[The R.M.C. 803 session was called to order at 1043, 23 February 2016.]

MJ [COL POHL]: The commission is called to order. All parties again appear to be present that were present when the commission recessed.

Mr. Connell, I will give you first shot on rebuttal argument and then if any other defense counsel wish to chime in, they may.

LDC [MR. CONNELL]: So the military commission asked the government a number of questions about the three documents that are in front of it, 112K, L and M, and I do want to stress that 112K, L and M are not representative of the responsive information to 112. It is ----

MJ [COL POHL]: It appears a lot of their response is, "go look at the FOIA website."

LDC [MR. CONNELL]: Yes, that is what their response is. And I don't think that we should substitute the judgment of a GS-12 CIA FOIA clerk for judicial review.

But on these particular documents, I think it's important to understand that this is the highest quality of discovery that the government has produced. These particular documents, 112K, L and M, have been through two rounds of review. In that second round of review across the three

1 documents, the government unredacted an additional 140 words.
2 They said that there are another 20 documents that they
3 reviewed and redacted -- unredacted no additional material.
4 They have invoked a classified information privilege.
5 I don't know whether it's still their position that they won't
6 produce these to the judge, but there has been a discussion of
7 something like an additional at least 52 responsive documents
8 to 112.
9 MJ [COL POHL]: Well, I'm assuming the government's
10 position, as I just heard it, was that there is no need for
11 judicial review because the documents don't meet the Yunis
12 standard. I thought that's what I heard.
13 LDC [MR. CONNELL]: Is that what you thought they said?
14 Because what I thought they said was that these documents in
15 their review do not contain, I wrote down the word, unique
16 information; I guess information that appears nowhere else.
17 MJ [COL POHL]: Well, we may be saying the same thing
18 because if you take the Yunis standard, it has the word
19 noncumulative.
20 LDC [MR. CONNELL]: Right.
21 MJ [COL POHL]: And I don't know that I want to go into a
22 long discussion about what cumulative is, but if you wish
23 to ----

1 LDC [MR. CONNELL]: You understand fully our position on
2 who makes that decision about cumulativeness. So the
3 government keeps talking about, you know, we have cited three
4 cases, Bismullah, Sedaghaty and Abu-Jihaad. And do any of
5 those cases absolutely say definitively that the government
6 has to conduct -- I mean, the military commission or the judge
7 has to conduct the review for cumulativeness? No. But they
8 are all cases in which the onus was put on the judge. In
9 Bismullah, the D.C. Circuit said there is a presumption of
10 need to know all information about the detainee unless the
11 government proves otherwise, right? Meaning judicial review.
12 MJ [COL POHL]: Wasn't Bismullah talking about the -- not
13 necessarily discovery, but talking about what information the
14 CSRT relied upon?
15 LDC [MR. CONNELL]: No. I mean, there was an element of
16 Bismullah that talked about that, but that particular part
17 was -- was when they were negotiating over the protective
18 order, and the question was, was the government going to be
19 able to make a need-to-know selection or are they going to
20 have to provide -- provide all information to the defense
21 unless they make a showing to a judge that information needs
22 to be protected. That's what that particular part of
23 Bismullah is about. I know there are multiple Bismullah

1 cases, but the --
2 Sedaghaty talks about a determination of
3 cumulativeness as part of the CIPA review. Abu-Jihaad is a
4 review -- it goes the other way, it finds against the defense.
5 Abu-Jihaad is a review of a judicial determination that
6 information was cumulative. So the starting point on this
7 cumulative question, which in the government's view appears to
8 be like the central question, not is it favorable to the
9 defense, is it cumulative, the beginning point is who makes
10 that decision, and that's the judge. 505 says it, existing
11 case law says it. Nothing from the government has no textual
12 basis for its claim that it can unilaterally make its
13 decision. In fact, at one point it retreated from that.
14 The government said, quote, "We will not make these
15 decisions alone." I thought for a moment it was coming
16 around, but then it backed off that decision. But here is the
17 important part the government has given -- described both ends
18 of a standard. The standard that the government is applying,
19 it just told us, is whether information is unique in a
20 document; that is, unique, appears nowhere else. Its other
21 example -- its example of cumulative is 16 copies of the same
22 document. There is an enormous amount of space between those
23 two poles. But even taking the government's uniqueness

1 standard, which finds no support whatsoever anywhere in the
2 case law or in the statute, the fact that on August 31, 2006,
3 Mr. Bradbury wrote to Mr. Rizzo -- I am referring here to
4 AE 112K, redaction 24 -- that "the CIA detainees are held in"
5 something is itself unique. The -- I talked at great length
6 on Thursday about the importance of distribution channels. I
7 talked at some length today about the importance of who says
8 what to whom. The government is acting as if we want to say
9 what is underneath this redaction 24, that "the CIA detainees
10 are held in" blank, as if we are interested in what -- in the
11 truth of that information. Like let's say that it says -- I
12 mean, I'm not going to speculate what it says, but it says
13 something are held in lovely conditions that are equivalent to
14 a five-star hotel as if we want to say the truth of that, and
15 that's what -- the importance of these documents, the whole
16 thrust of AE 112 is that we are relying on the falsity of this
17 information. We are seeking the falsity of the information,
18 not its truth.
19 Ultimately, one day there is going to be a panel of
20 military members sitting over there and I am going to want to
21 say to them that this document and 75 others like it, I will
22 say to them, are lies to protect liars. The falsity of this
23 information, not its truth, is what is important. And that is

1 why we have talked about outrageous government conduct, which
2 the government has conceded; it's why we have talked about the
3 government -- the precedential claim of authority to be able
4 to torture people extrastatutorily. That's why the importance
5 is the information that the CIA provided to the OLC. That's
6 the whole thrust of 112 is not that they are unique little
7 factoids that will shed light on the truth of what happened,
8 it's more in their falsity, and that is exactly what Brady is
9 about.
10 In Kyles v. Whitley, I just want to remind you the
11 three examples that the Supreme Court for why these documents
12 and recordings, which had to be produced in Kyles, the three
13 were to doubt the good faith of the government,
14 inconsistencies between documents, and a remarkably uncritical
15 attitude on behalf of the recipient. Those are exactly what
16 we want to prove using these documents.
17 Now, the government seems to have started at the
18 wrong point. They seem to have started with redacted
19 documents and worked backwards, which substitutes the nine
20 FOIA exemptions for the judicial determination of whether the
21 information in this substituted form allows us to make the
22 same defense.
23 But in fact, the government just argued, and I quote

1 here, that they can't walk through thousands of redactions.
2 So I think there is a real question as to even to these, the
3 cream -- these three documents, the cream of its discovery
4 production, whether these 150 redactions got a detailed
5 review -- maybe they did -- but the thousands of other
6 redactions, apparently the government can't walk through them.
7 This could be a resourcing problem. I don't know.
8 If the prosecution needs more people, if the trial judiciary
9 needs more people, if the defense needs more people, somebody
10 at some level is going to have to deal with that. But the law
11 is that information which is favorable to the defense and
12 material to an issue is producible. If the government wants
13 to withhold it, it has to submit that judicial review. It
14 doesn't get any plainer than that.
15 MJ [COL POHL]: Does it have to initially meet a -- it
16 probably has, but just for the sake of this discussion -- and
17 again, I am going back to what I think the government is
18 saying, is that they do the initial screening and applying
19 whatever standard is applicable, whether it is classified or
20 unclassified, and they say if it doesn't meet that standard,
21 they are done.
22 LDC [MR. CONNELL]: The question ----
23 MJ [COL POHL]: Let me ask you this: Do you hear them

1 saying the same thing?

2 LDC [MR. CONNELL]: Yes, but they are applying the wrong
3 standard, because the question is the standards of -- in every
4 case, every prosecutor has to make a decision about looking at
5 a piece of information in context of all the other
6 information; is it favorable to the defense, is it material to
7 some issue, right? That happens in every case. There is
8 always an initial screening by the prosecutor. I am not --
9 nothing I have said disturbs any of that function. I am
10 trying to be faithful to the statutory scheme.

11 What they are saying, however, is they take it the
12 next step. They are -- the Yunis standard is the invocation
13 of a privilege not to produce classified information. It is
14 not is it favorable or is it material. The favorability and
15 materiality standard or the materiality of the preparation of
16 the defense under 701, the prosecution gets an initial cut on
17 that. If it wants to withhold it, some information, because
18 it is -- thinks it is cumulative and it thinks it falls under
19 949p and 505(f) and it is justified in deleting or withholding
20 information, that is the process that has to go through the
21 judge.

22 MJ [COL POHL]: On classified evidence.

23 LDC [MR. CONNELL]: On classified evidence, of course.

1 MJ [COL POHL]: The unclass -- okay. So if they -- and,
2 again, I am just trying to understand the parties, so their
3 belief that this doesn't meet the Yunis standard ----
4 LDC [MR. CONNELL]: Is subject to judicial review, yes.
5 MJ [COL POHL]: So under that analysis, it is I would
6 review all classified that they don't give to the defense
7 because they are saying it's ----
8 LDC [MR. CONNELL]: Cumulative.
9 MJ [COL POHL]: ---- cumulative or the other two prongs
10 that you said?
11 LDC [MR. CONNELL]: Not the other. That's the point of my
12 circle. If it is not helpful to the defense, then it
13 doesn't -- then that's the ordinary cut that a prosecutor
14 ordinarily makes.
15 MJ [COL POHL]: Okay. That's a variation of the Brady.
16 LDC [MR. CONNELL]: Correct, it's the variation of the
17 Brady argument. The reason I have that little quarter moon
18 there is there is a place where these two standards don't
19 overlap and that's where it's favorable to the defense but
20 cumulative; that's what's subject to judicial review.
21 MJ [COL POHL]: The Yunis standard you say only is -- a
22 judicial review is conducted on the cumulative prong, not the
23 other two? Is that what you just told me?

1 LDC [MR. CONNELL]: So for Brady evidence ----
2 MJ [COL POHL]: Non-Brady classified evidence.
3 LDC [MR. CONNELL]: Non-Brady classified evidence that
4 meets the standard in 701. Right, because otherwise why do
5 they have to produce it?
6 MJ [COL POHL]: That's the starting point.
7 LDC [MR. CONNELL]: Right.
8 MJ [COL POHL]: Assuming there is a delta between those
9 two standards.
10 LDC [MR. CONNELL]: Right. Which there is -- there is a
11 lot of raid evidence in this case, for example. That's the
12 delta between -- the raid evidence is a perfect example of the
13 delta between 701 and Brady. It is not necessarily favorable
14 to the defense.
15 MJ [COL POHL]: You keep saying Brady, but I keep coming
16 back to Yunis.
17 LDC [MR. CONNELL]: Okay. Here is the disconnect. The
18 language of the D.C. Circuit in Mejia, where Mejia said
19 information that satisfies Brady automatically satisfies Yunis
20 because if something is favorable to the defense, then it is
21 at least helpful to the defense -- and the reason why I --
22 your -- I don't know, the reason why I keep not focusing on
23 Yunis is because Yunis is subsumed within Brady. If

1 information is favorable within Brady terms and it is
2 material, then it's at least more than theoretically relevant
3 and it satisfied Yunis for classified information.
4 MJ [COL POHL]: Yeah, but I am talking about -- okay,
5 so -- but I am just trying to get the first cut is material
6 preparation to the defense?
7 LDC [MR. CONNELL]: For 701, yes.
8 MJ [COL POHL]: Okay. If it doesn't meet that standard,
9 no judicial review, we are done?
10 LDC [MR. CONNELL]: Right.
11 MJ [COL POHL]: Okay. Okay.
12 LDC [MR. CONNELL]: Under 701 -- do you want to talk Brady
13 information or 701?
14 MJ [COL POHL]: I am going to go through your circles.
15 You don't have to put them back up.
16 LDC [MR. CONNELL]: That's okay. I've got circles.
17 MJ [COL POHL]: It is not material to the preparation of
18 the defense, whether it is classified or unclassified because
19 they have no duty to turn it over, that's the lowest standard.
20 LDC [MR. CONNELL]: Right. Your Honor, may we have the
21 feed from Table 4 and we will have the slide, the previous
22 slide from the one that we put up earlier, please. It will be
23 slide 5 in AE 397. I don't want to slow you down.

1 MJ [COL POHL]: No, go ahead. If you want to put your
2 circles up, you can.
3 LDC [MR. CONNELL]: Thank you very much, Judge.
4 Why don't you cut the feed from Table 4 until we get
5 the slide up. No, that's the right computer. That's the one
6 we have to use in here.
7 **[Pause.]**
8 LDC [MR. CONNELL]: All right. Here we are. Since we are
9 talking about 701, this is the slide that ----
10 MJ [COL POHL]: Put it on the big screen. Okay. Okay.
11 Any -- you said "information" is the improper word, but I am
12 going to use it because I think it covers all discovery. I
13 think your explanations were simply different discovery
14 vehicles or how it is transmitted. If I get an audio, that's
15 information. If there is -- so I am going to use information
16 in the global sense here.
17 LDC [MR. CONNELL]: Sure. And I will jump in to say 13526
18 contains a definition of "information" which is really useful.
19 It's material capable of being recorded, so the recordation or
20 the information are both evidence, right?
21 MJ [COL POHL]: But the starting point is material
22 relevant to the defense, the lowest material necessary to the
23 defense if the doesn't meet that, the government has no

1 obligation to give it to you and no obligation to submit it
2 for judicial review.
3 LDC [MR. CONNELL]: Correct. I want the hypo. Are we
4 talking about classified or unclassified?
5 MJ [COL POHL]: I am talking about everything. If
6 classified evidence doesn't meet that standard, you don't get
7 anything higher.
8 Then we go into classified evidence.
9 LDC [MR. CONNELL]: Right.
10 MJ [COL POHL]: Okay. So unclassified evidence the
11 government says is not material to the preparation of the
12 defense, no judicial review.
13 LDC [MR. CONNELL]: Yes.
14 MJ [COL POHL]: Classified evidence, that isn't material
15 to the preparation of the defense.
16 LDC [MR. CONNELL]: No judicial review.
17 MJ [COL POHL]: Classified evidence that they say is not
18 relevant, cumulative or not helpful ----
19 LDC [MR. CONNELL]: You have to split those apart.
20 MJ [COL POHL]: Okay.
21 LDC [MR. CONNELL]: So not relevant and not helpful is
22 just a variety of -- I mean, is a slightly higher standard
23 than material to the preparation of the defense, right?

1 MJ [COL POHL]: Helpful arguably is subsumed with the
2 Brady issue.
3 LDC [MR. CONNELL]: Yes. If information is favorable to
4 the defense ----
5 MJ [COL POHL]: It's going to be both.
6 LDC [MR. CONNELL]: ---- it's going to be both and that's
7 what Mejia says. If the information is material in a Brady
8 sense, it's going to be relevant.
9 MJ [COL POHL]: So the government makes a cut under Yunis
10 that it's not -- that it's cumulative ----
11 LDC [MR. CONNELL]: Right.
12 MJ [COL POHL]: ---- you say that's subject to judicial
13 review.
14 LDC [MR. CONNELL]: Yes. Cumulative, there is no Brady
15 element of cumulativeness, and so it is not subsumed -- Yunis
16 doesn't have anything to say about cumulativeness. Yunis has
17 something important to say about relevance and its
18 relationship to Brady, about helpfulness and its relation to
19 Brady favorability, but it doesn't have anything to say about
20 cumulativeness. That is the part where the government is
21 asserting a privilege and needs judicial review of its
22 privilege assertion.
23 MJ [COL POHL]: If the government says the material is not

1 relevant or helpful, okay, they say it's classified material
2 but it's not relevant or helpful, do they decide that or -- or
3 is there judicial review over that?
4 LDC [MR. CONNELL]: Ordinarily in first cut, they decide
5 it.
6 MJ [COL POHL]: Okay.
7 LDC [MR. CONNELL]: The reason why I say "first cut" is
8 there could be a motion to compel, we would try to articulate
9 why it's relevant and helpful and you might say, "Oh, I see
10 your point" and compel it, but we are talking about first cut
11 now.
12 MJ [COL POHL]: First cut. So the government -- well, of
13 course they don't provide it to you unless it's like a
14 redaction. You don't know what they don't give you sometimes.
15 LDC [MR. CONNELL]: Sometimes. Sometimes we do, sometimes
16 not.
17 MJ [COL POHL]: Okay. So it's your view that if the
18 government claim, and I am going to go to these memos, and
19 it's unclear what the claim is ----
20 LDC [MR. CONNELL]: I agree.
21 MJ [COL POHL]: ---- because there is a variety of
22 potential claims here, but your view is that if there's a
23 claim is it's cumulative, what procedure are they supposed to

1 follow in your view? 505(f)?
2 LDC [MR. CONNELL]: Yes, because under 505(f)(2)(A) they
3 are seeking deletion or withholding of information.
4 MJ [COL POHL]: That's relevant and helpful.
5 LDC [MR. CONNELL]: That is otherwise relevant and
6 helpful.
7 MJ [COL POHL]: Okay. I understand.
8 LDC [MR. CONNELL]: The -- so the reason why I bring up
9 the highest -- the fact that 112K, L and M are the highest
10 quality information is because the government sort of doubled
11 down on them. In response to the military commission's
12 questions, the government said that it had reviewed each of
13 the redactions and had determined that they did not meet its
14 relevant discovery standard.
15 The government is operating at a document level and
16 puts a burden on us, I suppose -- a burden that I do not
17 relish because it is so much work -- but a burden to do the
18 eaches. And so I have a proposal that I'll call the bluff and
19 let us brief why we think that each of these redactions is
20 discoverable and accept the documents in camera and review
21 them. It's not millions of documents, it's only 150
22 redactions in, you know, 20 or 30 pages, and let's see who is
23 right.

1 MJ [COL POHL]: Okay. Okay.
2 LDC [MR. CONNELL]: Thank you.
3 MJ [COL POHL]: We'll use this as a test case for going
4 forward.
5 LDC [MR. CONNELL]: Yeah. That's right.
6 MJ [COL POHL]: Thank you, Mr. Connell.
7 LDC [MR. CONNELL]: You can cut the feed from Table 4.
8 Oh, I'm sorry, someone else would like the circles.
9 It's my proudest moment, Your Honor.
10 MJ [COL POHL]: Sure.
11 LDC [MR. NEVIN]: I think that's an interesting idea and
12 I'm not going to take a lot of your time and try to send you
13 off in another direction. I just want to say four things, and
14 the first is I hope the military commission sees, if nothing
15 else out of this process, that we need you to provide a very
16 clear, granular, as Mr. Connell puts it, roadmap for how this
17 process is supposed to proceed, because the government
18 either -- without respect to their faith either way, sees this
19 very differently and has a different take on it. And we need
20 the military commission to be clear about exactly what the
21 process will be on these matters, because there are so many
22 places, so many undulations within the field where you can
23 hide and claim that you have fulfilled this obligation and you

1 may not be seen in the process of doing that. But if there is
2 a clear, unmistakable process for going forward, then we are
3 protected. And I definitely -- and I know that's -- I think
4 that's really what you are about, but I just want to reinforce
5 the idea or at least articulate it in that way as something
6 that I think is important.
7 The second thing is this. I think we've had a
8 discussion about eaches and I heard General Martins stand here
9 and say, "It can't be that we have to look through every one
10 of these things and analyze it individually. That's just not
11 possible."
12 I just want to say that that is exactly what it is.
13 That's precisely what it is. And the rule for this comes out
14 of another very big case or has been eloquently expressed in
15 another big case, the Timothy McVeigh case. I have a copy of
16 the decision here. I would like to put it on the camera and
17 read you one sentence ----
18 MJ [COL POHL]: Okay.
19 LDC [MR. NEVIN]: ---- please. This is, of course, the
20 case that arises out of the bombing of the Murrah Federal
21 Building in Oklahoma City and Judge Matsch heard the
22 government's objection that there were many, many people who
23 had worked on this case, many different agencies, and they

1 said that -- that fulfilling these discovery requests would be
2 burdensome and Judge Matsch wrote, "That is not a proper
3 objection, the failure to comply with a constitutional command
4 to present evidence fairly at trial is not excused by any
5 inconvenience, expense, annoyance or delay." Determining this
6 must not be made according to a cost/benefit analysis. You
7 heard earlier today or perhaps it was yesterday that the
8 government had just had 25 paralegals assigned to it.
9 MJ [COL POHL]: Well, that was a -- we heard yesterday
10 from another defense counsel that allegation.
11 LDC [MR. NEVIN]: I mean, I have seen the memo as well
12 confirming it, so I will represent to you that that's the
13 case.
14 MJ [COL POHL]: Okay. Okay.
15 LDC [MR. NEVIN]: And I don't mean to say that I think 25
16 paralegals is enough for the government or not. It's not the
17 point. This is a big -- this is a big, in the sense of size,
18 case and, I mean, I know I don't have to tell you that, and I
19 don't have to tell anybody that, but it's true, and so it's
20 going to take time and the government has to fulfill these
21 obligations. Mr. Connell makes the point about a GS-12 FOIA
22 clerk and I don't know who the FOIA clerk was in this case at
23 the CIA, but clearly it wasn't you. It wasn't the military

1 judge in a capital prosecution who is charged with the
2 obligations that exist under the rules.
3 The third thing I want to say is that I believe
4 there -- that one of the aspects of the roadmap that the
5 military commission should provide us with is a clear
6 definition of what "cumulative" means.
7 And this connects to my fourth point as well, which
8 is I think we have not made a sufficient acknowledgment of the
9 fact that this is not Yunis, this is a capital case.
10 I think we frequently fail to appreciate the extent
11 to which the Eighth Amendment controls how we have to proceed
12 when we are before you on these things, and that's my fourth
13 point, but the third and the fourth point blend together.
14 Let's talk about cumulative first. I see a
15 distinction between an official who drafts a memo and signs it
16 and gives it to her assistant and the assistant then makes ten
17 copies of it because they are going to be distributed at a
18 meeting this afternoon, but the meeting gets called off, and
19 the ten copies, ten identical copies of the memo are sitting
20 on the assistant's desk now and a case is filed and someone
21 comes through to gather evidence and they look at this stack
22 of ten identical memos that are sitting on the assistant's
23 desk. I am not arguing -- I don't know whether others are --

1 but I am not arguing that all ten of those memos or a copy of
2 all ten of those memos need to be provided to the defendant in
3 discovery.
4 Take a separate situation. The assistant makes ten
5 copies of the memo and sends them out to ten different
6 people -- perhaps hands them out at the meeting, to keep my
7 scenario going -- and those people take them back to their
8 office, those ten officials take them back to their offices
9 and they put them in a file. They are still identical. Let's
10 say for purposes of discussion they haven't made any marks on
11 them, they are just now sitting on the file of Officials A, B,
12 C, D, E, F, up through whatever ten is. We are entitled to
13 know -- in this case, we are entitled to know where each of
14 those memos was -- was found, ended up, however you want to
15 put it. We are entitled to know that, and I will explain why.
16 MJ [COL POHL]: But the information there, the cumulative
17 information is the memo. The noncumulative information is the
18 people they went to.
19 LDC [MR. NEVIN]: Quite so.
20 MJ [COL POHL]: So when we are talking about cumulative
21 here, I understand what you are saying. What I am saying is
22 you could have the same memo, I'm holding one of the exhibits
23 up, and the government does not have to give you ten copies of

1 the same memo. However, if the government -- again, if it
2 meets the other standard, I got that. But if there are ten
3 people the memo went to in the decision trail, they have to
4 give you the names of the ten people because that is not
5 cumulative to the memo itself. The argument that that's what
6 the definition of cumulative is, that would not be my
7 definition of cumulative.
8 LDC [MR. NEVIN]: Well, let me say the way I proposed the
9 hypothetical to you just a moment ago was none of those
10 officials made any marks on the documents.
11 MJ [COL POHL]: Uh-huh.
12 LDC [MR. NEVIN]: Let's now suppose that the official
13 comes back and takes a yellow sticky note, puts it on the
14 front of it, hands it to the official's assistant and says, do
15 something with this. Or let's suppose that the official
16 during the course of the meeting writes out in the margins and
17 says -- and says "this can't be right" or says "this doesn't
18 go far enough," something to that effect.
19 The cases are very clear that the material that must
20 be provided includes marginal notes and includes -- there are
21 specific cases that deal with sticky notes, as I'm calling
22 them, those notes that you put on the outside that contain a
23 comment, you are entitled to a copy of the memorandum and you

1 are also entitled to a copy of marginalia, of the stuff that's
2 been written on it by someone. All of that, none of that is
3 cumulative.
4 I take the court's -- or the military commission's
5 question to be if it is identical, not cumulative now, but
6 identical, then the purposes of discovery would be satisfied
7 by saying this identical memorandum was found in the files of
8 A, B, C, D, E, F, et cetera. I agree with that. But just so
9 you have my point about the marginalia.
10 So the reason I say that all of this discussion which
11 connects to this -- what I am saying about identicalness
12 versus cumulativeness, all of this discussion fails to take
13 appropriate consideration of what Kyles says, because Kyles
14 says specifically that the cumulative impact of mitigation, of
15 withheld information, of withheld favorable information, that
16 the cumulative impact of that is important. And Mr. Connell
17 was talking before about -- about the statement of Beanie and
18 so on. And so what had happened in Kyles was that someone
19 along the way had said, well, this is -- this piece of
20 evidence that says this is not important and they tossed it
21 out, and the same with this and the same with this, and the
22 Supreme Court said very clearly no, you look at it
23 cumulatively. You put your arms around all of it and you

1 assess its cumulative impact, as opposed to analyzing each
2 piece individually.
3 So what I'm saying is, a piece of information that
4 Mr. Mohammad was hung up by his thumbs, the government seems
5 to be saying to you, it's enough if we tell you that
6 Mr. Mohammad was hung up by his thumbs. We don't -- every
7 document that comes along after that that refers to him being
8 hung up by his thumbs, we can just black that out because we
9 already told you he was hung up by his thumbs. That's wrong,
10 because we are entitled -- in providing a defense to
11 Mr. Mohammad and in presenting mitigation evidence, we are
12 entitled to know everything that -- all of the aspects of
13 that -- of that information, and including -- and in
14 particular including where all of that information was
15 dispersed to.
16 And again now at this point, I suspect -- again one
17 of the reasons I asked you for a roadmap -- I suspect that the
18 government is confusing the idea of identical with the idea of
19 cumulative. And so it may be very important that it says in
20 one place that he was hung up by his thumbs; in another place,
21 it says that first the right thumb was connected and then the
22 left thumb was connected. That could be a very important
23 distinction. I suspect that the government is saying that we

1 already told you about the thumbs, so we don't have to tell
2 you this piece of information about first right and then left.
3 But in any event, and of course the military
4 commission will understand, I use this only as an example, I
5 don't -- I don't know that there is specific information out
6 there about thumbs. I'm saying this as a way of articulating
7 the issue.
8 So why is this important? Because this is a capital
9 case. There is no circle -- could I have it again by any
10 chance, the circles?
11 UNIDENTIFIED SPEAKER: You need to ask him.
12 LDC [MR. NEVIN]: Oh, yeah, they need to be.
13 MJ [COL POHL]: You can put the circles back up.
14 LDC [MR. NEVIN]: There is nothing here -- it's not up
15 yet. Okay. So my point is here that there is no overlay for
16 the Eighth Amendment. I think we frequently forget to have an
17 overlay for the Eighth Amendment or a Venn diagram for the
18 Eighth Amendment.
19 MJ [COL POHL]: Mr. Nevin, let me ask you this. Where
20 would your overlay go that's not already subsumed by what's
21 already on here? I understand your point, but I am just ----
22 LDC [MR. NEVIN]: If you would give me an hour or
23 something, maybe over the lunch break, I will come back and I

1 will tell you exactly where I would draw the circle because I
2 don't want to say something ----
3 MJ [COL POHL]: Okay.
4 LDC [MR. NEVIN]: I was going to say something at a more
5 general level and I will make it more specific if the military
6 commission would like, but let me at least say that.
7 I'm saying that evidence might well be discoverable
8 under Brady in a capital case with Eighth Amendment
9 implications might well be discoverable and be required to be
10 provided even though it was classified, and it might be --
11 there might be an obligation to provide it despite the fact
12 that there was some limitation within the confines of
13 relevant, noncumulative and helpful that would be trumped by
14 the fact that this is a death penalty case.
15 MJ [COL POHL]: I will give you an opportunity, but you
16 have got to -- because we are talking about -- you asked for a
17 roadmap here, and I've got to kind of know what you think the
18 signposts are. And if you believe that the Eighth Amendment
19 provides something that doesn't fit within these circles is a
20 separate analysis, then I am certainly willing to listen to
21 it, but, I mean, I need that; what's not covered by what we
22 already have. And not to put you on a spot, if you want to
23 take time, you can, but what I am simply saying is, you

1 understand what I am saying, you say if it doesn't fit within
2 the Yunis standard, doesn't fit within the Brady standard,
3 somehow it fits within a separate standard of the Eighth
4 Amendment, I have got to know what that slice is ----
5 LDC [MR. NEVIN]: I understand.
6 MJ [COL POHL]: ---- or circle or whatever Venn diagram
7 you want to use on it.
8 LDC [MR. NEVIN]: It may not be a circle.
9 MJ [COL POHL]: Maybe a comment, maybe a footnote or
10 whatever.
11 LDC [MR. NEVIN]: This is a comment or analogy, whatever
12 this diagram is, and I just want to make sure I don't get
13 abused by it or abuse it, so that's why I would like to have
14 some time, but that's the general idea. Because, look, in
15 this case I don't know but what the 403rd blow that was
16 delivered against Mr. Mohammad will make a difference to one
17 of these panel members, only one of whom has to say execution
18 is not right here, death is not right, and it may look like
19 the same thing, it may look like the slap or the douse or the
20 waterboarding or the pouring or the elevating of the board as
21 opposed to the declining of the board. It may look like the
22 same thing we've talked about before. It may feel cumulative
23 in the sense that we've already talked about that, we already

1 know there was a slap, there was a slamming against a wall,
2 but I don't know to what extent that next mention of that --
3 that one more event may be important to one of these jurors
4 who has -- who will have Mr. Mohammad's life in his hands, if
5 we get to that point.
6 And the same thing is true with respect to dispersion
7 within the government, because how widely this was dispersed
8 within the government is extremely important in assessing the
9 moral authority of the government to execute and -- and the
10 fact that it is -- that that document was located in this desk
11 too and also in that desk, again, one of these jurors someday
12 may find that fact important, may take the position in his or
13 her own mind that that is a reason in itself, finally, after
14 having heard it for days, that that is a reason in itself not
15 to execute him. And that's the context in which we're working
16 here. And the idea that it's too much work or that it's -- or
17 that there is a simpler way through this or something,
18 that's -- none of that stuff is important because of the
19 context where we are. Okay. Thanks.
20 MJ [COL POHL]: Thank you, Mr. Nevin.
21 Ms. Bormann, do you want to be heard?
22 LDC [MS. BORMANN]: I do, Judge, but right now I am
23 waiting for a printing of some material that I think will

1 explain to the commission our position.
2 MJ [COL POHL]: Okay.
3 LDC [MS. BORMANN]: And I think my paralegal is having
4 network problems. I know it's hard to believe, the Internet
5 here works so well, but he is attempting to print off the
6 mc.mil website and having some issues.
7 MJ [COL POHL]: I think Ms. Lachelier is prepared to go
8 and we will see where we are at.
9 Ma'am.
10 ADC [MS. LACHELIER]: Hi, Judge. My comments are just
11 really brief, and I may oversimplify, but the rule seems
12 pretty clear to me. The Congress spelled out what the
13 government is supposed to do in the 505 context and when they
14 invoke the national security privilege, which they apparently
15 are here, I think, they are saying, and they did say to you
16 this is classified, we are not at liberty to show it to you.
17 They can have 25 paralegals apparently review this document,
18 but you, Your Honor, are not allowed to see it. That's
19 essentially their position.
20 The rule says that when they invoke the privilege,
21 you are to make the determination as to what is cumulative --
22 I forget the triumvirate that they are spelling out all the
23 time -- noncumulative, relevant and helpful to a legally

1 cognizable defense. It clearly says in 505 the military judge
2 determines, when classified information is to be disclosed,
3 whether those factors are present.
4 When you say it's unclear what the government's claim
5 is, and so we're not quite sure what they are invoking, that's
6 disturbing, Judge, because there is a process and the
7 procedures they are using right now are extrajudicial and have
8 no bearing in the rules, and they are essentially trying to
9 hide information and claim that they are going to provide it
10 to us at some later date, in some other form, when we have
11 said this is the document, this is the information we need
12 reviewed.
13 Thanks.
14 MJ [COL POHL]: Thank you.
15 Mr. Harrington.
16 LDC [MR. HARRINGTON]: Judge, I will try not to make this
17 a cumulative argument, but I think one of the -- Mr. Nevin
18 alluded to it, but one of the things that many of the Brady
19 cases you look at were not capital cases, but even more than
20 that is you have to look at the context in which the decisions
21 are written. You don't see any appeals by the government
22 about Brady. You see appeals by defendants after they have
23 been convicted, and courts -- the appellate courts are looking

1 at the Brady violations in the context of is this severe
2 enough that we are going to reverse a conviction of somebody
3 who has already been tried by a jury and been convicted, and
4 courts obviously are looking at the weight of the evidence and
5 all sorts of other considerations, but --
6 And that just amplifies the attitude that a trial
7 court has to -- I think has to look at the Brady situation,
8 and you asked Mr. Nevin about how does the circle for the
9 Eighth Amendment apply here, and I think the Eighth Amendment
10 in a capital case basically says it's Brady on drugs. I mean,
11 the starting point has to be the emphasis that if it's
12 favorable in any way, no matter how minor it may seem to the
13 prosecution, no matter how minor it may seem to the court,
14 that it has to be disclosed -- disclosed to the defense. And
15 oftentimes, and I'm sure the experience of the other lawyers
16 with me, is sometimes you get Brady material which you think
17 is minimal and it leads to an opening, an opening in the whole
18 case because it leads someplace else. So the definition
19 really of "favorable" has to be -- has to be -- has to be
20 expanded.
21 Now ----
22 MJ [COL POHL]: Now, you indicated the word "favorable,"
23 not the word "exculpatory," with regards to Brady material,

1 correct?

2 LDC [MR. HARRINGTON]: Yes.

3 MJ [COL POHL]: And just so when you look at 701(c) --

4 excuse me, (e) -- let me put my glasses on and I can read

5 better -- it talks about exculpatory evidence and it appears

6 to be the regulatory implementation of the Brady requirement

7 and it talks about that, but it uses the term "exculpatory."

8 Would it be fair to say in your view that's too much of a

9 limitation if it is only limited to exculpatory evidence?

10 LDC [MR. HARRINGTON]: Oh, absolutely, Judge. Exculpatory

11 is something that's a much higher standard to meet than

12 favorable. There is no question about it.

13 MJ [COL POHL]: Okay. So -- and, again, as they talk of

14 the four separate categories here, we may end up in the same

15 place, but I just wanted to clarify that, that you would not

16 limit Brady -- you used the term -- I think the other day you

17 talked about favorable, not just exculpatory, but a lot of

18 times people talk about it as exculpatory. So favorable is

19 obviously a much lower standard than exculpatory.

20 LDC [MR. HARRINGTON]: Yes. And as I mentioned before,

21 there are cases that talk about exculpatory when they are

22 talking about Brady, there is no question about that, but

23 Mr. Connell read the section of Brady to you this morning that

1 uses the word "favorable" and I don't know whether that was a
2 prosecution sleight of hand or judicial sleight of hand of how
3 "exculpatory" ever replaced Brady.
4 MJ [COL POHL]: It may have turned into the facts of a
5 particular case, the evidence may have been favorable and
6 exculpatory. Okay. I got you. I just wanted to clarify that
7 to make sure that if the idea is we want -- if the desire is
8 that everybody understands the same understanding of what
9 Brady is, particularly from the government perspective, they
10 need to see if it is limited to exculpatory or helpful.
11 LDC [MR. HARRINGTON]: Right. And, Judge, I mean, one of
12 the things we have to remember is that Brady is an ongoing
13 process. So let's say the hypothetical that's been thrown
14 around here about the ten copies or something of the same memo
15 and the court, and then the prosecution says here is the memo
16 and it was given to these agencies, at least at that point in
17 time we have that notice and we can file specific Brady
18 requests to continue on. So, I mean, there may be some
19 sparring about that in the later instance. Obviously we would
20 prefer to have the ten copies.
21 Judge, I don't know what it's like in other places
22 now, but we have gone in my district from getting -- and I
23 think it's the same in other districts -- from getting almost

1 no discovery in federal cases to getting thousands of pages of
2 discovery in cases that are not even significant cases, and
3 the reason is the prosecution has just said we're going to
4 give them all sorts of stuff; 95 percent of it has nothing to
5 do with the case. But, for example, we will get 15 copies of
6 the same memo, just different police agencies have it, so the
7 cumulative thing is in the reverse in regular courts.
8 MJ [COL POHL]: Thank you, Mr. Harrington.
9 Ms. Bormann, are you still waiting?
10 LDC [MS. BORMANN]: I am. I sent paralegal number 2 to
11 check on paralegal number 1. I am not sure what the issue is.
12 It was one pleading. There must be ----
13 MJ [COL POHL]: I will go slightly out of order. I will
14 hear from the government, and then you will have an
15 opportunity after General Martins responds.
16 LDC [MS. BORMANN]: Thank you.
17 MJ [COL POHL]: General Martins, do you have anything you
18 wish to add?
19 CP [BG MARTINS]: Your Honor, I am actually reluctant to
20 talk about these things because I am concerned that these
21 rebuttals may expansively interpret what's within scope, but
22 some of these things do need to be responded to.
23 MJ [COL POHL]: Okay. Just so it is clear, is we are

1 going back to the normal course of business. Ms. Bormann will
2 have an opportunity to respond and then we are done.
3 Mr. Connell.
4 LDC [MR. CONNELL]: Sir, normal course of business is that
5 the proponent of a motion begins and ends, so it would
6 typically be argument, response, rebuttal. But so what has
7 been invited from General Martins is is surrebuttal.
8 MJ [COL POHL]: Okay. Fine. That's not the way I do it.
9 LDC [MR. CONNELL]: Okay.
10 MJ [COL POHL]: Okay. This is both sides will get usually
11 two cracks.
12 CP [BG MARTINS]: Your Honor ----
13 MJ [COL POHL]: Since we have five defense counsel teams,
14 the government wants to respond, go ahead.
15 CP [BG MARTINS]: Your Honor, the first item of
16 correction, and these characterizations are slipping in more
17 and more, so I do need to speak to it -- the government does
18 not concede any kind of finding of outrageous government
19 conduct. That's an issue in the case that will be litigated,
20 but regret the characterizations of concession did not object
21 to improper argument, but I do use this opportunity to rebut
22 it.
23 Second, Yunis not being about cumulativeness, the

1 term "cumulative" does not appear in the Yunis opinion. I
2 just went back and read through it. But it is very much based
3 upon a cumulativeness notion, which is why, when codifying
4 Yunis in the Military Commissions Act, the CIPA sections, the
5 term "noncumulative" appears. Recall that in Yunis, and I'm
6 quoting the D.C. Circuit here, "In addition, it should be
7 remembered that respondent was present throughout the
8 commission of the crime. No one knows better than he what the
9 deported witnesses actually said to him or in his presence
10 that might bear upon his defense in the case."
11 Now, you have articulated at other points whether or
12 not Yunis applies, and that specific aspect of cumulativeness
13 is as persuasive as it is in the Yunis sense, but it is based
14 on a notion that they are going to get the information that's
15 going to put them in substantially the same position somewhere
16 else. So Yunis does involve a notion of cumulativeness, and
17 that should be understood.
18 I want to just oppose this notion that I in any way
19 relied upon an argument that this is too hard ----
20 INT: Your Honor, the interpreter would like to ask
21 General Martins to speak a little closer to the microphone,
22 please.
23 MJ [COL POHL]: Sure.

1 CP [BG MARTINS]: I rarely get asked to speak louder or in
2 a way that can be heard better, but that's okay.
3 MJ [COL POHL]: Go ahead.
4 CP [BG MARTINS]: So inconvenience, expense, annoyance,
5 delay, that has no part of my argument. My argument is that
6 it cannot be that we are needing to go back and relitigate
7 what a Freedom of Information Act initial denial authority
8 used to put a masking on a document that we turn over. That
9 cannot be the standard. And we're looking at the original
10 document. We're chasing them all down.
11 MJ [COL POHL]: So what is -- I don't understand your
12 point. If you have a FOIA IDA redacted a document and you are
13 looking at it anyway, the unredacted thing, I don't understand
14 why you said "we can't go back and" ----
15 CP [BG MARTINS]: What I am saying is why relitigate the
16 FOIA. Our job is to look at it and say does it have
17 information that's material to the preparation of the defense.
18 MJ [COL POHL]: Okay.
19 CP [BG MARTINS]: And then we are going to provide the
20 material, the information that's material to the preparation
21 of the defense.
22 MJ [COL POHL]: Does the FOIA IDA have any role in that?
23 CP [BG MARTINS]: That's my point. That's what I was

1 saying, and it was being characterized as I'm saying this
2 stuff is too hard. That's not part of my argument, that it's
3 too hard.
4 MJ [COL POHL]: Just so I am clear, it is that you have
5 got -- you tell the defense in some of these places go look at
6 the FOIA website or the information that's been FOIA released,
7 not a website; but you do not -- at the same time, that
8 underlying document you look at independently?
9 CP [BG MARTINS]: Yes.
10 MJ [COL POHL]: And you determine whether the FOIA
11 redactions, for want of a better term, are consistent with
12 your discovery obligations?
13 CP [BG MARTINS]: Yes.
14 MJ [COL POHL]: And if the FOIA redactions are consistent,
15 then the FOIA copy is the government's response?
16 CP [BG MARTINS]: The one change I would make to that, and
17 this allows me to put a finer point on it ----
18 MJ [COL POHL]: Okay.
19 CP [BG MARTINS]: ---- if the FOIA document as redacted,
20 plus what we are going to be providing, and requesting
21 substitutions or other relief through you, gives them all of
22 the information that was in that original document, then we
23 believe we are complying with our discovery obligations. So

1 it's not just -- so we are looking at the material that
2 they're not getting in the FOIA-released version and saying
3 are we giving them that information somewhere in the body of
4 our responses.
5 MJ [COL POHL]: Okay. I think I understand. I just want
6 to make it clear in my own mind, is -- is that you will -- the
7 FOIA redactions -- excuse me -- the FOIA-redacted copy of the
8 document answers their discovery request, combined with not
9 just the document but other information you're going to give
10 him, therefore you believe it's responsive?
11 CP [BG MARTINS]: Correct.
12 MJ [COL POHL]: Okay.
13 CP [BG MARTINS]: That in the whole we are compliant with
14 our discovery obligations.
15 MJ [COL POHL]: Let me ask you this, because you are
16 reviewing stuff for Brady material also, and I discussed this
17 with Mr. Harrington. The rule -- R.M.C. 701(e) talks about
18 exculpatory evidence and it appears to be the regulatory
19 implementation of Brady. Okay? And Mr. Harrington has made
20 the point that Brady is not limited to exculpatory evidence.
21 Now, there may be a distinction without a difference
22 when you read the body of this, but do you agree with
23 Mr. Harrington that Brady is a little more expansive or much

1 more expansive than simply exculpatory evidence? Because I
2 have got to know what ----
3 CP [BG MARTINS]: As a first matter, I am looking toward
4 the rule, it's an implementation. I think 701(e) is more
5 expansive than exculpatory even though the caption says
6 exculpatory, and you know this. The third subcategory is
7 reduce the punishment, and I think that embraces something
8 that's larger than exculpatory, which goes to guilt or
9 innocence.
10 So speaking within the terms of the rule, I believe
11 it's more expansive and that it's a fair attempt to summarize
12 and codify or provide a black-letter version of Brady.
13 MJ [COL POHL]: And so you're applying, when you're doing
14 your reviews, the favorable standard?
15 CP [BG MARTINS]: We are applying this -- I mean, this is
16 an area of a lot of intricate back and forth between parties
17 and I would prefer not to do this on the fly.
18 MJ [COL POHL]: Okay.
19 CP [BG MARTINS]: But we would agree that our obligation
20 exceeds exculpatory. The word "favorable" is not in here and
21 there is a lot of litigation on there that Mr. Harrington
22 apparently is seeking to, you know, get us all to adopt
23 without proper briefing. But the obligation we have is

1 broader than exculpatory, and it's framed largely by this rule
2 and applicable case law.
3 MJ [COL POHL]: Okay. And Ms. Lachelier had mentioned
4 about 505(f). Is, in your view, 505(f) triggered when the
5 trial counsel invokes a privilege?
6 CP [BG MARTINS]: There is a requirement of invocation of
7 privilege, definitely, under both 505(f) and then that's
8 statutory as well. That's 949p-4(a).
9 MJ [COL POHL]: But the government -- just to be clear, on
10 the documents, the memos here, the redactions that are
11 classified, the government is not claiming privilege on them,
12 they are just there somewhere else?
13 CP [BG MARTINS]: I'm sorry, Your Honor, say that again.
14 MJ [COL POHL]: Okay. What I am saying, in these memos,
15 okay, because they were classified at one time and they are
16 currently unclassified, it's a fair inference that there is
17 classified information that's redacted out?
18 CP [BG MARTINS]: Yeah, we are not claiming -- if it is
19 unclassified, we turned it over, we are not claiming any
20 privilege as to that document ----
21 MJ [COL POHL]: Okay. So ----
22 CP [BG MARTINS]: ---- but the original remains TS/SCI,
23 non-portion-marked, and we have a qualifying declaration that

1 states a provision of classified information in the discovery
2 process would be damaging to national security and here is
3 why. So we are invoking the privilege as to the information
4 in that document that is banner-marked TS/SCI -- admittedly
5 there is a portion-marking aspect to a lot of these DoJ
6 ones -- that we are not turning over for that reason, so ----
7 MJ [COL POHL]: But the reason you're not turning them
8 over is because -- not because they are classified, but
9 because they are cumulative of something else? I'm saying --
10 and, again, we're probably beating this to death, but I just
11 need to understand.
12 CP [BG MARTINS]: I understand.
13 MJ [COL POHL]: Sometimes I just really need to kill
14 something. The classified information that you are not
15 disclosing in these memos and not submitting for judicial
16 review is because, why?
17 CP [BG MARTINS]: The classified information that ----
18 MJ [COL POHL]: In the memos you say there is no judicial
19 review even though it's ----
20 CP [BG MARTINS]: Oh. It's not material to the
21 preparation of the defense, it's not discoverable.
22 MJ [COL POHL]: So we don't even get, in your view, to
23 505(f)?

1 CP [BG MARTINS]: There are large portions that we would
2 say are not even material.
3 MJ [COL POHL]: Okay. Just so -- Mr. Nevin mentioned
4 roadmap. Just so I understand, I think I am finally getting
5 there, is that if it were material to the preparation of the
6 defense, applying that really low standard, okay, and it's
7 classified, would you submit that for -- or would you have to
8 have the little higher standard of Yunis?
9 CP [BG MARTINS]: Material, and it is classified, that
10 portion is classified?
11 MJ [COL POHL]: Right. Would that trigger 505(f) really
12 is my question.
13 CP [BG MARTINS]: It would be -- so we would be applying a
14 noncumulative, relevant, helpful standard ourselves.
15 MJ [COL POHL]: Okay. So it's classified evidence and
16 it's met the very low barrier of 701?
17 CP [BG MARTINS]: Right.
18 MJ [COL POHL]: If it is classified, it's got to meet a
19 higher barrier we talked about. Okay. And my question
20 is ----
21 CP [BG MARTINS]: Classified. This is classified.
22 MJ [COL POHL]: Classified evidence. Okay. Would you
23 submit it for judicial review even though you made ----

1 CP [BG MARTINS]: The information is coming to you for
2 judicial review. It may not be coming to you with that as the
3 original, although ----
4 MJ [COL POHL]: That's not my question. Please just let
5 me kind of get -- I am a linear thinker at times.
6 Okay. If it meets -- it's material to the
7 preparation of the defense -- I am focusing on Mr. Connell's
8 circles here. Do you submit it -- it's classified material,
9 material to the preparation of the defense, do you submit it
10 for judicial review? Or do you make an independent
11 determination it's cumulative and therefore there is no
12 judicial review?
13 CP [BG MARTINS]: I mean, I have to come back to these
14 memos because this is the example.
15 MJ [COL POHL]: Sure, that's fine.
16 CP [BG MARTINS]: This is the example. The document is
17 TS/SCI. There is an unclassified version that contains
18 information that we think is material to the preparation of
19 the defense, so we would either refer them to it or give them
20 a copy that's in the possession, custody and control of the
21 government, and the TS/SCI version contains classified
22 paragraphs, some unclassified paragraphs, a whole mix of
23 things. We don't believe it's our obligation to go through

1 that thing and re-portion-mark all of it. I am not making a
2 claim here of inconvenience. I am making a claim here of what
3 is the government's obligation with regard to discovery and
4 with regard to protection of classified information.
5 So we look through that entire document, the
6 original, for things that are material to the preparation of
7 the defense and then apply the 701(c)(3) analysis to it, make
8 sure that we're meeting all of the different discovery
9 obligations we have. Statements of the accused get a
10 particular additional level of attention because those are
11 almost presumptively relevant and material. So if it -- if it
12 is a classified piece, we look to see are we -- that we are
13 applying Yunis there. We're saying, are we making sure we are
14 giving this information to the defense somewhere in the body
15 of the material that we are producing. And when we provide
16 that information, if the information packs in items that are
17 harmful and damaging and we can figure out a substitute, we
18 are asking you to approve that substitute. Sometimes we're
19 able to provide them something that is -- sometimes we are
20 able -- and Mr. Connell spoke to some of the words in these
21 documents that we produced, and that's because we've looked at
22 them and have seen that certain parts of it -- certain parts
23 of it could be produced without providing it to you because we

1 don't need to create a substitute.
2 MJ [COL POHL]: Okay.
3 CP [BG MARTINS]: That we could turn over to cleared
4 counsel a version of it that is exactly what was in there,
5 which is the words there, so we unmask that.
6 MJ [COL POHL]: If classified information is subject to
7 discovery and you want to withhold it, do you not need to
8 follow 505(f) procedure?
9 CP [BG MARTINS]: If it is subject to discovery.
10 MJ [COL POHL]: Okay. And then I guess that's where I
11 keep coming back to. Subject to discovery -- and, again, I
12 understand discovery relies on the good faith efforts of the
13 government because people don't know what they don't know.
14 Okay. Subject to discovery, do you interpret that to mean
15 that a piece of classified evidence has to meet the
16 noncumulative, relevant and helpful standard of Yunis before
17 you need to submit it for a 505(f) review?
18 CP [BG MARTINS]: Yes. Yes. We are making cumulativeness
19 determinations. If it's merely theoretical relevance, if
20 there hasn't been a -- using the Yunis case law, if he ----
21 MJ [COL POHL]: I just want to understand. The question
22 is when does the judge get in the pipeline, and I think we
23 finally got to where I understand your position. Not

1 necessarily that I agree with it, but I understand your
2 position that you make, for want of a better term, a Yunis
3 cut, that may be -- you believe that if it is cumulative, we
4 don't give you the 505(f) because we are giving it to you
5 somewhere else and therefore we are not withholding classified
6 information.
7 CP [BG MARTINS]: It's just because we're getting -- we're
8 getting circular in discussion of information and what is
9 cumulative. We are looking at the information, and if there
10 is some articulated theory of why a specific type of
11 information that doesn't refer to the contents or the truth of
12 a statement, we listen to that and concede that some of that
13 could make it relevant or make it noncumulative. It's a
14 different ----
15 MJ [COL POHL]: Okay.
16 CP [BG MARTINS]: ---- situation of the material. So if
17 it's noncumulative and we need to -- and we have invoked
18 classified information privilege here, yes, we are -- we
19 are making ----
20 MJ [COL POHL]: That would trigger the 505(f) procedure?
21 CP [BG MARTINS]: It -- yes.
22 MJ [COL POHL]: Okay. It's subject to discovery and
23 classified -- we are only talking about classified evidence

1 here. Classified evidence subject to discovery that you
2 believe is noncumulative, that triggers the 505 procedure; but
3 if it's classified discovery that you believe is cumulative
4 with something else you gave, then there is no ----
5 CP [BG MARTINS]: Something else we gave and, oh, by the
6 way, it would have come to you or is coming to you. I mean,
7 again ----
8 MJ [COL POHL]: I got you, but I am just saying ----
9 CP [BG MARTINS]: That's an important detail. I mean, you
10 are not getting cut out of this. You are not getting cut out
11 of this.
12 MJ [COL POHL]: General Martins, I am not looking for a
13 job here. I got it. I got what my role is. I got it. I
14 want to make sure I understand what you are going to give me.
15 And, again, I am not soliciting more work. But what I am
16 simply saying is your position is that if it is -- it is the
17 government's position it is cumulative with something that's
18 gone through, whether it's cumulative with a piece of
19 classified evidence or unclassified evidence and all that
20 other procedures, but if you believe it's cumulative, then you
21 do not believe the withholding of cumulative information
22 because it is not subject to discovery, because it's
23 cumulative, doesn't require the 505(f)?

1 CP [BG MARTINS]: This is getting into the abstract and
2 using the word "cumulative" a lot. I am going to consult my
3 team here if I get a minute here because you are asking this
4 repetitively here of me.
5 MJ [COL POHL]: Okay.
6 CP [BG MARTINS]: So I want to see if I am missing
7 something.
8 MJ [COL POHL]: Let me ask it one more time and then you
9 go to your team. Okay. Here is my simple question, which I
10 think is a simple question. It is classified discovery, okay,
11 step one, that you believe is cumulative?
12 CP [BG MARTINS]: Classified discovery. I mean, already
13 at the start of that, we are talking about a document that has
14 some classified in it.
15 MJ [COL POHL]: Classified information.
16 CP [BG MARTINS]: Classified information. Okay.
17 MJ [COL POHL]: That you believe is cumulative with other
18 information that is going to be provided to the defense
19 through whatever process. Okay? So you got me so far?
20 CP [BG MARTINS]: Uh-huh.
21 MJ [COL POHL]: I think we're good so far. Then my
22 question is: If you make that cumulative determination here,
23 then there is no requirement for judicial review of that

1 cumulative information and I'm not part of that process.
2 CP [BG MARTINS]: The cumulative -- the original ----
3 MJ [COL POHL]: You don't ----
4 CP [BG MARTINS]: ---- the information that we believe is
5 cumulative, appears elsewhere, that information will not be
6 summarized or substituted for unless it goes through you, and
7 yes, we do that, and that determination is not just a "we
8 believe." It's informed by theories of relevance that they
9 provide, that are beyond mere theoretical. So that's my
10 answer, but I'm just going to check with...
11 **[Pause.]**
12 CP [BG MARTINS]: I wanted to see if there was something I
13 was missing in your question and not hearing, which can
14 definitely happen when I am listening.
15 But, Your Honor, co-counsel asked me to sort of
16 implore that 701(c) actually cites to Yunis -- in the material
17 to the preparation of the defense section of discovery, it
18 tells us to look to the Yunis standard in terms of what is
19 material to the preparation of the defense, it cites to the
20 case prominently, and that's our job, and we are doing it as
21 best we can based on the articulated theories of relevance.
22 But yes, we are making determinations about whether
23 information is cumulative. When clued into some aspect of

1 that, which we believe we are entitled to, to be clued into
2 some aspect that would make some aspect noncumulative, then we
3 are going to be looking for it. Specificity of requests for
4 documents are some of those clues. Particular requests after
5 they have talked to their client are some of those clues.
6 Witness requests help us figure out, you know, what they are
7 looking for without getting into their strategy. We have to
8 look at all of that, and we do, and we take it seriously.
9 And since defense continues to want to discuss 25 new
10 paralegals, we are availing ourselves of every appropriate
11 resource to get through a heck of a lot of material. I have
12 no apologies for that. We don't want, on the 15th anniversary
13 of 9/11, to be talking to Carol Freund or other survivors and
14 have to say we aren't doing our best to review this material.
15 Subject to your questions.
16 MJ [COL POHL]: No, I'm good. I have no questions.
17 We're going to recess for lunch here and then,
18 Ms. Bormann, if you have the opportunity after lunch, you will
19 be last heard on this issue with your slides.
20 The commission is in recess until 1330.
21 **[The R.M.C. 803 session recessed at 1202, 23 February 2016.]**
22 **[END OF PAGE]**
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