statements; and third, the
6 revelation of a "remarkably uncritical attitude" on the behalf
7 of the recipient of the information, of the cooperating
8 witnesses' information in that situation.

9 Those are similar to the arguments that are being
10 made in 112, which I am going to describe in detail in a
11 moment, that because it is not simply the information that
12 detainees were blindfolded, for example, it is instead the
13 fact of who said to whom that detainees were blindfolded and
14 in what language they described it. We will get to that more
15 in a moment.

16 Before we do, I would like to ask that -- permission
17 to have the feed from Table 4 and display to the gallery what
18 is already in the record at AE 112J, slide 2.

19 MJ [COL POHL]: You may put that on the screen.

20 LDC [MR. CONNELL]: Thank you. This slide demonstrates --
21 is just a list of the four categories of information which are
22 the subject of AE 112. Those four categories are
23 particularized by 83 specific requests under the categories,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and the government has estimated somewhere between 72 and 78
2 responsive documents may exist.

3 The government's sole remaining claim with respect to
4 this -- to these production of information is that they --
5 that the requests are overbroad. So I would like to draw the
6 commission's attention to the actual law of overbreadth in a
7 military -- in a criminal context. We can cut the feed from
8 Table 4.

9 The actual law of overbreadth in a criminal context
10 is found in United States v. Bagley at 473 U.S. 667, a 1985
11 case, where the Supreme Court revised its previous views about
12 the specificity of Brady requests versus the general Brady
13 request, and what the United States Supreme Court held in
14 Bagley is that a general request as "please give me all
15 exculpatory information" is exactly the same as a specific
16 request, "please give me the recording of Beanie."

17 There are three exceptions to that found in both
18 Supreme Court law and the Court of Appeals of the Armed Forces
19 law. The three exceptions are -- the only difference between
20 general and specific requests is that a specific request makes
21 defense reliance on nonproduction more reasonable. That
22 exception is found in Bagley itself at 682 to 683.

23 In other words, having made a specific request for

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the recording of Beanie, if the government does not produce
2 the recording of Beanie, it makes it more reasonable for the
3 defense to rely on the fact that no such recording exists.

4 The second exception ----

5 MJ [COL POHL]: But if that recording were
6 exculpatory ----

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: ---- under Brady, wouldn't they have a sua
9 sponte responsibility to disclose it?

10 LDC [MR. CONNELL]: Yes, absolutely. In fact, one of the
11 things that Bagley says, I am really just relying on its
12 overbreadth piece, the general versus specific request, but it
13 really says no request falls into the same category.

14 There are two other significance to a specific
15 request.

16 MJ [COL POHL]: Go ahead.

17 LDC [MR. CONNELL]: I'm sorry, sir?

18 MJ [COL POHL]: I said go ahead.

19 LDC [MR. CONNELL]: The military courts apply
20 constitutional harmless error standard to a specific request
21 even under Rule for Courts-Martial 701, even that is the
22 specificity of a request elevates a request from the ordinary
23 nonconstitutional review standard to the constitutional review

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 standard, and that's found in United States v. Coleman,
2 72 MJ 184 at 187 C.A.A.F., Court of Appeals for the Armed
3 Forces case in 2013.

4 And the third difference between a general request
5 and a specific request is that specific requests can direct
6 the prosecution to specific agencies that were not involved in
7 the prosecution or the investigation. For example, if the --
8 if NASA had had something, had information that the defense
9 thought was favorable to it and material but was not otherwise
10 involved in the investigation by specific requests, the
11 prosecution -- the defense can direct the prosecution to check
12 with NASA. That is found at -- that principle is articulated
13 in United States v. Williams at 50 MJ 436, a C.A.A.F. case
14 from 1989.

15 The reason why I go through this review of the law of
16 overbreadth is that overbreadth is not really a defense for
17 the prosecution, because as the military commission pointed
18 out, no request, general request or specific request, they
19 still have responsibility to produce all information to the
20 defense that is material and favorable to the defense.

21 The specificity of the requests helps focus -- I
22 mean, as an actual, like, tactical, on-the-ground litigation
23 matter, helps focus the prosecution on to what they should be

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 looking for, and it helps focus the military judge as to what
2 the defense is asking for. If I came in and asked, "Judge,
3 please compel all exculpatory and material evidence," you
4 would probably say, "Sure. Prosecution, don't you have to
5 turn over all material and favorable evidence to the
6 defenses?" The prosecution would say yes, and then we would
7 move on without having made any actual progress in getting the
8 flow of discovery from the prosecution to the defense.

9 The specificness of the request and the reason why
10 112 is different from 114 is different from 286 is because it
11 let's us have bite-sized chunks -- even when there is fairly
12 large chunks in this case -- bite-sized chunks of discovery
13 that we can talk about intelligently.

14 One of the reasons why as a litigation matter I have
15 opposed consolidation is that it moves that question in the
16 wrong direction. It moves us from bite-sized chunks to trying
17 to make a general argument.

18 Now, on 19 February, over my objection, the
19 government argued parts of 397 and 112 in the 505(h), and the
20 government accused me of gesturing -- I quote here, "gesturing
21 toward a box and saying 'I want that.'"

22 So what I am going to do now is a deep dive on
23 AE 112K, L and M, and I have provided the parties and the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 military commission -- I gave three copies to the bench --
2 with documents which contain numbering -- I'm sorry, they are
3 AE 112K, L and M -- and they contain numbering of the
4 redactions, because one of the difficulties with the record
5 that we had was that I would refer to the redaction on page 1
6 and someone else would have to refer to the second redaction
7 on page 2.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: So what I would ask to do ----

10 MJ [COL POHL]: So we are going to substitute -- same
11 redactions, just they are now numbered rather than creating a
12 cumulative exhibit here, we will simply substitute this one
13 for the other.

14 LDC [MR. CONNELL]: Fine. Thank you very much. You beat
15 me to it, Your Honor.

16 MJ [COL POHL]: Let me ask you a question. You talked
17 about the judicial review under 505(f).

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

19 MJ [COL POHL]: Does that relate to nonclassified,
20 unclassified information?

21 LDC [MR. CONNELL]: No.

22 MJ [COL POHL]: Okay. And I'm not ----

23 LDC [MR. CONNELL]: Except if there is a claim under 506.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I shouldn't be so broad. There could be a 506 claim.

2 MJ [COL POHL]: I'm not going to do what I did before,
3 which is a mistake I made, which was going back and forth on
4 an individual argument. We will get back to this.

5 LDC [MR. CONNELL]: Sure.

6 MJ [COL POHL]: Is it your belief that the -- I am looking
7 at the 31 August memo, which is 112 ----

8 LDC [MR. CONNELL]: K.

9 MJ [COL POHL]: That's the one we talked about. Is it
10 your belief that all of redactions are because they are
11 cumulative and cumulative only? Although we don't know, I got
12 that.

13 LDC [MR. CONNELL]: I believe the government has not
14 articulated what its basis is. That's one of the points that
15 I was making earlier.

16 MJ [COL POHL]: But if it were unclassified discovery,
17 could ----

18 LDC [MR. CONNELL]: Meaning if under the redactions it was
19 unclassified.

20 MJ [COL POHL]: Unclassified, do you see a judicial role
21 in that absent a -- a difference between a general rule and a
22 specific rule?

23 LDC [MR. CONNELL]: On the front end, so the ordinary

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 process of discovery, the government produces some things
2 voluntarily, right, sometimes with redactions, sometimes not.
3 My view is, which is AE 161, if the government wants to
4 withhold information which would otherwise be discoverable in
5 an unclassified document, it needs to go through the 506
6 process. But what I understand you to be saying is where
7 there is no claim of government information privilege, right?

8 MJ [COL POHL]: Yes.

9 LDC [MR. CONNELL]: For the sake of your hypothetical.

10 MJ [COL POHL]: Yes. They are not -- they are simply
11 saying it's nonresponsive, for example, or it's cumulative,
12 it's cumulative or nonresponsive, unclassified evidence.

13 LDC [MR. CONNELL]: All right. See, those are
14 analytically distinct, I think, but let me -- I want to
15 actually answer your question which is ----

16 MJ [COL POHL]: They are not 505 or 506.

17 LDC [MR. CONNELL]: They are not 505 or 506. The
18 government produces information. That doesn't go through you.
19 Okay? The government produces, say, a flight manifest. That
20 doesn't go through you. That's ordinary unclassified
21 discovery between the parties, you don't get involved.

22 MJ [COL POHL]: What if there were redactions under that
23 unclassified flight manifest?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: If the redactions are -- let's say it
2 is for a flight that has nothing to do with this case
3 whatsoever, okay? There are a lot of flights involved in this
4 case, not just the ones involved on 11 September 2001. There
5 are a lot of other flights where Mr. al Baluchi allegedly flew
6 from Kuwait City to Karachi or whatever.

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: If they are withholding otherwise
9 discoverable information, that requires a claim of government
10 informational privilege in the 506 process.

11 If, on the other hand, which is somewhat like the
12 example used before, it's really a tear line issue where
13 flight -- one half of the document is relevant to this case
14 and the other half of the document is, you know, just about
15 some other case that has nothing to do with this whatsoever,
16 in that situation that would not be a claim of government
17 information privilege, that would be a government deciding
18 that its not -- it doesn't fall within the realm of 701, in
19 that situation not really Brady.

20 So how would, in that wholly unclassified situation
21 where there is no claim of government information privilege,
22 if the defense believes that the redactions are wrong or that
23 the government has withheld information, say it withheld

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 page 13 of a document and gave us 1 through 12 and 14 through
2 20, then we can ask the judge on a motion to compel to review
3 the information. If we make a good enough argument to
4 convince the military judge that something should be looked
5 at, then the in camera review process, the nonclassified
6 in camera review process where the military commission --
7 where the government could produce something, that is what
8 happened in the 108 series, for example.

9 In the 108 series there was a debate about whether
10 something was producible from the prosecution to the defense,
11 and the military commission thought the defense had a
12 colorable argument, took the information under -- accepted the
13 information in camera and said, "these documents I am
14 providing to the defense, these documents I am not providing
15 to the defenses."

16 In the unclassified nongovernment information
17 privilege scenario, that is the only role for judicial review.
18 Does that answer your question?

19 MJ [COL POHL]: Yes.

20 LDC [MR. CONNELL]: In the classified situation, however,
21 when the government wishes to make, withhold or redact; that
22 is, delete, information that is otherwise discoverable, so we
23 are not talking about the situation where it simply has

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 nothing to do with the case whatsoever, the -- you know it's
2 about South Africa, the -- in that situation, if they wish to
3 delete or withhold information, on whatever basis, including
4 that it is cumulative with other information, there is a
5 front-loaded role for judicial review. And that's what's
6 provided in 949p-4, that's what's provided in 505(f), which is
7 that when the government wishes to withhold information on
8 cumulation basis or whatever, they have to go through the
9 judge, and the reason for that is that the standard is
10 different. And it is a standard because they are asserting a
11 privilege, and in order to successfully assert that
12 privilege -- without having other sanctions, I mean -- there
13 has to be a judicial finding that the withholding redaction,
14 substitution or summary would let the defense make essentially
15 the same defense as it would otherwise. And that's what the
16 Sedaghaty case says, is that there is a cumulative analysis
17 that takes place within that 505 analysis.

18 So if the government wants to assert its privilege,
19 it has to do so in front of a judge. That's not unique to
20 this situation, right? 505(f) has implemented United States
21 v. Yunis, but that's true across the board. If any party
22 wishes to make a claim of privilege, ordinarily they have to
23 submit that to judicial review. If you are in a deposition

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 where there is not even a judge there, I mean, a civil
2 deposition where there is not even a judge, and one of the
3 parties says, "I assert my privilege against
4 self-incrimination, I take the Fifth," then what often happens
5 is they get on the phone with with the magistrate and the
6 magistrates makes a decision, has to answer or doesn't have to
7 answer. Claims of privilege are ordinarily subject to
8 judicial review. That's the same for classification
9 privilege, as attorney-client privilege, self-incrimination
10 privilege or the basis for that informer's privilege.

11 Informer's privilege under Roviaro, which forms the
12 basis for Reynolds, always involves judicial review of the
13 claim of privilege.

14 So let us begin with AE 112K. May I have the
15 document camera, please.

16 MJ [COL POHL]: Sure.

17 LDC [MR. CONNELL]: There are some redactions that take
18 place again and again in this document, which is a memorandum
19 for John Rizzo, the acting general counsel of the CIA, dated
20 August 31, 2006 immediately before the transfer of the
21 defendants from CIA custody to Guantanamo Bay. So I want to
22 talk about the document as a whole a little bit and then I
23 will do the eaches.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 This memo regarding the Detainee Treatment Act, which
2 had just been passed in 2005, uses the Fifth Amendment shocks
3 the conscious test. It says that the ultimate inquiry is
4 whether conditions amount to punishment which occurs where the
5 hardships associated with a particular condition or set of
6 conditions are out of proportion to a legitimate governmental
7 interest. Interesting to see them weigh in on our questions
8 that we have been debating this week, but that's a separate
9 thing.

10 Now, what did the SSCI say about this document? The
11 SSCI, in the redacted executive summary of the torture report
12 at pages 429 to 430, wrote that "The OLC," the Office of Legal
13 Counsel, "relied on the CIA's representations related to
14 conditions of confinement for its analysis. The OLC wrote
15 that 'underlying our analysis of all these methods [conditions
16 of confinement] is our understanding that the CIA provides
17 regular and thorough medical and psychological care to the
18 detainees in its custody.' As detailed in this summary, the
19 lack of emergency medical care for CIA detainees was a
20 significant challenge for the CIA." That's going to become
21 important as we go through the document.

22 There is some information that is redacted multiple
23 times and I don't want to flag those up front before we get to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the eaches. One of them is the so-called Effectiveness Memo,
2 which is also cited in AE 112M. The second is the name of
3 [REDACTED] is sometimes redacted and sometimes not, both in
4 this and in 112M.

5 So let's look at redaction number 1 in AE 112K.
6 Redaction number 1 is the classification block, I believe.
7 And I want to be 100 percent clear. I have never had access
8 to the information underneath these redactions. I am giving
9 my best guess because I was accused of simply waving at blocks
10 and saying I want that, and if the line by line is necessary,
11 then I want to give the military commission the line by line.

12 The classification block is important because when we
13 receive a classified version of this, we need to know how to
14 mark it for classification.

15 MJ [COL POHL]: When you get the classified version,
16 wouldn't those markings already be on that?

17 LDC [MR. CONNELL]: Not if they were redacted. It's kind
18 of classified ----

19 MJ [COL POHL]: You would say if we got the classified
20 version of this, we would have to know how to handle that?

21 LDC [MR. CONNELL]: The banner markings? The classified
22 block is more because it gives us the declass date. We have
23 to pass through the declass date on our own classification

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 block as I have recently been reminded by the staff of the
2 trial judiciary in my pleadings. And I need to have the
3 declass date. I don't get to set that declass date if it has
4 already been set by the classification authority.

5 MJ [COL POHL]: Got it.

6 LDC [MR. CONNELL]: We need the pass through.

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: In redaction number 2, which is one
9 that the government referred to in its argument, I believe
10 that this refers -- this redaction refers to the legal
11 authorities granted to the CIA for the program, which is also
12 specifically requested in our supplement -- our supplemental
13 requests in AE 112, which is itself classified and I am not
14 going to discuss about that anymore.

15 But this might also be, I think, the factual basis
16 for the OLC's assumption that following this later in the
17 paragraph that the CIA has a sound basis for determining that
18 each detainee it's holding in the program is an enemy
19 combatant covered by terms of, something else redacted,
20 throughout his detention. So it appears this redaction
21 relates to the information after it.

22 Redaction number 3 tells us something important. It
23 tells us in 2006, just before the transfer of these men from

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the CIA to Guantanamo, what defined enemy combatant.

2 Redaction number 4 is the job title and the name of
3 the author of the Effectiveness Memorandum that I mentioned
4 earlier. The SSCI redacted executive summary describes a
5 document in which the job title of Principal Deputy Assistant
6 Attorney General in the Office of Legal Counsel match up,
7 which is why we suspect, but don't know, that this is
8 [REDACTED].

9 [REDACTED] is extremely important and whether this
10 is him or not is extremely important because in the
11 overlapping circles of who knew what was actually going on in
12 black sites and who knew what representations were being made
13 to other elements within the government, [REDACTED] sits
14 directly in that circle. I believe that [REDACTED] is the
15 person to whom Senator Feinstein said when she said that one
16 person's name was referred to over 1600 times in the redacted
17 portion of the SSCI report.

18 The redaction number 5 in footnote number 2 suggests
19 detainees that are not enemy combatants under the Laws of
20 Armed Conflict -- excuse me, suggests that detainees who were
21 not enemy combatants under the Laws of Armed Conflict were in
22 CIA custody at some earlier point in time which would require
23 separate legal authority, if such legal authority exists.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 With respect to redaction 6, this is again the job
2 title and the name of the author of the Effectiveness Memo.

3 With respect to redaction 7, this is the author of an
4 important document known as "Briefing Notes," probably, I
5 suggest, [REDACTED], because the prosecution did not redact this
6 information elsewhere. This is an example of something that
7 the prosecution might claim is redundant -- excuse me,
8 cumulative, because they didn't redact similar information
9 earlier, in another place.

10 But putting this in context of where it actually
11 occurs in this memorandum conveying important information on
12 the eve of transfer is important to understand who actually
13 said what to whom.

14 With respect to redaction number 8, the synergistic
15 effect that is described here is important because it
16 describes the ways in which the program has had a crucial
17 synergistic effect on other intelligence resources. That's
18 important because of its comparison to other documents. In
19 one of the 2005 OLC memos, they describe it as differently.
20 "This program has been virtually indispensable to the task of
21 deriving actual intelligence from other forms of collection."

22 Exactly what -- how important this RDI program was is
23 one of the things which is controverted in the SSCI report,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 something that's one of the conclusions that the prosecution
2 has not stipulated to, and that is many of these OLC reports
3 rely on, like the Effectiveness Memo, this torture or these
4 forms of interrogation are so important that we have to take
5 these -- we have to undertake these actions no matter what
6 other problems there may be.

7 With respect to redaction number 9, I believe that
8 the redaction portion refers to unusually strict internal
9 scrutiny because it follows -- because of what follows in the
10 preceding sentence. However, it might have something about
11 other purposes for conditions of confinement, like
12 interrogation, or it may have something to do with detainees
13 who no longer have significant intelligence value but
14 nevertheless meet the standards for detention.

15 There is something -- one of the reasons why this
16 document is important for some of the reasons which are
17 articulated in Kyles v. Whitely is because of its lack of
18 internal complementarity. The part 1 of this document and
19 part 3 of the document essentially follow a structure, which
20 is, number 1, detainees are dangerous; number 2, other
21 purposes for conditions of confinement; number 3, detainees
22 who no longer have significant intelligence value but
23 nevertheless meet the standards for detention; and number 4,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 these facilities are special.

2 This document, part 1, where we are talking about
3 right here, does not present facts on items 2 and 3, the other
4 purposes and the detainees who no longer have significant
5 intelligence value, this is the so-called warehousing problem,
6 but unless it's under one of these redactions.

7 So the fact what's under this redaction is important
8 not just for the redaction itself, but for the overall
9 structure. One thing that's important is you will see here to
10 demonstrate this lack of internal complementarity, the
11 paragraph in part 3 refers -- referring to those parts that I
12 just described, refers to part 3(D) of the memorandum but
13 there is no part 3(D) of the memorandum.

14 With respect to ----

15 MJ [COL POHL]: Mr. Connell, I think I got a flavor of
16 what you are doing in this. Did you feel because the
17 government's comment about boxes that you needed to go through
18 all 72?

19 LDC [MR. CONNELL]: Sir, I am prepared to go through all
20 150 on all three documents.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: The government, when I made -- when I
23 discussed this document, the government said, "Oh, look at

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 redaction number 2." Excuse me. It is actually a different
2 one. Give me just one second. Actually the government was
3 referring to in AE 112K redaction number 11, which I was about
4 to get to, and redaction number 11 is a reference to how, in
5 what way, the detainees eyes are covered, what kind of opaque
6 material.

7 CP [BG MARTINS]: Your Honor, I object. I think we spoke
8 about this in the 505(h). I thought that's where that
9 discussion should remain because we wound up discussing, so
10 objection. I'm concerned about the nature of the discussion.

11 MJ [COL POHL]: Okay. Let's not ----

12 LDC [MR. CONNELL]: I don't understand the objection. I'd
13 like to respond, but I don't understand it.

14 MJ [COL POHL]: Well, okay.

15 CP [BG MARTINS]: He is restating me and I said something
16 in a classified forum. Objection to the form of the argument.
17 If he is talking about what he wants to ----

18 LDC [MR. CONNELL]: A classified statement that the
19 government referred to this redaction? That's not classified.

20 MJ [COL POHL]: What I am gathering is he is taking your
21 argument to refer to something that he said in the 505(h)
22 hearing.

23 LDC [MR. CONNELL]: All right. Well, I'm not -- other

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 than the fact that the government chose this particular
2 redaction, redaction number 11 ----

3 MJ [COL POHL]: Let's -- let's -- okay. Let's just move
4 on to the source of it. You want to discuss about 11 that we
5 discussed in the open session last week, you can.

6 LDC [MR. CONNELL]: Sure.

7 MJ [COL POHL]: I mean, the government, you know,
8 emphasized on number 2, they spent a lot of time on, and then
9 we go around and around about what I can see and what I can't
10 see.

11 LDC [MR. CONNELL]: Right. And I'm quitting there.

12 MJ [COL POHL]: Okay. If we need to, I will give you an
13 opportunity to go through all 150 after I hear from the
14 government, but I don't really think I need to hear that right
15 now. I understand your point.

16 LDC [MR. CONNELL]: Right.

17 MJ [COL POHL]: Your point made. If you had to, you would
18 have a justification for each one of these specifically more
19 so than specifically the ----

20 LDC [MR. CONNELL]: Right. And this was about 20 hours of
21 work, and I'm not saying that -- but I want to say is that by
22 April I can do all 72 documents. We can probably do all
23 10,000 redactions. So there are important justifications for

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 why we need the information that's under redaction.

2 MJ [COL POHL]: You mean -- by April, you mean if you talk
3 from now until April?

4 LDC [MR. CONNELL]: Perhaps, sir. But my point is that if
5 we need to do the eaches, I will do the eaches.

6 MJ [COL POHL]: Okay. You're prepared to do the eaches.
7 You made your point.

8 LDC [MR. CONNELL]: Okay.

9 MJ [COL POHL]: Anything further?

10 LDC [MR. CONNELL]: I have nothing further.

11 MJ [COL POHL]: Any other defense counsel wish to be heard
12 on this particular issue? I see no response, so I will take
13 that as no.

14 Okay. Trial Counsel?

15 LDC [MS. BORMANN]: Judge, I do want to reserve rebuttal
16 here.

17 MJ [COL POHL]: I will give you an opportunity after we
18 hear what the government has to say and you will be permitted
19 to rebut.

20 General Martins.

21 CP [BG MARTINS]: Your Honor, the government is
22 considering 112 within its motion for a consolidated approach
23 to discovery and a seeking of an order that helps -- helps us

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 move this forward.

2 The need for the consolidation is reflected in the
3 multiple requests by Mr. Connell for the same types of
4 information. They are duplicative requests, there are
5 requests -- and I will talk about what we know by
6 overbreadth -- requests that aren't clearly anchored to an
7 issue in the case. We are trying our best to figure out what
8 the issues are in the case and believe we are entitled to get
9 those in order to carry out our discovery obligations.

10 I do want to respond to Sedaghaty, the Ninth Circuit
11 case that Mr. Connell believes is helpful here, and I just
12 want to point out a couple of things about it because he seems
13 to be relying on it so heavily. So this is the Ninth Circuit
14 case, 2013, 728 F.3d at 885, and I have looked through it. It
15 is a CIPA case, but it simply does not stand for the
16 proposition that the government doesn't do a cumulativeness
17 analysis. It does, importantly, if I can project on the --
18 I'm using just case law here, this is the counsel's own case.
19 I would like to just show two pieces of it. It is a case
20 about the adequacy of a substitute.

21 So this is a substitute the government gave to the
22 judge with the original, and importantly it has some in there
23 that substitute -- the underlying portion on the left need not

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 be of precise concrete equivalence and the fact that its the
2 insignificant tactical advantages can accrue to the defendant
3 by the use of the specified classified information should not
4 preclude the court from ordering alternative disclosure. That
5 is an important principle here that Sedaghaty confirms. It is
6 coming from Moussaoui and Rezaq, Fourth Circuit cases that are
7 important -- or Moussaoui, a Fourth Circuit case, and Rezaq, a
8 D.C. Circuit case, our reviewing court, for this idea of
9 information being what the accused is entitled to, not the
10 specific document, once we have a classified information
11 privilege that is invoked. Importantly also, it was found by
12 the Sedaghaty court, the Ninth Circuit, that the substitute
13 was not adequate and omitted key facts helpful to set his
14 defense. So nothing in here about the proposition he cites it
15 for, appears to cite it for, and that he focused a big portion
16 of his analysis on in his oral argument that the government
17 doesn't do a cumulativeness analysis.

18 MJ [COL POHL]: Let me ask you this, General Martins.
19 What is the basis for these redactions?

20 CP [BG MARTINS]: These are documents that were redacted
21 based on a FOIA process, about Freedom of Information Act.
22 These are things that are now, in a redacted form,
23 unclassified. We have either pointed the defense toward them

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 or in some cases turned them over because portions of them
2 appear to fit the material to the preparation of the defense
3 standard in Rule for Military Commissions 701(c)(3) as those
4 documents are well known that the government doesn't have to
5 produce discovery or create new products to produce in
6 defense, but these are documents that we think at least meet
7 the material to the preparation of the defense.

8 MJ [COL POHL]: I didn't ask you what you gave them. I
9 asked you -- and I didn't ask you how the redactions came
10 about. I asked you what is your basis for the redactions in
11 this criminal trial?

12 CP [BG MARTINS]: Well, we didn't make those redactions.
13 These are documents that are in the possession, custody and
14 control of the government even as they are also in the public
15 domain, so they fit that part of 701(c)(3). There are a whole
16 bunch of reasons there are black marks on those unclassified
17 versions and we could walk through those and try to uncover
18 the FOIA reasons why those black marks appear, but there are
19 documents that fit the 701(c)(3) standard and we are turning
20 them over. I have actually -- Mr. Connell, to his great
21 credit, provided me these numbered redactions that he was
22 interested in, and I actually do think there is some value in
23 the eaches because we sort of come to better understand his

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 theory of materiality and relevance, and I have gone through
2 them.

3 We do have the original and I have looked at them and
4 I believe that's how the process is intended to work. I have
5 confirmed that either what's redacted is not relevant to any
6 discernible issue. Now, he is asking for the specific
7 document. He has given us some specifics. That's helpful.
8 It's going to cause us to take a closer look at what may be
9 interesting him. We can't walk through thousands of
10 redactions, necessarily, on every document, but it causes us
11 to look at that more carefully. It's either not relevant or
12 it's -- we don't see that it bears upon any issue in the case
13 if there is some -- some dialogue that gives us a better idea
14 of what he is looking for.

15 For instance, today I am hearing that he is very
16 interested in, as he put it, who said -- said this to whom,
17 not specifically what was said, and in what language it was
18 described. I'm still looking at it and trying to understand
19 if -- does it make something more outrageous, is it more --
20 more pertinent to his argument related to outrageousness, is
21 it a mitigation question.

22 MJ [COL POHL]: Okay. We had this discussion the other
23 day about judicial review. And after some back and forth, it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 appeared the government's position is that if it's classified
2 evidence, judicial review is warranted through the 505
3 procedure. Is that accurate?

4 CP [BG MARTINS]: If it's -- if it's relevant.

5 MJ [COL POHL]: Okay.

6 CP [BG MARTINS]: It has to be otherwise discoverable.

7 MJ [COL POHL]: Okay. What I am trying to get to here is
8 that there's redactions to these documents. There is no basis
9 for the redactions. So I don't know, defense doesn't know.
10 We don't know whether the basis is cumulative, nonresponsive,
11 it's classified and the government -- the defense hasn't made
12 a sufficient showing for disclosure or anything.

13 CP [BG MARTINS]: Your Honor, it cannot be that the
14 obligation is for us to give an itemized description of every
15 blacked-out portion of every document in the possession,
16 custody and control of the government. That just can't be the
17 standard, and it can't be the standard ----

18 MJ [COL POHL]: We are not talking about -- I understand
19 what you are saying. And let's talk about unclassified stuff
20 because I think that's an easier box than the classified
21 stuff.

22 If it's unclassified, okay, on a particular document,
23 I'm not talking about every document, I'm not talking ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: What's the "it's," Your Honor?

2 MJ [COL POHL]: If you propose a redacted version and the
3 redactions are unclassified. Okay?

4 CP [BG MARTINS]: Who am I proposing this to? Your Honor,
5 is this something I am turning over? I am just trying to get
6 the scenario.

7 MJ [COL POHL]: You have handed -- we will take the Rizzo
8 memo. Let's assume everything underneath the blacked-out
9 portion is unclassified.

10 CP [BG MARTINS]: That's the assumption.

11 MJ [COL POHL]: That's an assumption. Okay. I don't know
12 whether it is or it isn't because you choose not to share
13 that. Okay. That's fine. Then it's your position if it is
14 all classified redactions, that the government -- the
15 government has no obligation for any judicial review of those
16 redactions?

17 CP [BG MARTINS]: Your Honor, if the document as redacted
18 is unclassified?

19 MJ [COL POHL]: Right.

20 CP [BG MARTINS]: If the document ----

21 MJ [COL POHL]: No, no, no. I'm sorry, not the document
22 as redacted, the redactions are all unclassified. Every
23 redaction is unclassified. That's what I'm talking about.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 You provide ----

2 CP [BG MARTINS]: Every redaction.

3 MJ [COL POHL]: So there is no issue about classified.

4 The defense says we want to know about the unclassified
5 redaction, why you did that. Okay. There is no judicial role
6 in that.

7 CP [BG MARTINS]: I mean, we have to be invoking some kind
8 of privilege. I agree with Mr. Connell that you may have a
9 Roviaro government-informant privilege behind those so it can
10 be unclassified, but it could be another type of privilege
11 that gets the same -- I think a lot of the same treatment by
12 the courts.

13 MJ [COL POHL]: But let's assume it's not 505, not 506.

14 CP [BG MARTINS]: Right.

15 MJ [COL POHL]: There is no privilege involved, it's
16 simply the government provided redacted unclassified -- okay.
17 The redactions are unclassified, no invocation of privilege.
18 Is it your position that there is no judicial review for that
19 even with a specific differences request for a particular
20 document to be reviewed?

21 CP [BG MARTINS]: And the hypothetical is we have not
22 turned over ----

23 MJ [COL POHL]: Let me go slowly here. You have turned

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 over a document. The entire contents of the unredacted
2 document is unclassified and there is no privilege
3 invoked ----

4 CP [BG MARTINS]: If it's material.

5 MJ [COL POHL]: And -- and -- and -- let me finish. And
6 all the redactions are also unclassified, you have made a
7 decision that the redactions are not material to the
8 preparation of the defense, and that's why they were not
9 provided ----

10 CP [BG MARTINS]: For that category of redaction, if we
11 are redacting it in that category, it would be because it's
12 not material to the preparation of the defense.

13 MJ [COL POHL]: Got it. Okay. Good. We're making
14 progress here. At least we are understanding each other. If
15 the defenses comes with that particular document and says,
16 "Your Honor, we think there is material under there that may
17 be material to the preparation of the defense, we want to do
18 an in camera review" -- on a specific document; I am not
19 talking about every document, but on a specific document --
20 the government position is such review is not authorized?

21 CP [BG MARTINS]: I think that the commission has the
22 authority to direct that, to seek an in camera review of that.
23 And I think the rules contemplate you are going to possibly

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 know more about materiality.

2 MJ [COL POHL]: Uh-huh.

3 CP [BG MARTINS]: So I think in that case the commission
4 could be reviewing those in camera, that specific document.

5 MJ [COL POHL]: Okay. Now, this document that if it is
6 now -- I will change my hypothetical -- that the redactions
7 are classified, I am not doing 506, I am strictly doing 505,
8 and the government has decided that these are not, under the
9 505 standard, helpful under Yunis -- which I'm assuming is the
10 standard you would apply, correct?

11 CP [BG MARTINS]: Yes.

12 MJ [COL POHL]: Okay. You can redact those sua sponte
13 with no judicial review?

14 CP [BG MARTINS]: Not helpful. They're not helpful.

15 MJ [COL POHL]: You make the determination it doesn't meet
16 arguably the different discovery standard under 505.

17 CP [BG MARTINS]: Let me clarify here. Actually, and
18 these are good examples, these memos -- because in having
19 given them to me I went and looked at the original, if there
20 is anything in there that is information in the Rezaq and
21 Moussaoui, now Sedaghaty example, it's information that is
22 helpful and it's unique in that document, we would be -- we
23 wouldn't redact, we wouldn't seek a substitute, we would be --

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 well, if it implicates classified information, we would seek a
2 sub. We would not make that call on our own if it is unique.
3 And, in fact, if we are turning it over to cleared counsel, in
4 some circumstances we are not even asking for a substitute, we
5 are providing it.

6 So at that point, I mean, we are looking and
7 seeing -- because we have been structuring it around the ten
8 categories, if it is talking about conditions of detention,
9 are we providing that exact information somewhere else, that's
10 important. We are not going to try to get new classification
11 reviews of hundreds of thousands of pages of documents that
12 have redactions and that are not portion-marked and so forth,
13 so that's an important piece. We are looking to see is there
14 something unique in there that's nowhere else. If it is, then
15 this becomes something that we have to figure out how to get a
16 substitute. We don't do that on our own ----

17 MJ [COL POHL]: Okay.

18 CP [BG MARTINS]: ---- if we invoke the privilege and
19 don't want to turn it over to difference counsel or if we
20 anticipate this is something counsel is going to want to show
21 to the accused, because then we have got to figure out is
22 there a way to do this that could be made into
23 Unclassified/FOUO.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: On these documents, the government has not
2 invoked any privilege on it?

3 CP [BG MARTINS]: They all -- well, they're all ----

4 MJ [COL POHL]: Is that correct?

5 CP [BG MARTINS]: They are all TS/SCI in their unredacted
6 form, so we are. I mean, we are not -- we do, and we have a
7 qualifying declaration that to ----

8 MJ [COL POHL]: Okay. For the redactions.

9 CP [BG MARTINS]: ---- to disclose this in the discovery
10 process, which is subject to your protective order, that that
11 would be harmful to national security to turn it over.

12 MJ [COL POHL]: So what I am saying is ----

13 CP [BG MARTINS]: The original we have a problem with it.
14 The unclassified ----

15 MJ [COL POHL]: Right, the unclassified you are not.

16 CP [BG MARTINS]: ---- and we believe parts of it are
17 material to the preparation of the defense and we don't have
18 any privilege on any other parts of the unclassified version,
19 so we turn that over, straight over.

20 MJ [COL POHL]: And then just so I am clear here, some of
21 the blacked-out material is not classified; is that correct?
22 But it's not material to the preparation.

23 CP [BG MARTINS]: Right. Right.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: See, the difficulty I am having here, I
2 think everybody is having here, is -- and I know there is at
3 least 72 eaches on at least one of the documents -- is, nobody
4 knows except the government why the redactions are there.
5 Nobody but the government knows whether it's classified or
6 unclassified. Nobody knows that regardless of the
7 classification why it was not given out.

8 Now, would it be fair to say that if it was -- met
9 the Yunis standard and was classified, that you would have to
10 provide some type of adequate substitute?

11 CP [BG MARTINS]: And we would -- if it were
12 noncumulative, relevant and helpful, we would be needing to
13 have you see it and approve it.

14 MJ [COL POHL]: Okay.

15 CP [BG MARTINS]: We will not make those decisions
16 unilaterally. But the cumulateness that's in Section 4 --
17 Mr. Connell, you know, focused on Section 4 of CIPA and
18 505(f) -- you do make a noncumulative, relevant, helpful
19 determination if you are going to order the government to turn
20 over classified information, that's the trigger for you to be
21 able to do that, subject to any sanctions if we refuse. That
22 doesn't mean we don't make cumulateness determinations, and
23 we are trying to do them in good faith. Knowing what he is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 focused on is helpful, and the fact that we make decisions
2 within our purview is something that's happening every day;
3 every prosecutor does all the time. That's the way the system
4 works.

5 MJ [COL POHL]: And, again, I am just trying to understand
6 the government's position here. Now, the other day I believed
7 I heard from the defense that the cumulative analysis does not
8 apply to Brady material. Perhaps I misheard that, but I
9 believe I had heard that. Do you agree with that?

10 CP [BG MARTINS]: I mean ----

11 MJ [COL POHL]: Yunis talks about noncumulative.

12 CP [BG MARTINS]: There is a little bit of circularity
13 there. If something is equally favorable to the defense, I
14 mean, if you have 16 identical copies that happen to be in
15 different government files, I mean identical in every respect,
16 if there is some particularized reason why it being in a
17 certain position is a key piece of favorable information, then
18 I could see that meaning that cumulateness doesn't have a
19 bearing on Brady. But at some level, cumulateness is
20 important. Kyles v. Whitley is not a CIPA case and we
21 understand the principles for which it stands.

22 Your Honor, the other aspect is if it's really the
23 case that we have to show you every cumulative document, we

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 are specifically going against the purpose of the Classified
2 Information Procedures Act, which is to prevent a type of gray
3 mail -- I'm not impugning anybody's motives here -- but it
4 can't be that we let a large number of people rummage through
5 all the classified documents looking for clues of who said
6 what to whom, when and where. It's possible those things
7 become relevant. Perhaps we can stipulate to aspects of that
8 that can then protect the information while giving the accused
9 what he wants, and that's -- we believe it's necessary for the
10 judge to take that into consideration in order to protect the
11 information.

12 MJ [COL POHL]: Just to be clear that the classified
13 information that has been withheld here, the government does
14 not believe it meets the Yunis standard; that's why they have
15 submitted it for no judicial review, correct?

16 CP [BG MARTINS]: To be clear, we have not given you large
17 amounts of conditions of confinement, policy information in
18 the areas of the Echo paragraph, SOPs, guidelines, policies,
19 requests. Well, we actually have provided some of the
20 requests for so-called enhanced interrogation techniques and
21 approvals. There are materials that are coming that are the
22 basis on which we believe redactions here are cumulative. And
23 so again, we have to look at it holistically. We have to look

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 at this in order to protect the information we have got to
2 look and see it all and say we don't need to turn over this or
3 that document that has other bits in it that are either
4 irrelevant or are classified.

5 MJ [COL POHL]: I understand that. I understand that.
6 But you keep saying that -- you keep coming back to the word
7 "cumulative." Okay? And my simple question is, is you
8 understand the responsibilities under Brady ----

9 CP [BG MARTINS]: Yes, absolutely.

10 MJ [COL POHL]: ---- as relates to classified information?

11 CP [BG MARTINS]: Yes.

12 MJ [COL POHL]: And you are representing to me that none
13 of the blacked-out information in these three memos meets
14 either of those standards that would trigger judicial review?

15 CP [BG MARTINS]: Yes. And ----

16 MJ [COL POHL]: Not whether it's cumulative or not. I am
17 not asking you that.

18 CP [BG MARTINS]: Now, some of this material is coming
19 your way and you will see an original document that contains
20 very nearly the same thing, and then we are going to be giving
21 you a substitute. So we are going to be giving you that
22 opportunity to make sure that information is ----

23 MJ [COL POHL]: I've got that, but I am just talking about

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 these three that I have got in front of me now.

2 CP [BG MARTINS]: We have reviewed them with an eye toward
3 the other things that we are preparing -- you know, the
4 substitutes for you to look along side by side with the
5 originals, and in fact some of the memos themselves may be the
6 unique ones, although we have tried to look for a way to give
7 the document without having it go through you. If one of the
8 23 OLC memos contains a unique bit, we have looked at it to
9 say have we seen that anywhere else, that description of that
10 detention, because OLC memos are relying upon things the CIA
11 told lawyers in OLC.

12 So that's rare, but we found a couple of occasions
13 where something has been unique to those memos that bears upon
14 the accused and some discernible theory of relevance to this
15 case.

16 MJ [COL POHL]: Okay. In the memos, the redactions that
17 are not classified, okay, let me finish my question ----

18 CP [BG MARTINS]: Right.

19 MJ [COL POHL]: ---- in redactions that are not
20 classified, you have made a determination they are not
21 material to the preparation of the defense?

22 CP [BG MARTINS]: Yes.

23 MJ [COL POHL]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: Yes.

2 MJ [COL POHL]: Okay. Anything further?

3 CP [BG MARTINS]: No, Your Honor. Thank you.

4 MJ [COL POHL]: Thank you. We will take a 15-minute
5 recess and then I will hear from the defense. The commission
6 is in recess.

7 [The R.M.C. 803 session recessed at 1026, 23 February 2016.]

8 [END OF PAGE]

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23